

ENGLAND AND WALES / JUDGMENT

Phaestos Ltd & Anor v Ho

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THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover
Neutral Citation Number: [2012] EWHC 2756 (QB) Case No: HQ09XO5182 (NOW HT 11-459) &
HQ11XO01305 (NOW HT 11-461) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
Royal Courts of Justice Strand, London, WC2A 2LL Date: 16/10/2012 Before: THE HONOURABLE
MR JUSTICE KING

- ----- Between:

(1) Phaestos Limited

(2) Mindimaxnox LLP Peter Ho And

(1) IKOS CIF Limited

(2) Phaestos Limited

(3) Mindimaxnox LLP

- and - Tobin Maxwell 'Sam' Gover

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- ----- Claimants Defendant Claimants Defendant Mr P Goulding QC and
Mr C Ciumei (instructed by Bird & Bird) for the Claimants Mr N Tozzi QC and Mr T Kibling
(instructed by Wragge & Co) for the Defendants Hearing dates: 20/21/22/25/27 July 2011 and
20/21/22/23 September 2011

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Judgment

Mr Justice King:

1. It is regrettable that judgment in this case has been delayed by this court as long as it has.
2. By an application dated the 27 May 2011 the claimants sought by way of interim relief an order against the defendants seeking four basic heads of relief
 - (i) the listing of documents belonging to the claimants or containing confidential information (defined under the term 'Relevant Documentation'): which were copied, retained or came into the possession of the defendants, prior to or after termination of THE HONOURABLE

MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover their employment with the claimants and other than in the normal course of their employment; (ii) the preservation and delivery up of such documents or the destruction of them, with independent verification, if requested; (iii) the provision of witness statements verifying compliance and providing various details relating to the circumstances in which any listed item came into their possession and the use to which it has been put; (iv) that the defendants permit an independent computer expert nominated by the claimant (in the original form of application that expert was specified as 'Kroll Ontrack') to make disc images of the defendants' computers and electronic storage devices and to search (the emphasis is the emphasis of this court) for any 'Relevant Code' or evidence of the use or copy or transfer or deletion thereof, and to produce a report on his searches and the results.

3. In the most recent version of the proposed order, that provided by the claimants by submission of 10 October 2011, the 'search' is to be for any Relevant Code or Relevant Documentation.
4. 'Relevant Code' is given a wide meaning relating to bespoke software systems, computer programmes, mathematical models, research analysis systems, quantitative analysis systems, trading systems and execution systems used to operate or otherwise in connection with any aspect of the business of a 'Specified Entity'. 'Relevant Documentation' is to mean any document which belongs to a 'Specified Entity' (as defined) and/or contains Confidential Information (as defined). A 'Specified Entity' means any of the claimants or any entity within the IKOS group or any associated company or holding company. In the course of the hearing before me, the definition of 'Confidential Information' underwent a number of changes in the draft order proposed by the claimants to accommodate they say the concerns of the defendants that the order should not embrace information relating to IKOS which is not confidential and which has come into their possession since the termination of their employment with the claimants.
5. By the time the application first came on for hearing before me, there had been a flurry of open correspondence between the parties in which ultimately no objection was being taken by the defendants as regards a large bulk of the proposed order, namely that relating to lists, delivery up and preservation, although there was an ongoing debate as to the proper definition of confidential information. The battle lines however were being drawn over the proposed order for imaging and search of the defendants' computers (and inevitably costs). The defendants were prepared to agree a form of order which would essentially allow such imaging and search but only by a single independent expert jointly instructed by both parties on instructions agreed by both parties. The Claimants although accepting if necessary the exercise being carried out by two experts, one instructed by each side, were adamant that they were entitled to an order for their expert to conduct the search independently of any other and reporting his conclusions to themselves, subject to a protocol to take account of any proper objections the defendants might have as to the disclosure of privileged information and private or other information which could not fall

within the definition of Relevant Code or Relevant Documentation.

6. In these circumstances the stance taken by the defendants before me has been that in principle the claimants are not entitled to any kind of search order at all having regard to the limited nature of the causes of action pleaded in relation to such documentation and further in THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover view of the lapse of time since the defendants' contracts of employment were terminated (some 2½ years) and the failure of the claimants to make any application at various times when they were aware that the defendants (or at least Mr Ho) was admitting that their original disclosure was inadequate and indeed that Mr Ho's original letter of 23 December 2008 stating in effect, on the occasion of the termination of his employment, that he had returned all the claimants' property to them was not correct, had been made under a mistake. Moreover, it is said that in any event relief should be denied the claimants on the basis that they do not come with 'Clean Hands', having regard to evidence of their having put the defendants under unlawful surveillance and harassment.
7. A schedule produced for me by the parties helpfully set out the history of the respective defendants' employment with the claimants until their employment was terminated on 23 December 2008. Both had started out with Phaestos Limited (originally named as IKOS (UK) Ltd) and then in the case of Mr Ho, employment was transferred under TUPE from 11 April 2008 to Mindimaxnox LLP; and in the case of Mr Gover his employment was, on the claimants' case (but denied by the defendant), transferred either in July 2006 or in about April 2007 to Cyprus to IKOS CIF Ltd or alternatively, he was seconded to IKOS CIF Ltd and then transferred under TUPE to Mindimaxnox in April 2008.
8. On its face the Application Notice suggested that the need for the interim relief, was not simply because 'there is evidence that the defendants in breach of express and/or implied contractual and equitable duties, have unlawfully copied, retained and misused Documents' but that 'They are now operating in direct competition with the Claimants and may gain an unlawful advantage'. The information relied upon in support of the application was put in these terms: '1. The defendants, as employees, were under express and/or implied contractual and equitable obligations not to copy documents belonging to the Claimants or relating to their business for their own purposes, to return all company property and confidential information when their employments terminated on 23 December 2008 and not to disclose documents containing confidential information to third parties.'
2. Through matters arising in the course of this litigation and elsewhere, it has been increasingly clear following termination of their employment in December 2008, that Mr Ho and Mr Gover have unlawfully copied and retained confidential material and retained confidential material and documents belonging to the claimants. In a witness statement dated 12 October 2010, Peter Ho admitted to the removal of property and/or confidential information belonging to the claimants, that it was a 'mistake' to sign a document confirming that he had returned all company property. In subsequent solicitors' correspondence he has also admitted that he is in possession of a further significant volume

of materials belonging to or related to the claimants and stated unequivocally that a large number of documents were provided to him by Mr Gover.

3. Mr Gover has, despite a number of requests, refused to provide access to his personal computer which he used extensively during his employment to work on the claimants' confidential software systems rather than the desktop provided by his employer. He has evaded the claimants' attempts to inspect the laptop and ensure the return and/or deletion of any confidential information stored on it. THE HONOURABLE MR JUSTICE KING
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4. Despite repeated attempts to clarify these matters in correspondence, both defendants have refused to provide any coherent explanation of the nature of the material they have retained, the extent to which that material has been copied and any use to which it has been put.
5. Furthermore, Mr Ho and Mr Gover are the founding partners of Altq LLP ('Altq') which describes itself on its website as a 'research-driven hedge fund group' and Mr Ho has admitted was in competition with the Claimants. In a new and recent admission, in an article published in the Financial Times on Saturday 21 May 2011, Mr Gover was quoted as stating that he and Mr Ho had begun to prepare to establish their competing business whilst still employed by the Claimants. As competitors, Mr Ho and Mr Gover (and any associates) would gain an unlawful advantage and derive potentially significant financial gain if they have access to any hardware or software that contains information belonging to any of the Claimants.
6. As things stand, Mr Ho and Mr Gover remain in control of an unknown quantity of materials with potential commercial value, which should have been returned to the Claimants in December 2008.'
9. By the time the application came on before me for hearing in July 2011, witness statements had been served in support of the application from Warren Wayne, partner in the firm of solicitors then having conduct of the claimants' case (Bird and Bird LLP) dated 7 June 2011 ('Wayne 4'); Michael Polymenakos 7 June 2011, planning manager of IKOS CIF Limited (IKOS CIF) the first claimant in the Gover action, being the company based in Cyprus where Mr Gover went to work in April 2007; John Holden, a computer expert working at Smith and Williamson Ltd, the proposed independent expert now nominated by the claimants for the purposes of the computer imaging and search sought by them, a further statement of Mr Wayne (Wayne 5) dated 13 July 2011 commenting upon the matters now disclosed in the defendants' evidence served in response to the Application.
10. Mr Holden, the claimants' expert, sets out the wide extent and ambit of the investigation of the defendants' computers which the claimants seek to undertake. He explains that the imaging procedure not only captures the files which are visible to the user of that computer system but also those which are not, such as deleted data; using the image files it is possible to use keyword, date range and other technical searches in order to establish:- "whether or

not certain files are present; examining the image files will therefore be able to assist the gathering of the data such as but not limited to (amongst other things) ‘users who have accessed the computer with a unique login, such data as may belong to the claimants in this case whether present in the reference system of the computer, so called live files, or in a deleted state; whether data obfuscation methods have been used, such as secure deletion or wiping; help establish the extent of any data deletions and whether data that has been present on the computer has been subject to transfer from or to external devices.’ He further emphasises that even USB storage devices contain much more data than the files currently stored within them. By imaging these devices it is possible to recover deleted data and other information that may assist in tying the use of a particular storage device to a computer.

