



Neutral Citation Number: [2021] EWHC 9 (Ch)

Case No: IL-2011-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 08/01/2021

Before:

CHIEF MASTER MARSH

Between:

MARTIN JOHN COWARD

Claimant

- and -

(1) PHAESTOS LIMITED

(2) MINDIMAXNOX LLP

(3) IKOS CIF LIMITED

(4) IKOS ASSET MANAGEMENT LIMITED

Defendants

Derrick Dale QC and Ian Bergson (instructed by **BDB Pitmans LLP**) for the **Claimant**
James Abrahams QC (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 9 October 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
CHIEF MASTER MARSH

Chief Master Marsh:

Introduction

1. This claim was issued in 2010 and came on for trial before Asplin J (as she then was) in March 2013. On 17 May 2013 she handed down a lengthy judgment. The opening paragraph described the nature of the claim in the following way:

“This is a dispute as to the ownership of the intellectual property rights in certain of the Gauss software used by a highly successful quantitative trading business, the IKOS investment business which is now carried on through the Defendant companies. The IKOS business provides hedge fund and hedge fund management services to professional investors. Investment decisions are made by means of an automated system based on unique mathematical models and algorithms implemented in software and databases. It was not disputed that the business has been hugely successful, largely as a result of the software.”

2. She went on to describe the parties to the claim and it is convenient to adopt her summary:

“2. The business was founded as a partnership in 1992 in England. The precise date on which that partnership was founded and whether it was Ms Elena Ambrosiadou’s (Ms Ambrosiadou’s) business in which the Claimant, her husband Dr Martin Coward (Dr Coward) participated or was a joint enterprise in which for a short time, others participated, are matters in dispute. Ms Ambrosiadou and Dr Coward are now estranged, Ms Ambrosiadou having filed for divorce in April 2009. It was around that time in December 2009, that Dr Coward left the IKOS business and sought to set up a rival organisation based principally in Monaco. As a result of those events, numerous sets of proceedings were commenced in a number of jurisdictions, including these proceedings.

3. Dr Coward is a mathematician and computer programmer with a PhD in Control Theory Engineering from Cambridge University. Until his resignation on 11 December 2009, Dr Coward was Chairman and a director of IKOS CIF Ltd, the Third Defendant, (IKOS CIF). It is not disputed that Dr Coward wrote the original software upon which the IKOS business was based and made a significant contribution to the development of the software over the years.

4. Ms Ambrosiadou is a Chemical Engineering graduate who obtained an MBA from Cranfield Business School and went on to work for British Petroleum before founding the IKOS business with or with the assistance of Dr Coward. She is a Greek national. It is not disputed that whilst Dr Coward focussed on the programming side of the business, Ms Ambrosiadou dealt with structural, legal, financial and human resources issues.

5. The Defendants are companies which are part of, or have been associated with, the IKOS business. The First Defendant, Phaestos Limited is a UK company, incorporated on 5 July 1991. During part of the time with which this case is concerned, it was called IKOS (UK) Limited. For the sake of simplicity I shall refer to it as IKOS UK throughout. It was one of the partners of IKOS Partners to which I shall refer below, until IKOS Partners was dissolved as of 31

December 2006. Between October 2006 and April 2008, IKOS UK provided programming, research and technical services to IKOS CIF. It is not disputed that some of the software used in the IKOS business was written by IKOS UK employees between March 1993 and April 2008.

6. ...

7. The Third Defendant, IKOS CIF, is a Cypriot company incorporated on 29 December 1995. It was formerly known as IKOS OFC Limited. It has been IKOS Asset Management Limited's (IKOS AM) sub-investment manager since February 2006 (for the equities portfolio only) and since 1 July 2006 it has been IKOS AM's sub-investment manager for all the management of futures portfolios. It is not disputed that some of the software used by the IKOS business was also written by employees of IKOS CIF.

8. The Fourth Defendant, IKOS AM is a Cayman Islands company incorporated on 12 January 1996 and is the investment manager to the IKOS Fund which is a hedge fund also located in the Cayman Islands.

9. Currently, Ms Ambrosiadou is the Chief Executive Officer and a director of IKOS CIF and is the Chief Executive Officer and a director of IKOS AM."

