

THE HIGH COURT

[2021] IEHC 136
[2020 No. 7472P.]

BETWEEN

MICROSTRAIN LIMITED TRADING AS CUBICM3

PLAINTIFF

AND

JOHN DELANY, IVAN MCFADDEN, JOSEPH (OTHERWISE JOE) BRENNAN, LUKASZ PIORUNKIEWICZ, JACKIE MCGOVERN, PATRICK (OTHERWISE PAT) GAVIN AND RESOLUTE ENGINEERING GROUP LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 2nd day of March, 2021

Introduction

1. On 5th November, 2020, on motion *ex parte* of counsel for the plaintiff, I made an order requiring the first, second and third defendants to immediately deliver up to an independent forensic IT expert all devices in their possession or control which contained information or which previously contained information which might have been deleted in relation to the plaintiff's business, and restraining those defendants from deleting, interfering with or taking any other steps to destroy any such material on any such devices. The order went on to direct that the forensic IT expert should image the devices in order to make a forensic copy and to keep that copy safe pending further order of the court.
2. That order was sought on the basis that it was said to be necessary to ensure the preservation of confidential information which was said to have been accessed and removed from the plaintiff by the first, second and third defendants during the currency of their employment and used by them both during the currency of their employment and subsequently for the purpose of establishing and carrying on the business of the seventh defendant in competition with that of the plaintiff. The removal and use of that information was said to have been in breach of the first, second and third defendants' contracts of employment and of their duties at common law. The order directed to the first, second and third defendants also enjoined them from deleting any material on their devices.
3. In making the order I expressed myself to have been satisfied that the plaintiff had established an extremely strong *prima facie* case; that the potential or actual damage to the plaintiff was very serious; that there was clear evidence that the defendants had in their possession incriminating documents or things; and that there was a real possibility that the defendants might destroy such material before an application *inter partes* would be heard.
4. At the same time I made a separate interim order directed to the fourth, fifth and sixth defendants restraining them from deleting, interfering with or taking any other steps to destroy any of the plaintiff's materials or any materials derived from the plaintiff's materials.

5. The defendants were duly served with the interim orders and notice of motion for interlocutory orders. The motion was adjourned from time to time to allow for the filing by the defendants of replying affidavits and the filing of further affidavits on behalf of the plaintiff and came on for hearing on 14th January, 2021.

The issues on the interlocutory motion

6. At the hearing of the motion the defendants submitted to all but one of the reliefs sought by the plaintiff. They accept that the plaintiff has been successful in its application but submit that it should not be awarded the costs of the interim application and that they, the defendants, should have the costs of the interlocutory motion on the grounds, firstly, that the plaintiff did not on the interim application make full disclosure and secondly, that the evidence on which the application was grounded was hearsay.
7. The defendants in their replying affidavits have made a number of admissions. The first, second and third defendants admit that during the currency of their employment they copied a list of all of the plaintiff's leads and business prospects under negotiation, that they took that list with them when they left, and that both before and after they left their employment they abused that confidential information for the immediate benefit of the seventh defendant and effectively for their own benefit. However, they argue that because they did what they did before Mr. Justin Elliott, the man who swore the affidavit grounding the application, was employed by the plaintiff, he did not know what he knew from facts within his own knowledge and so his evidence was inadmissible. In the main the defendants do not contest the accuracy of what Mr. Elliott has deposed. Rather their argument is that from a legal perspective anything that happened within the plaintiff prior to the commencement of his employment on 29th June, 2020 is, as far as Mr. Elliott is concerned – as Mr. Rumsfeld might have put it – an unknown known.
8. The second strand to the defendants' argument is that the finding of the court that there was a real possibility that the defendants would destroy material was based on incomplete evidence. The argument is that the orders to which they have submitted on the interlocutory application would not have been made on the interim application if the court had been apprised of the full facts and the plaintiff had properly spelled out the case against, as well as for, the making of the interim order. By the way, the third, fourth, fifth and sixth defendants have admitted that they breached the order of 5th November, 2020 by deleting information which they had been ordered not to delete, but they argue that this could not properly have been apprehended by the plaintiff before the order was made.

Legal principles

9. There is no contest as to the applicable principles of law, which are well established. On the *ex parte* application the plaintiff was obliged to make full and frank disclosure of all facts which it was material for the court to know. This was expressly noted by Mr. Dowling when he moved the *ex parte* application. The duty extends beyond making the fullest possible disclosure of all facts known to the applicant to those facts which would have been known to the applicant had he made proper enquiries. Reference was made to

R. v. Kensington Income Tax Commissioners Ex parte Princess de Polignac [1917] 1 K.B. 486 and *Brink's Mat Ltd. v. Elcombe* [1988] 1 W.L.R. 1350

10. Full disclosure of the facts must be linked to fair presentation. The applicant must identify the crucial points for and against the application and not rely on general statements or the mere exhibiting of numerous documents. Reference was made to *Tugushev v. Orlov* (No. 2) [2019] EWHC Comm. 2031 and *Siporex Trade v. Comdel* [1986] 2 Lloyd's Rep. 428.
11. The consequences of a failure to comply with the obligation can be very serious. The court may discharge the *ex parte* order and, to mark its displeasure, may refuse the plaintiff relief which it might otherwise have granted. *Tate Access Floors v. Boswell* [1991] 2 W.L.R. 304. Or a failure of disclosure may be marked by a suitable costs order: which may be to order the plaintiff to pay some or all of his own costs, or to pay some or all of the defendant's costs, or to direct the adjudication of costs as between legal practitioner and own client. Reference was made to *OJSC ANK Yugraneft: Millhouse Capital UK Ltd. v. Sibir Energy plc* [2009] 1 BCLC 298, *U & M Mining Zambia Ltd. v. Konkola Copper Mines plc* [2014] EWHC Comm. 3250 and *National Bank Trust v. Yurov* [2016] EWHC Comm. 1913.
12. When the court comes to consider the gravity of a non-disclosure, it must consider the materiality of the facts not disclosed; the extent of the applicant's culpability for the non-disclosure; and the overall circumstances of the case which led to the application in the first place. *Bambrick v. Cobley* [2006] 1 ILRM 81.

The *ex parte* application

13. The *ex parte* application was grounded on the affidavits of Mr. Justin Elliott and Mr. Andrew Harbison sworn on 4th November, 2020 and an affidavit of Mr. Conor Gavin sworn on 5th November, 2020.
14. Mr. Elliott introduced himself as the managing director of the plaintiff. He deposed that he had commenced working for the plaintiff on 29th June, 2020 as acting technical sales manager and that he had shortly thereafter assumed the role of acting managing director in July, 2020. Mr. Elliott explained that his predecessor as managing director was Mr. Stephen Neill who had served as such from 2004 until 2020. He said that the relationship between the plaintiff and Mr. Neill deteriorated in 2019 and 2020. That deterioration coincided with significant business challenges associated with the Covid-19 pandemic and the departure from the plaintiff's employment between June and August, 2020 of the first, second and third defendants – to whom he referred as "*the Executives*" – and the fourth, fifth and sixth defendants – to whom he referred as "*the Employees*". Mr. Elliott acknowledged at the outset of his affidavit that the plaintiff was constrained as to the information available to it as to events which, as he put it, took place on Mr. Neill's watch. While emphasising that the process of investigation was ongoing, Mr. Elliott said that the circumstances surrounding the departure of the individual defendants and the establishment of the seventh defendant were such as to show that the departure of the

staff and the establishment of the company took place in circumstances of manifest illegality.

