TRANSCRIPT OF PROCEEDINGS

Ref. BL-2021-002014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT

7 Rolls Building
Fetter Lane
London

Before JOANNE WICKS QC sitting as a Deputy High Court Judge

IN THE MATTER OF

CONTINGENT AND FUTURE TECHNOLOGIES LIMITED (Claimant)

-v-

MR ONEA (Defendant)

MR B SHAH appeared on behalf of the Claimant
MR A HALBAN appeared on behalf of the Defendant

JUDGMENT
27th JUNE 2022
(AS APPROVED)

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JOANNE WICKS QC:

1. The Claimant is a company which developed and operates a tech platform providing customers with tools for efficient procurement decision-making. The Defendant was a shareholder, director and employee of the claimant. His fellow founding shareholders were Mr Taiwo Alegbe, the CEO, and Mr Rajpal Singh Wilkhu, Chief Operating Officer and Chief Technology Officer. The Defendant was the Chief Product Officer until 11 or 12 October 2021, the exact date is in issue. He had been suspended pending a disciplinary investigation by an email sent on 9 August 2021, but which he says he did not read until 10 August 2021.

2. The Defendant owed the Claimant duties of confidentiality: (a) in equity; (b) pursuant to clauses 4 and 9 of a Founder's Service Agreement dated 11 September 2019; and (c) pursuant to clause 15 of a Subscription and Shareholders' Agreement dated 9 October 2020. These proceedings concern alleged breaches of the Defendant's duties of confidence and of the Claimant's IT policies; and a counterclaim by the Defendant for breach of confidence against the Claimant.

3. At a hearing on 9 November 2021, of which short notice was given to the Defendant, Sir Anthony Mann accepted the Defendant's undertakings, firstly, not to use the Claimant's confidential information except for limited purposes and, secondly, not to contact any of the Claimant's investors, customers, vendors or clients. He ordered the Defendant not to access, interrogate, copy or retrieve material from the Claimant's IT systems, software or travel account. This is the return date for that injunction.

4. The parties have substantially agreed the form of order. This involves the creation of a confidentiality club with the Defendant's solicitors and counsel. The Defendant will be permitted to use the material in employment proceedings which are currently in existence and in any shareholder proceedings which he may bring, subject to obtaining the Claimant's permission or an order of the court. Otherwise he will repeat the undertakings he gave on 9 November until trial or further order, he will confirm the deletion of confidential material and agree that if he finds anything in future he will deliver it up and delete it.

5. There were three issues of principle between the parties. One I dealt with on 22 June 2022, relating to the question of an imaging order. There are two issues outstanding. The first is what should happen regarding material which the Defendant contends he should be permitted to use for whistleblowing purposes. The second is whether the Claimant was in breach of its duty to make full and frank disclosure when obtaining the order it did from Sir Anthony Mann.

Whistleblowing Material

6. The Defendant holds certain information from the Claimant which he seeks to be able to use to make protected disclosures under the Employment Rights Act 1996 ("**the 1996 Act**"). Mr Shah, for the Claimant, submits that it is not possible for the court now to determine whether or not this material is, in fact, protected by the 1996 Act. He says that is a matter for trial. Pending trial, he recognises that there is a triable issue as to whether the Claimant's confidentiality rights are overridden by the 1996 Act. But he says damages are not an adequate remedy and the balance of convenience favours treating this material in the same way as other material, i.e. subject to the confidentiality club and only to be used if the Claimant or the court permit.

7. Mr Halban, for the Defendant, submits that it is possible for the court to reach a decision on the status of this material now and, in any event, that the balance of convenience favours permitting the Defendant to make protected disclosures. He says it is wrong in principle to give the Claimant, the subject of the whistleblowing complaint, the right to control whether disclosures are made.

8. There is no dispute for the purposes of this hearing that the material which falls within this category is confidential and would *prima facie* be subject to the Defendant's contractual confidentiality obligations. However, by section 43J of the 1996 Act:

> *"(1) Any provision in an agreement to which this section applies is void insofar as it purports to preclude the worker from making a protected disclosure.*
>
> *(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not) including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract*".

