

JERSEY / JUDGMENT

Nautech -v- CSS Ltd and Others

[2013] JRC 089 (13 May 2013)

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judgment

the deputy bailiff:

Introduction

1. The plaintiff asserts that he has been engaged in the business of recruiting and providing seismic geophysical engineers and maritime personnel for shipping activities worldwide since about 1992. Over the course of the intervening period, it has built up a database of relevant employment details of engineers, officers and crew currently under contracts and employment with the plaintiff, or available to accept such contracts. The data available to the plaintiff includes personnel employment status, qualifications, and other personal information for over 1,000 qualified maritime personnel. The plaintiff is beneficially owned by Mr Peter Harrison who is the sole director and who has sworn affidavits on behalf of the plaintiff in these proceedings. 2. The first defendant was incorporated in Jersey in February 2013. It is asserted that the fifth defendant describes himself as the managing director of the first defendant, which has established a website domain in which its business is described as recruiting and providing seismic geophysical engineers and maritime personnel to the shipping industry worldwide. 3. The second, third and fourth defendants were employed by the plaintiff from October 2008, May 2012 and June 2008 respectively until 28 th March, 2013, in relation to the second and third defendants and a later date in relation to the fourth defendant. It is alleged that on 29 th March (Good Friday) the second defendant spoke with Mr Harrison, and informed him that he was taking one of the plaintiff's major clients to his new employer, the first defendant. It appears from the plaintiff's claim that the first defendant began trading on or about the 2 nd April, 2013, and on 4 th April, 2013, the first defendant's website went live. 4. On 11 th April, 2013, the Bailiff signed an Order of Justice at the instance of the plaintiff, with various immediate orders including an Anton Piller order and some interim injunctions. Details of these appear below. On the return date namely 19 th April, Advocate Baker appeared for the defendants for whom Advocate Redgrave now appears before us, to put the matter on the pending list and to seek some immediate orders in relation to the orders obtained ex parte and set out in the Order of Justice. The application was deferred until Thursday 25 th April and the various summonses of the parties were

heard on that day and the days following. The fourth defendant played no part in these applications, and Advocate Cook withdrew from the hearing by consent having appeared as a matter of courtesy. In this judgment references to "the defendants" mean the first, second, third and fifth defendants, except where the context otherwise requires. The Defendants' Application 5. The application of the defendants was for the discharge of the Anton Piller order, on a number of grounds; an order for the return to the defendants of all items which had been removed by the plaintiff pursuant to that order; an order discharging or varying other injunctions contained in the Order of Justice, as set out below; an order that the plaintiff provide an explanation both as to what has happened to the material seized following the Anton Piller Order being served, what copies have been made and who has had access to that material; an order that searches of the material seized should cease immediately and images be returned to the defendants; that paper or other copies of material be returned to the defendants; and that the plaintiff provide tangible and irremovable security to fortify the undertakings required to secure the grant of the injunctions. Not all of these claims for relief were pursued by Advocate Redgrave in the hearing before us. In turn, Advocate Sinel issued a cross summons seeking an order that each defendant be cross examined in relation to the contents of the affidavits which they had sworn, or provide further affidavits as to the use made of and present location of all confidential information described in paragraphs 13 to 42 of the re-amended Order of Justice; he sought to amend further the re-amended Order of Justice; and he sought an order that the defendants and each of them should shut down the website operated from the domain www.css-shipservices.com, the website of the first defendant. The Court was informed that the issue of further affidavits and/or cross examination of the defendants on their existing affidavits had been settled in principle, and that work was being done on the language which might appear in the Court's order in due course. The Court was also informed that it was unlikely that objection would be taken to the further amendments to the re-amended Order of Justice, but formal confirmation of that point was not available. Advocate Sinel maintained the application for an order to shut down the website and indeed provided a further summons during the course of the hearing seeking orders pursuant to Article 129 of the Intellectual Property (Unregistered Rights)(Jersey) Law 2011 that the defendants deliver up by 30 th April, 2013, all material, in whatever form, listed in Schedule F to the Order of Justice, or confidential information of the plaintiff in each of their possession, power, custody and control, with affidavits to be made by each defendant confirming that they no longer had or had access to any Schedule F items or other confidential information or copyright works of the plaintiff. The Order of Justice 6. In summary the Order of Justice claims that the second, third and fourth defendants have copied confidential information and/or trade secrets belonging to the plaintiff and made the same available for the first and fifth defendants for the purposes of the new business which the first defendant has commenced in competition with the plaintiff. The claims made by the plaintiff are of misuse of confidential information and trade secrets, breach of the contract of employment, infringement of copyright and conspiracy. The prayer for final relief includes claims for damages, delivery up to the plaintiff of the plaintiff's copyright

works in the possession, custody or control of the defendants, and an inquiry into damages, including additional damages, for infringement of copyright and misuse of confidential information, and an account of profits and other sums due to the plaintiff. The Anton Piller Order 7. The Order of Justice contains various orders for interim relief, made upon undertakings by the plaintiff to the Court as to damages if the order was wrongly obtained or wrongly applied, undertakings only to use the information or documents obtained for the purposes of the present proceedings or related civil proceedings, and undertakings to return all items seized pursuant to the order as soon as practicable, and in any event within 28 days. The undertaking was given by the plaintiff's advocates to take all reasonable steps to preserve the integrity of all information seized and recovered for preservation. 8. The interim orders included an order that the defendants should permit authorised representatives of the Viscounts Department, Advocate David Benest as supervising advocate, Advocate Steven Chiddicks on behalf of the plaintiffs, and a Mr Carl Ceillam ("Mr Ceillam"), the investigations director of the Chain Limited, a Computer Hacking and Investigation Network, a Guernsey based operation, to enter the business premises of the first defendant and the homes of the second, third and fifth defendants to search for, inspect, image, photograph or photocopy, and deliver into the safe keeping of the plaintiff's advocates all the documents and articles listed in Schedule B to the order ("the listed items") (emphasis added). The interim order contained provision that the supervising advocate should explain to the defendants what the order meant in everyday language, and allow the defendants time to seek legal advice and to ask the Court to vary or discharge the order. If they took that course, the supervising advocate could be requested to delay the start of the search for up to one hour or such other longer period as the supervising advocate might agree. 9. The order continued as follows:- "46. Before permitting entry to the premises by any person other than the Supervising Advocate, the Defendants may, for a short time (not to exceed one hour) - (a) Gather together any documents he believes may be incriminating in that they may lead to criminal proceedings or be legally privileged; and (b) Hand them to the Supervising Advocate for him to assess whether they are incriminating or privileged as claimed. 47. If the Supervising Advocate decides that the defendants are entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, he will exclude them from the search, record them in a list for inclusion in his report and return them to the defendants. 48. If the Supervising Advocate believes that the defendants may be entitled to withhold production of the whole or any part of a document on the ground that it or part of it may be privileged or incriminating, or if any of the of the (sic) defendants claims to be entitled to withhold production on those grounds, the Supervising Advocate will exclude it from the search and retain it in his possession pending further order of the Court. 49. No item may be removed from the premises until a list of the items to be removed has been prepared and a copy of the list has been supplied to the defendants, and they have been given a reasonable opportunity to check the list. 50. The premises must not be searched and items must not be removed from them, except in the presence of one of the defendants. 51. If the Supervising Advocate is satisfied that full compliance with paragraph 49 is not practicable, he may permit the search to proceed and items to be

removed without fully complying with it. Delivery up of articles/documents. 52. The defendants must immediately hand over to the Nautech's advocates (sic) any of the listed items, which are in their possession or under their control. Any items the subject of a dispute as to whether they are listed items must immediately be handed over to the Supervising Advocate for safe keeping pending resolution of the dispute or further order of the Court. 53. The defendants must immediately give the search party effective access to the computers, including iPhones or other Smart phones or tablet computers on the premises (computers), with all necessary passwords, to enable the computers to be searched and imaged. If they contain any listed items the defendants must cause the listed item to be displayed so that they can be read and copied. The defendants must also provide Nautech's advocates with copies of all listed items contained in the computers." The other interim orders 10. The Order of Justice also contained interim orders that the defendants should immediately inform Nautech's advocates in the presence of the Supervising Advocate where all the listed items were, how and where they were obtained and the uses that had been made of them, including the name and address of everyone who had supplied him or offered to supply him with the listed items, the name and address of everyone whom he had contacted or offered to contact from the listed items and full details of the dates of every such contact and offer. 11. The first party cited was required to give details of the beneficial ownership of the first defendant, the names of its director's officers and employees, and to state who gave instructions in respect of its incorporation and administration, and what services were provided to it by the party cited or related entities. 12. Each defendant was required to swear and serve affidavits within three days setting out this information on oath. 13. There were also the following interim orders:- "Prohibited Acts 57. Except for the purpose of obtaining legal advice the defendants must not directly or indirectly inform anyone of these proceedings or of the contents of this Order, or warn anyone that proceedings have been or may be brought against him by Nautech until such time as all five defendants have been served. 58. The defendants must not destroy, tamper with, cancel or part with possession, power, custody or control of the listed items otherwise than in accordance with the terms of this Order. 59. The defendants and each of them must not infringe Nautech's copyright in the database or make further use of Nautech's confidential information and/or trade secrets or any part thereof for any purpose including offering any situations vacant to engineers, officers or crew or otherwise exploiting the said confidential information of Nautech or any part thereof. 60. In lieu of them working out the one month notice period in each of their contracts of employment with Nautech, the Second, Third and Fourth Defendants shall immediately commence a period of garden leave for one month until midnight on 10th May 2013 and shall not be employed by the First Defendant or in any other capacity until 11th May 2013 at the earliest. Variation and Discharge of this Order. 61. Anyone served with or notified of this Order may apply to the Court at any time to vary or discharge this Order (or so much as it affects that person) but they must first inform the Plaintiff's advocates and give a minimum of 48 hours' notice of their intention to apply to vary this Order. If any evidence is to be relied upon in support of the application to vary, the substance of it must be communicated in writing to the Plaintiff's advocates at least 24 hours