15. Mr. Elliott deposed that the departure of the individual defendants had been coordinated. He said that while he had initially believed that the defendants had established a legitimate competitor, the plaintiff now believed that the individual defendants' departure and the establishment of the corporate defendant had occurred in circumstances of multiple breaches of contract, breaches of fiduciary duty, and unlawful interference with legitimate contractual relations. Further, he said, by reference to an affidavit of Mr. Andrew Harbison of Grant Thornton, certain of the defendants had taken active steps to prevent the plaintiff from having access to laptop computers used by them in the period immediately prior to their departure, and the plaintiff had evidence of the copying and forwarding of confidential business information for the benefit of the seventh defendant, Resolute.
16. Mr. Elliott's affidavit ran to 41 pages, with 54 exhibits, running altogether to 359 pages. I will try to go into the detail in no greater depth than is necessary to set out and analyse the defendants' case of non-disclosure.
17. The plaintiff, said Mr. Elliott, was established in Ireland on 11th March, 2003 by an Australian couple, Mr. Trevor Loffel and Ms. Katrina Walsh, who at that time were living and working in Ireland. The plaintiff trades as CubicM3 and acts as distributor for pipes and stormwater attenuation systems manufactured by Advanced Drainage Systems Inc., said to be a United States entity, and a subsidiary of that corporation called StormTech LLC. The plaintiff was said to have established itself since as Ireland's leading supplier of sustainable stormwater solutions and, at some unspecified time in the meantime, as a leader in the supply of solar photovoltaic energy systems.
18. Mr. Elliott explained the nature of the plaintiff's business and the software and IT system tools used to manage the work in some detail. CubicM3 was said to have an internal specific computerised workflow associated with managing its supply chain and coordinating with customers for installation, commissioning, and certifying completed projects. Its software and IT tools were said to have been heavily customised over the years to optimise for the specific needs and complexity of its business and workflows and, as a result, to be proprietary. In addition, the plaintiff was said to have invested in Salesforce, described as the leading CRM (customer relationship management) software, which it had customised to its working environment and to meet its specific workflows. This was described as a database of all current and past projects which allows opportunities to be tracked from enquiries through a number of channels, through design and estimating, to sales, to installation. Mr. Elliott described in some detail how the CRM system operated and said that CubicM3 contends that the CRM together with the related folders in Dropbox containing specific design and pricing files amount to a trade secret within the meaning of Directive (EU) 2016/943. Mr. Elliott also described what he called a proprietary Excel modelling tool which optimised volumetric design and cost of each attenuation tank – to which I will return.

19. Starting at para. 27 of his affidavit, Mr. Elliott moved quickly from 2004, when Mr. Neill first began working for the plaintiff, to 2006, when Mr. Loffel and Ms. Walsh returned to Australia, to 2019 into early 2020, when there was a disagreement between the company and Mr. Neill (the details of which, although not thought by the plaintiff to be relevant to the application were nevertheless summarised), to March, 2020 when, he said, the emergence of the Covid-19 crisis gave rise to cash flow problems.
20. Mr. Elliott introduced each of the defendants under sub-headings of their names.
21. The first defendant, Mr. John Delany, was employed by the plaintiff from September, 2008 to 3rd July, 2020 as, according to Mr. Elliott, senior sales manager. He gave notice on 7th June, 2020 and his last day at work was 3rd July, 2020.
22. The second defendant, Mr. Ivan McFadden, was employed as technical manager from July, 2008 to 3rd July, 2020. He too gave notice on 7th June, 2020 and finished on 3rd July, 2020.
23. The third defendant, Mr. Joe Brennan, was employed as technical sales manager from January, 2014 to 29th June, 2020. He gave notice on 29th May, 2020 and ceased employment on 29th June, 2020. Mr. Brennan's brother John also worked for the plaintiff until he gave notice and finished up on 30th October, 2020.
24. The fourth defendant, Mr. Lukasz Piorunkiewicz, was employed by the plaintiff as a senior design engineer from March, 2015 until August, 2020. He gave his notice on 31st July, 2020 to take effect from 31st August, 2020. When, after he had given his notice, Mr. Piorunkiewicz was asked whether he was going to work for Resolute he denied it. When, on 14th August, 2020 Mr. Elliott learned that he was, his access to the plaintiff's Dropbox and e-mails was cut off.
25. The fifth defendant, Ms. Jackie McGovern, was employed by the plaintiff as a sales administrator from November, 2017 until August, 2020. The affidavit of Mr. Elliott showed that she gave her notice on 13th July and commenced work with Resolute on 7th August, 2020. Ms. McGovern was the person who was most proficient in the use of the CRM database and did most of the work on that.
26. The sixth defendant, Mr. Patrick Gavin, was employed by the plaintiff as area sales manager for the west of Ireland between 1st December, 2017 and 31st August, 2020. When he gave his notice on 27th July, 2020 he was asked by Mr. Elliott whether he was joining Resolute and denied it. Mr. Elliott had previously spoken to Mr. Gavin about advancement and allowed Mr. Gavin, during his notice period, to continue to have access to confidential project and pricing information which otherwise would have been withdrawn. Mr. Gavin joined Resolute on 14th September, 2020.
27. The seventh defendant, Resolute Engineering Limited was incorporated on 25th May, 2020 on the application of Messrs. Delany, McFadden and Brennan made on 30th April, 2020.

The alleged non-disclosure

28. The alleged non-disclosure by the plaintiff has been grouped by the defendants in two categories. The first category comprises four instances in which it is said that the plaintiff failed to disclose essential information to its forensic IT consultant, Mr. Andrew Harbison, which is said to have been of such moment that had Mr. Harbison been told "*the edifice on which the [plaintiff's] application was so elaborately structured would have crumbled.*" The second category comprises seven instances in which the court is said to have been misled, actively and by omission.

The instructions given to Mr. Harbison

29. Mr. Andrew Harbison is a director of Grant Thornton who was engaged to carry out a digital forensic examination of ten devices – five notebook computers, a desktop computer, and four android mobile phones – which had previously been assigned to members of the plaintiff's staff. Mr. Harbison took possession of the devices on 21st and 22nd October, 2020 and, following a preliminary examination, wrote a report on 3rd November, 2020 which directly – by a verifying affidavit of Mr. Harbison of 4th November, 2020 – and indirectly – as the basis of much of Mr. Elliott's evidence – was the foundation of the *ex parte* application. Mr. Harbison's report ran to just over ten pages of narrative and twelve pages of appendices.

30. I will address the alleged omissions in the order in which they were raised by the defendants.

Ms. McGovern's computer

31. What Mr. Harbison called Notebook Computer 5 was a Dell device which had been used by Ms. McGovern. Mr. Harbison reported that this had been re-set at about 02:36 on the morning of 21st August, 2020, which was about one hour after Notebook Computer 3 – a Dell device which had been used by Mr. John Brennan – had been upgraded. He reported that the registry had been altered so as to erase the record of use of USB storage devices, but that data fragments found elsewhere showed that a USB device had been inserted into the computer on at least one occasion in the past. Mr. Harbison also found in what he called the Shellbag database evidence that the Microstrain Dropbox account had been extensively accessed in the minutes immediately prior to the re-setting of the log file. While Mr. Harbison was not able to say that that material had been copied onto a USB device, he thought that the destruction of the record of the use of such devices was such as to immediately give rise to concern that the contents of the Dropbox account had been so copied. By reference to his findings in relation to Notebook Computers 2 and 3, and Desktop Computer 1, which he had previously set out (and to which I will come), Mr. Harbison expressed concern that measures had been taken to frustrate the investigation of user activity on Notebook Computer 5.

32. The defendants do not contest the substance of Mr. Harbison's findings or conclusions but point to the fact that Ms. McGovern's last day of work was on 28th July, 2020, when she returned her devices to Mr. Elliott and gave him the passwords. Ms. McGovern, it is said, did not tamper with her computer or delete material, nor could she have done so on 21st

August, 2020, when the device was in the possession of the plaintiff. The plaintiff and Mr. Elliott are said to have misled the court by failing to tell Mr. Harbison this.

33. The simple answer to this alleged omission is that Mr. Elliott never suggested that it was Ms. McGovern who had interfered with the device which had previously been assigned to her. Mr. Elliott did not say that Ms. McGovern's last day at work had been 28th July, 2020 but he did say that she had given her notice on 13th July and had commenced employment with Resolute on 7th August, 2020. The evidence was absolutely clear that Ms. McGovern had left before the device which had previously assigned to her was interfered with. There was no suggestion – and the defendants do not suggest that it might somehow have been inferred – that Ms. McGovern might have kept her device after she ceased working for CubicM3.