9. The definition of protected disclosure is given in section 43A:

> "*In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of the sections 43C to 43H".*

10. Section 43B provides relevantly:

> "(1*) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed;*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*…".
>
> Sections 43C to H set out various people to whom qualifying disclosures may be made in order to become a protected disclosure.

11. In my judgment the court cannot at this hearing determine whether the Defendant would be making a protected disclosure if he revealed the information to a person permitted by section 43C to 43H. I cannot properly judge whether the Defendant would have a reasonable belief that in making the disclosure he was acting in the public interest and that a criminal offence had been committed, was being committed or was likely to be committed, nor that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject. Those are matters for trial, including for the cross-examination of the Defendant as to whether he holds the relevant belief and for submission as to whether or not that belief is reasonable.

12. I must, therefore, approach this question in accordance with the *American Cyanamid* test. I accept that there is a serious issue to be tried. I also accept that damages are not an adequate remedy, either for the Claimant if disclosure is permitted, or for the Defendant if it

is refused. In either case the relevant party may suffer harm which is difficult to quantify in damages.

13. I turn then to consider the balance of convenience. In my judgment this clearly favours maintaining the confidentiality of this material pending trial. If the Defendant is permitted to make disclosure and it is determined that he was not permitted to do so, the Claimant will have lost protection of its confidential information and is also likely to suffer reputational and perhaps economic harm. On the other harm the Defendant suffers no harm by being restrained from making a disclosure pending trial. If he ultimately succeeds at the trial, he will be permitted to make protected disclosures thereafter. There is nothing in the evidence to suggest that the issues which he wishes to raise are time-sensitive or that the impact of a whistleblowing report would be reduced if he was required to wait until after trial.

14. I agree, however, with Mr Halban that subjecting the Defendant to an obligation to seek permission from the Claimant for any use pending trial runs counter to the 1996 Act. If circumstances change and it for some reason becomes appropriate for the Defendant to make a disclosure pending trial he may apply under the usual liberty to apply. I do not consider it necessary to impose any further precondition on any application to court. So, in my judgment, the whistleblowing material will be subject to the injunctions granted and the undertakings given, but it will be covered by the liberty to apply which is already provided for in the draft orders.

Full and Frank Disclosure

Background

15. At the hearing before Sir Anthony Mann on 9 November 2021 the Claimant relied on a spreadsheet which has been referred to as the "**Access Spreadsheet**". This purported to show a number of occasions on which the Defendant had accessed the Claimant's computer systems after being suspended and without authorisation. The Access Spreadsheet purported to show 64 instances of alleged unauthorised access. Of those, 57 were on 4 October 2021. It is now accepted that those entries for 4 October 2021 were in error, and that the Defendant did not access the Claimant's computer systems at all on 4 October 2021.

16. The Claimant's evidence shows that on 4 October 2021 Mr Wilkhu, as the Claimant's Chief Technology Officer, accessed the Defendant's Google Drive folder. He took over the Defendant's IT account and he made the Defendant's personal folder available to the administrator only. The Google audit logs, that is to say logs which the Google system creates automatically and stores for six months, show that as the creation of a folder in the Defendant's name.

17. The Claimant says that the error came about because when Mr Wilkhu prepared the Access Spreadsheet he did not use the raw CSV native files based on the data in the Google audit logs. He used the user interface which enabled him to filter the information. By setting "Actor" to the Defendant's name, he received a list of all log entries performed by the Defendant. However, because of his actions on 4 October, the logs attributed his own actions to the Defendant and appeared in the filtered set of results as the Defendant's.

Authorities

18. It is common ground that because the Defendant was only given short notice of the application, the Claimant was subject to the duty to make full and frank disclosure of all material facts. The principles are gathered in the decision in *Brink's Mat Limited v Elcombe* [1988] 1 WLR 1350. Ralph Gibson LJ said this at pages 1356 to 7 (I will omit the citation of authorities):

"*In considering whether there has been a relevant nondisclosure and what consequence the court should attach to any failure to comply with a duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.*
(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts'.
(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.
(3) The applicant must make proper enquiries before making the application. The duty of disclosure, therefore, applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries.
(4) The extent of the enquiries which will be held to be proper and therefore necessary must depend on all circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant; and (c) the degree of legitimate urgency and the time available for the making of inquiries.
(5) If material nondisclosure is established the court will be 'astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty'.
(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the nondisclosure was innocent in the sense that the fact was not known to the applicant or that its relevance was not perceived is an important consideration but not decisive by reason of the duty on the applicant to make all proper enquiries and to give careful consideration to the case being presented.
(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded'. The court has a discretion notwithstanding proof of material nondisclosure which justifies or requires the immediate discharge of the ex parte order nevertheless to continue the order or to make a new order on terms".