in advance of any application to vary." 14. The listed items were the following:- (i) All mobiles, telephones and/or Smart phone devices including iPhones and Blackberry, mobile tablets and owned and/or used by the defendants; (ii) Online email programmes including business and/or personal and/or social networking (such as Facebook) email accounts owned and/or used by the defendants and each of them; (iii) Electronic storage devices holding data including hard drives, USB sticks and external hard drives owned and/or used by the defendants and each of them; (iv) Computers, laptops and/or workstations (whether PC, AppleMac or similar) owned and/or used by the defendants and each of them; and (v) Central server systems owned and/or used by the defendants and each of them; (vi) Contract tender documents with WesternGeco and any other maritime personnel client of CSS Limited. (vii) paper files relating to the business of CSS Limited including but not limited to all PAN number applications (emphasis added). 15. We shall turn shortly to the evidence in support of the interim relief, and what transpired before the Bailiff, but before doing so we summarise what actually happened following the grant of the interim orders. The fourth defendant was served at 2:30pm on Thursday 11 th April at the offices of the plaintiff. He was not the subject of a search and seizure order. The importance of the gagging order was impressed upon him by the Supervising Advocate. The fourth defendant surrendered a mobile phone, although, as there was dispute as to whether it fell within the terms of the order, it was retained in the custody of the Supervising Advocate. 16. The Order of Justice was then served upon the first party cited, the address for which was the same as the intended address for the first defendant - however the first defendant had not taken up its lease of the premises and was not present thereon. 17. The search party then attended the home of the third defendant at approximately 5:30pm. The report of the Supervising Advocate indicates that he explained the Order to the third defendant, taking him through each of the operative parts. The third defendant did not avail himself of any right to take legal advice, although we are informed by Advocate Redgrave that he did ask for a confirmation as to whether it was likely that he would be able to obtain legal advice at that time of day and was informed by the Supervising Advocate that it was not likely. At all events he then identified to the search party items which fell within the terms of the Order and answered the questions which he was required to answer by paragraph 54. The search party removed an Apple iPhone, a Dell black laptop, a white AppleMac laptop, a contract of employment between the third defendant and the first defendant, and some business cards showing his employment with the first defendant. The iPhone and black Dell laptop were returned on 12 th April. The rest of the items seized were returned at some point after 19 th April. 18. The second defendant was served the following morning at 9:30am. Again Advocate Benest, the Supervising Advocate, explained the operative parts of the Order. The second defendant agreed to attend with the search party at his home, and when the Supervising Advocate re-iterated the third defendant's right to advice and his rights in relation to privilege, he decided he would take some independent advice, which he obtained from the office of the Acting Batonnier and possibly another lawyer. He allowed the plaintiff's advocate to enter the premises thereafter, and answered the questions asked of him at paragraph 54 of the Order. The items which were identified and provided by the

second defendant were an Apple iPhone, two Apple iPads, an ASUS laptop and a contract of employment given to the second defendant by the fifth defendant witnessing his employment by the first defendant. Each of the items was listed and taken save for one of the Apple iPads. The second defendant also provided some passwords necessary for access to the items which were taken and also to his email Facebook and LinkedIn accounts. None of the items were returned until after April 19th most were returned on or about 25th April. We are informed the second defendant's mobile phone has still not been returned. 19. Service on the first and fifth defendants had not been possible on either Thursday or Friday, but was effected at 9:30am on Saturday 13th April. The fifth defendant was told of the detailed terms of the Order by the Supervising Advocate. He identified his mobile phone, an ASUS laptop and an HP desktop computer. He identified certain paper documents contained in four files and the statutory records of the first defendant. The mobile phone was reviewed but not seized. The laptop and desktop units were taken together with the paper documents. 20. The fifth defendant was asked about the first defendant's computers and servers, which were held at the premises of the second party cited. He signed a written authority to permit the search party to remove any of the items listed in Schedule B of the Order from those premises, provided that the removal took place in the presence of Mr Mark Wetherall, who was a director of the second party cited. 21. Later that morning, 13th April, the search party attended on the second party cited and removed the base units, server and certain laptops, as well as some loose papers. 22. It is to be noted that the report of the Supervising Advocate is absolutely silent as to whether any attempts were made to take images of the data contained in the servers, laptops, iPhones or other electronic equipment which belonged to any of the defendants. We assume from that situation that no attempts were made. The items were simply seized and removed by the plaintiff's advocates. 23. Mr Ceillam swore an affidavit on 25th April, 2013, which was put before us. In it, he explains that he is an information technology security specialist, investigations director of and sole shareholder in The Chain Limited, an investigations network. He has provided computer forensics and data security services professionally since 2001 and holds himself out as an expert instructed by the plaintiff. In his affidavit, he explains how he made forensic images of the plaintiff's original evidence disc drives between 11th and 19th April, 2013. He indicated that the evidence collected by him as part of the search party was currently undergoing automated processing by him or by his employees in preparation for later analysis. He confirmed that the second defendant's iPad and iPhone had been imaged, and although he had retained one image, images were also with Advocate Sinel. He had followed the same course with imaging a CSS server and two HP desktops. Both the hardware and the original media had been sent to Advocate Sinel and he, Mr Ceillam, had retained one set of images. 24. Mr Ceillam confirmed that all the items had been returned to Advocate Sinel with the exception of the third defendant's MacBook, which was currently in Mr Ceillam's office in Guernsey. 25. An affidavit of Mr Adrien Merhet, a director of AM Consultancy Limited which provides IT consultancy services in Jersey and elsewhere, was sworn on 26th April and was put before us. Mr Merhet was the driver of one of the vehicles containing the search party, but he did not enter any of the premises. Much of his evidence is subject to the potential criticism that

it is hearsay, and therefore its reliability cannot be easily tested. Nonetheless, taking the affidavit at face value, it is to be noted that the search party acquired a substantial volume of computer equipment and it was resolved that the equipment would be taken to his offices which has the necessary resources to support the imaging process and appropriate security to store and preserve the items and data contained within them. In his affidavit he describes how Mr Ceillam attended his offices on 14 th April and disconnected two image drives, placing them into separate evidence bags, one of which was placed into a dedicated cabinet at AM Consultancy offices, and the other taken to Guernsey for analysis. It appears from his affidavit that Mr Ceillam took not only some of the image drives to Guernsey, but also the iPhone seized from the second defendant and sundry other equipment. He deposed that Mr Ceillam told him that the various disks were collected by a courier for return to Jersey at 3pm on 19 th April, and were sent the next day. The disks were received in Jersey on 22 nd April, but, according to Mr Merhet, were detained by Customs/GST officials for clearance, and he indicates his information that the consigned items were not received by Messrs Sinels until approximately 3pm on 24 th April. The disks were physically reinstalled into the equipment on 25 th April. 26. The Court has also had put before it, a letter from the second party cited to the first defendant in which it is said that on Friday 26 th April at 4:30pm, the second party cited received an HP NL310 server and two HP 4300 desktop PCs back from Messrs Sinels. On looking at the chain of custody, they noted that the server was released by Mr Ceillam on Sunday 14 th April. It had not been touched since then as an image of the drives was taken during Saturday 13 th April and Sunday th April. After the image was taken the server was not used and was not correctly put back together, and so it did not work. This was because the cables had been placed back into the system incorrectly. The second party cited asserts in this letter that the server could have been returned on Monday 15 th April. 27. Before looking at what was said to the Bailiff in order to obtain the Orders ex-parte, we note that in his opening remarks on the summons to discharge the Anton Piller Order, Advocate Redgrave asserted that in a nutshell, the basis of his application was that the Orders were framed in a way that was more draconian than was necessary for the protection of a legitimate right, and that for two weeks, the tools of the trade had in effect been removed from the defendants which stopped their business in its tracks. He asserted that the true purpose of the plaintiff was not to preserve the evidence and regain property, but to strangle the competitive entity at birth. The computers could and should have been imaged on site. Furthermore the search or analysis of the seized equipment had been carried out in Guernsey and by the plaintiff's internal staff, and therefore not supervised by the plaintiff's advocate or indeed the Supervising Advocate. 28. We think it is clear that on the information currently available to us Advocate Redgrave is right to say that in effect the tools of the trade have been removed from defendants and their business stopped in its tracks. We will return to the significance of this at a later stage. 29. The application for the various interim orders was supported by an affidavit dated 8 th April, 2013, sworn by Mr Harrison, the director of the plaintiff. In it, in summary, he deposed to his belief that there had been an unlawful extraction of information and/or data of property owned by the plaintiff by at least two of its employees, namely the second and third defendants, during their term of employment, and