11. The defendants’ evidence served in response to the application, included two witness statements from Mr Ho (Ho ‘6’ dated 30 June 2011); (Ho ‘7’ dated 15 July 2011) and two from Mr Gover (Gover ‘1’ dated 30 June 2011 and Gover ‘2’ dated 15 July 2011); and one THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover from Jonathan Chamberlain of the Defendant’s current solicitors, Wragge & Co LLP dated 20 June 2011. These set out in much more detail than hitherto disclosed in correspondence between the parties that which the defendants now admit they retained and copied and disclosed of the IKOS Code and Documentation using their personal computers and other storage devices and according to Mr Goulding QC on behalf of the claimants disclose changing accounts.
12. The basic point made by Mr Goulding has been that given what he describes as the misleading impression given by the defendants prior to the application and the changing accounts in their subsequent statements which he says raises a number of unanswered questions, it is necessary for a fair disposal of the issues raised on the causes of action pleaded against the defendants to ‘inspect’ the images for two separate purposes. One is to ensure that the defendants have fully complied with their Delivery up undertakings/ obligations and that full Disclosure is made of all relevant material. In other words it is necessary in the first instance in order to ‘police’ the defendants’ delivery up and disclosure obligations. Secondly it is necessary to obtain evidence of the true extent of the Defendants’ wrongdoing with regard to the claimant’s property, (namely its Code and other confidential information and documentation) in the context of the pleaded causes of action. It is said to be relevant to a number of the causes of action pleaded against the defendants. Mr Goulding lists these as being:
 - 1) the pleaded claim for breach of the express and implied terms of the defendants contracts of employment and of the equitable duty of confidence not to misuse the Claimants’ confidential information. This is a reference to the Consolidated Particulars of Claim at paragraphs 32 and 33 alleging that each of the defendants:

1. during his employment copied documents including software belonging to the claimants, relating to the claimants' business and/or containing confidential information other than in the normal course of business;
2. retained material including hard copy documents, electronic documents and software upon the termination of his employment which belonged to the claimants and/or contained confidential information;
3. disclosed confidential information to third parties, including to each other. It is noteworthy however that there is no pleaded case of disclosure to any other named party. Nor is there any express allegation that the defendants misused any confidential information retained by themselves (other than in so far as the disclosure to each other amounts to such misuse). However says Mr Goulding, damages for breach of a contractual or equitable duty not to misuse confidential information can take the form of a notional fee that the defendants would have been required to pay for the claimants' agreement to the defendants' use of the confidential information and in assessing damages on that basis it must be relevant to know exactly what IKOS software or other confidential information has been copied, retained, disclosed or deleted, how and when. This is why inspection of the computer disc images is necessary in order to 'ascertain and secure' that evidence.
- 2) the pleaded claim (at paragraph 31) against Mr Ho for misrepresentation (by signing the letter of the 23 December 2008 to the effect that he returned all property belonging to Mindimaxnox other than a laptop). The allegations of copying, retention and disclosure are relied upon in support of the allegation; THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover
- 3) the claimants' pleaded claim (paragraph 49) – in response to the defendants' counterclaim for £6m as bonus payments for 2007 and 2008 - to be entitled to pay nil bonuses in respect of these years, and for declaratory relief in this regard, relying again, amongst other things, on the matters alleged concerning copying, retention and disclosure. The defendants' alleged conduct in wrongfully copying, retaining, disclosing and deleting its confidential information is thus said to be conduct relevant to the defendants' entitlement to a discretionary bonus.
- 4) the pleaded claim at paragraphs 53 to 59 for repayment of £12m bonuses paid to the defendants for 2005 and 2006 on the basis that they were paid under a mistake of fact that the defendants had complied with their duties. Again the matters relied on in support include the alleged wrongful copying, retention and disclosure. In argument Mr Goulding expressed the position thus: 'the claimants' claim that the payments were based on the mistaken belief inter alia that the defendants had complied with their contractual and equitable duties not to misuse the claimants' confidential information.'

13. Hence the overall submission on behalf of the claimants is that a key issue in relation to each of these claims is the nature and extent of the defendants' copying, retaining, disclosing and deleting of the claimants' confidential information using their computers and other electronic devices. Hence it is necessary to inspect the computer disks to discover the nature and extent of this wrongdoing.
14. I use the phrase 'inspect' advisedly since there is a fundamental divide between the parties as to the nature of the application being made as regards the imaging of the computers and the operations to be undertaken by the expert. Mr Tozzi QC on behalf of the defendants says this can only be interpreted as an application for a search order using as its genesis section 7 of the Civil Procedure Act 1997 (the 1997 Act) providing in part '(1) the court may make an order under this section for the purpose of securing any or any existing or proposed proceedings in the court- (a) the preservation of evidence which may be relevant' and it is correct that in the claimants' original skeleton argument reference was made under the heading 'legal basis for the order sought' to the court's 'wide and flexible power to make appropriate orders for preservation and inspection under its inherent jurisdiction and under s 7 of the Civil Procedure Act 1997'. It cannot, said Mr Tozzi, be an application connected with disclosure under the CPR, since as at the date of the application before me, the stage of standard disclosure in respect of any pleaded causes of action relating to the defendants' use of documentation had not been reached. In the case of Mr Gover, proceedings against him had only been issued in April 2011 albeit in his case there had been proceedings brought against him by IKOS CIF in Cyprus (since discontinued for want of jurisdiction) but even in these, there was, as regards disclosure or delivery up of documents, only a claim for a declaration that Mr Gover continued to be bound by a duty of confidentiality and 'was obliged to return to IKOS CIF any assets in his possession by reason of his employment with IKOS CIF'. And as regards Mr Ho, although proceedings against him were issued in November 2009 and amended particulars of claim served on the 14 October 2010, no cause of action relating to the retention/use of documentation then appeared and did not appear until they were added by way of amendment in June 2011 when the consolidated Particulars of Claim were served.
15. And then says Mr Tozzi one has to look at the very limited nature of the now pleaded case as regards the defendants' retention of documentation/property belonging to the THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover claimants which contains no express allegations of the misuse of confidential data. It amounts to no more than a claim for delivery up which is unchallenged in relation to property which belongs to the claimants and unobjectionable provided a proper definition of 'Confidential Information' could be agreed and a declaration that the defendants remain bound by duties of confidentiality which says Mr Tozzi they have never sought to suggest they are not. In order to justify an extensive search order of the kind proposed there would, he submits, have to be a cause of action pleaded in relation to which it could be said to be both relevant and necessary, such as a conspiracy with Mr Coward (an ex employee of the claimants) involving the theft and improper use of IKOS software. No such cause of action

has however been pleaded although it is hinted at in the witness statement of Mr Polymenakos. In effect the submission is made that an intrusive search order is being sought for which no substantive cause of action has been pleaded to justify the making of such an order.

