

IN THE HIGH COURT OF JUSTICE No: HC-2014-001479
CHANCERY DIVISION
NCN: [2014] EWHC 4616 (Ch)

Court 6

The Rolls Building
Fetter Lane
London WC2 A2U

12 December 2014

Before:

THE HONOURABLE MR JUSTICE BARLING

BETWEEN:

FILMFLEX MOVIES LIMITED

Claimant/Applicant

-and-

PIKSEL LIMITED

Defendant/Respondent

ANTHONY PETO QC and **TOM CLEAVER** (instructed by Covington & Burling)
appeared on behalf of the Claimant

TIMOTHY HOWE QC and **DEEPAK NAMBISAN** (instructed by Olswang) appeared
on behalf of the Defendant

Friday, 12 December 2014

Judgment

MR JUSTICE BARLING:

1. This is an application for interim relief. It last came before Mr Justice Mann in the interim applications court on 3 December 2014. At that stage there were two applications. It was accepted by all sides that the first one, with an agreed time estimate of between one day and one day and a half, could not be heard then because there was insufficient time. The second application, which is now before me, was to hold the ring until the more substantive matter could come on in the early part of next year.
2. In this application, the claimant, Filmflex Movies Limited, represented by Mr Anthony Peto QC and Mr Tom Cleaver, seek delivery up to a third party of a source code and associated materials. It claims entitlement to this under a contractual arrangement to which I will refer again in a moment. The application is for delivery-up to a software developer called Aditi Technologies Private Limited (“Aditi”), on terms which are intended to restrict the use of the material and to prevent it being passed to the claimant or to others until the full application relating to the claimant's substantive entitlement to that information and data can be heard by the court.
3. The assumption throughout, (certainly before Mr Justice Mann, and today before me), has been that that hearing should, all being well, come on towards the end of January or the beginning of February 2015.
4. The defendant and respondent to this application is Pikel Limited, represented

today by Mr Timothy Howe QC and Mr Deepak Nambisan.

5. Before Mr Justice Mann on 3 December all the parties agreed that, because this matter would be listed for an urgent hearing today lasting no more than two hours, it would be heard on the basis that, for the purposes of this application only, there is an arguable case within the meaning of the well-known *American Cyanamid* principles. That understanding has not been entirely respected, in that the skeleton arguments have descended into details of the underlying contractual entitlements of the claimant. However, I intend to proceed on the agreed basis that the claimant has an arguable case, but that there is something for the defendant to argue about in terms of the claimant's entitlement to the material in question.
6. The claimant provides video on demand movie streaming services and has licences for that purpose from various content owners in order to distribute movies in a digital form and to do so online to its customers, such as Virgin Media.
7. The defendant, Pikel Limited, is an IT company which was previously called ioko365 Limited. It designs, builds and runs digital media platforms for media entertainment companies such as the claimant.
8. In May of this year, the claimant was acquired by a leading technology company called Vubiquity, which is said to be a direct competitor of the defendant. Prior to that acquisition, the claimant and the defendant appeared, according to the evidence, to have been in a collaborative relationship which was marked by a number of contractual arrangements, including the one to which I have referred.
9. The evidence has been provided in the form of a number of witness statements. On behalf of the claimant these statements are from, in particular, Mr Demby,

who is Vubiquity's chief information officer, and on behalf of the defendant from, in particular, Mr Mark Christie, who is the chief technical officer of the defendant. In addition, from the defendant's point of view, there is also a witness statement from Mr Klaus Peter Heiland, the interim CEO of the defendant.

10. The defendant, as I have said, is a provider of video software and related services, designing, building and managing software platforms for companies such as the claimant, who use them to deliver the video on demand streaming content to their own customers.
11. In the course of the argument before me, the subject matter in issue in this application has been variously labeled: it is either called the “combined source code” or the “composite Píksel source code”. The adjectives "composite" and "combined" are indications of a division of ownership which is common ground and to which I will refer again in a moment. The composite or combined source code underlies the operation of the platform by which the claimant operates its streaming services.
12. The defendant's customers include, Virgin Media and a number of other leading media companies, such as Everything Everywhere, TalkTalk and Eircom.
13. The combined source code, namely the information underlying the software in question, is a collection of computer instructions written in what is called human readable computer language, and setting out in text form the building blocks which comprise the operating system software enabling the platform to operate. This code is currently held by the defendant itself and also independently by a neutral third party escrow agent called NCC Group Escrow Limited, which was jointly appointed by the claimant and the defendant pursuant to and also prior to

the entry into a formal escrow agreement made between the parties and the escrow agent.