19. I would stress that the duty of full and frank disclosure is an important element in ensuring that justice not only is done but is seen to be done. A respondent to a without notice application is excluded altogether from the court's decision-making. A respondent who is given short notice may have some opportunity to participate but is at a major disadvantage when compared with the applicant, through lack of time to prepare and marshal evidence. If the court makes its decision based on inaccurate information that can create the perception that the odds are unfairly stacked against the respondent and, in litigants in person in particular, contribute to a conspiracy mindset. The duty, therefore, has a vital role to play in demonstrating to respondents that their case will be heard fairly and with an open mind by the court.

20. More recently Carr J brought together a series of principles from the cases in the decision in Tugushev *v Orlov* [2019] EWHC 2031 at [7]:

"*x). Whether or not the nondisclosure was innocent is an important consideration but not necessarily decisive. Immediate discharge without renewal is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate nondisclosure or misrepresentation that an order would not be discharged.*
xi) The court will discharge the order even if the order would still have been made had the relevant matters been brought to its attention at the without notice hearing. This is a penal approach and intentionally so by way of deterrent to ensure that applicants in future abide by their duties.
xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issue before the judge; ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter noncompliance; iii) whether or not and to what extent the failure was culpable; iv) the injustice to the Claimant which may occur if an order is discharged leaving a Defendant free to dissipate assets although a strong case on the merits will never be a good excuse for a failure to disclose material facts.
xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example, by a suitable costs order. The court thus has at its disposal a range of options in the event of nondisclosure".

Obviously that particular case was in the context of a freezing order, but the principles are generally applicable to without notice and short notice applications.

21. Principle xiii), concerning marking nondisclosure in some way other than discharging the order, is also reflected in the decision of *National Bank Trust v Yurov (No 1)* [2016] EWHC 1913 at [18] and expanded upon in *National Bank Trust v Yurov (No 2)* [2016] EWHC 1991. I shall take up from [10] of the latter decision. Again, this was a decision made in the context of an application for a freezing order:

"*10. I deal first with the costs of the initial application for the freezing order. In my view where there are failures of disclosure which are substantial, as I found to be the case here, the costs of such an application should normally be borne by the claimant in any event. That would be the position if instead of allowing the order to continue but imposing a cost sanction the order was discharged, as will sometimes be appropriate. In general, a claimant which is in substantial breach of important duties to the court in making a without notice application should not benefit from an exercise of the court's discretion in its favour to recover the costs of that application…".*
11. So far as the costs of the application to discharge the freezing order are concerned, I accept the bank's submission that it has been the successful party and that the starting point should be that it is entitled to its costs of the application. I consider, however, that it will generally be appropriate to make a deduction from the costs which would otherwise have been awarded in favour of a claimant where there have been failures of disclosure, and that this may be a very substantial deduction. In an appropriate case it may be right to deprive a claimant of costs in their entirety. The making of such a deduction will generally be a necessary sanction, to mark the failure in the particular case and, perhaps more importantly, to encourage proper compliance with the

requirements of full and frank disclosure in the making of without notice applications for freezing orders and to deter non-compliance…

12. *I acknowledge that there may be cases where rather than making a deduction, even a very substantial deduction, from the costs to be awarded to the successful claimant which has succeeded in maintaining its injunction, it may be appropriate to make an award of costs in favour of a defendant, sometimes even an award for assessment on the indemnity basis. That was Teare J's approach in the* Konkola Copper Mines *case and nothing I say shall be understood as casting doubt on his order. Every exercise of discretion depends on its own circumstances.*

13. *In general, however, I consider that the starting point must be that the claimant is the successful party. If the starting point were that costs, particularly on the indemnity basis, were awarded in favour of a defendant which has after all failed to obtain the discharge of the order, that could encourage disputes about failures to disclose to be litigated rather than promoting a realistic attitude on the part of defendants as to whether, despite a failure to disclose, a freezing order is nevertheless appropriate. An approach which as it were gives the defendant a free shot of discharging a freezing order so far as costs are concerned would not be helpful".*

Determination

22. The Defendant was sent a notice of suspension on 9 August 2021. This confirmed that during his suspension he would no longer have access to the Claimant's computer network. A subsequent notice dated 21 September extended his suspension on the same terms. The Defendant was sent the Access Spreadsheet on 11 October. He claims he resigned on that date, citing constructive dismissal. The Claimant contends he was dismissed on the grounds of gross misconduct the following day, 12 October.