that this was done for their own benefit and for the benefit of others associated with the setting up and/or running of the first defendant including the fifth defendant. He deposed to his belief that the fourth defendant might well be implicated in the conspiracy as well. 30. He deposed to his belief that if the plaintiff's information was not retrieved from the first defendant, the plaintiff would suffer significant and irrevocable damage, and it would be hard if not impossible to measure such losses. He believed that there was a real and substantial risk that the information of the plaintiff might be destroyed and/or otherwise become diluted or contaminated. This was because he thought it likely that the defendants, on becoming aware of the proceedings, would want to destroy any incriminating evidence, and secondly, he believed that as time passed, there was potential for the defendants to allege that the information on the first plaintiff's database was obtained legitimately and from sources other than the plaintiff. 31. The reasons for his various beliefs amounted to these:- (i) The timing of the letters of resignation of the second and third defendants, namely on Good Friday, at the beginning of the high season in relation to the plaintiff's business, was deliberately designed to cause maximum difficulty. Furthermore, the terms of the two resignation letters were said to be so similar that he considered they had been drafted by the same person and/or that one had been heavily influenced by the other. (ii) In a telephone conversation with the second defendant on 29th March (Good Friday) the second defendant had told him that he was joining a shipping company in Jersey and that he was within his rights to give immediate notice to leave. Allegedly the second defendant told Mr Harrison that the company for whom he was going to work had already been awarded a contract with WesternGeco, the major client of the plaintiff. He deposed his belief that the second defendant had used the iPhone to make calls, send and receive text messages and send and receive work emails, and that the iPhone was and is the property of the plaintiff, which paid for the bills for both the second and fourth defendant's phones. (iii) The same day, Mr Harrison checked the second defendant's Facebook page which referred to his leaving the plaintiff and giving his new contact details which referred to the first defendant. He had never heard of the first defendant but noted that the second defendant described that company as a "specialist offshore maritime recruitment and placement company, offering both short-term contracts and permanent positions with client companies on a global basis" and that he gave his business address as an email address which appeared to be linked to the first defendant. The Facebook account showed a comment from an administrator with WesternGeco wishing the second defendant luck with the future, and a reply that the second defendant was still going to be working with the administrator, albeit with a different hat. A couple of days later there was a similar exchange with a different administrator of WesternGeco. (iv) On 1st April, Mr Harrison had a discussion with the fourth defendant. The discussion surrounded a number of matters on which the fourth defendant and Mr Harrison had not agreed with each other as well as complaints which Mr Harrison had of the fourth defendant's performance. When Mr Harrison put to the fourth defendant a direct question as to whether he was going into business with the fifth defendant, the fourth defendant denied it. (v) On 2nd April, the day after the bank holiday, neither the second nor the third defendants turned up for work. Mr Harrison noted that the

first defendant was asserting it was open for business on its Facebook page. From a LinkedIn page, the first defendant asserted its specialities to be maritime, seismic, sub-sea, environmental survey, maritime security, merchant marine, ship services, underwater equipment hire, and described itself as a specialist offshore maritime recruitment and placement agency/operating from Jersey in the Channel Islands. It claimed to provide highly qualified and experienced/specialist contract and temporary staff to the maritime and nautical industries worldwide. The fifth defendant was identified as the managing director. After reviewing the CSS material, Mr Harrison spoke to the fourth defendant to ask him outright if he was involved. He deposed that the reaction was a nervous and unconfident denial. (vi) A review of the plaintiff's computer systems revealed an email from the second defendant to the third defendant on 5 th March with what has been described by Advocate Sinel as a "shopping list" of things which were needed for opening a new business. There was no basis upon which the second defendant would have needed to have provided such a list for his work for the plaintiff. On th March, there was an email from the second defendant to himself which contained an amount of material which might have been innocent, but also contained the following information:- "(6) Amend the Lowlands contract in such a way that it doesn't appear to be a copy yet retains compliance with NCL 2006. RD to action. (7) Send quotation for WG contract. RD/KG to action." (vii) On 4th April a review of the first defendant's website, which went live on that day, showed that the first defendant claimed to have a large database of seafarers from a diverse range of countries and backgrounds, and a global database of seismic experts enabling them to overcome visa issues and logistical challenges to get the right person to the client at the right time. Mr Harrison could not understand how the first defendant could have such a large database at its inception, unless the plaintiff's information had been used. (viii) Mr Harrison also noted on 4 th April that the fourth defendant had sent an email from his work email address to his private and personal email account relating to the PAN application process needed to conduct business in India without incurring a 10% withholding tax on invoiced transactions. The plaintiff had gone through a difficult process to obtain the PAN (permanent account number) number, given out by the Indian Income Tax Department, which had been extremely time consuming. This email tended to suggest that the plaintiff's information was to be used by the fourth defendant. (ix) On 6 th April, Mr Harrison found that he was unable to identify information on the plaintiff's computer which ordinarily he would have expected to find, with details of personnel contracts and contact details for the crew on certain WesternGeco vessels. He also noted that relevant hard copy contracts for WesternGeco, usually filed in the plaintiff's premises, were missing. 32. It appears to us that this affidavit of Mr Harrison demonstrates how the plaintiff might well be severely damaged by competitive pressures from the first defendant, especially so using three important members of the plaintiff's staff, and operating at a time which would cause the plaintiff maximum disruption at the beginning of the high season. We can well understand why Mr Harrison may have felt let down, even betrayed, by staff who he hoped would have some feelings of loyalty towards him. Nonetheless, when one strips out from the affidavit concern at what might happen to the plaintiff's business, and the dismay at the behaviour of the second to fifth defendants

inclusive, one is left with material which would certainly justify suspicion that the plaintiff's confidential information and/or trade secrets might have been copied, but not much by way of hard evidence of such copying. There does not seem to be any evidence at that time of a threat of deleting material, other than an implied assumption perhaps that those who took copies of the plaintiff's material would cover their tracks if they found they would be caught doing so. Essentially the hard evidence was this:- (i) A claim by the first defendant that it had a large database of potential employees when there was no rational basis upon which such a database could have been put together in such a short time. (ii) Some WesternGeco paperwork had disappeared from the plaintiff's offices in circumstances where the second defendant had already admitted to Mr Harrison that he had tendered for the WesternGeco contract and would be dealing with them directly in the future. (iii) The email from the fourth defendant to his private address containing information about the PAN application process. (iv) The message sent by the second defendant on 6 th March from his iPhone which contains the references to an amendment of the Lowland contract, as set out above.

33. We think that this information was sufficient to form the basis for an application for some urgent interim relief, as was indeed conceded by Advocate Redgrave in his application. Nonetheless the application was made ex-parte and there were particular duties upon the plaintiff in that connection which we now detail. 34. First of all, the interim relief which was sought ought to have been the least draconian order that was necessary for the protection of the plaintiff. It was an Order obtained ex-parte, and should therefore have gone not one step further than was strictly necessary. 35. Secondly, there was an obligation to make full and frank disclosure. There are many cases to this effect in the judgments of the Royal Court and Court of Appeal. An example is *Goldtron Limited v Most Investments Limited*