16. Mr Tozzi referred me to the principles (set out in volume 2 of the White Book at paragraph 15-91) applicable for the grant of Search Orders in the Anton Pillar sense referred to in CPR 25.1(1)(h) and subsection (3) of section 7 of the 1997 Act, that is to say an order, made on a without notice application, for a party to admit another to its premises for the purpose of preserving evidence by the carrying out of a defined search. These principles include the clear showing of fraud, dishonesty, contumacy or imminent removal or destruction of property or evidence and the existence of a strong prima facie case of a civil cause of action. Mere suspicion is not enough, and the danger to be avoided to the claimant by the grant of the order must be serious. Mr Tozzi does not seek to suggest that these principle are to be applied with full vigour to the present situation involving personal computers and not involving the enforced entry onto premises, but does say the overriding principle is that of necessity and no order ought to be made unless it is necessary in the interests of justice, relying also on the terms of Article 8(2) of the ECHR given the invasion of privacy inherent in the proposed order. He submits that in order to make the proposed order the Court should need to be satisfied that there be at the very least a seriously arguable case in conspiracy.
17. Mr Tozzi took me to the evidence relating to certain matters relied upon by Mr Polymenakos to suggest (in paragraph 83 of his witness statement) that Altiq, the company set up by the defendants and which started trading on 1 April 2011, 'may be' the London affiliate of Mr Cowards hedge fund business, in order to demonstrate the fundamental weakness of such evidence, something I have to say he did so with compelling force.
18. In other words Mr Tozzi suggests that this application as far as it relates to an ordered search of the personal computers in order to obtain evidence of wrongdoing, is no more than an unjustifiable 'fishing expedition' in which the claimants hope to find a case which has not been pleaded. It is accepted that Mr Gover has admitted giving permission to his then solicitors, Fox, to disclose relevant documentation to Mr Ho in the circumstances outlined in the witness statements, but it is said that there is no authority for the proposition that where there is evidence of wrongful disclosure to A, it is legitimate to inspect documents to ascertain not only the nature and extent of the disclosure to A but also whether there has been THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover disclosure to B or C, absent any evidence that they have been disclosed to other parties. He drew my attention to evidence served by and on behalf of the defendants, including their computer expert Mr Sykes, refuting any suggestion that in setting up Altiq they had used IKOS software. In essence they say they wrote the software for Altiq from scratch, with its computing running on a different operating system to IKOS using software written in a different language.

19. Mr Goulding has not sought to persuade me that there is evidence to contradict these assertions as to the evidence relating to Altiq, other than doubts cast by the claimants' computer expert, Mr Turner, upon the legitimacy of the Sykes' exercise. Mr Goulding's riposte was essentially that it is wholly unnecessary for the claimants to have to establish any sort of conspiracy in order to justify the order they seek which I have indicated they say is to support their existing claims - although he does submit that the claimants were entitled to express in their witness evidence their legitimate concerns as to what use has been made by the defendants of their confidential information, including the Code, and the potential which the Gauss Code had as a reference to or guide to writing the Altiq software, given further on the evidence (that of Mr Sykes and Mr Gover) the Altiq code was being written during a period when IKOS code was in Mr Gover's possession in 2010 before he said he deleted it.
20. There was a break of several weeks between the two hearings before me. At the close of the first and in order to preserve the evidence pending the outcome of the application, I made an order for the imaging of any Relevant Computer as defined, by an independent computer expert appointed by the defendants. The full extent of that order dated 29 July 2011 is annexed to this Judgment. This Order was in principle complied with. In addition the defendants gave undertakings reflecting those parts of the order applied for in the Application which were not under challenge before (matters of definition of terms aside) relating, amongst other things, to the serving of lists of all Relevant Documentation (as defined) and the serving of statements verifying compliance, and delivery up. Again this order is said to have been complied with (subject to certain issues as to the completeness raised by the claimants).
21. When the hearing was resumed before me on 20 September 2011, it was demonstrated that some seven computers had been delivered up for imaging, whereas the defendants' initial evidence had seemed to suggest that only four computers were involved (Mr Gover said he had only two PCS and one laptop (Gover 1 para 130) and Mr Ho referred to only one (Ho 6 at paragraph 34)). This said Mr Goulding raises an issue in itself as to just how many computers the claimants' documents were copied onto.
22. Overall I was told the defendants had recently delivered up a vast amount of material consisting of approximately five lever arch files and one ring binder of hard copy documents and 1,597 electronic documents. THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover
23. As an example of the need to inspect the computer discs to police the delivery up, reference was made to the Gauss Code purportedly - on his witness statements - deleted by Mr Gover which fell within the terms of the order, since it had not been deleted permanently. Thus, to quote Mr Goulding's written submission: 'the Gauss Code falls within the meaning of Relevant Documentation in that it is a document which contains confidential information concerning IKOS within the meaning of that order. Document means a document within the meaning of CPR 31.4 which includes a deleted document (31APD2A). Gover deleted the

Gauss Code 'in the standard way (Gover (2) paragraph 33g). It was retained by Gover on the termination of his employment within the meaning of paragraph 1a of the Order. It is therefore an item which Gover was obliged to list and deliver up. He has done neither.'

24. Mr Goulding by the resumed hearing had significantly refined his exposition of the legal basis upon which he was seeking the order in relation to the 'inspection' of the computers which had now been imaged. His overriding submission is that this is not, on proper analysis, an application for any kind of Search Order. Preservation and inspection of relevant property – CPR 25(1)(i) and (ii)
25. The Order he seeks, he says, is one of preservation (which has now occurred) and inspection of 'relevant property' within CPR 25.1(i) and (ii), 'relevant property' being defined for these purposes in 25.(2) as 'property (including land) which is the subject of a claim or as to which any question may arise on a claim. Although Mr Tozzi argued that this cannot be correct since the computers were not themselves the subject of any claim, Mr Goulding counter submitted that in any event there are questions as to the defendants' computers which arise on the claim, namely: -what property belonging to the claimants or relating to their business was copied to the defendants' computers? -what such property was copied from the defendants' computers to other computers and when? -what property was deleted from the defendants' computers and when? Disclosure and Inspection under CPR 31.12
26. Further or in the alternative it is an order made pursuant to CPR 31.12 for specific disclosure and inspection which can be made at any stage of the proceedings (see commentary in White Book at 31.12.1.1). The order sought is for specific disclosure of the computer discs, which are documents within CPR31 (which in fact has now been done by reason of compliance with the Order of this court of 29 July 2011) and inspection of those discs to identify the claimants' property and documentation.
27. Mr Tozzi takes fundamental objection to this approach. He does not dispute that a computer disc can be a document within the meaning of CPR 31 since under CPR 31.4 'document' means 'anything in which information of any description is recorded' and information is recorded on a computer disc in the form of electronic documents and metadata relating to those documents. There is moreover some authority for the proposition that the THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover Hard Disc of a computer is a document for these purposes – see Alliance and Leicester Building Society v Ghremai [1992] RVR198,199 per Hoffman relying on the approach of Vinelot J in Derby and Co Ltd v Weldon (no 9) 1991 1 WLR 652 to which I was referred. His point is rather that it is wrong and misleading to treat the taking of the disc images pursuant to the court order (which was in order to preserve evidence) as if those images have now been disclosed as disclosable documents under CPR 31 in their entirety giving rise to a right of inspection. Disclosable documents are limited to those defined in CPR 31.6. Disclosure is defined in 31.2 ('a party discloses a document by stating that the document exists or has existed'). The approach of the claimants is said to run roughshod over the practice and procedure for the disclosure of electronic data as set out in PD 31B under which it is for the

party whose computer is to be searched (pursuant to its duty of search under CPR 31.6) for disclosable documents to carry out the search, pursuant to an agreed methodology (keyword searches, methods of search, width of search and so forth) subject to the supervision of the court, and its orders in the case of any dispute, following which disclosure is given of the materials and inspection given (which at that stage but not before under 31BPD para 6(4) would allow the receiving party to search the document) in a format which the parties should seek to agree.