23. In a letter dated 2 November 2021, when acting in person and in response to a letter before action from the Claimant's solicitors, the Defendant said this:

"***Unauthorised Access***

I have not accessed, retained or used the company's confidential information unlawfully or at all during my suspension period…The access log provided against me during the disciplinary process and referenced in Appendix 1, Part 1 of your letter suggests that an IT Administrator, presumably the CTO, had moved the files on my behalf. Only an IT Administrator is authorised to perform this action. According to the company IT policy only the CTO and the CEO are Administrators".

The access log the Defendant was referring to was the Access Spreadsheet. So the Defendant was saying that an IT administrator, presumably Mr Wilkhu, had moved the files which the Defendant was alleged to have moved. We now know that that is more or less exactly what had happened in respect of the 4 October entries.

24. The Claimant's evidence as to how the Access Spreadsheet came to be created as it was is plausible. It would not be obvious that Google would attribute to the Defendant actions which were not taken by the Defendant. At the time of creating the Access Spreadsheet it was reasonable to suppose that if the filter was switched to the Defendant's name, what the exercise would produce would be the actions of the Defendant. I would not necessarily expect the Claimant to have checked the Access Spreadsheet and the results of the filtering process against the audit logs at the time it made the Access Spreadsheet.

25. But if the Claimant was to use the Access Spreadsheet for the purpose of a without notice or short notice application, it was under a duty to make proper enquiries as to what the Defendant said about that spreadsheet in his letter of 2 November. There were three things the Claimant could and, in my judgment, should have done on receipt of that letter.

26. First, it could have checked the user log-in information to see whether the dates on the Access Spreadsheet correlated with dates on which the Defendant had logged into the system. That log-in information shows that the last time the Defendant logged in was on 26 September. If the Claimant had checked that information, that would have demonstrated that it could not have been the Defendant accessing the systems on 4 October.

27. Secondly, the Claimant could have gone back to the user interface and filtered by "date" rather than by "actor" for the specific dates identified in the Access Spreadsheet. This would have revealed that an event did take place on 4 October, namely, the creation of the file by Mr Wilkhu.

28. Thirdly, Mr Wilkhu could and, in my judgment, should have reflected on whether any of the actions he had taken could have had the consequence of corrupting the evidence as shown by the Access Spreadsheet.

29. There is no evidence of the third step having been taken and the Claimant cannot have carried out either the first or the second steps. In my judgment those were the first breaches of the duty of full and frank disclosure.

30. At the hearing before Sir Anthony Mann the Claimant relied upon a witness statement of Kamila Kolasinska, the Claimant's Head of Legal, dated 8 November 2021. She said this:

"22. *Due to these disclosures Contingent began to monitor Mr Onea's access to Contingent IT systems on the 1st of October 2021 and through this monitoring ascertained that Mr Onea had accessed its IT systems without authority. Following Mr Onea's refusal to return Contingent's confidential data in his email of 8th of October 2021 Contingent ultimately took over control of Mr Onea's IT and email accounts on the 9th of October 2021…*
23. *Subsequent to taking over control of Mr Onea's IT accounts on the 9th of October 2021 Contingent created a spreadsheet which details the occasions and dates upon which Contingent's IT systems were accessed by Mr Onea without following the procedure set out in his suspension letter. This shows broadly that*
23.1 Mr Onea accessed 64 documents during his period of suspension without the authorisation of Contingent.
23.2 Most of these instances of access occurred on the 4th of October 2021 with a further handful of incidents on the 9th of August 2021, 10th of August 2021 and 4th of September 2021.
24. The types of documents accessed included board meeting minutes, finance data and supplier contracts. I understand from discussions with Contingent's chief technology officer that access in this context is synonymous with downloading, that is when a user accesses documents a copy will be downloaded and cached on their system…According to Contingent's CTO "Move" in this context means that a document was moved from one location to another by Mr Onea and this could be, for instance, that a file was moved to a local drive. User sharing permissions change indicates that the document was shared by Mr Onea with another user internally at Contingent".