[2002] JLR 424 . The applicant must set out all the relevant facts and arguments, not only those upon which he relies, but also those upon which the defendant might rely. The defendant is not represented, given that it is an ex-parte application, and the judge who considers the application ought to have the benefit of representations as to what might be said by the defendant had he been present. 36. Thirdly, as is indicated in the Practice Direction RC05/24 on Mareva injunctions, any application for the discharge or variation of any of the injunctions granted will be dealt with as soon as the Court can entertain such an application and the parties should ensure their availability at short notice for such purpose. A provision such as that contained in the Order of Justice in this case that at least 48 hours' notice of any application to vary or discharge the Anton Piller Order would have to be given to the plaintiff is inconsistent with the Practice Direction, and ought not to have been included without it being expressly drawn to the attention of the judge asked to sign the Order of Justice. There is no indication in this case that it was drawn to the Bailiff's attention. 37. Fourthly, there is no Practice Direction dealing with Anton Piller orders in the Royal Court. That is a matter which no doubt ought to be rectified shortly, and this case certainly indicates why that is so. It is true that Anton Piller orders are only rarely obtained in this jurisdiction. Maybe that is in part because fears that documents and/or computer records will be destroyed are often satisfactorily answered by the

recognition that the value of a financial services licence to operate would outweigh the risk taken by a licensee in not following a court order (although that in any given case will depend upon the facts). The consequence however of not having a Practice Direction was that, consistent with the obligation for full and frank disclosure, the applicant for an Anton Piller order has a special duty to ensure that all relevant authorities and material are put before the Court which then has the opportunity of considering this unusual order against the facts in question. 38. It is this last obligation that Advocate Redgrave contends, on behalf of the defendants, was breached by Advocate Sinel in his submissions to the Bailiff who, Advocate Redgrave contends, was misled. 39. In this case, we are fortunate that the application for the Anton Piller Order was heard in No. 2 Court, and the application was recorded so that a transcript is available. The relevant sections for this purpose are as follows:- "Bailiff: thank you for attending. I have read the papers in this matter, but I had, and I understand exactly why the Plaintiffs are applying, but I did have some queries and you will appreciate it is a very draconian order and one has got to be satisfied that it is absolutely right to make it. Advocate Sinel: its also an unusual order in this jurisdiction. Bailiff: yes. Yes we haven't had many. So perhaps the simplest course, because I have read the papers is simply for me to raise with you the queries I have. Advocate Sinel: certainly sir. Bailiff: and the first point is the very point you raised. This is an unusual order in this jurisdiction and therefore I did remind myself from Halsbury what is required. Advocate Sinel: if it helps at all sir, what we did in relation to this to call in specialist counsel from London and to take the English rules, as they were, and try and apply them across. So that's been the attempt throughout, taking into account that we have a different process and a procedure. We have never seen a Supervising Advocate over here before..." (emphasis added) 40. So there we have a clear statement from Advocate Sinel that the English rules were taken as the form for the order that was put before the Court ex-parte, applied across as far as possible. 41. The transcript shows that the Bailiff raised a number of concerns, some of which are not relevant for these purposes. One of them, however, was this. At page 19 of the transcript:- "Bailiff... the Order of Justice defines listed items which is in your Schedule B. Advocate Sinel: Yup. Bailiff: this is what you, and then the order is that you be able to take these away. Advocate Sinel: Indeed sir. Bailiff: I am slightly troubled because this appears to be the actual hard machines, if I can call it that, in other words their actual telephones and computers and laptops and workstations. Whereas there is no suggestion that those belong to you. Advocate Sinel: no sir. Bailiff: what belongs to you might be some of the information and programmes in there, either might belong to you or it might be compelling evidence of wrongdoing. Advocate Sinel: The... Bailiff: but surely, surely, what you are entitled to go in and search for and seize is the information, not the telephones themselves. Advocate Sinel: I raised this with specialist counsel I am told this is how it's done , because you actually need to get hold of them in order to image them. There is an undertaking in here at the end to return. Bailiff: is there? I missed that, where is that? Advocate Sinel: Undertaking it's in here somewhere. I can't put my hand on it (pause) I had to check this point this morning, I am sure it's in here somewhere, there is an undertaking to return what isn't ours as it were.

Bailiff: Because yes. I mean because that I would have thought must be so, and again I think I require a little help, if there is guidance anywhere else, but this is the way things are done, because in your covering letter, in support of your application, what you say at the end is that "Mr Celum (sic) informs us that to extract an image of CSS Limited's computers is likely to take around 8 hours, for the most part this is dictated by the time it takes for the images to be downloaded. Once the image is downloaded it" which is assume means the image "can be taken offsite and Mr Celum (sic) will follow protocol to investigate the data and its origins." (emphasis added) 42. The transcript goes on to reveal Mr Sinel saying this at page 20:- "Now there are two ways of imaging something. You can either unbolt something, take it away and you run a series of machines in tandem, which would do it all at the same time. Or if it is done on site it takes about 8 hours to do on site and it wouldn't, I mean, it doesn't mean you remove anything. Those are the two options, the practical options for enforcement. Now in relation to what we have got here, having spoken to counsel about it, then we were told we can take them away, this is how it's normally done, but then they are returned where they are, because it covers mobile telephones and so on and so forth, they would be searched and returned... and in practice it's going to be a question of how that is best achieved with us having the right at the moment to remove, but until we actually know what's there, we just, you know we're going in blind. And these are questions of practicalities, I mean, we can all understand the court saying well, you know what are the safeguards? When does it go back? And how do you avoid disrupting more than you need to? Bailiff: exactly, because without that they can't carry on any legitimate business they may have. Advocate Sinel: yes. From our point of view we are giving an undertaking, supervising questions it's an undertaking in damages backed by the client which is able to back it. I am just trying to think where, I did check that we had one to return. Bailiff: I was about to say, what, surely we need in this is that if you are right, this is the way things have to be done. The only legitimate objective of taking these hard material is for you to be able to copy it quickly, copy the programmes from it quickly and then return it. So we need to say that in order don't we? Advocate Sinel: indeed. But that refers to 1, 2, 3 and 4 and 5. No 6 and 7. Yes so across the board." (Emphasis added) 43. It can be seen from these extracts that the Bailiff was clearly troubled by the prospect of an order enabling the plaintiff to remove equipment which did not belong to it from the defendants' premises preventing them from carrying on legitimate business. It seems to us that two things comforted him in relation to the Order that was ultimately made. The first was that this was the practice which was adopted in England and Wales on such applications. This was mentioned by Advocate Sinel on three occasions. The second was that there was an undertaking that the imaging be completed as quickly as possible and the equipment thereafter handed back, thereby causing the minimum disruption to the first defendant's business. 44. As to the first of these comforting points, the difficulty is that the English standard procedure was not adopted. 45. Practice Direction 25A under the heading Interim Injunctions, which supplements part 25 of the Civil Procedure Rule provides at paragraph 7.5 in relation to search and custody of materials:- "(1) No material shall be removed unless clearly covered by the

terms of the order. (2) The premises must not be searched and no items shall be removed from them except in the presence of the respondent or a person who appears to be a responsible employee of the respondent. (3) Where copies of documents are sought, the documents should be retained for no more than two days before return to the owner. (4) Where material in dispute is removed pending trial, the applicant's solicitors should place it in the custody of the respondent's solicitors on their undertaking to retain it in safe keeping and to produce it to the Court when required. ... (7) No material shall be removed from the premises until the respondent has had reasonable time to check the list. (8) If any of the listed items exists only in computer readable form, the respondent must immediately give the applicant's solicitors effective access to the computers with all necessary passwords, to enable them to be searched and cause the listed items to be printed out. (9) The applicant must take all reasonable steps to ensure that no damage is done to any computer or data. (10) The applicant and his representatives may not themselves search the respondent's computers unless they have sufficient expertise to do so without damaging the respondent's system. (11) The Supervising Solicitor shall provide a report on the carrying out of the order to the applicant's solicitors..." 46. The specimen delivery up order is in these terms:- "The respondent must immediately hand over to the applicant's solicitors any of the listed items, which are in his possession or under his control, save for any computer or hard disk integral to any computer . Any items the subject of a dispute as to whether they are listed items must immediately be handed over to the Supervising Solicitor for safe keeping pending resolution of the dispute or further order of the Court." (emphasis added). 47. It is immediately apparent from this specimen order that the standard English order does not permit the removal of computers or hard drives integral to a computer. This ought to have been said to the Bailiff. It may well be so that in appropriate cases an English judge will make an order in the form of paragraph 52 of the Order of Justice which the Bailiff signed on this occasion, but it is clear that it is the duty of counsel to point out to the judge the terms of the standard form of order and to justify the reasons for departing from it. By contrast, what happened here, was that the Bailiff was informed that this was the standard form of order, and this in circumstances where he was clearly worried by making an order the effect of which was to remove from the defendants not only equipment which belonged to them but equipment upon which they relied for their business. 48. This point was made to Advocate Sinel in the course of his submissions, and on 29 th April he responded with a letter addressed to me, copied to Advocate Redgrave and Advocate Cook, setting out the position, in which he said this:- "I turn first to the involvement of counsel. Counsel drafted the order of justice, the interim relief sections of which were taken substantially from the standard draft English search order (omitting at that stage for example most of the provision for a "return date"). At the time I came to settle counsel's draft, I asked counsel whether the English procedure permitted the removal of computers offsite for imaging. Counsel told me it was permissible, depending on the circumstances, but it was not the standard order. It was possible to obtain such an order where the circumstances dictated it." 49. The question which Advocate Sinel put to counsel was very similar to the question which the Bailiff later