28. None of the procedures for such e-disclosure had been completed as at the date of the application before myself and Mr Tozzi submitted that it is wrong to characterise that which the claimants are seeking as an inspection of documents disclosed by the defendants after they had carried out a search using agreed criteria. Rather, he says, the claimants are seeking in effect to carry out an unfettered search as far as search terms, period, data, width, with no limit on the searching exercise other than it is to be 'for any Relevant Code or Relevant Documentation or evidence of the use or copy or transfer or deletion thereof'.
29. Mr Goulding's reply to this ground of objection was to emphasise that what was being sought was specific disclosure of and inspection of Relevant Code and Documentation which by its very definition is confidential information belonging to the claimants rather than documentation belonging to the defendants which is in their possession.
30. I am bound to say however that this reply did tend to support in my judgment that what this application has been about is in truth the search of the defendants' property (their personal computers) not in order to inspect disclosable documents within the meaning of CPR 31 but to police the quite different obligation upon the defendants to deliver up the claimants' property which they have no right to retain and to seek out and preserve evidence of the misuse of the same in breach of duties owed to the claimants ('evidence of the use or copy or transfer or deletion thereof'). Inspection under CPR 31.14
31. This application in other words would not appear to be an exercise in inspection of disclosable or disclosed documents within CPR 31 as such, even though Mr Goulding persisted in submitting it was by relying (again in the alternative) upon a party's right under CPR 31.14 to inspect a document mentioned in amongst other things a party's statement of case or witness statement, the defendants having in the witness statements, served in advance of the hearing of the application, although served after the application was issued, THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover described the steps taken by way of copying the claimants' property onto their respective computers, and further referred to the computers in the consolidated defence and counterclaim, albeit again served (on the 5 August 2011) after the application was issued. The objection that to grant the application on this basis would be to allow the disproportionate and unnecessary inspection of a vast amount of irrelevant documentation, is countered by emphasising that under the proposed order the claimants would not themselves be carrying out the inspection but rather an independent expert. Hence it is said the importance of the proposed Protocol, which means that any documentation which is

irrelevant will not survive, as it was put, the combined sift of the Expert's search and the defendants' objections to the claimants themselves inspecting it, which forms part of the safeguards in the Protocol. Inherent Jurisdiction

32. I am bound to say however that it is not without significance that only in one form of the draft proposed order, namely that produced when the hearing resumed on the 20 September 2011, did the claimants use the term 'inspect' to describe that which the independent expert was to be permitted to do in relation to the imaged discs. By the date of the claimants' very final submissions made to me in writing dated 10 October 2011, there was a reversion to the term 'search' ('3.the defendants shall permit the Independent expert(s) to search the Disc images or copies thereof for any Relevant Code or Relevant Documentation or evidence of the use or copy or transfer or deletion thereof in accordance with the protocol attached herewith').
33. Mr Goulding accordingly addressed me on the basis that if necessary – that is to say if the court were not prepared to make the order sought under CPR 25.1(1)(i) and (ii) (preservation and inspection of relevant property) or CPR 31(disclosure and inspection of documents) the claimants would rely on the court's inherent jurisdiction to grant appropriate interim remedies, in which the governing principle would be whether the order should be made having regard to the overriding objective to deal with cases justly under CPR 1.1.
34. Mr Goulding conceded that there was no express interim remedy listed in CPR 25.1(1) expressly providing for the preservation and inspection of evidence save (see CPR 25.1(1)(h)) for a Search Order requiring a party to admit another party to premises for the purposes of preserving evidence under section 7 of the 1997 Act, again a reference to a search order in the Anton Pillar sense, but pointed out that CPR 25.1(3) provided that the fact a particular kind of remedy was not listed in paragraph (1) did not affect any power that the court might have to grant that remedy, and that it could not be that the court had no power to make an order for the preservation and inspection of evidence, including an order for the search of the computers in this case, other than by way of a search order in the above Anton Pillar sense. Section 7 of the 1997 Act granted the court an unfettered power to make an order for the purpose of securing the preservation of evidence but in any event the court had an inherent jurisdiction to make interim orders for securing a just and proper trial of the issues between the parties which necessarily included the power to make the order sought in the present application. Mr Goulding referred me to a summary report of a decision of the High Court under the former Rules of the Supreme Court (C v PBP [1995] CLY 415) in which the court ordered disclosure and inspection of the defendants' computer files containing information THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover relating to the identity and requirements of purchases by the defendants' customers, so that they might be inspected by an independent expert (with suitable safeguards to protect confidentiality) for the purpose of comparing them with the Plaintiff's computer database to see if there had been any copying. The court is reported as ordering disclosure on the basis that the computer files and the information they contained were

relevant 'documents' discoverable under the equivalent of CPR 31.12, or alternatively as relevant property that could be inspected under the equivalent of 25.(1)(c)(ii) or alternatively under the court's inherent power to fill any lacuna in the rules.

35. Mr Tozzi did not dispute the existence of this inherent jurisdiction but reminded the court that the principles under the overriding objective could not be the only requirements and that Article 8(2) of the ECHR was also engaged which imposed a requirement of necessity and proportionality and which applied whether or not what is here being sought was a Search Order in the Anton Pillar sense since what was being sought was an interference with each defendant's 'private and family life, his home and his correspondence'. The decision on *C v CPB* did not, he submitted, assist since that case predated the CPR and the detailed procedures for giving of electronic documents since developed, and the issue in that case was whether disclosure could be ordered at all of information within computer files when the present defendants did not suggest otherwise. The issue in the present case, he submitted, was one not addressed in that case namely 'not whether disclosure should be given of electronic data but how that should be done'. The detailed way in which disclosure was to be given was not explained in *CPB*. Moreover says Mr Tozzi the facts of that case were in no way analogous to the present since there were there express allegations of the misuse of confidential data by the defendants to further their own business, and a claim for account of profits. The Court's Conclusions
36. I give first this courts conclusions on the application based upon the material which was before me and the stage at which the proceedings had then reached. I will then turn to consider whether any different outcome should be reached having regard to the regrettable passage of time which has elapsed since the application was heard and the stages, in particular those relating to disclosure, through which the proceedings have gone since they were transferred to the Technology and Construction Court by order of Ramsey J of 8 December 2011 and have been case managed ever since by Akenhead J a number of whose orders have been drawn to my attention.
37. I have reviewed the correspondence passing between those acting on behalf of the claimants and those acting on behalf of the defendant Mr Ho over the years since the issue of these proceedings. It has not helped that the solicitors acting on behalf of the respective parties have in fact altered over the years. Thus the claimants were originally represented by SJ Berwin, then Beachcroft, but from 1 October 2010 Bird and Bird came on the record on their behalf, and indeed since the hearings before me they are now represented by Herbert Smith Freehills. In the case of Mr Ho he was originally represented by Fox until his current solicitors Wragge and Co replaced Fox on 21 February 2011. THE HONOURABLE MR JUSTICE KING Approved Judgment *Phaestos & others v Ho and Grover*
38. I would accept that correspondence does reveal what might be described as a slow drip emergence of precisely what of the claimants' property Mr Ho had retained or had received into his possession since he left the claimants' employ and a gradual change in position of Mr Ho as to whether that which he had in his possession could be deemed confidential

information or property belonging to the claimants (e.g. whether copies of originals were his legitimately to keep). Mr Ho had served an original list of documents in July 2010 of which some 76 were queried by the claimants as belonging to them which he had no right to retain and there was then an argument as to which documents fell within the Confidentiality Club Order obtained in October 2010 followed by the revelation (Fox letter dated 13 December

- 2010) that the majority of them (all but eight) had been provided to him by Mr Gover as relevant to the current proceedings and the then ongoing Employment Tribunal proceedings brought by the defendants. A further schedule of 61 was served by Fox on 10 January 2011, not as being a list of documents disclosable in the action as it then stood (indeed the list is headed 'documents previously in the possession of Dr Peter Ho previously undisclosed as deemed not relevant to the issues in the litigation') but as being material which 'could be said to belong' to the claimants. Apart from extracts from notebooks disclosed as relevant to the trial of the preliminary issue, (in March 2011, albeit disclosed after the trial was concluded, a fact however I am satisfied is in itself of no significance having regard to the investigation carried out by the trial Judge, Eady J) none of these so listed were actually provided until Mr Ho's sixth witness statement served in response to this Application when he exhibited 57 of the 61, his current solicitors being unable to identify three of the 61 from the boxes of files sent to them by his former solicitors, Fox, including one entitled 'Untitled List of Data'. Finally, Mr Chamberlain of Mr Ho's solicitors, by his statement of 30 June 2011 again served in the context of this application, exhibited a schedule of further material previously held by Fox as yet undisclosed which 'may be relevant to this Application'. This amounted to some further 66 listed items.
39. In the case of Mr Gover, proceedings against him were not commenced in this country until shortly before this Application. It is certainly the case that the first demand of him for delivery up was that of the 19 April 2011 before service of the Particulars of Claim in the unconsolidated proceedings against him on the 20 April 2011, and on the material I have seen no demand for a search of his computers until 23 May 2011. However he has in his witnesses statements served in response, purportedly given what he said was a full account of, for example, electronic items and documents still in his possession relating to IKOS either on his personal laptop, USB2 or USB3 storage devices. These included 177 emails of which he accepted 14 were business related and 'could be said to contain confidential information', two screen grabs of two tabs from an excel file which he had created on his office computer while in the claimants' employment containing his best estimate of the claimants' business revenue during the years 2007 – 8; another excel spreadsheet (file pnl.xls) put together on his home laptop containing prior years' bonuses and comparing it with various estimates of the company's profits, which within it included revenue/cost information from a spreadsheet given to him by the CFO at IKOS, and various company presentations from 2003-6.