Mr. Gavin's computer

34. Notebook Computer 2 was a Dell device which had been used by Mr. Pat Gavin during the time of his employment with Cubic3M. Mr. Harbison reported that the creation date and the date of last modification of the user profiles on this device were the same, 13th July, 2020, and were within 30 minutes of each other. This suggested that the computer had been logged into only once, on that date, if at all. He found that the profile folder was missing from the Desktop subfolder which, he said, made it unlikely that it would have been possible to log onto the computer, and so, he reported, it did not appear that the user profile associated with Mr. Gavin was genuine.
35. Mr. Harbison reported that there was evidence that this device had been "sanitised". The machine was equipped with an electro-magnetic hard disk drive. Such drives tend to accumulate deleted material in the unallocated – Mr. Harbison called them empty – spaces on the hard drive which can be retrieved and reconstructed by a digital forensics expert.
36. Notebook 2, when Mr. Harbison looked at it, was three years old. He would have expected to find the unallocated space to have been largely filled with deleted material but instead found only a few megabytes of data, such as would have been produced over a few hours of access. This, he thought, was evidence of the deliberate use of erasing software, probably recently. Mr. Harbison recommended that Mr. Gavin be approached to determine whether it was he or someone else who was responsible for the changes.
37. The defendants' complaint as to the evidence presented to the court in relation to Notebook Computer 2 is that the plaintiff failed to disclose to Mr. Harbison that Mr. Gavin had encountered a problem with it in December, 2019 which had been repaired by the manufacturer who, at that time, had reported that the hard drive had failed and that several documents had been lost. This was said to go to Mr. Harbison's conclusion that the computer had been deliberately wiped with the intention of frustrating the investigative analysis of it.
38. The defendants' complaint is based on Mr. Gavin's replying affidavit in which he deposes to the problem in December, 2019, the repair of his device, and the report to him by the

Dell technicians that the hard drive had failed and his numerous personal documents had been lost. Mr. Gavin disclaims any expertise in computers and does not contradict Mr. Harbison's statement that the empty spaces had been deliberately wiped, but says that he did not do it, and that he did not ask or procure anyone to do it on his behalf.

39. No more than Mr. Gavin, I am not a computer expert, but I fail utterly to understand the basis of this allegation of non-disclosure. While counsel make much of it, Mr. Gavin does not suggest that Mr. Harbison should have been told of the problem he had with his computer ten months after the problem was fixed or that he ever had any problem with it after it was fixed, and there is no expert evidence that the problem might have been material to Mr. Harbison's analysis and conclusions. I am satisfied that it can properly be inferred from Mr. Harbison's reference to the computer being three years old that he was probably not told that there had been a hard drive failure in December, 2019 but I do not understand how this is said to have been material. Mr. Harbison's conclusion was based on the creation and last modification of the user profile on 13th July, 2020 and the presence of random deleted data consistent with only a few hours or less of usage. The defendants complain that the plaintiff relied on Mr. Harbison's evidence in support of its case that this computer had been deliberately wiped with a view to frustrating investigative analysis but do not say that Mr. Harbison was wrong, or that his analysis would, or even might, have been different if he had been told of a previous problem which had been fixed.

The Messrs. Brennan's computer

40. What Mr. Harbison called Notebook Computer 3 was a Dell device which had been used by Mr. Joe Brennan until he left on 29th June, 2020, and thereafter by his brother Mr. John Brennan. Mr. Harbison found that the contents of the hard drive on this device, by contrast with all of the other devices he inspected, had been encrypted. He was unable to ascertain who had put the encryption in place but sourced an administrator password which got him past the encryption.
41. Mr. Harbison established that one of the files called *setupapi.dev.log* had been reset at 16:05 on 20th August, 2020. The USB records in the registry had been deleted but there was trace evidence that such devices had been used on the machine. He reported that the erasure of the USB storage records and the resetting of the *setupapi.dev.log* was consistent with an attempt to conceal the fact that USB devices had been used. Mr. Harbison established that Notebook Computer 3 had been subjected to a full upgrade between midnight and 01:00 on the morning of 21st August, 2020 which had scrambled much of the deleted data in what he called the empty spaces of the hard drive, which he had previously explained was an area of the electro magnetic drive in which deleted material accumulates as part of the usual operation of the operating system.
42. On Notebook Computer 3 Mr. Harbison found one folder of data relating to Resolute Engineering which dated back to at least 24th April, 2020. This folder was repeatedly accessed between 26th April and 20th August using the credentials associated with Mr. Joe Brennan and thereafter using the credentials associated with Mr. Joe Brennan's brother, Mr. John Brennan, who continued to work for the plaintiff after Mr. Joe Brennan

left. Mr. Harbison and his team recovered a long list of files associated with Resolute and associated access dates but the files themselves had all been deleted: probably, he thought, on the afternoon of 20th August and prior to the operating system upgrade on 21st August, 2020. Analysis of e-mails retrieved from this device showed that Mr. Joe Brennan had sent a significant number of documents from a resolute.ie e-mail account while he was employed by CubicM3.

43. The defendants' complaint in respect of this device is that Mr. Harbison was not told that the plaintiff or its IT consultant had performed a factory reset on this device after it had been returned and after it had been issued to his brother.
44. In his replying affidavit sworn on 10th December, 2020 Mr. Brennan accepts that he promoted and incorporated Resolute during the currency of his employment; that he sought to divert business from CubicM3 to Resolute; that he copied and used customer lists and project folders; and that while employed by CubicM3 he uploaded files to the Resolute OneDrive. He also admits that in defiance of the order of the court of 5th November, 2020 he deleted a number of WhatsApp messages which he described generally as "*personal WhatsApp messages*" but specifically as communications with three identified employees of CubicM3 – including his brother – which included conversations in relation to contracts which CubicM3 had won and contracts which Resolute was working on.
45. The basis of the allegation of non-disclosure is Mr. Brennan's evidence that he handed back his laptop when he left (on 29th June, 2020) and it is his "*understanding*" that the computer was later given to his brother, John. Mr. Joe Brennan's "*understanding*" is that his brother Mr. John Brennan encountered some difficulties in creating a new user account and sought the assistance of Mr. Martin Fox of the plaintiff and of the plaintiff's IT consultants who, he understands, performed a factory reset of the device. "*This*", he suggests, "*may have been the activity to which Mr. Harbison referred in his letter exhibited at AH1 to his affidavit. I cannot understand why this was not explained to Mr. Harbison or to this Honourable Court.*"
46. Mr. Brennan does not expressly disclaim, but neither does he profess, expertise in IT. While the work which he suggests was done on his erstwhile computer was very much closer in time to Mr. Harbison's examination than the work on Mr. Gavin's computer, it seems to me that all that Mr. Brennan can and does say is that he does not understand why Mr. Harbison was not told of the reset. He does not say that this was material information. In my view Mr. Brennan's surmise that the factory reset "*may*" have accounted for the condition in which the computer was found when inspected is, on its face, mere speculation. Moreover, it seems to me that Mr. Brennan has failed to take account of all of what Mr. Harbison has said. Firstly, the activity which Mr. Harbison found on Mr. Brennan's computer was close in time to that which he found on Mr. Piorunkiewicz's computer, to which I shall come. Secondly, Mr. Brennan does not engage with the similarity identified by Mr. Harbison between the alterations made to his and to Ms. McGovern's computers, or the fact that those alterations were very close in time.

Thirdly, he does not engage with the evidence that the alterations made to his computer were almost immediately after extensive access was made to a OneDrive account whose top level folder was called "*Resolute group*". If I take Mr. Brennan's "*understanding*" of what happened to his computer after he returned it as evidence of what he has been informed of by his brother and believes, he does not say that his brother told him that he was not responsible for what Mr. Harbison found.