put to Advocate Sinel. We are surprised that in those circumstances the Bailiff received the reply which he did, because we might have expected Advocate Sinel to remember his conversation with counsel. His response was not acceptable. Be that as it may, the important consideration is that the Bailiff was told that the order which he was making was in standard English form, applied across to Jersey, given the changes in procedure. 50. We think this was a serious error. The judge was asked to make one of the most draconian orders the Court can make in civil proceedings, on an ex-parte basis, interrupting the rights of the defendant to property and privacy. It is sometimes right to make those orders, and indeed it may have been right in the present case to have made an order of some kind which had this effect, but we cannot ignore the fact that wrong information as to English practice was given to the Bailiff in relation to a matter which was of serious concern to him. Indeed, although one might have expected the plaintiff to have raised in his Affidavit the issue of removing the defendants' property from them in the context of his obligation of full and frank disclosure, it was the Bailiff who raised the issue with Advocate Sinel. 51. The second point that was troubling the Bailiff was this question of the return of the hardware to the defendants, which was to take place as soon as possible. There is a parallel here with the Civil Procedure Rules in relation to the return of documents which have been copied - it is expected that this should take place within two days. On this occasion, all the hardware which was removed, was retained for a much longer period, in some cases up to two weeks, and indeed, so we are informed after the hearing, the laptops of the second and third defendants were only returned on or about 30th April. The undertaking to return the equipment was expressed in the amended Order of Justice to require its return as soon as possible or before the end of 28 days. The Bailiff had clearly proceeded in the hearing on the basis that it should take place as soon as possible. This was the second reassurance he was given by way of comfort. The significance of the failure to inform the Bailiff of the departure from the standard Anton Piller order in England is emphasised by what actually took place. 52. Accordingly, a major problem with the order that was made in this case is that it has permitted the plaintiff to remove equipment belonging to the defendants, and by doing so to remove the practical ability of the first defendant to trade at all, not just its ability to trade on the back of confidential information to which it was not entitled. Furthermore, even information to which the defendants were entitled has been removed from them. A second problem, theoretically at least, is that the removal and copying of the material on the defendant's computers has given the plaintiff access to any information of the defendants which was confidential to them and which the plaintiff was not entitled to have. There is no evidence of the Bailiff being informed of any of these problems. There is no evidence of the possibility being canvassed with the Bailiff that an interim injunction might have been issued, restraining the defendants from destroying evidence, using software programmes designed to delete material, and to deliver up the plaintiff's property. It is well known that the fact that programmes designed to delete material, have been used is detectable, so that an injunction could undoubtedly be policed ex-post facto, and the breach of it, if established, would be telling against the defendants. 53. A further problem is that it is

impossible to see how the Supervising Advocate could assess any claims to privilege or to the ownership of material on the seized hardware when all that hardware had in fact been removed. Indeed, it had not only been removed, but in some cases had been removed from the jurisdiction. It was certainly not always in the custody and control of the advocates for the plaintiff, who at least owed duties to the Court and could be trusted to ensure that the material was not contaminated in any way. 54. When this jurisdiction was exercised in the case of *Anton Piller KG v Manufacturing Processes Limited and Others*

[1976] CH 55 Ormrod LJ said this:- "The proposed order is at the extremity of this Court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant. There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong *prima-facie* case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before any application *inter-partes* can be made." 55. In *Yousif v Salama*

[1980] 3 AER 405, the plaintiff had a claim for commission from the defendant for goods supplied where the extent of the commission was to be found only in the documents of the defendant. The plaintiff applied for and obtained an Anton Piller order permitting him to enter the defendant's premises to search and locate the files and remove them to the custody of his solicitor, the Court of Appeal allowing his appeal against a refusal by the judge in chambers to make the order. In Lord Denning's view, there was evidence which showed the defendant to be untrustworthy, and the plaintiff had a legitimate fear that the documents would be destroyed. In those circumstances Lord Denning considered it was proper to make an Anton Piller order to the effect that the plaintiff's solicitor would be able to retrieve the documents, take them into his personal custody for a while, make copies of them and then return the originals to the defendant. That was said to be an aid to justice, preserving the evidence in the case. 56. In the view of Brightman LJ, the order is justified only if there is *prima-facie* evidence that essential documents are at risk. If they were, then the Court ought to permit the plaintiff to take such steps as are necessary to preserve them. On balance he was of the view that the evidence was sufficient to justify the Court in concluding that the documents were at risk. By a majority the Court therefore granted the Anton Piller application. 57. Donaldson LJ, as he then was, did not agree with his brother judges on the facts, but did agree that, in an appropriate case, a conservatory order might be made, particularly if the whole process of justice would be frustrated because the plaintiff would be left without any evidence to enable him to put forward his claim. It is interesting to note from his dissenting judgment the concluding remarks:- "As I say, I think this is a draconian power which should be used in only exceptional cases. I have considered, of course, whether, as was suggested in argument, it can rightly be said that no harm was done to an honest man by taking discovery from him when eventually he would have been ordered to give it. I think that great harm is done. The people of this

country are entitled not to have their privacy and their property invaded by a court order except in very exceptional circumstances. That in my judgment is not this case." 58. The notion that people of this Island are entitled not to have their privacy and property invaded by a court order except in very exceptional circumstances seems to us to accord with the right to respect for private and family life conferred by Article 8 of the European Convention on Human Rights and part of the domestic law binding on this Court by the Human Rights (Jersey) Law 2000, with this exception. The Human Rights Law places a lower threshold than "very exceptional circumstances". There is an issue of proportionality which arises in the application of Article 8 of the Convention; but there is also involved the obligation to ascertain whether the Convention right can be respected by finding another solution to the problem facing the administrative authority other than invading the Convention right itself. The Human Rights Convention is simply another way of expressing the same idea which is found in the cases on Anton Piller orders, namely that these are draconian orders at the extreme limits of the Court's power in civil cases, and they ought not to be made if there is a less intrusive way of achieving the same result. 59. In *Columbia Picture Industries Inc. and Others v Robinson and Others*

[1987] CH 38, Scott J had a number of remarks to make about Anton Piller orders. At page 70 he said this: "But the legitimate purposes of Anton Piller orders are clearly identified by the leading cases which have established the legitimacy of their use one, and perhaps the most usual purpose, is to preserve evidence necessary for the plaintiff's case. Anton Piller orders are used to prevent a defendant, when warned of impending litigation, from destroying all documentary evidence in his possession which might, were it available, support the plaintiff's cause of action. Secondly, Anton Piller orders are often used to track to its source and obtain the possession of the master tape or master plate or blueprint by means of which reproductions and breach of copyright are being made. This purpose is, perhaps, no more than a subdivision of the first. It is implicit in the nature of Anton Piller orders that they should be applied for ex-parte and dealt with by the courts in secrecy. In the Queen's Bench division applications for Anton Piller orders are heard in chambers. Secrecy is ensured. In this division, applications are heard in court but it is customary for the court to sit in camera. Otherwise there is a risk that the defendant may become aware of the litigation and the whole purpose of the Anton Piller procedure will be frustrated. Anton Piller orders and procedure have, therefore, these characteristics: no notice to the defendant of what is afoot, and secrecy. A third and, perhaps the most significant feature of Anton Piller orders is that they are mandatory in form and are designed for immediate execution. The respondent to the order is required by the order to permit his premises to be entered and searched and, under most if not all orders, to permit the plaintiff's solicitors to remove into the solicitor's custody articles covered by the order." 60. And later he said this at page 72: "Now let the possible and, perhaps probable effects of an Anton Piller order be considered. The order is served and executed. If the order is in the terms of the order in the present case and is executed as it was in the present case, there will be a wholesale removal of all business material, whether stock in trade, bank statements,

cheque books or correspondence. The continuance of the business by the respondent to the order is thereby made impossible. How can a business be continued without records? How can it be continued without stock in trade? It will be recalled that, in the present case, the order authorised the removal of, inter-alia, the video recorders at 8, Frederick Street. They were not, in the event, removed but, if they had been, the whole of Mr Robinson's copying business would for that reason alone have been closed down... The service and execution of an Anton Piller order is likely to have on a respondent a personal as well as a commercial effect. Anton Piller orders are often granted not simply in respect of business premises but in respect of the respondent's home. He is required, on pain of committal, to open the doors of his house to the plaintiff's representatives and to permit a search of the contents thereof. The plaintiffs and their representatives are at liberty to search and rummage through the personal belongings of any occupant of the house and to remove the material they consider to be covered by the terms of the order. The traumatic effect and the sense of outrage likely to be produced by an invasion of home territory in the execution of an Anton Piller order is obvious... It has to be accepted that a common, perhaps the usual, effect of the service and execution of an Anton Piller order is to close down the business which, on the applicant's evidence, is being carried on in violation of their rights... but the question whether a business, alleged by the applicants for an Anton Piller order to be illicit, is in fact illicit or is genuine cannot ordinarily be answered until final judgment. Given that none of the many Anton Piller cases with which Mr Cumberland had been concerned had ever come to trial, his answers must be read as meaning that an Anton Piller order and its execution have the effect of closing down the business, which the plaintiffs have, on the ex-parte application, satisfied the judge is prima facie an illicit business. It is a fundamental principle of civil jurisprudence in this country that citizens are not to be deprived of their property by judicial or quasi judicial order without a fair hearing. Audi alterem partem is one of the principles of natural justice and contemplates a hearing at which the defendant can, if so advised, be represented and heard." 61. In *Lock International Plc v Beswick and Others*