40. Much time was spent before me in examining the extent to which that which the defendants now concede they had retained in their possession was truly confidential information, the point being made by Mr Tozzi that for the most part they were not highly confidential or sensitive, and included material relating to their contracts of employment, and such as there were, had on the evidence, only been retained to further the defendants' respective positions in their ongoing bonus and other disputes with the claimants, and that there was no evidence of or pleaded allegation of misuse for competitive commercial purposes, which Mr Tozzi would characterise as misuse in any true sense. Mr Gover does admit to having copied IKOS documentation to his home computer during his employment which potentially could have assisted his brothers in advancing their claims against IKOS, a protracted dispute which began in October 2005. (Gover 1 at paragraph 123. '...Around this time I copied files to my home computer (over the VPN) which I wanted to search through to find evidence of my (and my brothers') profit share – this was not necessarily because I wanted to use it as evidence in court, or because I did not believe IKOS would engage properly in the disclosure process (which I would not have known anything about anyway until early 2007) but because there was such little documentation showing what had been agreed ...'), but again Mr Tozzi submits that this is far removed from any concept of 'true misuse'. As examples of the sort of material which for the most part had been retained Mr Tozzi referred me to the description given by Mr Ho of the controversial 76 documents in his List of July 2010, the bulk of which had been provided by Mr Gover (albeit they were ultimately brought within the Confidentiality Club order) at paragraph 60 of Ho 6 ('The documents relate to his (and my) employment remuneration and terms, contractual negotiations, examples of IKOS bullying ...'). Confidential Information, apart from Software
41. I am however prepared to accept that as demonstrated to me by Mr Goulding both in open and private session that some (but by no means a great deal) of the material retained was clearly confidential, in particular certain material relating to revenue figures, and in principle such copying and retention of an employer's property/confidential information for private purposes cannot be justified by the fact that private purpose was the bona fide desire to further an ongoing dispute between employee and employer (see *Brandeaux Advisers (UK) Ltd v Chadwick* [2011] IRLR 224).
42. However, none of these matters if they stood alone, relating to that which was retained to further the ongoing bonus and other disputes in my judgment, would be sufficient to justify the inspection/search order sought in respect of the computers at this stage. On the face of the pleadings they are in reality only secondary to the other pleaded breaches of duty which it is averred entitle the claimants to resist the claims for unpaid bonuses or to claim a return of those allegedly paid under a mistake. The question of the further policing by such methods of delivery up of such confidential material which has been agreed to by the defendants (and indeed complied with, subject to certain issues as to the completeness raised by the claimants) and such disclosure obligations should await the proper stage in the proceedings after such delivery up has been completed and disclosure given, and any

further application to the court.

43. I agree with Mr Tozzi that there was not now at the stage of the hearings before me, anything to suggest that the defendants still had anything on their computers (deleted material apart – to which I shall return) beyond that which they have now disclosed in some detail and agreed to return. The claimants’ software
44. However where I have been concerned is the evidence which has emerged and the way in which it has emerged, of the respective defendants having retained, copied and disclosed (albeit not to third parties) and then purportedly deleted the claimants’ software which on any view contained confidential information critical to the claimants’ business. THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover
45. As Mr Goulding emphasised - and irrespective of when proceedings were issued against them or express demands in relation to software were made, the starting points are the two letters of the 23 December 2008, one signed by Mr Ho, the other not replied to and otherwise ignored by Mr Gover. In the first Mr Ho signed that he had returned all ‘software, emails and documents relating to IKOS’ when as is now known he failed to do so. The other was a letter demanding the return of, and putting Mr Gover on notice that he was under an obligation to return, amongst other things, all confidential information relating to any of the IKOS group stored on any computer or other electronic device. This was followed up by a not dissimilar letter of 30 December 2008 to Mr Gover to which no reply was sent. Whatever be the argument (strongly advanced by Mr Tozzi) as to the correct identity – among the companies making up the IKOS Group - of any particular defendant’s employer to whom any express contractual obligations were owed, and whether the documentation admittedly retained by the defendants could be said to belong to that employer – I am prepared to accept for present purposes that on any view the defendants would be bound by an equitable duty of confidence in relation to such documentation.
46. It is unnecessary, in my judgment, to go into the fine detail minutiae of the correspondence passing between the claimants’ solicitors and those acting on behalf of Mr Ho from the commencement of proceedings in 2009 and the issue of the present Application. At no stage prior to the letter from Wragge and Co dated 27 May 2011 was there any acknowledgement on behalf of Mr Ho that he had retained or come into possession of confidential IKOS software since the termination of his employment or subsequently purportedly deleted the same, as we now know to be the case. Although it is correct to say that a request directed specifically to what use had been made of the claimants’ software was not made until the claimants’ solicitors letter of 19 May 2011, issues were raised by the claimants’ solicitors in correspondence with Mr Ho’s solicitors in January 2011 concerning the deletion of data belonging to the claimants (letter of the 9 January 2011, for example), but these went unanswered, when the true picture according to Mr Ho’s subsequent statements is that he deleted IKOS Code from his home computer some months after the termination of his employment and deleted the Gauss 2003 software in late 2009 and in 2010 having copied it to his computer in Summer of 2009 having been given it by Mr Gover . As will be seen what he

was given by Mr Gover in that summer, and which he retained before subsequently deleting some months later, was a storage device USB3 which according to Mr Gover contained all the IKOS documentation and information which was in Mr Gover's possession on termination. This included not only the confidential emails and the confidential IKOS revenue sheets contained in spreadsheets highlighted by the claimants referred to above, but IKOS (the Gauss 2003) Code copied by Mr Gover.

47. As far as Mr Gover is concerned, again and albeit demands for information relating to such software were only first made by the claimants' solicitors by letter of the 19 May 2011 shortly before the issue of the application, I agree with the submission by Mr Goulding that that which he has now disclosed has raised legitimate concerns in the claimants as to whether the full extent of his dealings with the claimants' software since leaving their employment has emerged.
48. In the round what has emerged is that he retained Gauss 2003 and HOS software on his computer when his employment terminated. He copied this to a USB stick (USB2) in summer 2009 which he kept for himself, while copying its contents to USB3 which he handed to Mr Ho ostensibly to give to Fox. By late 2009 Mr Gover seems to have copied the THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover contents of USB2 back to his lap top. He then says he deleted Gauss 2003 and HOS from USB2 and USB3 (which he retrieved from Fox for this purpose) in late 2010.
49. According to Mr Goulding, Mr Gover had as at the hearings of this application, failed to provide any plausible explanation as to why he kept USB2, why he copied it to his laptop or why he deleted Gauss 2003 and HOS in late 2010.
50. Whether this is sufficient to justify that part of the proposed order under challenge is however the critical issue given the lack of any pleaded case on the misuse of the software as such (outside retention, copying, and disclosure by the defendants to each other).
51. I set out the principal extracts from first the letter of Wragge and Co of 27 May 2011 in this regard, and then from the successive witness statements of the defendants (Gover 1 and 2; Ho 6 and 7), in order to explain how these concerns are now put. Wragge letter of 27 May 2011 'As far as Messrs Ho and Gover are concerned your clients are aware that as part of their duties at IKOS they had access to and use of IKOS software. They have not used IKOS software for any purpose other than in the normal course of their duties at IKOS. Mr Gover had for a period of time in the 1990s responsibility for maintaining the office backup of all IKOS data, including software, which was stored on numerous back-up tapes in his home. Both Mr Gover and Mr Ho had some IKOS software on their home computers so as to work on it at home on occasion, again only in the course of their normal duties. Mr Ho deleted any software that remained on his home computer after leaving IKOS. In late 2006 Mr Gover handed over what he believed to be all of the back-up tapes in his possession (around 40) so your clients could search them as part of their disclosure duties in the litigation with Julian Gover and Lucien Gover. In or around June 2009, after leaving IKOS and in preparation for

the return of property envisaged by the failed compromise agreement negotiations with your clients, Mr Gover collected material still in his possession relating to IKOS and as he was about to depart for Italy for the birth of his second child, gave it to Mr Ho to pass to his then legal advisors, Fox solicitors. This material included 2 further back-up tapes which he had found (labelled June 1998 and November 1998), 2 voice recorder tapes (labelled with various dates from 18/9/1995 and 7/9/98), a CD-ROM (labelled Software) and a credit card sized promotional CD-ROM containing marketing material. Mr Gover deleted any software on his home computer having first backed it up to a USB stick which he also gave to Mr Ho to pass to his then lawyers, Fox, who in turn passed any items they had received to us when they handed over all the files earlier this year. Both had access to IKOS software in the course of their employment with IKOS and as set out above but otherwise not. THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover Neither has ever used IKOS software in connection with any business other than that of the claimants or IKOS. Neither is aware of any other persons with any access to any IKOS software or copies Gover 1