3. The only gloss that needs to be added to this summary is that the second defendant ceased trading some time ago and has been struck off of the register and Ms Ambrosiadou is no longer the Chief Executive Officer and a director of IKOS CIF.
4. Asplin J mentions there having been numerous sets of proceedings between Dr Coward, IKOS and associated parties. Since 2013 the litigation has continued to proliferate. I am told they have now been involved in a total of 31 civil claims in six jurisdictions.
5. Reference was also made by Asplin J to Dr Coward and Ms Ambrosiadou's divorce proceedings in Greece that were commenced in April 2009. Divorce proceedings were commenced in Cyprus in 2010. Although their marriage was dissolved in January 2015, the financial aspects of their divorce proceedings have not been concluded. Indeed, Dr Coward's application that is the subject of this judgment is made with the explicit aim of obtaining access to documents Dr Coward says may assist him in the matrimonial proceedings in Cyprus in which he is seeking a share of the increase in the family wealth between the date of the marriage and the date of separating from Ms Ambrosiadou. That application was made to the court in Cyprus as long ago as 2010. IKOS takes a quite different view about the reasons why Dr Coward is making the application. It says that the application is nothing to do with the proceedings in Cyprus and that it is a general fishing exercise for the purpose of obtaining valuable IKOS documents.
6. In addition to the many civil claims, there are also ongoing criminal complaints against Dr Coward in Cyprus and Monaco arising out of the events that were the subject of Asplin J's judgment.
7. The most recent claim in this jurisdiction was brought by Dr Coward against Ms Ambrosiadou in the Commercial Court. Dr Coward alleged that that his former wife

was in breach of contract and fiduciary duty arising out of two oral contracts. Mr Andrew Henshaw QC (as he then was), sitting as a Deputy Judge of the High Court, stayed the claim on the basis, inter alia, that Dr Coward did not provide a plausible basis for the alleged oral agreements and, therefore, was unable to satisfy the applicable jurisdictional gateway.

8. IKOS says that Dr Coward has not succeeded in a single one of the civil claims he has brought against IKOS and associated parties. This is controversial statement when put in this straightforward way because success can be a matter of degree. However, it appears that Dr Coward has not succeeded outright in any claim and IKOS and Ms Ambrosiadou have been largely, but not entirely successful, in the claims they have brought.
9. The application that is the subject matter of this judgment arises from an order made by Asplin J on 30 July 2013 dealing with issues that were consequential upon her judgment. Before describing the terms of the application, it is convenient to summarise the nature of the issues in dispute and relevant parts of the procedural history.

The claim

10. Dr Coward claimed to be the owner of the intellectual property rights in the Gauss software and databases which were and are central to the operation of IKOS' businesses. IKOS counterclaimed seeking a wide range of relief that would follow from their case that they held the IP rights in the software. IKOS also counterclaimed for relief in relation to allegations of breach of confidence.
11. It is common ground that Dr Coward severed his links with IKOS in December 2009 and took steps to set up his own competing business in Monaco. Before doing so, he downloaded IKOS' software covertly to the "Red Laptop" which he had acquired for the purpose. He also took with him other items of computer hardware the data on which was the subject of breach of the confidence claims brought by IKOS. The items of hardware were described as the "Burns Laptop", the "Burns USB" and the "Steining PC" (together "the Devices"). The Burns Laptop and the Burns USB belonged to Mr David Burns who was an employee of IKOS. The Steining PC was so named because it was kept at Dr Coward and Ms Ambrosiadou's residence in West Sussex. The "Burns and Steining Materials" comprise the information stored on the Devices.
12. During the course of the litigation Dr Coward handed the Steining PC to Hogan Lovells, who then acted for him, in March 2010 and handed the Burns Laptop and the Burns USB to Hogan Lovells in August 2010.
13. An interlocutory order was made by Morgan J on 10 February 2012 which made provision for an inspection and confidentiality regime in relation to inter alia the "Forensic Materials". They were to be subject to the regime in CPR 31.22 and the order contained permission to apply.
14. At the outset of the trial before Asplin J, IKOS accepted a proposal put forward by Dr Coward to narrow the issues before the court. This agreement is reflected in an amendment to IKOS' counterclaim with the addition of paragraphs 55A, 55B and

55C. In substance the amendments recorded that IKOS would limit its claim for breach of confidentiality to exclude its case in respect of the Burns and Steyning Materials. In return, Dr Coward would provide undertakings in an agreed form and all copies of the Burns and Steyning Materials in his possession would be returned and/or destroyed, subject to the retention of a single image taken from all the Devices. The basis upon which the images would be retained was left to the end of the trial.

15. Several points bear emphasis:

- (1) The Burns and Steyning Materials were the subject of review for the purposes of disclosure by Dr Coward under CPR rule 31 during the claim.
- (2) By the time disclosure was given, Dr Coward had already made his application in the matrimonial proceedings to which some documents comprised in the Burns and Steyning Materials are now said to be relevant.
- (3) Dr Coward did not claim to be the owner of either the Burns Laptop or the Burns USB.
- (4) It was common ground at the trial that IKOS owns the Steyning PC.
- (5) As a result of the agreement reached at the outset of the trial, the court did not make a determination about the alleged breach of confidentiality in relation to the Burns and Steyning Materials although Dr Coward gave an undertaking in relation to use of it.

16. The judgment given by Asplin J concludes with a section under the heading:

“What should the regime be for the delivery up/destruction by Dr Coward of the Burns/Steyning Materials?”