- [1989] 3 AER 373, the first eight defendants held key posts with the plaintiff, a company which manufactured metal detectors. They became dissatisfied with the new management and joined a new company which was started by a former managing director of the plaintiff's parent company, to manufacture and market metal detectors in competition with the plaintiff. The plaintiff issued a motion for an injunction restraining the defendants and the new company from making use of its trade secrets and confidential information. The plaintiff also obtained and executed an Anton Piller order against the defendants under which the plaintiff searched the premises of the new company and the homes of three of the individual defendants, and removed not only documents belonging to the plaintiff or containing confidential information but virtually all the records of the new company. The defendant's motion to discharge the Anton Piller order was heard before Hoffman J. Having reminded himself that Anton Piller orders potentially involved serious inroads on principles which have long been regarded as essential in the liberty of the subject, such as

the presumption of innocence, the right not to be condemned unheard, the protection against arbitrary searches and seizures and the sanctity of the home, Hoffman J said this in relation to competition, at page 383:- "Anton Piller orders are frequently sought in actions against former employees who have joined competitors or started competing businesses of their own. I have learnt to approach such applications with a certain initial scepticism. There is a strong incentive for employers to launch a pre-emptive strike to crush the unhatched competition in the egg by causing severe strains on the financial and management resources of the defendants or even a withdrawal of their financial support. Whether the plaintiff has a good case or not the execution of the Anton Piller order may leave the defendants without the will or the money to pursue the action to trial in order to enforce the cross undertaking in damages. Some employers seem to regard competition from former employees as presumptive evidence of dishonesty. Many have great difficulty in understanding the distinction between genuine trade secrets and skill and knowledge which the employee may take away with him. In cases in which the plaintiff alleges misuse of trade secrets or confidential information concerning a manufacturing process, a lack of particularity about the precise nature of the trade secrets is usually a symptom of an attempt to prevent the employee from making legitimate use of the knowledge and skills gained in the plaintiff's service... Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response. To borrow a useful concept from the jurisprudence of the European community, there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of customers with whom they were in contact when employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who was misusing confidential information will destroy documents in the face of the court order requiring him to preserve them. In many cases it will therefore be sufficient to make an order for delivery up of the plaintiff's documents to his solicitor or, in cases in which the documents belong to the defendant but may provide evidence against him, an order that he preserve the documents pending further order or allow the plaintiff's solicitor to make copies. The more intrusive orders allowing searches of premises or vehicles require a careful balancing of, on the one hand, the plaintiff's right to recover his property or to preserve important evidence against, on the other hand violation of the privacy of the defendant who has had no opportunity to put his side of the case. It is not merely that the defendant may be innocent. The making of an obtrusive order ex-parte even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff. The absolute extremity of the court's powers is to permit a search of the defendant's dwelling house, with the humiliation and family distress which that frequently involves." 62. No doubt it was judicial comment of this kind which led to the setting up of the committee by the Judge's

Council to report on the practical operation of these orders. Staughton LJ reported in 1992:- "2.3 The overriding principle upon which the grant of these orders ought to be based is that of necessity. No such order ought to be made unless it is necessary in the interests of justice. No order ought to be made in wider terms than is necessary to achieve the legitimate object of the order. The safeguards incorporated into the order for the protection of the respondent should be as full as would be consistent with the achieving of that object" At paragraph 2.8 of its report, the Staughton committee added a fourth precondition for the grant of an Anton Piller Order namely:- "The harm likely to be caused by the execution of the Anton Piller order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of this order." 63. Very many of the comments in the judgments cited above appear to us to be relevant in the present case. There were undoubtedly reasonable grounds for suspicion that the defendants, or some of them, had taken material from the plaintiff. That might certainly have been enough to warrant the making of an order on an ex-parte basis for the preservation of evidence or the handing up of papers which belong to the plaintiff. We are doubtful that the evidence produced to the Bailiff was really sufficient to take the plaintiff past the threshold of an extremely strong prima facie case that the defendants, if no Anton Piller were made, would destroy the only evidence by which the plaintiff could prove its case. We think there was a failure on the part of the plaintiff to make appropriate full and frank disclosure of all things that might be said against the application for the orders which were in fact obtained, not least so that the Bailiff might have been informed of alternative orders which the defendants would have contended were adequate to protect the plaintiff's position - for example, an order requiring the defendants not to destroy or delete any of the data on their relevant computers, hard drives or iPhones; orders requiring the defendants to deliver up to the plaintiff copies of specified documents which the plaintiff claims have gone missing such as the WesternGeco contract; and even if it came to making an Anton Piller order of some description, restrictions on that order which either permitted imaging to take place on the defendants' premises or on the premises of the Second Party Cited, or, more restrictively, the printing of certain data from the database in question. The latter course would preserve in hard copy form the evidence by which the plaintiff might prove its case. However the plaintiff wanted more than that. The orders which it obtained required the Court either to make a preliminary judgment that all the material on the defendants' various pieces of hardware belonged to the plaintiff and not to the respective defendant, and this on the basis of the plaintiff's evidence alone; or to ensure that adequate alternative orders were considered We do not think the evidence came close to satisfying the former test, but not only was the Bailiff not told of other orders which could have been made which would have protected the plaintiff's position, but he was misled as to the way in which English courts would approach a matter of this kind. We have noted that neither in Mr Harrison's affidavit nor in the submissions made to the Bailiff was there mention of any reasons why the orders should not be made. We recognise that the application was put together at short notice but this failure to address the possible defences was in our view a significant factor in the plaintiff obtaining the ex-

parte orders it did. 64. Indeed we think that a substantial purpose of the Anton Piller application was to strangle the first defendant at birth, to prevent it from starting up business as a competitor at all, and to bring down the second, third and fourth defendants with it. We reach this view not only because of the unnecessary ambit of the orders which were obtained using the Anton Piller jurisdiction and the failures to make full and frank disclosure outlined above, but also because of the following features. 65. First of all there was an interim order obtained at paragraph 60 of the Order of Justice which restrained the second, third and fourth defendants from doing anything other than commencing a period of garden leave until midnight on 10 th May, 2013, and an order that they should not be employed by the first defendant or in any other capacity until 11 th May, 2013, at the earliest. In relation to the dates chosen, this could not under any circumstances be justified. The second and third defendants had given notice on 28 th March, and if the justification were as Advocate Sinel said, namely that they could be prevented from working for anyone else during the contractual notice period of one month, that expired on th April. For our part, without resolving the matter today, we have some doubt as to whether it was possible lawfully to obtain this order in any event, even during the period of notice. There was no restraint of trade obligation in the contracts of employment of the second, third and fourth defendants. It is trite law that an employer cannot obtain an injunction requiring an employee to perform his contract of service. It seems to us that there is at least an argument that a requirement to take garden leave is not dissimilar from a requirement to perform the contract of service, albeit the service is not as originally anticipated in the contract. We have not been fully addressed on the issue and we leave it over in case it should be relevant to any action on the plaintiff's undertaking in damages. For present purposes the point is that by obtaining an injunction against the second, third and fourth defendants which went well beyond what the plaintiff was entitled to obtain even on its best case, there is material there from which inferences can be drawn as to the plaintiff's real intention. The Bailiff should also have been told, as part of the obligation of full and frank disclosure of the reasons why the date of 11 th May had been selected and what objections the defendants might have put up to this order. 66. Secondly, the conclusion that the Plaintiff's intentions were to strangle the first defendant at birth is supported by the delay which occurred before the hardware which was removed from the defendants under the Anton Piller order was returned to them. We do not see there was any justification for this delay. Although the plaintiff had undertaken to return the hardware as soon as practicable, we think it is more likely than not on the evidence we have seen to date that the plaintiff would have retained the equipment for as long as was possible before returning it, had the defendants not issued this summons. 67. Thirdly the plaintiff's intentions can be ascertained from the summons before us for an order closing down the first defendant's website. We do not think there is any basis upon which that remotely can be justified, and nothing that Advocate Sinel put before us came close to doing so. His main submission in support was that the third defendant had used the plaintiff's confidential information to conduct a mail shot of potential employees of the first defendant. Assuming the third defendant to have done so, which we took to be