At paragraph 38.4 she set out the passage from Mr Onea's letter that I have referred to above. She then continued:

"38.6 Mr Onea appears to be suggesting that it was not him but the IT administrator who accessed and moved the files "on his behalf". This is simply not correct, and Contingent is very concerned that Mr Onea has made this allegation. As recorded in the spreadsheet these actions are identified to a specific user which in all of the examples is stated to be Mr Onea. If the CTO or the CEO had taken steps in relation to these files that information would be recorded on the system".

31. In my judgment this evidence was seriously deficient. First, it makes no reference to access by Mr Wilkhu on 4 October. Indeed, the natural inference to be drawn was that the Claimant did not have full control over the IT systems until 9 October. Secondly, it characterises the actions of the Defendant, or purported actions of the Defendant, as "*synonymous with downloading*", which was not the case. Thirdly, it asserts that the Defendant was not correct to say that it was the IT administrator who had accessed the system when that plainly was correct in relation to the entries for 4 October, and the Claimant had not taken the basic steps I have outlined above to check whether what the Defendant was saying was accurate. Fourthly, the evidence implies that the Claimant had checked the system for records of the CTO or CEO taking steps in relation to the files, when it had not. These were further breaches of the duty of full and frank disclosure.

32. Whilst Ms Kolasinska gives evidence of how the Access Spreadsheet was created neither she nor anyone else from the Claimant gives any evidence as to how this witness statement came to be made in this form. As Mr Halban says, the absence of any explanation from Mr Wilkhu as to why the court was not told of his access on 4 October is striking. In my judgment Ms Kolasinska's evidence was highly material to the decision made by Sir Anthony Mann. At the hearing the Defendant appeared as a litigant in person assisted by a member of the Chancery Bar Litigant in Person scheme. He offered undertakings not to disclose confidential information or to contact the Claimant's suppliers, but he refused to give an undertaking not to access the Claimant's system because, he said, the Claimant's claims that he had accessed the systems were based on fraudulent evidence.

33. The 4 October allegations were material in two ways. First, they formed the vast majority of the allegations of unauthorised access. Otherwise, in Ms Kolasinska's own words, there were only a "*handful of incidents*", and these were all events for which the Defendant had an explanation. The sufficiency of that explanation is a matter for trial, but it was clearly key that there were apparently 57 unauthorised movements on the system for which he could not offer an explanation. Moreover, the apparent downloading of a large number of documents on a single day gives a completely different impression to the reality. It is suggestive of a disgruntled employee downloading a cache of confidential information to use in competition with or against an employer. Secondly, the 4 October allegations were material because the evidence relating to 4 October clearly influenced the Defendant's refusal to give an injunction and it was that refusal to give an undertaking which was the reason why Sir Anthony Mann granted an injunction.

34. Mr Shah argues that if proper enquiries had been made by the Claimant it would have found further instances of unauthorised access instead of the 4 October entries but that is not, in my judgment, a good submission in this context. Based on the case which the Claimant chose to present to the court, the failures to carry out proper enquiries and the way in which

the evidence was presented, which effectively doubled down in opposition to the Defendant's rejection of the Access Spreadsheet, were very significant to the outcome of the hearing.

35. In my view if a material nondisclosure is made then it is the responsibility of the maker to ensure that the other party and the court is told of it and a full explanation given. Here, following the hearing on 9 November, on the contrary the Claimant exacerbated its failure to give full and frank disclosure in two ways.