17. The question clearly relates to the loose end that was left by the agreement reached at the outset of the trial. The answer to the question posed by the judge was given in the following terms:

“308. It has been agreed that a forensic image of all of the Burns and Steyning materials should be retained by Navigant, an independent firm which has been jointly retained by the parties for similar purposes to date. It is also agreed that there be liberty to apply in this regard.

309. With regard to the Steyning PC, although it is not disputed that it is the property of the Defendants, as I understand it, they do not press for its return at this stage as long as it is also held by Navigant.

310. Although I will hear further submissions in this regard also, it seems to me to be relatively clear that all other copies of the Burns and Steyning Materials in the possession, custody or control of Dr Coward should be destroyed and the completion of the destruction confirmed on oath.”

18. It is significant that Asplin J required Dr Coward to destroy the Burns and Steyning Materials in his possession. Although no formal determination was made on IKOS’

claim for breach of confidentiality, the judge must have concluded that Dr Coward had no right to retain them.

The order dated 30 July 2013

19. The order made by Asplin J on 30 July 2013 recited IKOS' agreement not to pursue its counterclaim so far as it related to the Burns and Steyning Materials and after dealing with IKOS' successful counterclaim concerning the software and databases, dismissed Dr Coward's claim and ordered destruction of the material downloaded by Dr Coward to the Red Laptop. Paragraph 6 of the order provided that the parties were to comply with the regime set out in Schedule D of the order concerning what are described there as the "Forensic Materials"¹. The parties were permitted to vary the terms Schedule D by agreement; no such agreement has been reached.
20. Paragraphs 11 to 16 of the order deal with confidentiality and continued the regime set up by the order of Morgan J with a number of changes. Schedule C to the order lists the documents that were referred to during the trial that were to remain confidential.
21. Paragraph 13 of the order provided that:

"13. In respect of any materials not listed in Schedule C to this Order:

 - (a) *CPR 31.22 and 32.12 (and the exceptions thereto) shall apply in the usual way:*
 - (b) *the Inspection and Confidentiality Regime which is in place for these proceedings shall continue to apply to any materials to which it applies. Save where those materials have, in respect of a document been read to or by the Court or referred to in a hearing held in public or, in respect of a witness statement or expert report, been put in evidence at a hearing held in public."*
22. The regime in Schedule D to the order comprised the following elements that are relevant to the application:
 - (1) The "Burns & Steyning Documents" are defined as being the documents identified in Schedule B of the order. Schedule B contains a lengthy list of such documents. They are of course the documents falling into that category that were disclosed by Dr Coward following his lawyers' reviews of the Devices for the purposes of disclosure.
 - (2) Under paragraph 4(a) and (b) the services provider Navigant Consulting (Europe) Limited (now re-named Ankura Consulting (Europe) Limited) was to retain for 10 years the Steyning PC, the Burns Laptop and the Burns USB and the images obtained from those devices. The cost of retaining this hardware and the images was to be borne equally by Dr Coward and IKOS.
 - (3) Under paragraph 7:

¹ This broadly speaking was the definition used to describe the Devices used in Annex B to the Morgan J order.

“Navigant and the parties have permission to apply to the Court on notice to all parties to this Order for further directions as to the further use or disposal of the items set out in Paragraph 4(a) to (d) above. For the avoidance of doubt nothing in this order shall create any right to access any document that would not exist but for this Order.”

- (4) Under paragraph 8(a) Lewis Silkin (Dr Coward’s solicitors at the time of the trial) were required to destroy the images of the Burns Laptop, the Burns USB and the Steyning PC in their possession.
- (5) Under paragraph 10(a) Dr Coward was required to search for and destroy all copies or versions of the Burns & Steyning Documents.
- (6) Paragraph 15 provided that:

“If Dr Coward believes that any of the items which he is required to destroy under this Order contain information which he would (but for the terms of this Regime) be entitled to and which he wishes to retain, he may make an application to the Court for Directions, supported by evidence, on notice to IKOS, such application to be made as soon as reasonably practicable.”

23. To put the application now made by Dr Coward under that paragraph in its proper context it is worth recording that:

- (1) Although no determination was made in respect of the confidentiality claim in respect of the Burns and Steyning Materials, they were the subject of the regime in Schedule to the order which required Dr Coward to destroy all copies in his possession.
- (2) He was given an opportunity under paragraph 15 to apply to retain those parts of the Burns and Steyning Materials to which he claimed to be entitled. No such application was made.
- (3) The confidentiality regime set up under Morgan J’s order was to continue. However, it appears to me that the order itself was largely superseded by Asplin J’s order and the permission to apply provisions in the Morgan J order were effectively superseded.
- (4) The reasons why Ankura was required to retain images from the Devices and the Devices is not spelled out in the order but as a matter of impression the thinking appears to have been essentially pragmatic. It avoided the need to determine rights in the Forensic Materials. The images and the Devices were warehoused for 10 years against the possibility of access to them being required. However, the retention of the images and the Devices must be seen in light of the destruction of the Burns and Steyning Materials in Dr Coward’s possession.