admitted by Advocate Redgrave, we still consider the closing down of the website could not be justified. There is no reason to suppose other potential employees would not approach the first defendant, whether as a result of the attendance at trade shows or conferences, word of mouth, or otherwise, or that lawful approaches might be made by the defendants using their individual experiences in the trade. The cross summons in this respect is dismissed. 68. Finally, the evidence of the second party cited in the letter to which we have referred suggests that when the hardware was returned, it was returned in a state unfit for use. This is not consistent with the basis upon which Anton Piller orders of this kind are made. 69. For all these reasons, principally the unnecessary width of the orders which were obtained in the first place but also the supporting factors which we have listed above, we consider that a real and substantial intention of the plaintiff was to damage the business of the first defendant irretrievably. 70. For this reason, and for the reasons of non-disclosure on this application to the Bailiff, the normal result would be an order discharging the Anton Piller orders in full, and leaving the defendants open to making a claim on the plaintiff's undertaking in damages. Before going on to consider what would be the right course, we must however now review some of the evidence which has been wrongly obtained through execution of the Anton Piller orders. If what has been said in this judgment so far can be seen as critical of the plaintiff, it is only right that we now redress that balance by considering some of the conduct of the defendants. The Defendants' Conduct 71. The fact is that on the evidence we have now seen and on the admissions which Advocate Redgrave has made on behalf of his clients, it is clear at least for interlocutory purposes that some of the plaintiff's material was copied from its database by one or more of the second, third or fourth defendants, and that its copying was in part facilitated by advice given through the fifth defendant and/or the second party cited; although the state of knowledge of the fifth defendant and the second party cited has yet to be ascertained. Furthermore it is admitted that the third defendant has effected a mailshot to persons whose names and addresses were abstracted from the plaintiff's database. One can add to this the admission that appears to have been made that some of the information deriving from the plaintiff's database has been deliberately destroyed by the first defendant or its agents, albeit the reasons for that destruction have not yet been ascertained. The result is that although there may have been only reasonable grounds for suspicion that wrong doing was taking place at the time the application for the Anton Piller order was made, falling short of a strong prima facie case, the subsequent events show that reasonable suspicion was in fact well founded, at least in part. The extent to which any actual wrongdoing on the part of one or more of the defendants is established will of course be a matter for trial. 72. We will give some examples below, but the findings we have just made on the evidence so far naturally raise the difficult question as to whether the plaintiff should be permitted to retain the fruits of an order which ought not to have been obtained when those self-same fruits appear to show, after the event, that in fact the order might, on one analysis, have been justified. 73. We do not seek in this interlocutory judgment to detail all the evidence which might be asserted against the various defendants. As material examples, we cite the following in relation to each

defendant. The Second Defendant 74. The second defendant, like the fourth defendant, had a mobile telephone bill paid for by the plaintiff. There is dispute between the second defendant and the plaintiff as to whether the plaintiff's liability for the bill carried with it the right to ownership of the telephone. We do not attempt to deal with that in this interlocutory judgment. However we note that for the month of February 2013, the second defendant incurred telephone charges with JT of £1,244.62. £778.00 was in respect of roamed data, and £390.88 in respect of 214 roamed telephone calls. There were eight other international telephone calls. The plaintiff asserts that this detail shows that the second defendant was using the telephone, whilst employed by the plaintiff, to make approaches to maritime and other staff internationally with a view to encouraging them to deal in the future with the first defendant. We cannot make any firm finding in this respect at this stage of the proceedings, but this is certainly a matter which requires explanation. 75. We have also been shown a LinkedIn profile for the second defendant as at a date in April where the second defendant holds himself out as operations manager for C S S Limited from April 2013 to the present, and also maritime crewing manager for the plaintiff from October 2008 to the present. 76. Furthermore the documents obtained from the Anton Piller order include an exchange of emails on 30 th March between the fifth defendant and the second defendant. The exchange commences with an email at 13:49 from the fifth defendant where he says:- "thanks for your time this morning - much to do. Here are your folders as requested" (emphasis added). 77. The reply from the second defendant was:- "there's more relevant data in those files than you could ever hope to acquire by exporting my mail file. This gives me everything I need to run W G from Tuesday." 78. There is no question that the second defendant was well aware of his obligations to the plaintiff. An email sent by him to the fifth defendant on 8 th March at 10:02am indicates that he prepared a proposal to be put to Western Geco, with whom the plaintiff had regular dealings. The email contained a proposal form presumably for a relationship between the first defendant and Western Geco. The email explains:- "Hi Kevin Please see the proposal for Western Geco. Can you send this to Fran, fschrage@slb.com and initiate discussions (I don't feel it proper for me to do so at this time). We can then review once she has made her comments. The rates are for the most part the same as Nautechs, I have however lowered our mgt fee as we discussed and traded off against higher finders fees." 79. Following a question from the fifth defendant as to whether he should refer to recent discussions without mentioning names, the second defendant replied:- "Hi Kevin. I think it's fine to mention names, she's fully supportive. I just felt it's perhaps not in good order for me to be negotiating for C S S while still employed by Nautech." 80. There seems every likelihood that the email sent by the second defendant on 30 th March reflected that the fifth defendant had sent him relevant files which had been downloaded from the plaintiff. It is noteworthy that on 18 th March the fourth defendant had sought advice from the fifth defendant's information technology specialists (the second party cited) as to how files could be saved or copied without any trace that that had been achieved. That advice was given on 18 th March and it appears from an email from the fourth defendant to the fifth defendant, copied to the second defendant, sent on 21 st March that this material was

being downloaded:- "Kevin - I spoke to Mark twice last night as he was struggling with the download of my PST file due to the bandwidth at the Nautech office, the size of the file and speed of the small travelling laptop. Hopefully we have overcome the problem and with user name and password Mark is now downloading the pst file directly to one of his laptops. Last night I set Joanie.pst file running and it was completed this morning. This evening I set Sarah.pst file running and should be finished by the morning. There are two or three other pst files I need to download and I'll set the large one running on Friday night.... Using the names, categories and pst files I think we should be able to re-create the majority of the folders from the current database. Plenty of work ahead but certainly a very large volume of data collected." 81. Recognising that this remains the interlocutory phase where no formal findings of fact are made, the Court is in no doubt that, on the evidence currently available, we should proceed on the basis that a considerable amount of information on the plaintiff's database was in fact downloaded by one or more of the second to fourth defendants during the course of their employment by the plaintiff. The Third Defendant 82. The third defendant swore an affidavit on the 4th April in accordance with the requirements of the interim orders obtained by the plaintiff. In that affidavit, he deposes that he created three availability lists from an internal software programme whilst he was employed by the plaintiff. These were created in approximately November 2012 and he forwarded them to his personal email address in March 2013. The availability lists included the name, category of work, particular skills and availability for the period to which the spreadsheet related. He also created contacts in his Outlook folder for all personnel in the software programme Crew Manager, whilst employed by the plaintiff. This was for the purpose of sending mass emails to contacts listed in the availability lists. All these contacts were exported to an Excel file forwarded to himself on his computer at the plaintiff's offices. His affidavit is not entirely straightforward in this respect, because it implies that the Excel file was on the plaintiff's computer system and not available to the third defendant after he left the plaintiff's employment, but this was corrected, to the extent that that implication existed, by an admission by Advocate Redgrave in argument that the third defendant had used those self-same contacts to generate the mass mailing referred to in paragraphs 19 and 20 of his affidavit - in which he confirms that in early April 2013 he sent an email to approximately four hundred diver contacts and 200 remote operating vehicles contacts to introduce them to the first defendant and request that they send their updated curriculum vitae to him if they wished to be on the books of the first defendant. Advocate Redgrave also accepted that the defendants should not be able to benefit from this wrongful activity, the emails sent out utilising information which the third defendant had wrongly passed to himself from material gathered whilst in the employment of the plaintiff. Fourth and Fifth Defendants 83. We have already mentioned at paragraph 80 a series of email exchanges relevant to the conduct of the fourth and fifth defendants. Advocate Sinel spent some time looking at other email exchanges as well. By way of example, the fourth defendant sent an email to the fifth defendant, copied to the second defendant on 12th March, 2013, when he said this:- "Kevin - one of the important items we need to try and copy is what is called a pst file. This contains historical email for