Mr. Piorunkiewicz's computer

47. Desktop Computer 1 is a HP Z240 which was used by Mr. Piorunkiewicz until he was cut off on 14th August, 2020. Mr. Harbison reported that this, too, had been tampered with to conceal previous activity. Again he found that the USB repositories had been removed and reset. In particular, that part of the registry that recorded the use of USB storage devices had been removed. As was the case with Ms. McGovern's computer, the *setupapi.dev.log* had been reset. This, reported Mr. Harbison, was something which was consistent with the deliberate modification of data to conceal activity rather than the usual operation of the computer. Mr. Harbison found in a part of the registry called the "*Shellbag*" – which records information for a fairly pedestrian purpose – information as to the fact of each connection, the drive letter associated with the device, and even the names of some of the files that were present on the device. From the Shellbag, Mr. Harbison was able to say that on 24th August, 2020 at 12:01 someone had inserted a USB stick into Desktop Computer 1 which contained six folders, all of which started "*F:\JOHN PROJECTS*", five of which continued "*\RESOLUTE*" and four of which continued, variously "*\LOGOS*", "*\TEMPLATES*", "*\St Paul*", and "*\RN200076*". By no later than 17:15 on the same afternoon the *setupapi.dev.log* was cleared out and reset.
48. The defendants' case in relation to Mr. Harbison's report of what he found on Mr. Piorunkiewicz's computer is more or less the same as the case they make in relation to Ms. McGovern's. The fact is that Mr. Piorunkiewicz ceased employment on 18th August, 2020. Mr. Harbison's report expressly notes that the activity which he found occurred on 24th August occurred after Mr. Piorunkiewicz had left. The allegation of non-disclosure is of what is said to be the crucial detail that Mr. Piorunkiewicz returned his computer on the day he left.
49. I find that there is no substance to this allegation of non-disclosure. It seems to me that the whole point of noting that the activity occurred after Mr. Piorunkiewicz had left was to show that he was not, or at least was very unlikely to have been, directly responsible for the activity. The premise for this can only have been that Mr. Piorunkiewicz, in common with nearly everyone else, handed in his computer before he left. I say nearly everyone else because Mr. Harbison was able to ascertain by an inspection of Notebook Computer 1 – that which was handed in by Mr. McFadden when he left – that it was an old one and not the computer which he had been using for the previous year or so, and Mr. Elliott's affidavit showed that Mr. John Brennan initially refused to return the computer he had been using and Mr. Elliott had to send a courier to Leitrim to collect it.

50. If the alleged non-disclosure is that the plaintiff did not spell out that Mr. Piorunkiewicz did not do what was done, it was nowhere said that he did, and it was clearly spelled out that the activity occurred after he had left.

Alleged non-disclosure by Mr. Elliott

51. The first allegation of non-disclosure made against Mr. Elliott is that he did not disclose that he knew of the existence of Resolute from at least early July 2020 and that he did not disclose that CubicM3 retained Resolute as a consultant on various projects, or that Resolute had invoiced CubicM3 for such work as early as July, 2020. Peculiarly, the defendants' case is anchored on what Mr. Delany, in his replying affidavit, said that Mr. Elliott did not say, rather than on what Mr. Elliott did say.
52. Mr. Elliott, at para. 7 of his affidavit sworn on 4th November, 2020, said that he had not until recently had an opportunity to properly consider the circumstances surrounding the departure of the defendants. Mr. Delany, in his replying affidavit, says that he does not accept that. He says that Mr. Elliott was well aware of the existence of Resolute from at least early July, 2020 and knew intimately that CubicM3 and Resolute had been competing for business in the same marketplace ever since. He says that CubicM3 has since retained Resolute as a consultant on some projects and exhibits a number of e-mails.
53. There is an immediate and obvious disconnect. Mr. Elliott did not say at para. 7 that he was unaware of the existence of Resolute. He was plainly aware of the departure of the first to sixth defendants and said, at para. 8 of his affidavit, that he operated on the assumption that they had behaved lawfully. Having set out the circumstances in which the plaintiff was established, outlined its business and business methods, and identified the financial and logistical problems created by the pandemic, Mr. Elliott first of all summarised the difficulties between the plaintiff and Mr. Neill, and then introduced the defendants, giving the dates on which they joined and left the plaintiff.
54. Starting at para. 76, Mr. Elliott set out the alleged wrongs of the defendants. Mr. Brennan, it will be recalled, left on 29th June and he was followed by both Mr. Delany and Mr. McFadden on 3rd July, 2020. By para. 106 of his affidavit Mr. Elliott had come to the first half of July, 2020 at which point he was being told by Mr. Gavin that the company did not have the stock to fulfil various orders but that "*the Executives*", that is Messrs. Delany, McFadden and Brennan, did have the stock to fulfil six orders. At para. 112 Mr. Elliott said that in the early stages of July, 2020 he was not aware of the existence of Resolute, nor could he comprehend how "*the Executives*" had stock when the company did not. Whatever about the name of the corporate vehicle, it was clear that Mr. Elliott was aware by no later than 14th July, 2020 that the first three defendants were in competition with the plaintiff. A handwritten note made by Mr. Elliott on 14th July shows that he was then told by Mr. Gavin that Mr. McFadden and Mr. Delany were filling an order, and that he was told by Mr. Gavin that they had ADS stock to fill orders which CubicM3 had not been able to fill.

55. By the way, the mystery of how the defendants had the stock to fill the orders may have been solved in the replying affidavits, in which Messrs. Delany, McFadden and Brennan admitted that at some unspecified time after Mr. Neill was laid off they helped themselves to stock of an unspecified value towards part of the unspecified value of commissions in respect of the first quarter of 2020, payment of which had been deferred. If they had documented the particulars and value of the material they took away, I think that they would have said so.
56. A bundle of e-mails said to show that Mr. Elliott was well aware of the existence of Resolute from at least early July starts with an e-mail of 8th July, 2020 from Mr. John Brennan to a CubicM3 customer who had made an enquiry on the previous day about PV panels. The customer had asked for a call and Mr. John Brennan asked the customer to add Mr. Joe Brennan to the call on the basis that he (Mr. Joe Brennan) was working for CubicM3 again on a sub-contractor basis. That e-mail was copied to Mr. Elliott. It gave Mr. Joe Brennan's e-mail address at resolutegroup.ie.
57. If from this I am asked to infer that Mr. Elliott misled the court or failed to make full disclosure of his knowledge of Resolute, I decline to do so. The fact of the matter is that the Messrs. Delany, McFadden and Brennan promoted and incorporated Resolute while they were employed with CubicM3 and made off with contacts and confidential information which they later exploited. They also took away stock. There is some dispute as to the precise impact of this on CubicM3's immediate contracts but if Messrs. Delany, McFadden and Brennan do not acknowledge that it was wrong they disclose their solicitor's advice that it was highly irregular. Having taken with them what they did, Messrs. Delany, McFadden and Brennan left behind them Mr. Gavin, who continued to feed them information, and Mr. Piorunkiewicz, who prepared and procured drawings for them using CubicM3 templates – which, when he left, he took with him.
58. In my firm view, it ill behoves the defendants, who have been, and acknowledge themselves to have been, caught red handed, to seek to undertake a nit picking examination of every word of Mr. Elliott's affidavit in the hope of identifying something that might have been better or otherwise expressed.
59. The second instance of alleged non-disclosure by Mr. Elliott is that he exhibited a document which, says Mr. Gavin, purported to be Mr. Gavin's contract of employment. This document, it is said, contains restrictive covenants which survived the termination of Mr. Gavin's employment but in fact, Mr. Gavin says, this document was never sent to, executed by or otherwise agreed to by him.
60. This, in my firm view, is a red herring. Mr. Elliott put up, marked "JE 21", what he described as "*a true copy (unsigned) of Mr. Gavin's contract of employment*". He quoted from the document the obligations in relation to confidential information – which went no further than those which the law would have imposed in any event. Mr. Elliott did not refer to the three month post termination restraint but in moving the *ex parte* application Mr. Dowling did. He pointed to the clause but made clear – which was the fact – that it was not part of the case as constituted. There may or may not be an issue in the case as

to whether the form of contract of employment referred to by Mr. Elliott was agreed, or signed, or sent to Mr. Gavin but the foundation of the *ex parte* application was not that Mr. Gavin was working for a competitor but that he was abusing confidential information.