The Application

24. The application notice summarises the basis upon which the application is made in the following way:

“The Claimant seeks an Order (a draft of which is attached hereto) pursuant to the liberty to apply in the Morgan and/or Asplin Orders and/or CPR 31.22(1)(b), for searches to be undertaken of the Device Images of the Steyning PC, the Burns Laptop and the Burns USB Drive held by Ankura pursuant to paragraph 4 of Schedule D to the Asplin Order, with a view to identifying specific documents relevant to the issues in Cypriot Proceedings between him and Ms Elena Ambrosiadou (Application No: 2/2010). This Application Notice adopts the same defined terms as the draft Order. The Order includes a regime inter alia: (a) to enable any documents relevant to the Cypriot Proceedings to be identified; (b) to allow any Agreed Documents to be used for the purposes of the Cypriot Proceedings; and (c) to identify any Disputed Documents and insofar as necessary for the parties to refer any matters in dispute back to the Court for resolution. The Order is sought because it is in the interests of justice for access to and use of the documentation to be permitted and for the further reasons set out in the witness statements of Liam Hemmings and George Triantafyllides of 6 February 2020 and 12 February 2020, attached hereto.”

25. The draft order has been amended since the application was made to take into account criticisms by IKOS. However, in essence, the regime proposed by Dr Coward is essentially that summarised in the application notice namely:
- (1) Search terms (the terms are not agreed) would be applied by Ankura to the Burns and Steyning Materials and a Keyword Responsive List (“the List”) produced that includes the file name, date, sender and recipient.
 - (2) IKOS would then have an opportunity to review the List for privilege. Any disputes about privilege would be resolved by independent counsel or the court.
 - (3) The documents in the List (other than privileged documents) would then be hosted by Epiq and reviewed by Dr Coward. This would be subject to the restrictions of a confidentiality club. In his closing submissions Mr Dale suggested that if it were necessary the initial review could be undertaken by Dr Coward’s lawyers without his involvement.
 - (4) The parties would then attempt to agree which documents are relevant to the matrimonial proceedings in Cyprus. If agreement is not possible the court will be asked to determine relevance.
 - (5) If there are relevant documents, Dr Coward would be entitled to seek to deploy them in the proceedings in Cyprus, subject to suitable safeguards to protect confidentiality being put in place.
26. The court has been asked to consider the following witness statements:
- (1) Two statements from Mr Liam Hemmings who is an English qualified solicitor based in Monaco who works for Dr Coward. He has worked for Dr Coward since 2011 and has first-hand knowledge of this litigation and other relevant issues.

- (2) Two statements from Mr George Triantafyllides who is a member of the Cyprus Bar and has knowledge of the matrimonial proceedings in Cyprus.
 - (3) A statement from Mr Andrew Moir who is a partner with Herbert Smith Freehills LLP who act for IKOS.
 - (4) Two substantive statements (and one corrective statement) from Mr Michael Polymenakos who is consultant to IKOS. He gave evidence at the trial before Asplin J who accepted his evidence without reservation.
 - (5) Two statements from Mr Polyvios Polyviou who is a member of the Cyprus Bar and Ms Ambrosiadou's retained legal counsel in the matrimonial proceedings in Cyprus.
27. The length and detail of the evidence provided to the court does much to mask the issues that have to be determined. No doubt this is a function of the manner in which the parties have conducted their disputes over the last 11 years. Neither of them has provided evidence to the court. In Dr Coward's case this is surprising because his application relies upon, in part, his recollections of disclosure in the claim.
28. Neither Dr Coward nor Ms Ambrosiadou impressed the trial judge as a witness. Prior to commenting about the manner in which they each gave evidence she observed:
- "It was quite clear that they are both highly intelligent and astute individuals. Unfortunately, their approach to giving evidence was tainted by their obvious and deep animosity and the extremely close correlation between their business and their personal affairs."*
29. As to their evidence, Asplin J went on to say:
- (1) *"Dr Coward is quite clearly a highly intelligent and articulate man. However, at times, I found his approach to giving evidence to be cavalier.*
- ...
- I also found him to be evasive when cross examined as to his knowledge of the content of various agreements which he had signed and public documents relating to the IKOS business. In all therefore, I did not find Dr Coward to be an entirely satisfactory witness."*
- (2) *"I found Ms Ambrosiadou to be extremely evasive and prone to making lengthy speeches in order to avoid answering questions which did not suit her, in what often appeared to be an attempt to obfuscate and confuse. Accordingly, I did not find her to be an entirely satisfactory witness any more than Dr Coward."*
30. IKOS says that the court should be careful when considering evidence provided on behalf of Dr Coward where it records his recollections and describes his motives for making the application. However, it is not the function of the court on dealing with this application to make findings of fact unless the evidence lacks any substance at all. It is neither necessary or appropriate for the court to determine, as IKOS would wish,

that Dr Coward's motives for making the application are, in fact, unrelated to the matrimonial proceedings.