36. First, it did not correct the position swiftly upon learning the truth. It must have known that the Defendant had not accessed the systems on 4 October by the time it served it Particulars of Claim on 24 November 2021, because it did not rely on the 4 October events in those Particulars of Claim. But it did not offer any explanation to the Defendant: instead the Defendant was forced to deal with this in detail in his first witness statement on 2 December 2021. In her fourth witness statement Ms Kolasinska says, "*As soon as Contingent became aware that the log entries of the 4th of October 2021 were mistakenly attributed to Mr Onea, we corrected the position*". This is disingenuous. There was a correction only to the extent that the Claimant ceased to rely on the 4 October entries in its Particulars of Claim. Moreover, the explanation for the error has never been comprehensive. Ms Kolasinska made her second witness statement on 21 December 2021 and there she said that the error occurred because of misinterpretation of the logs and apologised. In her fourth witness statement of 17 June 2022 she gave further explanation of the effect of applying the filter in the user interface. But nowhere in the Claimant's evidence has there been any explanation of what enquiries were made when the Defendant's letter of 2 November was received, or why the evidence in Ms Kolasinska's first witness statement took the form it did. Nor has any evidence been given as to when or how the Claimant discovered their error.

37. The second way in which the Claimant exacerbated the failure to give full and frank disclosure is that it refused to disclose the Google audit logs which would have revealed what Mr Wilkhu did on 4 October. Following the hearing on 9 November, the Defendant wrote to the Claimant's solicitors on several occasions asking to see the audit logs. This was refused on the basis that they were irrelevant to the issues in the application. The request was repeated in the Defendant's first witness statement on 2 December 2021. Ms Kolasinska's second witness statement in response dated 21 December did not produce the audit logs for 4 October despite (a) admitting that an error had been made; and (b) producing some audit logs in raw Excel form, but for different dates. The request to see the audit logs for 4 October was repeated in the Defendant's Defence dated 19 January 2022. Finally, concerned that the logs would be deleted after six months, the Defendant made an application for their preservation on 28 March 2022, which resulted in the making of an order by Michael Green J, mainly by consent, on 1 April 2022. Some of the logs were disclosed, those to 8 October 2021 in May 2022 and those to 12 October 2021 in June 2022.

38. The overall picture, therefore, is one in which, firstly, there may well be an innocent explanation for the way in which the Access Spreadsheet was originally created. But, secondly, upon the Defendant raising the issue, the Claimant failed to take steps to check the accuracy of what the Access Spreadsheet said. Thirdly, no explanation at all has been given for the obviously false evidence in Ms Kolasinska's first witness statement. And, fourthly, the Claimant sought to hide the position by failing to give a proper explanation for the error to the Defendant or to produce the audit logs which would have shown the true position.

39. Mr Halban realistically recognises that there is little point in seeking the discharge of the interim injunction when his client is offering to give undertakings and to submit to

injunctions going forward. He submits that it would be proper for the court to mark its displeasure by an order for costs and I agree.

40. In line with the *National Bank Trust v Yurov* decisions, I determine that the Claimant should not have any of its costs of the hearing before Sir Anthony Mann and, indeed, that if the Defendant incurred any costs as a litigant in person, that he should have those costs of that hearing.

41. Since then, the Defendant has incurred costs in putting in evidence and dealing with the Claimant's evidence that he would not have had to incur if there had been full disclosure originally and if the Claimant had come clean quickly and comprehensively. I need to reflect those additional costs in an appropriate order, whilst still recognising that there are and have been issues beyond the 4 October access, and that both parties would have incurred some costs in any event. Michael Green J ordered the costs of the evidence preservation order to be in the case. I do not attempt to disturb that order, but I determine that the Claimant is not to have 50 per cent of its costs against the Defendant of the application to continue the injunction on the return day and that the Claimant is to pay 50 per cent of the Defendant's costs of that application, assessed on an indemnity basis. In making that award I have borne in mind the warning in *National Bank Trust v Yurov (No 2)* about the dangers of taking the starting point as being that Defendants should have their costs, particularly on an indemnity basis, even where they have failed to obtain discharge of an order. However, here the reason why the injunction and undertakings are being continued beyond the return day is because the Defendant has taken a realistic attitude to the need to protect the Claimant's confidential information pending trial and he has not sought discharge of the order altogether.

42. I make clear that the costs order that I have made, that is to say 50 per cent of the costs of the return day application, assessed on an indemnity basis, are to be paid to the Defendant, does not prevent me exercising my discretion to award the balance of costs to one party or another in the usual way as part of my discretion and I will hear counsel on that point.

This transcript has been approved by the Judge