61. I should also say that I do not accept that it necessarily follows from the mere fact that the plaintiff has not filed a further affidavit contesting what Mr. Gavin has said that the plaintiff accepts his evidence as being correct. Save as to the costs and one element of the interlocutory relief the defendants have conceded that the plaintiff is entitled to the orders sought. In my view the plaintiff was not only entitled but was correct to take the position that it would not allow the motion to become bogged down in insignificant detail.
62. The third criticism of Mr. Elliott is that he is alleged to have misled the court. At para. 80 of his affidavit, Mr. Elliott deposed that Ms. McGovern issued an "*entire weekly CRM sales report*" to Mr. McFadden on 29th June 2020 and again on 6th July 2020. The challenge to his evidence is that he did not disclose that Ms. McGovern was not working on the dates in question, that these reports were automatically generated by CubicM3's CRM software, or that they were, in fact, sent from the email address *noreply@salesforce.com*. Nor, it is said, did Mr. Elliott disclose that CubicM3 had deliberately set up a system to ensure that these reports were sent to Mr. Delany, Mr. McFadden and Mr. Gavin on a weekly basis. Instead, it is said, CubicM3 sought to conjure suspicion from these perfectly anodyne activities.
63. The circumstances in which those e-mails were sent have been explained in the replying affidavit of Ms. McGovern, and her explanation is accepted. The weekly reports were generated by the plaintiff's CRM and were circulated on every Monday. The reports were circulated automatically by the CRM system and were supposed to go to each of Messrs. Delany, McFadden and Gavin, as well as to Mr. Neill at their *cubicm3.com* e-mail addresses. In late 2019 it emerged that because Messrs. Neill and Delany shared a CRM licence, Mr. Delany was not getting the reports and Ms. McGovern added Mr. Delany's *gmail.com* address to the circulation list. The e-mails show, as Ms. McGovern says they show, that they were not sent by her but by *noreply@salesforce.com* "*on behalf of Jackie McGovern*".
64. The exhibits show that by 29th June, 2020 Mr. Neill had been taken off the circulation list but if this created the opportunity to substitute Mr. Delany's CubicM3 address for his *gmail* address it was not taken and it appears to have been by oversight that Mr. Delany was not taken off the list when he left on 3rd July, 2020. Mr. Delany in his replying affidavit has confirmed Ms. McGovern's evidence as to how the reports came to be sent to his private e-mail address and that his private address was added to the list before he made his plans to leave. In an otherwise very comprehensive reply, he does not challenge the belief expressed by Mr. Elliott that the defendants were using these lists to target lists for which CubicM3 had already submitted designs and pricing in order to unfairly undercut its price point.
65. The fourth criticism of the evidence and presentation of the *ex parte* application is that:-

"CubicM3 did not tell this Honourable Court that Mr. Loffel withdrew vast sums of money, which CubicM3 has refused to quantify, from CubicM3's bank accounts, or that his extraordinary actions imperilled CubicM3's financial probity. Instead, CubicM3 told this court that its financial position had been imperilled by the pandemic and by the defendants' actions."

66. Mr. Delany in his replying affidavit spends some time dealing with this withdrawal which, he says, he first learned of in April, 2020. Mr. Delany had limited access to the plaintiff's U.K. bank accounts but not to its Irish accounts. He says that he learned in April, 2020 that Mr. Loffel had, in March or April, withdrawn a very significant sum from CubicM3's Irish accounts which he transferred to Australia, where, he says, CubicM3 does not have any business. Later he says that Mr. Loffel told him that he had transferred €200,000 but that Mr. Neill told him that the amount was much greater than that, but he does not say how much. Later again he says that Mr. Loffel told him and Mr. McFadden that the withdrawal had been made in order that the plaintiff would qualify for the State's temporary wage subsidy scheme, which he says was worth €40,000 per month. Mr. Delany suggests that Mr. Loffel by his actions starved CubicM3 of the capital it needed to trade during an extraordinarily difficult period.
67. It seems to me that what Mr. Delany has to say about this withdrawal amounts to a series of assertions for which no evidential basis is offered. Mr. Delany does not know for sure how much was withdrawn. He does not know how much the plaintiff had in its Irish bank accounts. He does not know for sure the purpose of the withdrawal. I do not understand why Mr. Delany, as he says, might have been shocked by the transaction if he did not know the purpose of it and I do not see how Mr. Delany can say that the plaintiff was starved of cash if he does not know how much cash it had before and after the withdrawal. Certainly Mr. Delany does not identify any prospect or project that could not be pursued or undertaken for want of funds. There were, in May, 2020 pay cuts, lay-offs and short time and the payment of commissions for the first quarter of 2020 was deferred but there is no suggestion that Mr. Loffel was not – as he is said to have said that he was – entitled to withdraw the money which he did.
68. Mr. Elliott did tell the court that the plaintiff's financial position had been imperilled by the pandemic and by the actions of the defendants. It is not contested that this was true so the argument that the company's financial position was attributed to these matters "instead" of the identified withdrawal does not stack up. The identified sum of €200,000 is not, to my mind, obviously "vast" in the context of a company with a turnover of €12 million or any evidence of the amount of money which the plaintiff had on hand. Nor is there any evidence as to where the money went after it left the plaintiff's account, specifically that it was not thereafter available to the plaintiff or would not have been available if required.
69. More to the point, I did not at the time of the *ex parte* application, and I do not now see how the fortunes of the plaintiff are at all relevant. The defendants in their replying affidavits paint the picture in the second quarter of 2020 of an unhappy ship. Mr. Delany

says that there was a real sense that it was a sinking ship. The defendants' case is that they had contributed greatly to the development and financial success of the plaintiff. So I am sure they did, and they were paid their salaries. When they became dissatisfied with the manner in which they were being treated or with the way on which the business was being managed they were perfectly free to leave and (as far as the case now stands) to establish themselves in competition with the plaintiff. They were not, however – and they acknowledge that they were not – entitled to plunder their employer's customer lists, confidential information, or stockroom. Even if, for the sake of argument, there was anything irregular about the withdrawal or transfer made by Mr. Loffel, it would not have justified the defendants in doing what they did. That being so, the withdrawal was irrelevant, and the plaintiff cannot sensibly be criticised for failing to disclose irrelevant information.

70. The fifth criticism made of the *ex parte* application is that the plaintiff did not disclose that the "*trade secrets*" it claims to possess were copied from others, using generic software packages and information and techniques that are in the public domain.
71. There is simply no substance to that criticism. Mr. Elliott described the plaintiff's business as a distributor of attenuation systems made by Advanced Drainage Systems Inc. and StormTech. He described that the plaintiff uses a range of software and IT system tools which had been customised over the years. Specifically, he identified the plaintiff's investment in and use of Salesforce, Dropbox, and an Excel modelling tool which had been modified, and pointed to the differences between this and a tool available on the ADS website. Mr. Delany's description of the modifications made to the various tools is not materially different. He cavils with Mr. Elliott's claim that they amount to trade secrets, but it may be a fair measure of their value that the defendants copied them and took them away. Mr. Delany declares that it is quite remarkable that Mr. Elliott did not disclose that he – Mr. Delany – and Mr. McFadden contributed to the refinements, but the incontestable fact of the matter is that the refinements were the property of the plaintiff.
72. The sixth criticism is that Mr. Elliott told the court that the defendants conspired with one another, in a "*wide-ranging stratagem*" to ensure that CubicM3 would not pursue business opportunities, so that Resolute could benefit from them instead, but, although he had been copied with several e-mails in relation to these matters, omitted to say that CubicM3 had deliberately decided not to quote for pumping stations shortly before Mr. Brennan left his position, or that Ms. McGovern was instructed to send e-mails to customers, in order to so advise them. Nor, it is said, did Mr. Elliott explain to the court that CubicM3's employees had been instructed to do everything possible to recover debts due and owing to CubicM3 at that time.
73. This is another question of detail on which the plaintiff has declined to be drawn. At paras. 99 to 114 of his affidavit Mr. Elliott dealt with an alleged failure to pursue sales in the best interest of CubicM3. He said that he had identified a significant number of opportunities which had not been followed up in the manner expected and not converted into sales, without any apparent reason for losing the sale. By way of example, he

pointed to a proposal which had been made in May, 2020 for an attenuation system for O'Callaghan Properties; an inquiry made on 27th May, 2020 for a substantial attenuation project from Stafford Bonded; and a tender request received on 22nd June, 2020 for attenuation facilities and hydro brake chambers for a development at Archers Wood, County Wicklow. Mr. Delany explains that Resolute went on to win the O'Callaghan Properties and did not bid for the Stafford Bonded Project. He does not address the Archers Wood project. He says, generally, that Mr. Loffel placed them all under great pressure to get money in with the consequence, unfortunately, that "*certain other aspects of our normal work were not pursued as punctually or diligently as they might otherwise have been as a result.*"