31. The key points concerning the matrimonial proceedings in Cyprus that are relevant for the purpose of the application are:
 - (1) The proceedings commenced in 2010.
 - (2) In January 2010 Dr Coward issued application number 2/2010 seeking a share of the increase in Ms Ambrosiadou's assets between the date of the marriage and their separation arising from his contribution. The application makes reference to the SPV that is at the heart of the application. The application in the Cypriot proceedings was therefore issued long disclosure took place in this claim.
 - (3) By June 2012 Ms Ambrosiadou had filed a Defence and Counterclaim.
 - (4) The hearing of oral evidence commenced on 27 September 2016, but was adjourned until November 2019 when Dr Coward was called as the first witness.
 - (5) In 2018, both parties amended their respective cases.
 - (6) Dr Coward's evidence in chief given in November 2019 was not concluded on that occasion and the case is due to resume with a continuation of Dr Coward's evidence in chief and his cross-examination.
 - (7) Ms Ambrosiadou's evidence and her cross-examination will follow on later at some point in 2021.
32. Dr Coward's application relates to assets that he alleges Ms Ambrosiadou has not disclosed in the matrimonial proceedings. It is focussed on an investment of \$60 million that was initially held in a special purpose vehicle called IKOS 2003 and latterly in Ms Ambrosiadou's name in an IKOS fund known as the IKOS Equity Hedge Fund. The shorthand used by the parties for the special purpose vehicle and the fund are respectively "the SPV" and "IKOS EH" and I will adopt those abbreviations.
33. According to Dr Coward, the SPV was an offshore vehicle that was set up for the purposes of mitigating tax relying upon a perceived loophole in Chapter 2 Part 7 of the Income (Earnings and Pensions) Act 2003. The machinery that was deployed for that purpose does not matter save to say that according to Dr Coward:
 - (1) The scheme was set up at a time when the business of IKOS was operated as a partnership between Dr Coward and Phaestos Limited, which was controlled by Ms Ambrosiadou.
 - (2) \$60 million was deposited in the SPV.
 - (3) HMRC challenged the scheme and the funds were ring-fenced.
 - (4) Ultimately Ms Ambrosiadou had the benefit of these funds.

34. Ms Ambrosiadou did not make reference to these funds in her written evidence in the proceedings in Cyprus. Dr Coward seeks permission to have access to the Burns and Steyning Materials for searches to be carried out to locate documents that relate to the SPV. He says that the application is made at this stage because his lawyers in Cyprus requested him to obtain further evidence about the SPV after his examination in chief was adjourned part heard in the autumn of 2019.
35. His belief that the images include documents that are relevant to the SPV, and thus relevant to the proceedings in Cyprus, is said to be based upon his recollection about material facts being prompted by a review of the Material that resulted from orders made under the Police and Criminal Evidence Act 1984 by His Honour Judge Dight on 17 September and 2 October 2019. The orders were made in response to an application made on 13 September 2019 by the City of London Police for Ankura to produce documents that were relevant to the investigation. The application was a response to a Letter of Request from the authorities in Cyprus dated 11 April 2016. The Letter of Request followed a criminal investigation in Cyprus into Dr Coward's access to IKOS's computers in 2009 and concerns whether Dr Coward has committed offenses under the laws of Cyprus concerning illegal access to a computer system and illegal interference with (a) computer data and (b) a computer system.
36. The response to the application made by the City of London Police had two stages. First, an inspection regime was agreed which forms Schedule A to HH Judge Dight's order dated 17 September 2019. Secondly, after the inspection procedure had been followed, a Production Order was made by HH Judge Dight on 2 October 2019 by consent. The inspection regime had the following principal features:
 - (1) It proceeded on the basis of lists of documents. A 'Mapping List' was produced first which comprised a list of the documents on each of the devices with their file path and other basic metadata.
 - (2) From that list, Dr Coward was able to select documents for which he wanted to extract more detailed metadata.
 - (3) Using the secondary stage of metadata extraction Dr Coward could then identify the documents he wanted to inspect.
37. At each stage IKOS was entitled to object and provision was made for material that might be privileged to be reviewed by independent counsel. In any event, the point IKOS seeks to rely upon is that, for the purposes of the inspection exercise, Dr Coward insisted upon only metadata being inspected in order to determine which documents were relevant to the application by the City of London Police. This was a much more limited approach compared with the proposals in the draft order this court is asked to make. Furthermore, IKOS points to the inherent improbability of this process jogging Dr Coward's memory of documents that were inspected as part of disclosure in 2012.
38. Mr Hemming says that after Dr Coward's evidence was adjourned part heard in the autumn of 2019 he was asked by his lawyers to produce documents providing evidence of the value of the SPV and Dr Coward mentioned to Mr Hemming that there were likely to be documents on the Devices. Mr Hemming goes on to say:

“25. I understand from Dr Coward that he received regular reports about the values of the various IKOS funds including IKOS EH and that sometimes he would receive emails concerning the value of his and Ms Ambrosiadou’s assets, prepared by IKOS’ in-house accountants. Dr Coward also recalled that early on in the litigation between Dr Coward and Ms Ambrosiadou, Mr Burns had prepared some analyses of the SPV and IKOS EH and Dr Coward thought that these documents may have been on David Burns’ laptop and USB stick. Dr Coward explained to me that this recollection was prompted by his review in the autumn of 2019 of lists of files held within the Forensic Materials for the purposes of the Production Order application. Until that time Dr Coward told me that he had largely discounted the Devices as a potential source of relevant documentation for the purposes of the Cypriot Proceedings.

26. I believe Dr Coward’s recollection is correct for the following reasons:

a. I was part of the team that reviewed the Devices as part of the disclosure exercise in the IP Claim. I do remember seeing at least one or two tables of assets with two columns, one marked Elena the other Martin. These were not detailed accounting type documents but rather lists of perhaps 10 to 15 items with a value given for the couples respective shares. I cannot recall the contents of those tables in any detail but when I mentioned these to Dr Coward, the description I gave matched his recollection, and I believe that they contained information relevant to the SPV.

b. During the Production Order proceedings ... I received and reviewed a list of file names of the documents on the Devices. I believe that this list contains documents likely to be relevant to the issues described at paragraph 21 above. I do not give further details of the contents of this list in this statement, because it is a confidential document for the purposes of the Production Order proceedings. However, I reserve the right to seek permission to do so in due course should that prove necessary”

CPR 31.22

39. I will first deal with the alternative ground referred to in the application, namely CPR 31.22(1)(b). The rule provides:

“31.22 (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—

...

(b)

the court gives permission;

...”

40. It is right to note that paragraph 13 of Asplin J’s order records that CPR 31.22 applies “in the usual way”. This does not, however, create any additional right or entitlement. It merely records that the rule applies. It does not vary the application of the rule for the purposes of this claim. In short, it does not assist Dr Coward’s case whether it is taken in isolation or reviewed with the entire provisions of Asplin J’s order.

41. CPR 31.22(1)(b) is, in any event, of no assistance to Dr Coward because:

- (1) It applies only to documents that have been disclosed to a party, not to documents disclosed by the applicant. The Steyning and Burns Materials were disclosed by Dr Coward, not by IKOS.
 - (2) If it is the case that Dr Coward wishes to search the Steyning and Burns Materials for documents that were not disclosed by him, he cannot rely upon the rule because it applies only to documents that are in the possession of the applicant. Even if the wider control test in CPR 31.8 is taken, Dr Coward is unable to say he has a right to possession of the entire contents of the Devices or that he has a right to inspect them.
42. Mr Dale submitted that although this is not a typical case where Dr Coward is seeking to use documents disclosed by IKOS, and although the authorities considering how the court should exercise its discretion under CPR 31.22(1)(b) are not on all fours with this case, it is nevertheless helpful to have regard to the principles they embody. He invited the court to have regard to the summary of those principles set out in the judgment of Eder J at [16] in *Tchenguiz v Director of the SFO* [2014] EWHC 1315 (Comm). Although that is indeed a helpful summary of the principles that apply to CPR 31.22(1)(b), I do not find it to be of assistance here because the application is made under a regime for retention of the Devices and the Materials at the end of a trial in the circumstances I have described.

Dr Coward's additional grounds

43. As Dr Coward's case was developed in the exchanges of witness statements, additional grounds of entitlement to have access to the Materials were put forward. The grounds are summarised in Appendix 1 to the applicant's skeleton argument. In summary they are:
- (1) IKOS acted as agent for Dr Coward in holding the documents relating to the SPV.
 - (2) Dr Coward was a partner of IKOS Partners and there is inter alia a right of inspection of partnership books under section 24(9) of the Partnership Act 1890.
 - (3) Dr Coward was an investor in IKOS Funds which entitled him to receive documents valuing the funds.
 - (4) Dr Coward's personal data is or may be held on the Devices and he is entitled to access this information.
44. During the course of the hearing Mr Dale was pressed to say whether he relied on these grounds. Very fairly he accepted that they could not be grounds for searching the Burns and Steyning Materials in order to ascertain whether they contain documents that Dr Coward may, depending upon their nature, have an entitlement to see. In short, these additional grounds add nothing to the application.
45. In the evidence filed on behalf of Dr Coward it was suggested that CPR 31.17 might assist him. The provision in CPR rule 31.17 derives from section 34(2) of the Senior Courts Act 1981 which provides:

“On the application, in accordance with rules of court, of a party to any proceedings to which this section applies, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim ...”.