Microsoft Outlook. Can you ask your IT man if there is a way of copying these without leaving a marker that shows the file has been copied." 84. This email was forwarded by the fifth defendant to their IT specialists and it appears that advice was given by those specialists to the fourth defendant thereafter. 85. Emphasis was also placed by Advocate Sinel on the minutes of a meeting held in Surrey on 9 th February, 2013, attended by the second, fourth and fifth defendants with others. The minutes of this meeting show clearly that consideration was being given to arrangements to set up the new business in competition with the plaintiff. On the information currently available, there was nothing preventing the second, fourth and fifth defendants from having these discussions. What the second and fourth defendants were prevented from doing of course was using the confidential information of the plaintiff to improve the ability of the first defendant to compete. In our view there is not much in the minutes of that meeting of the 9 th February which greatly assist the plaintiff in the criticisms which have been made of the defendants. However there are certainly some indications that efforts would be made to use that information. The second defendant is quoted as saying "he should be able to bring across all his officers in forty days", but he recognised there was a problem in moving across officers he already had on ships. When the minute describes officers "he already has on ships", it could more accurately have been drawn to describe officers which the plaintiff already had on ships. 86. We have looked carefully at the information which has been provided to us, and reminding ourselves that this is an interlocutory matter and no final findings of fact are to be made, we are satisfied for these purposes that the defendants have taken advantage of some information which was available to the second, third and fourth defendants through their employment by the plaintiff and that they did so whilst employed by the plaintiff. Indeed we think Advocate Redgrave accepted as much. He was contending before us that the defendants have done things they ought not to have done and indeed he accepted that they should not have the benefit of using information to which they were not entitled. Deleting Material 87. One of the purposes of the Anton Piller order is to preserve material from being deleted and therefore becoming unavailable for the purposes of doing justice in the dispute between the parties. As we have indicated above, we do not think that there was any real evidence put before the Bailiff of the probability of deletion of material. Nonetheless, the information subsequently obtained suggests that there was in fact a risk of some deletion of material. The evidence of Mr Mark Wetherall, Director of the second party cited, as appears in his affidavit dated 22 nd April, 2013, shows that a portable USB hard drive was presented to him by the fourth defendant on two occasions in March 2013 first for the transfer to one of the laptops forming part of the IT package of what appeared from the file named to be in Microsoft Outlook mailbox personal to the fourth defendant, and then subsequently a few days later for the transfer of three additional Microsoft Outlook mailboxes which did not, as he judged from the mailbox names, appear to belong to the fourth defendant. Mr Wetherall says that he was instructed by the second and fifth defendants that none of those mailboxes was to be incorporated in the first defendants information technology system and indeed that the mailboxes which had been transferred to the laptop were to be

permanently and irretrievably removed from it so that no member of staff of the first defendant would have access to that information. Indeed no staff member would have access to the laptop until the removal had been completed. Mr Wetherall deposes that the laptop was placed in a locked office to which only staff members of the second party cited had access. It appears that electronic copies of some of that material may still be held on the second party cited's back up driver and router. 88. The fourth defendant swore an affidavit on 18 th April indicating that the hard drive containing exported files was provided by him to Mr Wetherall who later returned the hard drive to him. The fourth defendant then deleted the information contained on it. He also indicated that the external hard drive had been utilised to store a copy screen shot of folders within the plaintiff's seismic database. This information had set out the names of the plaintiff's contractors in the file folders. The fourth defendant indicated the files had been deleted from the hard drive and were not provided to any other party. 89. The fifth defendant indicated that the first defendant had made no use of any items taken or copied by the second and third defendants. That contention was inconsistent with the concessions made by Advocate Redgrave before us. The fifth defendant also indicated that at or around the end of March 2013, the fourth defendant had exported mailboxes from the plaintiff's system by copying them to an external hard drive. The fifth defendant indicated that he had instructed Mr Wetherall to delete these mailboxes. These instructions were given approximately two weeks before the first defendant went live although the actual deletion apparently only took place on 13 th or 14 th April. 90. This affidavit of the fifth defendant is not immediately consistent with the emails which we have seen. It appears from those emails that the fifth defendant was at least aware during mid to late March that his information technology expert Mr Wetherall was assisting the fourth defendant, and possibly the second defendant, in arrangements to copy the plaintiff's information on to a hard drive such that the plaintiff would be unaware that the copies had been taken. The first defendant's business went live on 2 nd April and the website went live on 4 th April. It is hard to accept, at face value, the statements of the fifth defendant that some two weeks before that (19 th to 21 st March) he gave instructions for material to be deleted when at exactly the same time he was facilitating the copying of the material by ensuring that his information technology specialist was in touch with the second and fourth defendants. 91. Advocate Sinel contended that the defendants did not come before the Court with clean hands, and therefore should be given no relief. His assertion was based on the proposition that the lack of clean hands was demonstrated both by the conduct of the defendants in taking the plaintiff's information in the first place, and in their dissembling about what they had done in the affidavits put before the Court. We do not think that the "clean hands" point is one which falls to us to determine at this stage, although it may well be relevant later, because the Court's focus now is on the basis on which the plaintiff obtained the orders rather than the response of the defendants to them. However, in deciding whether to reinstate some orders or protection, of course this Court can review all the evidence before it, which we have done with a view to ascertaining what is the most appropriate interim order that ought to be made. Summary 92. In this case, we are satisfied that

although the Anton Piller orders in principle ought to be discharged for the reasons which we have given, which would normally mean that the plaintiff should not profit from orders improperly obtained, the defendants' conduct also leaves much to be desired. Accordingly, any interim orders from now on should have the dual objectives of enabling the plaintiff to use the material which has been obtained for the purposes of proving its case and secondly should not prevent the defendants from taking steps legitimately to run their business. The corollary of the last point is that the plaintiff should be prevented from maintaining orders which are intended to restrain competition as opposed to protecting its legitimate rights. 93. One of the difficulties that this case presents is that the information on the plaintiff's database apparently includes data, including probably some items of sensitive personal data, which can hardly be said to belong in any absolute sense to the plaintiff. The medical records or religious details of particular employees or potential employees do not belong to the plaintiff. What the plaintiff is *prima facie* entitled to assert is that the way in which this information is organised on its database or computer is confidential information. We think that the plaintiff is also *prima facie* entitled to assert that information as to the terms of employment of the various employees by the plaintiff over the years amounts to confidential information or trade secrets of the plaintiff, as is of course information about the client lists of the plaintiff. If the defendants have in their heads details of persons who might be approached as potential employees of the first defendant, or clients who could be asked to place their business with the first defendant, there is no reason, now that the second to fourth defendants are no longer employed by the plaintiff, why they should not approach such persons or clients. Similarly, if anyone approaches the first defendant as a result of conference flyers, web site or other trade advertising or personal information as to the start of its business, there is no reason why such details cannot be entered on the first defendant's database. We reject the view that on the material in this case the plaintiff is entitled to a springboard injunction which prevents the defendants from doing business. The fourth defendant has been in this business for many years. The second and third defendants have been in the business for some years. The first defendant appears to be owned by persons as yet unidentified who also have experience in the marine field. We think that the new business must not, as is said in the authorities, be strangled at birth. 94. By contrast, the first defendant must not profit from any wrongful actions of the defendants already committed. Somehow or other the interim orders must retain this balance. 95. We also bear in mind that the plaintiff now has taken an image of the defendants' material as a result of the Anton Piller orders which we are discharging. That material may include information which was originally that of the plaintiff, which one or more defendants wrongfully abstracted from the plaintiff, and also information which is genuinely that of the defendants, to which the defendants are entitled and the plaintiff is not. Some of that material therefore will be relevant to any claim the plaintiff may wish to bring and should be disclosable to the plaintiff by the defendants on discovery in these proceedings. The purpose of this order at paragraph 96 (iv) below is to provide a mechanism to ensure an application to validate the accuracy of the defendants' discovery is possible, thus protecting the plaintiff. 96. Accordingly we

make the following orders:- (i) The Anton Piller orders obtained ex parte and set out in paragraphs 42 to 53 of the Order of Justice be discharged forthwith. (ii) Any property of the defendants seized by the plaintiff which still remains in its possession be returned to the defendants forthwith. (iii) Paragraph 59 of the Order of Justice is discharged and there is substituted the order that each of the defendants is prohibited from infringing the plaintiff's copyright in any of the plaintiff's confidential information and/or trade secrets or any part thereof for any purpose including without prejudice to the generality of the foregoing the exploitation of that information for the purposes of offering any situations vacant to engineers, officers or crew. (iv) The plaintiff shall without delay deliver to the Judicial Greffier all images which it has made from the property seized from the defendants by virtue of the Anton Piller order now discharged. If the plaintiff has more than one copy of the same image so taken, all duplicate copies are to be returned to the defendants. (v) The injunction set out at paragraph 60 of the Order of Justice is discharged.

Authorities Intellectual Property (Unregistered Rights)(Jersey) Law 2011. Goldtron Limited v Most Investments Limited

[2002] JLR 424 . Anton Piller KG v Manufacturing Processes Limited and Others

[1976] CH 55 . Yousif v Salama [1980] 3 AER 405. Human Rights (Jersey) Law 2000. Columbia Picture Industries Inc. and Others v Robinson and Others [1987] CH 38. Lock International Plc v Beswick and Others [1989] 3 AER 373. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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