74. I find that there is no substance to this criticism. The defendants' argument is an attempt to divert attention from the attenuation projects or prospects which were the basis of Mr. Elliott's concerns to pumping stations and other projects. In respect of the three identified projects, it is acknowledged that Resolute got the project that Mr. Elliott could clearly prove that it had got, it is denied that Resolute got another, and the third is ignored.
75. Finally, there is the complaint that Mr. Elliott described Mr. McFadden, Mr. Brennan and Mr. Delany as "*Executives*" of CubicM3, knowing full well that they were mid-level managers employed by CubicM3 and that while they had sought to be made directors of CubicM3, their requests were refused.
76. Messrs. Delany, McFadden and Brennan are not entirely consistent in their position. Various, they say that they were responsible for the development of the plaintiff's business from a turnover of €1.5 million in 2010 to €12 million in 2019 and the development of the products sold by the plaintiff beyond ADS products, and they were mid-level managers. Various, they were mid-level managers with CubicM3 and they were the promoters of Resolute which they have plainly established in direct competition with CubicM3. Various, they assert that they were not directors of CubicM3 and they complain that they asked to be but were refused. As Mr. Elliott did, the defendants make a clear distinction between Messrs. Delany, McFadden and Brennan, on the one hand, and Mr. Piorunkiewicz, Ms. McGovern and Mr. Gavin, on the other.
77. What exactly it was that Mr. Elliott meant when he referred to Messrs. Delany, McFadden and Brennan as "*the Executives*" was an issue that arose on the *ex parte* application. The defendants' solicitors were later given the transcript. At para. 45 of his affidavit Mr. Elliott asserted that Messrs. Delany and McFadden, although they had never been formally appointed as directors, assumed fiduciary duties to CubicM3, and that they, with Mr. Brennan and a Mr. Martin Fox were the senior management team reporting to Mr. Neill until Mr. Neill left. In reply to a question from the court, Mr. Dowling was clear that while in the action the plaintiff was making the case that Messrs. Delany and McFadden were fiduciaries, the premise of the *ex parte* orders sought against them was simply and solely that they were – like the rest of the individual defendants – in breach of their duties as employees.

78. However they were labelled, the defendants' roles in the plaintiff were accurately described and distinguished. Messrs. Delany, McFadden and Brennan were more important than Mr. Piorunkiewicz, Ms. McGovern and Mr. Gavin. The argument that the plaintiff ought to be condemned in costs for having described them as "*the Executives*" is wholly unsustainable.
79. Two further aspects of the plaintiff's conduct are said to be relevant. The first is that Mr. McFadden was not given an opportunity to return his computer before the *ex parte* application was made. That is the relatively new computer, the property of the plaintiff, which Mr. McFadden kept when he ceased employment, at which time he gave back, instead, a computer which he had used from 2017 until about July, 2019. At the same time he went through the motions of giving back an old mobile phone while keeping a newer one. Mr. McFadden effectively accepts the conclusion of Mr. Harbison that the device retained by Mr. McFadden probably contained large numbers of proprietary and confidential files which, he says, he deleted after he was told by his solicitor that he should not be using or accessing any CubicM3 materials, but before the interim High Court order was served on him. The defendants now appeal to basic fairness. I reject the criticism that the plaintiff ought to have written to Mr. McFadden to ask that he should do in October, 2020 what he perfectly well knew he should have done on 3rd July, 2020. The defendants also complain that the plaintiff did not write a letter before action to Ms. McGovern or Mr. Piorunkiewicz and suggested that the evidence discloses no basis whatsoever on which the plaintiff could possibly seek relief against them. But the fact of the matter is that they have submitted to the interlocutory orders sought.

Hearsay

80. The second of the two further aspects of the plaintiff's conduct which is said to be relevant is its reliance on hearsay.
81. The *ex parte* application and the interlocutory motion were principally grounded on the affidavit of Mr. Justin Elliott who described himself as the managing director of the plaintiff. The defendants submit that Mr. Elliott is not, in fact the managing director of the plaintiff, and they complain that he has no direct knowledge of the matters to which he has deposed and has not identified his means of knowledge.
82. It is true that Mr. Elliott identifies himself as the managing director of the plaintiff, but he also avers that he commenced employment on 29th June, 2020 and shortly after "*assumed the role of interim managing director*". The plaintiff may not have passed the necessary formal motions or made the required returns, but it is clear – and is it uncontested – that Mr. Elliott has charge of the day to day business of the plaintiff, answering to Mr. Loffel and Ms. Walsh.
83. In one paragraph in his introduction and in a handful under the heading background, Mr. Elliott outlines the establishment of the company and business and the difficulties between the plaintiff and Mr. Neill. The dispute with Mr. Neill predated Mr. Elliott's employment but as of the date of swearing of Mr. Elliott's affidavit Mr. Neill was still an employee. Much of Mr. Elliott's summary of the dispute with Mr. Neill was by reference to

correspondence setting out opposing positions. If by the letter of the law Mr. Elliott ought to have said of the establishment of the business and the reasons for the unhappiness on the ship which he took over at the end of June that these were matters of which he was advised by Mr. Loffel and Ms. Walsh and believed, that was only background. Mr. Elliott's evidence as to the nature and extent of the plaintiff's business, the IT systems employed, and the circumstances in which the defendants left was all directly within his own knowledge. While Mr. Elliott clearly knew that the defendants had established themselves in competition with the plaintiff, the true circumstances surrounding their departure – or at least the solid evidence as to what they had done – and the urgency of the situation first emerged from the report of Mr. Harbison on 3rd November, 2020. It was clear that Mr. Loffel and Ms. Walsh are based in Australia. While it was correctly foreseen that the defendants might attempt to justify what they did by reference to the myriad difficulties which arose before Mr. Elliott was employed, the plaintiff's case was that nothing could have justified what they did. I am not persuaded that the application could not properly have been made without affidavits from Australia. The technical omission to give a means of knowledge for the very limited hearsay in the affidavit of Mr. Elliott is not such as would justify disallowing the costs of his affidavit, still less the entire of the costs of the interim and interlocutory applications.

84. Notwithstanding argument as to the appropriateness of one of the reliefs sought – to which I will immediately come – the plaintiff is acknowledged to have been entirely successful. The defendants have not made out their argument that there is any reason why the plaintiff should not have its costs against the first, second, third and seventh defendants.
85. There is, however, a distinction between the first, second and third defendants, on the one hand and the fourth, fifth and sixth, on the other. The first, second and third defendants, on their own case as well as the plaintiff's case, were the prime movers. The role and responsibility of the fourth, fifth and sixth defendants is less clear and for that reason I am not satisfied that I can justly adjudicate their liability for the costs of the interim and interlocutory applications. The trial judge will have a clear picture of the extent of their involvement and as between the plaintiff and the fourth, fifth and sixth defendants I will reserve the plaintiff's costs.

Order for inspection

86. The primary reliefs sought by the plaintiff were a springboard injunction restraining Resolute from soliciting or accepting orders or business in respect of the projects or prospects on the plaintiff's CRM list; an order for the return of its property; and orders for the delivery up of electronic devices (and passwords) for the purposes of imaging. The interim orders have been executed and there is consent to the interlocutory order for the preservation by the independent IT consultant of the extracted data.
87. The contested relief is a claim by the plaintiff for an interlocutory order permitting the nominated IT consultant to search the data for the purpose of establishing precisely what CubicM3 materials were on the defendants' devices, what use was made by the defendants of those materials, the circumstances in which the first, second and third

defendants came to establish the seventh defendant, and the circumstances in which the individual defendants came to commence working for Resolute while still employed by CubicM3.

88. Counsel for the defendants made a succinct and very helpful written submission as to the applicable legal principles by reference to a number of English cases, which counsel for the plaintiff accept is correct.
89. The purpose of a search order or an imaging order is to preserve evidence to ensure that it is not altered, destroyed or hidden. *Anton Piller KG v. Manufacturing Processes Ltd.* [1976] Ch. 55. Imaging, by its nature, is incapable of discrimination between information that is relevant to the issues in the proceedings and information that is irrelevant, business information and personal information, or information that is subject to legal professional privilege and information that is not. *TDB (Owen Holland) Limited v. Simons* [2020] EWCA Civ. 1182. Imaging can only ever be a preservation step, which must be followed by a proper consideration of the issues of disclosure and inspection. *TDB (Owen Holland) Limited v. Simons*. If there is to be an inspection of documents on the images it needs to be justified as a separate exercise and analysed in terms of the disclosure jurisdiction. *A v. B* [2019] 1 WLR 5832.
90. It is common case that there is a presumption that the imaged data should not be interrogated at this stage. That may be done in special circumstances, but the defendants argue that the plaintiff has not made out such circumstances.
91. On this issue I am satisfied that counsel for the defendants are correct. The plaintiff's proposal is that the search should be conducted by the independent IT consultant and the results preserved pending further order of the court. There is no evidence as to the extent of the information imaged. Some of it is likely to be CubicM3 information but much of it will not be. Any search to identify CubicM3 information would necessarily entail a perusal of the defendants' personal information to exclude it. I see no justification for doing that.
92. The defendants in their replying affidavits have made significant admissions. The plaintiff in due course will be entitled to discovery of such documents as are relevant to the issues and necessary for the fair disposal of the action. Mr. Dowling now says that in view of the admissions the plaintiff must win. If that is so (and I do not say that it is or is not so) the extent of discovery that may be required may be very limited. The proposed general examination of the imaged material, if permitted, might have to be supplemented by a focussed search for particular categories of documents. That would only add to the cost. Certainly, all the appearances are that the categories of documents that may be relevant and necessary may be very much more limited than they would be in a case which is fully contested. In principle the primary obligation to make discovery will be on the defendants and in the ordinary way I think that the plaintiff would have to justify a search of the imaged information by reference to some deficiency or apprehended deficiency or shortfall in the material discovered.