120. In around 2003 I remember transferring the trading analysis software ('Gauss 2003') to my home computer so I could work on it at home...
122. In or around June 2006 ... I went on a business trip ... to meet a pension fund in Germany ... an important potential client ... so we made a dedicated presentation for them... I took my laptop to the meeting and therefore wanted to copy the presentation onto the laptop ... I also wanted to take a copy of some diagnostic software for the future strategy (called 'HOS')...
125. When I was dismissed on 23 December 2008 I was given a letter which asked me to deliver 'all items in your possession which are the company's property'. I was shocked and angry with IKOS at their behaviour and of course they did not pay me as agreed. Given the circumstances of my dismissal I did not pay much attention to this part of the letter ...
126. On 30 December 2008 IKOS wrote to me again ... As I had been told by Martin on 4 December that I would be paid £3m by 24 December 2008, only then to be dismissed on trumped up charges without payment of that sum on 23 December 2008, I believed IKOS to be in breach of contract and in no position to make any demands of me. I did not reply to the letter ...
129. On 16 March 2009 another one of IKOS's former solicitors, Beachcroft LLP, provided Peter and my then solicitors Fox, with a proposed settlement agreement. Amongst other things that agreement proposed that Peter and I should deliver up all 'Confidential Information' and 'Employer's Property' to IKOS ... subsequent versions of the agreement envisaged that at 'completion' any physical property I had would be given to IKOS and any soft copy IKOS material I had would be deleted from my systems. I therefore took no further action to return property or delete files in the meantime.

130. In June/July 2009 I was planning to go to Italy for 6 months ... we were still negotiating the terms of the compromise agreement and I hoped it would be settled before I returned ... In order that I would not have to return to the UK to deal with completion, I undertook the exercise of going through my whole house (loft, cupboards etc) to find IKOS property, as well as searching my 2 personal computers - one in the loft (unused for many years), one desktop and one laptop. The physical property included papers, presentations, 4 tapes, 2 CDS and a USB stick (USB1) that was physically owned by IKOS ... I placed all these items in a box ('the Box'). Any files on the 3 computers vaguely related to IKOS I moved to a single location on another USB stick, which was my physical property (USB2). Having finished the exercise I made a copy of the contents of USB2 onto another USB stick (USB3) and placed that in the Box while I retained USB2. My intention was that when we signed the compromise agreement ... Fox would retain USB3 permanently in their archive, they would hand the rest of the items in the Box to IKOS (including USB1 and I would delete the THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover contents of USB2. I wanted Fox to retain USB3 in case I ever had any difficulty with IKOS in the future. I did not really trust them to honour the compromise agreement. Before leaving for Italy, I handed the Box to Peter, so that he could give it to Fox in advance of signing. I told Peter that USB3 was not to be given to IKOS, but to be retained by Fox.
131. I left for Italy and that was the status quo for many months. ... when it became clear that no settlement was going to happen, I think that I copied the contents of USB2 back to my laptop (for convenience more than anything else) as I was working on legal documentation by then. I then generally used USB2 for backing up various files, photos, my laptop and so on, so things became a bit more muddled but basically the material stayed on either my laptop or USB2.
132. The material on USB2, USB3 and my laptop included Gauss 2003 and HOS as well as various emails, presentations and other documents which I thought might be useful in the litigation. Sometime in late 2010 I decided that it was not appropriate for me to retain Gauss2003 any longer. I therefore decided to delete Gauss2003 and HOS from USB2 and my laptop, and I requested Fox to provide me access to the Box, from which I took back USB3 so as to delete Gauss2003 and HOS from that also. Gover 2
5. The software referred to is a full copy of the Gauss Code in 2003.
14. The box remained with Fox. I took back USB3 (as explained ...). I deleted the software from USB3 by connecting it to my laptop and deleting it in the standard way. USB3 is still in my possession.
33. d. I deleted IKOS related documents on my computers after I had copied them onto to USB2. Indeed on reflection I think I probably deleted some without copying them at all ...
- g. I cannot recall the exact date, but towards the end of 2010. I deleted it in the standard way.
- h. I have not used or read Gauss2003 or HOS since the termination of my employment. Ho 6

32. As at 23 December 2008 I had 2 categories of documents in my possession:
1. Documents from the course of my work
 2. Documents which concerned my employment (detailing matters such as my remuneration, terms, performance and so on).
33. In relation to category 1 documents access to the office network from home was essential to the performance of my duties for IKOS ... the cost of the connection between my home and the office was paid for by IKOS. In the course of my work I had sometimes to transfer materials like code or business working documents, to my then home computer. Over time this practice eventually stopped ... (so any code on my home computer would have been quite old). THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover
34. In January 2009 I decided that it was unwise to retain anything on my home computer that was not about my employment (i.e. category 1 documents). I therefore transferred any electronic documents that I wanted to retain (i.e. category 2 documents ...) to a new computer which I acquired. I bought a new computer because I was concerned that my previous machine would have been compromised as it had been connected to the IKOS network and IKOS supplied software had been installed on it over the years. Over the course of roughly a few months I transferred the category 2 documents and any other personal files to my new computer. I then ran permanent deletion software on the disc of the old computer and physically disposed of the hard disk when the transfer process was completed ...
85. c. I also passed on to Fox what Sam had given me. Whatever Sam had put in the box was not in my possession and was not mine subsequently to disclose.
- d. I also passed to Fox the USB stick that Sam gave me (which I understand to be described by him as 'USB3'). Before doing so I copied the contents of USB3 onto my home computer. I did this because I was concerned not to lose whatever data was on it. I was not aware that Sam had already made his own copy (USB2). I did not look at what was on USB3. I just copied the data and thought no more about it. Later, around late 2009 or 2010 I deleted the data copied from USB3 using a secure deletion tool. As the data on USB3 was Sam's not mine, I did not feel that I had any right to it and I did not think it was subsequently mine to disclose. Ho 7
10. b. Sam told me that USB3 was for retention by Fox, so I wanted to keep a copy, in case it was misplaced.
- c. I assumed USB3 was important as Sam wanted Fox to retain it. I realised of course that it related to IKOS.
- d. I was not intending to run whatever was on USB3 so I did not think that copying it to my new computer would compromise it.

11. ... Although I have no distinct memory of this I accept I am likely to have listed USB3 so I probably did realise that some form of Gauss was on it. I certainly made no use of it.
52. Understandably Mr Goulding made a number of trenchant observations concerning first, that which was not stated in the Wragge letter, presumably written on instructions, compared with what emerges in the defendants' witness statements, and then as to what he describes as a changing account, and as to 'unanswered questions' arising as a result of the defendants' now revelations. Omissions in the Wragge letter
53. Mr Goulding identified the four omissions in the letter as a result of which he would say the letter was seriously misleading: - the letter said that Mr Gover had backed up IKOS software to a USB stick which was given to Mr Ho to give to Fox (USB3). It failed to say that Mr Gover took a copy on another USB stick which he kept (USB2). This THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover - - - emerged (Mr Goulding would say 'only admitted by Mr Gover') only after the application had been issued. It failed to say that Mr Gover still had USB2 at the date of the letter and which had contained IKOS Code until late 2010. It failed to say that Mr Gover later copied the contents of USB2 back to his laptop. This was only admitted after the application was issued. It said that Mr Ho had passed the USB stick to Fox. It failed to say that before he did so he copied the contents (including the IKOS Code) to his own computer. This was only admitted by Mr Ho after the application was issued. Changing Accounts. Mr Ho
54. Mr Goulding highlights first Mr Ho's changing account as to whether he looked at USB3 when it was handed to him by Mr Gover to give to Fox. In his statement he says 'I did not look at what was on USB3', in his second, following a query raised by Mr Wayne on behalf of the claimants, he says 'I am likely to have listed USB3, so I probably did realise some kind of Gauss was on it'. Mr Gover
55. In respect of Mr Gover the contrast is made between his first saying that he moved any files on his computer that were vaguely related to IKOS to a single location on a USB stick, to later saying that on reflection 'I think I did delete some without copying them at all'. It is still not known, submits Mr Goulding, what these IKOS related documents were, deleted by Mr Gover without copying them which 'may be highly relevant to the claimants' claims.' Unanswered Questions
56. The unanswered questions which Mr Goulding submits may well be 'provided by the inspection sought by this application' are put as follows: Mr Gover
 - 1) Why did he copy the entire contents of USB2 (including IKOS code) back to his laptop sometime around late 2009?
 - 2) Why did he delete IKOS Code and HOS from his laptops, USB2 and USB3 towards the end of 2010? What prompted this? Why did he then consider 'it was not appropriate for me to retain Gauss2003 and HOS any longer'? What was he trying to hide? It is further pointed out that HOS was still on USB1 (the stick put in the Box held by Fox) when it was delivered up

following my order of July, showing that Mr Gover had not sought to retrieve this from Fox (unlike USB3) to carry out any deletions. THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover

- 3) What were the IKOS documents he deleted without copying them to USB2 which Mr Gover 'belatedly' admitted doing in his second witness statement? Mr Goulding then sought in relation to Mr Gover:
 - (i) to query in addition the completeness of the delivery up which had occurred consequential upon my Order of July 2011, although it should be noted that the undertaking at para 2a, was to deliver up all listed items in the particular defendant's possession or control and that in the case of relevant documentation in digital format, the delivery up could be made by providing the material on 'DVD or other such appropriate medium'. Specific complaint is made about the delivery up of only a hardcopy of the spreadsheet in file pnl.xls, and the failure to deliver up the electronic copy which has meant that the metadata of the file cannot be inspected and, it is said, it remains an open question as to when and from what sources did Mr Gover compile this spreadsheet. I have also already referred to the complaint in respect of the deleted Gauss Code which in its deleted form should still be on Mr Gover's computer. (ii) by reference to that to which I have already referred to (see paragraph 21 above) comparing the number of computers (seven), jointly delivered up for imaging, without discrimination between their origin, pursuant to my order of July, with the number suggested in the witness statements (Mr Gover, two PCs and a laptop; Mr Ho, one PC) to raise the question 'just how many computers were the claimants' documents copied on to?' and Mr Ho The questions allegedly raised in his case are:
 1. Why did he see fit to copy the entire contents of USB3, including IKOS code, to his computer in the Summer of 2009 when he claims USB3 belonged to Mr Gover and had been handed to him by Mr Gover to pass to Fox?
 2. Why did he suddenly decide that he should not have the contents of USB3 on his computer and proceed to delete it in 2009 or 2010? What prompted this? What was he trying to hide? He states that he is not sure when he deleted the USB3 contents from his computer. 'This is one of the missing pieces of the jigsaw that expert forensic inspection of the disc images will seek to identify.' Mr Goulding then makes a similar point in relation to the question still remaining as to the number of computers upon which the claimants' property was copied.
57. Overall, therefore says Mr Goulding, a compelling picture has emerged, which he says would not have emerged but that the defendants were compelled to put in witness statements in response to this application – although I record at once Mr Tozzi says that the speed with which the application was made following on from the requests made in the letters of the 19 May and 23 May 2011 did not allow the defendants the time they required to give a full account in correspondence – of extensive copying, retaining, disclosing and deleting of IKOS software and of other confidential information on the part of the defendants and the order sought is necessary to enable the claimants not only to identify the

relevant Code and Relevant Documentation which has been copied on to the defendants' computers but the THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover extent to which it has been misused beyond that which has been already admitted in the proceedings.

58. Particular emphasis is put upon the fact that the only way to find out the type of data referred to by the claimants' expert, Mr Holden, relevant to the investigation of the question of the extent of the misuse, including the use of any other devices once connected to the defendants' computers, is by the examination of the computer discs themselves. I have already identified that data at paragraph 10 above but it includes whether data belonging to the claimants exists in a deleted state, whether data obfuscation methods have been used, and data going to establish the extent of any data deletions and whether data which has been present, has been subject to transfer from or to external devices. So says Mr Goulding without the order sought for both imaging (which has now occurred) and subsequent inspection/search:
- 1) Relevant Code and Documentation which has been deleted non-permanently, would not be preserved but would be at risk of and likely to be overwritten;
 - 2) The claimants would be unable: o a) to identify and determine what the Gauss Code comprised that was copied onto the defendants' computers. This can only be produced as a result of a thorough forensic examination of the computer discs for Relevant Code that was deleted and retrieval of what is found; o b) to identify and examine metadata relating to Relevant Code and Documentation that is to be found on the defendants' computers which will shed light upon the defendants' dealings with it; o c) to identify what external devices have been attached to the defendants' computers which will shed light upon on what relevant Code and Documentation has been transferred (to or from the computers) and when o d) when the defendants deleted the code and documentation. A forensic examination will seek to ascertain when Mr Ho used permanent deletion software to delete the contents of USB3 which he says was late 2009 or 2010 but cannot recall when. Mr Gover says only that he deleted Gauss Code and HOS from his laptop in late 2010 but cannot be more precise. A forensic exercise should be able to go further.
59. Mr Goulding also says the court should accept a real concern on the part of the claimants that full disclosure of what is currently in the defendants' possession and control as regards Relevant Code and Documentation is not going to be made and the order sought is required to ensure that all documentation has been disclosed.
60. I however take on board Mr Tozzi's submissions that due allowance must be made for ambiguity in witness statements, and that it is not unusual for further clarification to be given of the detail of a particular piece of evidence, such that the court should not readily reach conclusions adverse to a witness' credibility in such circumstances. I equally have continually in mind what Mr Tozzi has throughout characterised as the 'limited' nature of the pleaded case against the defendants as regards their retention and use of the claimants'

Documentation. I further have in mind Mr Tozzi's riposte to the 'unanswered questions', THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover raised as above, that these should be the subject of Requests for Further Information rather than a justification for the sort of intrusive search order here being sought. Final Conclusion

61. The issue in principle is whether the claimants on the basis of the material before me as at the date of the hearings, were and are entitled at that stage to an order for the search (for that I repeat is the term used in the final version of the draft order submitted by the claimants) by an independent computer expert nominated by them, of the imaged discs for 'any Relevant Code and Documentation or evidence of the use or copy or transfer or deletion thereof'.
62. The conclusion I have reached in principle is perhaps an unusual one: namely that the claimants were undoubtedly entitled to that part of their original application which was satisfied by my Order of July 2011, that is to say the orders for the serving of lists of Relevant Documentation (as defined), the delivery up of the claimants' property/confidential information and for the imaging of the relevant computer discs, for the purpose of preserving evidence, but as at that stage no further order for the searching of the discs by an independent expert appointed by the claimants was justified pending the outcome of the delivery up order, and the standard disclosure process which had yet to be reached.
63. I do not consider that the order is or was necessary in order to police Disclosure of documents relevant to the pleaded issues under CPR 31. I would accept Mr Tozzi's basic submission that to do so on that basis would be to pre-empt the procedures for e-disclosure now provided for in the way already described. Any such policing should be by way of an application to the court after that procedure has been completed. I am bound to say that in so far as the application has been put as one for specific disclosure and inspection under CPR 31.12 this is one which is either misplaced or again premature. I would not regard the compliance with my order of July 2011 ensuring the imaging of the computer discs as one in which the defendants were giving disclosure of disclosable documents in their entirety giving rise to a right of inspection. Nor would I make such order pursuant to CPR 34.14 since that was not the basis upon which the application was issued, not least because the statements of case and witness statements were served after the application was made. However even if CPR 34.12 and/or CPR31.14 did apply, the court would still have to be satisfied on grounds of necessity and proportionality that the breadth of the inspection being sought was currently justified which for the reasons set out below I do not consider can be said. The decision of the court in Webster v Ridgeway [2009] EWHC 1140 is an example of an application of those principles to the application there being sought.
64. Equally, I do not consider that the order is or was necessary in order to police the orders made for delivery up of the claimants' property and/or confidential information. Again in all the circumstances of this case and the extent to which the defendants have now given disclosure of what is still in their possession and control, this should await completion of the

delivery up processes and any complaint as to the inadequacy of the same should be part of a fresh application to the court. So for example it has seemed to me that the complaint as to the failure to deliver up the electronic versions of the spreadsheet files, complete with metadata capable of being inspected, was premature.