46. CPR rule 31.17(3) provides that:

*“(3) The court may make an order under this rule only where—
(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.”*

47. Even though Ankura is not in a strict sense a party to the proceedings, it seems to me it is obviously not a person within the contemplation of section 34(2) given that its charges are met jointly by parties and it holds the Devices pursuant to Asplin J’s order. If that hurdle were to be surmounted, the provisions have no application to a claim that was concluded seven years ago and in which there are no substantive issues between the parties to be determined.

The Principal Ground

48. I turn to deal with the principal ground of the application, namely the permission to apply provision in paragraph 7 of Schedule D of Asplin J’s order. Although it is also made under the Morgan Order, the Asplin Order provides for the confidentiality regime set up under the Morgan Order to continue to apply in certain respects. It seems to me that the Asplin order supersedes its predecessor, which was an interlocutory order made to govern the position until the end of the trial, and applying under the Morgan order adds nothing.

49. There are several initial points about paragraph 7 of Schedule D:

- (1) The provision must be construed in its context, namely the agreement by IKOS not to ask the court to determine the confidentiality claim as it related, prior to the amendment on the first day of the trial, to the Burns and Steyning Materials. The agreement is set out in a recital to the order.
- (2) Asplin J’s conclusions about the Burns and Steyning Materials are clearly set out in the closing paragraphs of her judgment.
- (3) The images of the materials on the Devices held by Lewis Silkin were to be destroyed and the images and the Devices held by Navigant were to be held by a neutral third party for 10 years.
- (4) Dr Coward was given an opportunity under paragraph 15 to apply for direction about the retention of items he was required to destroy if they contained information that, but for the terms of the Regime, he would be entitled to retain. No such application was made in relation to documents

concerning the SPV, albeit that financial claims in the matrimonial proceedings had already been made.

50. At the invitation of the court there was some discussion about the principles that apply to the construction of court orders. There is a helpful and interesting discussion of the subject in the judgment of Mr Edward Murray (as he then was) sitting as a Deputy Judge of the Chancery Division in *Feld v Secretary of State for Business, Innovation and Skills* [2014] EWHC 1383 (Ch) at [27]-[29]. That decision does not appear to have been cited to Snowden J in *Brennan v Prior and others* [2015] EWHC 3082 (Ch) at [21]-[22]. I also have in mind Lord Sumption's remarks in the Privy Council in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [13].
51. These decisions establish that:
- (1) The exercise of construction is to establish what the judge would objectively be understood to have meant by the words used in the order.
 - (2) The general approach to the construction of written instruments or documents is to be applied, with the necessary changes, acknowledging that construing the meaning of an order is distinctly different from constructing a contract or a statute.
 - (3) Snowden J framed the test in *Brennan v Prior* at [21] as being:

“The question is what a reasonable person having all the background knowledge, which would have been available at the time to the maker of the document would have understood [the judge] to be using the language in the document to mean ...”.
 - (4) He went at [22] to set out the test to be found in the judgment of Lord Neuberger in *Arnold v Britton* [2015] 2 WLR 1593 at [15].
 - (5) The subjective intentions of the parties are not admissible and strictly the subjective intention of the judge is not admissible unless it is sought to amend the order under the slip rule.
52. It seems to me there are limits to the extent to which the court can apply by analogy the principles summarised by Lord Neuberger in *Arnold v Britton* and elsewhere. It is not clear from the authorities, for example, whether it is permissible to have regard to a transcript of discussions between the court and counsel before the order was finalised.
53. Mr Dale relies on the decision of the Court of Appeal in *Calzaghe v Warren* [2010] EWCA Civ 1447 as providing authority for the proposition that regard may be had to the transcript. Moses LJ having dismissed Mr Warren's appeal dealt briefly with Mr Calzaghe's cross-appeal which turned on whether there was an agreement between the parties that was said to have been recorded in a recital to an order of the first instance judge. Moses LJ had regard to a transcript of discussion between counsel for the purpose of deciding this issue. However, the approach adopted in that case does not support the existence of a principle that in every case where the terms of an order are being construed the court may have regard to discussion with the court because in

Calzaghe v Warren to court was concerned with establishing whether an agreement in a particular form existed.