93. The only justification offered for the proposed search order is that it would save time. The defendants, it is said, are stalling for time. I am unconvinced of that. While it does rather appear that in the initial exchange of correspondence there was some obfuscation and that at the initial listings of the motion the defendants were less than forthcoming with their solicitors and with the court, they filed their affidavits within about four weeks of service of the motion. Along the way the defendants, by their solicitors, sought to negotiate terms in open correspondence but the plaintiff's solicitor was having none of it and insisted on the filing of affidavits, following which the defendants, eventually, more or less capitulated.
94. As to what time might be saved in the progress of the action if a search order were to be made, there was no evidence, and Mr. Dowling was not really able to say. He guessed that the search of the imaged information might take a number of weeks.
95. It seems to me that the argument that the making of an order at this stage would save time is fundamentally flawed. It presumes that the court will at some time in the future inevitably make a search order, and it presumes that the search order will be in the same terms as are now proposed. However, until the pleadings are closed it cannot safely be assumed what categories of documents will be relevant and necessary. Moreover, the application now for a search order presumes that there will be some shortcoming in the defendants' discovery or other justification for such an order. Moreover, the argument fails to engage with the requirement that there must be a strong justification for any interference with the defendants' private information.
96. I find that the plaintiff has not made out the necessity for the making of a search order at this stage.

Payment on account of costs

97. The defendants' replying affidavits, which were delivered on 10th December, 2020, were reviewed by the plaintiff's solicitor who, by letter dated 14th December, 2020 invited the defendants' solicitors to consent to the orders sought by the notice of motion, an order for the costs of the *ex parte* application and the interlocutory motion, and an order for the immediate payment of €75,000 plus VAT on account of those costs. The letter referred to O. 99, r. 1(b)(5), which was presumably intended to be a reference to O. 99, r. 1B(5) which was the relevant rule under the provisions of O. 99 until it was replaced on 3rd December, 2019 but nothing turns on that mistake. The power in the old O. 99, r. 1B(5) is now to be found in O. 99, r. 2(5). The defendants' solicitors declined and on 16th December, 2020 Mr. Hugh Kane, solicitor, swore a short affidavit in support of the application for an immediate payment on account.
98. Mr. Kane pointed to the admissions in the defendants' affidavits. The case, he says, is a complex one rendered more difficult by the way in which it has been met. The defendants, it is said – and it is the case – initially denied any wrongdoing before ultimately admitting the very serious wrongdoing catalogued in their affidavits.

99. The legal costs, that is to say the lawyers' fees, incurred to date in respect of this application are said to amount to €225,000 plus VAT at 21%. The work is said to have involved significant manpower and to have demanded lengthy consultations at unsociable hours to accommodate the time difference between Ireland and Australia. In addition, the plaintiff is said to have incurred costs to Grant Thornton and FTI Consulting Management Solutions Limited. Mr Kane exhibits an update of costs from Grant Thornton to 31st October, 2020 of €25,067.50, exclusive of VAT, of which, it is said, the plaintiff has paid €10,000 plus VAT and an invoice from FTI Consulting dated 25th November, 2020 for €18,761.05, inclusive of VAT. Broadly speaking, the total claimed for costs is €265,000 plus VAT.
100. Mr. Frank Beatty S.C. for the defendants acknowledged that the court has the power to make an order for payment on account but emphasised that to do so is to depart from the normal rule that costs are payable when adjudicated. In this case, he says, there is insufficient evidence to warrant a departure from the usual rule. The sums claimed are said to be based on bald averments and figures plucked from the sky.
101. There was no argument as to the principles to be applied in deciding whether to make an order for the payment of a sum on account of costs, but the book of authorities filed on behalf of the plaintiff included (without demur on the part of the defendants) an extract from the fourth edition of *Delany & McGrath on Civil Procedure*, paras. 24-299 to 24-302.
102. High Court Practice Direction HC 71 which came into effect on 24th April, 2017 provides that where there is no dispute as to the liability for the payment of costs and in any other case in which the judge thinks appropriate, an order may be made directing the payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs.
103. Order 99, r. 2(5) of the recast O. 99 now provides that an order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.
104. I was rather surprised at the dearth of authority on the application of HC 71 which has been in effect for nearly four years.
105. The first case in which there is a written judgment is *Heeney v. Depuy International Limited* [2017] IEHC 355, in which an application was made on behalf of the plaintiff for a payment on account of the costs of a personal injuries action which had been settled on 15th July, 2015 upon terms that the plaintiff would be paid damages of €250,000 and his costs to be taxed in default of agreement. In the nearly two years between then and 28th June, 2017 when the application came before Barr J. no formal bill of costs had been delivered but there had been an exchange of short form bills in which the plaintiff's solicitors claimed a total of €644,704 and the defendant's solicitors had more or less admitted a liability of €143,299.

106. Barr J. noted that the practice direction had been made to address cash flow difficulties that had arisen from long delays in the taxation of costs. He noted that the court on such an application was likely to have very limited information and that in the case before him he had had very limited argument as to why the level of fees claimed might or might not have been justifiable. In those circumstances he concluded that it would not be appropriate that the court should give any indication as to what level of fees might be payable, rather, he said:-

"All the court can do, is try to come to a conclusion as to what sum would represent a reasonably substantial payment on account in respect of costs, while at the same time not exposing the defendant to a risk of a serious overpayment in respect of such costs."

107. The judgment shows that the defendant was willing to make a payment on account of €125,000 which, as I read the judgment, was inclusive of VAT. It is not clear what figure the plaintiff proposed. Barr J. directed a payment on account of €200,000. Significantly, Barr J. accepted the defendant's submission that unless and until there was a formal bill of costs the defendant was not in a position to refer the matter to taxation and he directed that this payment be made within 21 days of delivery of a formal bill of costs.

108. The second case was *Anteck v. Motor Insurers Bureau of Ireland* [2017] IEHC 503, also a judgment of Barr J. The plaintiff in that case sought a payment on account of the costs of a personal injuries action arising out of a road traffic accident which had occurred on 20th September, 2007, and which had been settled on 7th June, 2016 for €175,000 and costs, including reserved and discovery costs. A bill of costs was delivered on 27th April, 2017 and a summons to tax issued returnable for 7th July, 2017, the hearing of which had been adjourned to 18th October, 2017. Counsel's fees had been agreed and paid and the plaintiff sought a substantial payment on account of the outstanding claim for €93,628, inclusive of VAT, the bulk of which was in respect of the solicitor's instruction fee.

109. The defendant argued that the recent appointment of an additional taxing master had eliminated what until then had been very long delays in taxation and pointed to the short interval between the date on which the summons to tax had been issued and the date fixed for the hearing. The plaintiff's case was that although the system might have been improved, she was still facing the prospect of a long delay before the costs would be decided.

110. Barr J. said:-

11. The first question which the court must decide, is whether it is appropriate to direct that a payment on account should be made in this case, having regard to the submissions made by the defendants to the effect that there are no delays in the taxation process at the current time and, therefore, the underlying rationale for the Practice Direction as set out in the first sentence thereof, has not been met. I do not think that the Practice Direction requires that a plaintiff's solicitor should satisfy

the court that there is a long delay in the taxation process in order to establish his right to seek a payment on account. It seems to me that wherever there is an agreement, or a finding by the court, that a defendant should pay the plaintiff's costs, the plaintiff's solicitor can come into court at any time and seek a payment on account, without having to put evidence before the court that there are, in fact, long delays in the taxation process at the time the application is made.