65. What I have to consider is whether the order is and was necessary on the alternative basis upon which the application is put, namely that it is necessary to preserve and identify relevant evidence of the nature and extent of the already pleaded wrongdoing with THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover regard to the claimants' property, in particular its Code but also its other confidential information. The juridical basis for such an order would either to be found in CPR 25.1(i) and (ii) as being one for the preservation and inspection of 'relevant property' on the basis as submitted by Mr Goulding, the computers being relevant property as to which questions arise on the claim or under the court's inherent jurisdiction to make an order for the preservation and inspection of evidence, if necessary relying on its powers under section 7(1) of the Civil Procedure Act 1997. To this extent I would accept Mr Goulding's analysis already set out as to the powers of the court. The real issue however having regard both to the overriding objective in CPR 1.1 and the terms of Article 8(2) of the EHCR, is whether the order sought is necessary and proportionate having particular regard to the pleaded causes of action and the relief currently being claimed.
66. The matters already highlighted above did, I would accept, give cause for concern to the claimants as at the date of the hearings, that the defendants had not given a complete and accurate account of their respective dealings with the claimants' property so identified, since their respective employments were terminated and in particular in relation to the circumstances which led to their purported deletion of the Code. The purposes the claimants seek to achieve by the order sought which I have identified above under paragraph 58.2 (a)
- (b) (c) (d) may in those circumstances appear to be entirely legitimate ones but the issue for me is whether they are necessary for the fair disposal of the issues raised on the face of the pleadings. I have however already accepted the need for the imaging order reflected in the concern identified in paragraph 58.1 above.
67. Ultimately in rejecting the necessity for the order sought beyond that which I ordered on the 29 July 2011 I return to the very limited nature of the pleaded causes of action in respect of the claimants' documentation. The principal claim on the pleadings before me is one for delivery up. There is no express claim as such for damages for the commercial misuse of the claimants' property. Insofar as there is any real doubt as to whether the defendants have failed properly to comply with the orders made for listing and delivery up then an application can still be made to the court. Insofar as there is reliance upon the unauthorised copying and retention of documentation during the currency of the defendants' employment in support of the claimants' pleaded case on the repayment of bonus payments for 2005 and 2006 and in resistance to the defendants' claim to bonuses for 2007 and 2008, I

repeat my observation that these are secondary to the other breaches of contract alleged in support of these respective cases and I have sympathy with the defendants' point that as at this stage insofar as the claimants wish to investigate the extent of copying during the currency of the employment they have the ability to search their own computer systems which would have their own metadata and record of any searches carried out by Mr Ho and Mr Gover and copying.

68. But perhaps more to the point, delivery up and standard e-disclosure not yet having taken place, complaints about the failure to deliver up/disclose the electronic versions of various files, complete with relevant metadata, must in my judgment be premature. Insofar as it is complained that the Gauss Code copied and then deleted by Mr Gover, in a standard form, has yet to be disclosed and delivered up in reconstructed form, this again must be premature. Hence I do not consider that the concerns I have rehearsed at paragraph 58(2) (a) and (b) can justify the order sought.
69. I have no doubt that the real purpose behind the order for search now sought relates to the questions raised as to the circumstances now revealed in which the defendants retained after THE HONOURABLE MR JUSTICE KING Approved Judgment Phaestos & others v Ho and Grover the termination of their employment, and purportedly deleted copies of the IKOS Code and other software, and hence the purported need to investigate the matters summarised at paragraph 58 (2) (c) (d), and in the so-called 'Unanswered Questions' including the investigation of the transfer from and to external devices. But notwithstanding Mr Goulding's submissions to the contrary this is in my judgment in truth an unjustified fishing expedition in the hope of obtaining evidence of disclosure of the Code and software to third parties and/or the use of the Code for the purposes of the defendants' newly commenced competing business or to support an as yet unpleaded claim relating to the alleged commercial misuse of the claimants' property.
70. I agree with Mr Tozzi that the references in the witness statements of Mr Polymenkos and Mr Wayne to various matters which carry the sting, if true, that the defendants had been contemplating using the claimants' confidential software and other information for a competing business while still employed by the claimants, and further that their new business (Altiq) was in some way connected with the hedge fund business of Mr Coward with whom the defendants had been party to the misappropriation of the claimants' software and confidential property, can only be explained by the wish to convince the court that there is some evidence that this might be true. The fact is there was no evidence before me to this effect and the claimants through Mr Goulding did not attempt to suggest there was. The fact is there has been no evidence laid before me to suggest that there has been any disclosure of the claimants' software and other confidential property to third parties or that there has been any commercial misuse of the same by the defendants. And just as significantly there is no pleaded case to this effect.

71. In the round I agree with Mr Tozzi that absent at this stage of any such evidence of misuse by the defendants and absent any such pleaded case to this effect, the order sought on the basis of the need to investigate the defendants' dealings with the claimants' software and other confidential information since the termination of their employment cannot be justified. There is no pleaded case on this basis and it is wholly unnecessary in order to support the claim to delivery up. Clean Hands/Delay
72. In view of the conclusion I have reached, it is unnecessary for me to give any final ruling upon whether an otherwise justifiable order could be defeated by reference to the doctrine of 'Clean Hands' and/or delay in bringing the Application. However in view of the time spent before me debating these matters, I should indicate the following: Much was made by Mr Tozzi over the evidence set out in particular in Mr Gover's witness statement of unlawful surveillance of both defendants carried out by or on behalf of the claimants which he says the claimants have just ignored in their responses to that which has been raised. However in principle I consider that Mr Goulding must be right when he submits that since none of the fruits of any such surveillance is being relied upon by the claimants in support of the Application, these are irrelevant considerations – even if, which is denied by the claimants, what is here being sought is an application for equitable relief. I would accept that on authority the 'clean hands principle' is limited to where the conduct is directly related to the relief sought. See *Moody v Cox* [1927] 2 Ch 71, per Scrutton LJ 86-87; *Fiona Trust v Privalov* [2008] EWHC 1748 (Comm.) where Andrew Smith J cites at paragraph 17 observations of Lord Scott in *Grobelaar v News Group Newspapers* [2002] UKHL 40 ('the grime on the hands must of course be sufficiently closely connected with the equitable THE HONOURABLE MR JUSTICE KING Approved Judgment *Phaestos & others v Ho* and Grover remedy that is sought in order for an applicant to be denied a remedy to which he would ordinarily be entitled').
73. Secondly as regards delay as at the date of the hearings before me, if there had in fact been a pleaded case by the claimants in their consolidated Particulars of Claim introducing – albeit for the first time in the case of the proceedings against Mr Ho, and ex hypothesi for the first time against Mr Gover against whom proceedings in this country had only just been commenced - sufficient to support the order being sought, then I would not have refused relief based on considerations of delay, since relative to the introduction of the cause of action relied on the application could not be said to be tardy and the claimants would be entitled to look to the revelations for the first time in the Wragge letter of 27 May 2011 relating to the retention and deletion of software since the termination of employment. But of course I remain of the view that the failure of the claimants notwithstanding these revelations and anything else they sought to lay before me in the witness statements of Mr Polymenkos and Mr Wayne to introduce such a substantive claim based on the commercial misuse of the claimants' software and other confidential information does mean that as at the stage of matters before me, the order sought (beyond the order I granted of 29 July 2011) could not be justified. The progress of the proceedings since the hearings before this court

74. I am however acutely conscious that since the hearings before me there have been considerable developments in the proceedings following their transfer to the Technology and Construction Court and the various interlocutory orders made by Akenhead J including a number relating to disclosure and to the amendment of the pleadings and the appointment of experts. My knowledge of these various orders has come from my being copied into the same by the defendants' solicitors. I make clear however that nothing I have seen has influenced my decision as regards the Application before me and in particular I regard as irrelevant matters relating to the claimants' conduct in relation to their disclosure.
75. However I equally make clear that in relation to that which has been sought in the Application before me beyond that which I have already granted in the Order of the 29 July 2011, I simply make no order as distinct from dismissing the application.
76. It must remain open to the claimants, if so advised, in the light of the Delivery-up which has now been completed and any compliance or non compliance with the Disclosure Orders since made, and any amendments to the pleadings since made, to make application to the court in which the proceedings now reside, for orders relating to the inspection/search of the imaged discs preserved by my order, on the grounds of deficiencies in the delivery-up, the need to verify the same or deficiencies in the e-disclosure and the need to obtain specific disclosure or any other grounds relating to the court's inherent jurisdiction relating to the preservation and inspection of evidence. Form of Order: Costs.
77. I will invite the parties on the handing down of this judgment to make submissions both as the form of the order consequent upon this judgment and as to costs.

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