54. Mr Dale submitted that the Proviso does not form an obstacle to Dr Coward's application in circumstances in which they were in his possession prior to being put into escrow first under the terms of the Morgan Order and later under Asplin J's order. I consider that on a plain reading of paragraph 7 of Schedule D, in the full context of the claim, the judgment and the order as whole, its meaning is clear and the proper construction of the order is not open to any real doubt.
- (1) Paragraph 7 of Schedule D enables Navigant and the parties to apply for direction "as to the further use or disposal of the items in ..." paragraph 4(a) and (b) of the schedule. Leaving aside the last sentence of paragraph 7 ("the Proviso"), the language is not apt to give any right over the documents or information in them that did previously exist.
 - (2) The effect of the Proviso is not limited to Schedule D ("... nothing in this Order ...") and concerns access to documents rather than to hardware.
 - (3) One possible reading of the Proviso is that it relates to documents that would not exist but for the Order rather than a right of access that would not exist but for the order. It is, however, common ground between the parties that the former is not what was intended.
 - (4) The Proviso is clear. Unless Dr Coward is able to show a right of access to a particular document or documents he is unable to rely upon paragraph 7 of Schedule D.
55. Dr Coward wishes to undertake a wide-ranging search of the Burns and Steyning Materials using keywords. Inevitably, even if the keywords are limited in number and carefully defined, their application across a considerable volume of data will lead to a range of document being thrown up from the searches. It is inevitable that they will include business documents that belong to IKOS and confidential documents. It is notable that the methodology proposed by Dr Coward in this application is directed to documents rather than metadata, unlike the review for the City of London Police application. Dr Coward is unable to say that he wishes to search only for documents to which he has a pre-existing right.
56. It was not the intention of the order that Dr Coward was to be entitled to review a large body of data for the purpose, he hopes, of finding documents that will help his case against his former wife.
57. I do not consider that the court is entitled to have regard to a transcript of discussions between counsel and the judge in order to establish the proper meaning of the order where there is no ambiguity on the face of the order. The position might be different if the application was to correct the order under the slip rule to reflect what is said to be the true intention of the judge. Where the issue is of construction, there is a good reason why the transcript should not be considered because counsel's submissions made are more apt to reveal what the advocates had in their minds rather than what the judge was thinking. The judge may or may not intervene during those submissions and any intervention may merely reflect initial thoughts testing the submissions.

Applying the general approach to construction, discussion between the court and counsel is analogous to negotiations between the parties which are, as a matter of policy, not admissible as an aid to construction.

58. In any event, I do not consider that the transcript assists Dr Coward. Mr Dale relies upon the following exchanges between Dr Coward's counsel and the judge at the consequential hearing at the time the Proviso was being considered.

“MR. BLOCH: My Lady, there is a fundamental difference between the grounds on which, for example, Dr. Coward can rely and the grounds on which my learned friend can rely. In relation to something which was in Dr. Coward's possession and which he has agreed to, as it were, put into safekeeping, he does not need to establish the standard bases on which ----

MRS. JUSTICE ASPLIN: No, he does not need to establish anything. He can apply.

MR. BLOCH: Whereas in my learned friend's case he would have to establish grounds.

MRS. JUSTICE ASPLIN: He would have to found his foundation.

MR. BLOCH: The only question is how we make that clear in the order”.

59. Mr Dale submits that the Proviso was intended to apply in a different way to Dr Coward than to IKOS; that he does not need to show grounds to have access the Burns and Steyning Materials, whereas IKOS would have to establish a basis for having access. There is, however, no obvious explanation about why the judge would have intended the Proviso to go one way when the language agreed between the parties and approved by the judge applies to the parties equally.

60. I accept Mr Abrahams' submission that the context in which the exchange took place was when Mr Bloch was focussing on hardware which was Dr Coward's own property such as the Red Laptop. If Mr Bloch's observation is applied in reverse, IKOS would not need to show grounds for seeking access to the Steyning PC. Quite different considerations apply to the Materials that were extracted from the Devices bearing in mind Asplin J's requirement that Dr Coward should destroy all copies of the Burns and Steyning Materials. Later exchanges in the transcript between IKOS' counsel and the judge point towards an insistence by IKOS for the Proviso to apply equally between the parties.

61. Even if Dr Coward were able to establish a basis upon which he is entitled to have access to the Burns and Steyning Materials for the purpose of undertaking a search for documents relating to the SPV, I consider there are sound reasons for declining to make an order. In summary they are:

- (1) There is no general power in the English court to order disclosure in support of foreign proceedings. The proper place to apply is in Cyprus.
- (2) No explanation has been given about why an application was not made in Cyprus at a much earlier stage. Dr Coward is now in the middle of giving his evidence.

- (3) There is much debate between Mr Triantafyllides and Mr Polyviou about the scope of the Cypriot court's powers. However, it is clear that Dr Coward could have applied under Order 28 of the Republic of Cyprus' Civil Procedure Rules for discovery and/or inspection. Furthermore, the Cypriot Court could have applied for assistance pursuant to Council Regulation (EC) No 1206/2001.

62. The application will be dismissed.