12. *Even if I am wrong in that, I accept the evidence given by Ms. Hayes in her affidavit, to the effect, that even with the current taxation process, she is likely to experience some delay in receiving the fees due to her and that in all probability, she will not receive these costs until in or about December 2018. She states that having regard to the fact that the proceedings relate to an accident which occurred in 2007, which action was commenced by personal injury summons issued in December 2010, it is not unreasonable that she should receive some payment on account, in view of the fact that the defendants had agreed to pay the plaintiff's costs as far back as June 2016. In fairness to the defendants one must point out that, while the plaintiff's solicitor did furnish a schedule of vouched disbursements on 1st July, 2016, it would appear that the Bill of Costs was not actually furnished until 27th April, 2017. Nevertheless, I accept the argument that she may well have to wait another eighteen months before receiving payment of the costs due to the plaintiff, from the defendants. It seems to me that in such circumstances, it is appropriate for the court to give a direction pursuant to Practice Direction HC71."*

111. As in *Heeney* the court deliberately did not say how it had come to the figure but made an order for the payment of €45,000 within 28 days.
112. As to the application for a payment on account of costs, I am satisfied that the plaintiff's starting position is strong. When each of Messrs. Delany, McFadden and Brennan and Resolute were first challenged by letter dated 2nd October, 2020 that they had wrongfully removed and were exploiting confidential information, their response was that they were at a loss to understand what was being alleged but invited the plaintiff's solicitors to identify precisely what information had allegedly been taken, to whom it had allegedly been disseminated, the contracts allegedly secured by Resolute, and the precise involvement of each of the individuals in the winning of those contracts. After the interim orders were made, these defendants first attempted to negotiate their way out of most of what was claimed – specifically the springboard injunction – and only submitted at the last minute. The CRM list annexed to the plenary summons was a list of some 386 projects and prospects with a total projected value of €11,650,021.27. Of course that figure was not money in the bank but it was a valuable list of business prospects which these defendants took in order that they might exploit and which they did exploit. Not least to the point, the list showed the price that CubicM3 had calculated or bid for each of the projects or prospects. When Mr. Delany swore his replying affidavit on 10th December, 2020 he identified from CubicM3's CRM list 25 contracts to a total value of €916,970 that Resolute had won at prices, on average, of two thirds of the figures in the CRM list. There may very well be issues as to whether or the extent to which and the

basis upon which Resolute is accountable for the profits which Resolute earned – or the profits which CubicM3 might have earned – on those contracts but *prima facie* the defendants have had and will have the proceeds of business that otherwise the plaintiff might have had, and it is not an attractive prospect that the defendants should keep their ill gotten gains while the plaintiff carries the costs of the interlocutory motion.

113. The plaintiff asks for a payment on account of a figure plus VAT. Order 99, r. 2(4) provides that an award of costs shall not include any sum payable in respect of value added tax unless the party in favour of whom the award is made establishes that such sum is not otherwise recoverable. The plaintiff is registered for VAT and I cannot imagine how the VAT on its costs might not be recoverable. I am rather surprised that a claim was made for a figure plus VAT, but I do not believe that this oversight taints the application.
114. Mr. Kane does not offer an undertaking in the terms referred to in the practice direction to repay any sum in excess of the amount that might be adjudicated but in principle an order might be made conditionally upon such an undertaking being forthcoming.
115. I do not accept the defendants' submission that the claim is based on bald averment or that the figures claimed have been plucked from the sky. That said, and acutely mindful of the observation of Barr J. that the information available to the court on an application such as this will often be very limited, I am not satisfied that I have sufficient information upon which I could safely make a fair assessment at the level proposed.
116. The sum claimed for lawyers' fees up to 16th December, 2020 when Mr. Kane's affidavit was sworn is €225,000 plus VAT. This is said to be the amount of costs "*incurred in respect of this application*" but it is not said whether these fees have been invoiced or paid. If any attempt has been made to separate the costs of the interim and interlocutory applications from the costs of mounting the action, it is not evident. While it is obvious that a great deal of work had gone into the interim and interlocutory applications, the sum claimed is very large and I find it difficult to contemplate that yet more might be claimed in respect of costs attributable to the action. There is no indication of how much of the global sum claimed is in respect of the solicitors and how much is in respect of counsel. By contrast with the claim in respect of Grant Thornton's fees, there is no indication of the hours worked, or by whom. Taking all these things together it seems to me that the evidence offered in support of the application is just too thin.
117. The evidence in relation to other professional fees is also, in my view, short of what it needs to be. There is a detailed breakdown of the hours worked by Mr. Harbison and his team of seven in Grant Thornton up to 31st October, 2020 with the qualification that "*I might be prepared to do something for you in due course.*" There is an invoice from Grant Thornton of 30th November, 2020 directed to the plaintiff for €10,000 plus VAT which Mr. Kane says "*he understands*" that the plaintiff has discharged. There is an invoice dated 25th November, 2020 from FTI Consulting Management Solutions Limited to Kane Tuohy LLP for €15,505 plus VAT which Mr. Kane positively avers has been discharged in full. FTI Management Solutions is the corporate vehicle of Mr. Mícheál

Morrissey, the independent IT consultant who carried out the imaging. It occurs to me that there may very well be an issue as to whether the cost of this work is part of the costs of the motion or the costs of the action.

118. I am uncertain whether *Heeney v. Deputy International Limited* requires that an order for payment on account must always be conditional upon the delivery of a formal bill of costs but the requirement of the solicitor's undertaking recognises the risk that the sum ordered to be paid on account may be more than is ultimately allowed, and if the paying party thinks that the payment on account is too much, fairness requires that he should be in a position to do something about it. In *Heeney* there had been an exchange of short form bills and it could be expected that a formal bill could be drawn in early course. In this case there is no direct evidence, and no evidence from which it could confidently be inferred, when a formal bill might be drawn and delivered.
119. I am not persuaded to make an order for an immediate payment on account.

Stay

120. In the event that I was persuaded to make an order for the plaintiff's costs, counsel for the defendants asked that execution would be stayed pending the determination of the action.
121. It is suggested that as a general rule execution of interlocutory costs orders should be stayed to abide the determination of the action, but I do not understand the observation of Collins J. in *Crean v. Harty* [2020] IECA 364 to the effect that stays in such terms are commonly granted as a rule that they generally should be.
122. In support of that application reference was made to my own decision in *Madden v. Louth County Council* [2020] IEHC 422. In that case the plaintiff's application for an interlocutory injunction failed on the ground that he had not established that there was a fair issue to be tried and the defendant was awarded the costs of the motion, but execution was stayed pending the determination of the action. It seems to me that that case was quite different to this. Although Mr. Madden had not on the interlocutory motion established a fair issue to be tried as to his entitlement to a permanent injunction, it was suggested that he might proceed with the action. He was, of course, entitled to do that and there was a risk that his action might be stifled by an interlocutory costs order. The premise of the stay was that, however unlikely it might have appeared to be, the substantive action might succeed.
123. This is not such a case. While there is some dispute as to precise detail – and the relevance of that precise detail – there is no dispute as to the substance of what the defendants did, or that what they did was unlawful. The plaintiff has been put to considerable expense because the defendants first of all did what they did and then denied having done what they did, while continuing to exploit the plaintiff's confidential information. As I outlined at para. 112 above, the defendants have secured nearly €1 million worth of business from the plaintiff's CRM list. While as I said in the context of the plaintiff's application for an immediate payment on account I do not have direct evidence

of what has been billed and paid to date, this is expensive commercial litigation and it will have to be funded on both sides. In my view it would not be just that the defendants' liability to pay the plaintiff's costs would be postponed while their liability in respect of their own costs would be met immediately.

Orders

124. For the reasons given, I will make an order for the payment by the first, second, third and seventh defendants of the plaintiff's costs of the interim application made on 5th November, 2020 and of this interlocutory motion. I will reserve to the trial judge the plaintiff's costs of both applications against the fourth, fifth and sixth defendants.
125. The plaintiff's application for a search order in the terms of para. 18 of the notice of motion will be refused.
126. The plaintiff's application for an order for a substantial payment on account of the costs of the interim application and motion will be refused.
127. The defendants' application for a stay on execution of the order for costs will be refused.
128. I will list the case for mention, remotely, in two weeks' time to allow the parties to consider my judgment.