14. In these proceedings the claimant claims to be entitled, under the terms of a “master services agreement” entered into in 2012, to obtain a copy of the whole of the combined source code in order to, amongst other things, use and manipulate the content of that source code. I have been shown provisions of the master services agreement which are relied upon for that effect; these are couched in wide terms, relied upon heavily by Mr Peto as indicating that this is material to which the claimant has, in effect, unrestricted access.
15. The master services agreement has a number of key aspects, one of which is the introduction of something called “the identified date”, being 24 June 2011. The purpose of this date was to represent a starting point for a new intellectual property ownership structure under which the intellectual property rights in respect of the software underlying the platform that were created *prior to* that date belonged to the defendant, and the intellectual property rights in respect of relevant software that were created *after* that date would belong to the claimant. Therefore, the combined source code comprises both the pre-identified date source code and the post-identified date source code.
16. It emerged as common ground in the course of the hearing today, (indeed it may well have been clear before then) that the claimant is entitled in principle to access to the *post*-identified date source code. However, the controversy that apparently exists in respect of that aspect relates to the fact that some data has been supplied by the defendant to the claimant purporting to be the post-identified date source code, but the claimant says this is not in a form which is useful to it.

17. There is a further issue in regard to this element of the combined source code: the draft order for the purposes of today's application includes an order for delivery up to the third party in question (Aditi) of *all* the combined source code, including the element to which the claimant is admittedly entitled. However, Mr Howe submits that what is required has already supplied, and expresses the concern of his client that if they supplied more data or the same data in a different form, then it would involve supplying that element of the combined source code which they claim to own themselves and which is the main subject matter of the present application and dispute.
18. How best to resolve that particular issue is, it seems to me, something I shall have to deal with, if appropriate, after this judgment.
19. The relief that is now sought by the claimant is for delivery up of the material with a view to Aditi, the third party, carrying out what the claimant refers to as a “scoping exercise” in respect of the combined source code. The claimant says that the code must be supplied urgently to Aditi for reasons which I will need to address in a little more detail. In particular, delivery up is required because one of the claimant’s major customers, Virgin Media, has indicated that it wishes to develop a new functionality for the platform, known as “electronic sell through” or EST, so that Virgin's end users can purchase rather than rent film and video content. According to the claimant’s evidence, it first learnt of this business opportunity on 10 November 2014, and thus after some inconclusive correspondence with the defendant, the main application for delivery up was taken out on 24 November.
20. The scope of Aditi's business is not in dispute, and it appears to be common

ground that that company is at the very least a potential direct competitor of the defendant. For this reason the defendant submits that it has the most serious concerns about the material in question being delivered to Aditi, who is not a party to the proceedings and who, it is accepted, will not give a cross-undertaking in damages. The defendant submits that if it has access to the combined source code Aditi would inevitably acquire knowledge of valuable know-how and other proprietary data which the defendant claims to be its own, and which Aditi could not, as it were, unlearn.

21. To return to what the claimant submits is the pressing nature of the application, Virgin Media is said to account for approximately 90 per cent of the revenue of the claimant. This has been called into question by the defendant on the basis that, when analysed, the vast majority of that revenue relates to the supply of content rather than platform services of the kind with which this particular source code and the particular EST functionality, is concerned. Nevertheless, the claimant's case is that, having received that request from Virgin Media, the claimant has a limited timeframe in which to commit itself to supplying the functionality in question, and the longer it is kept out of the combined source code, the smaller the chance that it will be able to win this business opportunity with Virgin Media.

22. In particular the claimant says that as things stand it is prevented even from assessing the data in question in order to determine whether they are a suitable basis for developing the EST functionality; and if it cannot assess this and commit itself to supplying the functionality, then it is fearful that Virgin Media will turn to one of its competitors to provide it. The claimant is also concerned that in that event its relationship with Virgin Media would be jeopardised, creating harm that

could not adequately be quantified or compensable in damages. In the latter respect, the claimant's position is, in very general terms, that the defendant may well, for example, argue that if the claimant lost the contract it was for other reasons, and that it would not have obtained the contract in any event regardless of whether it had had the combined source code.

23. Secondly, the claimant submits that the damage is of a kind which might arise from the loss of a business relationship of indeterminate length and would therefore be incalculable.

24. Under the proposed order, the third party Aditi would be able to inspect the combined source code and would determine whether it was a suitable base for developing the EST functionality, and then it would begin preparatory work. The claimant is willing to undertake, until further order, not itself to take receipt of any of the data from Aditi, and not to deploy any of the relevant functionality that might be created by that company; and in the event that the court so ordered, the claimant would arrange for the combined source codes to be returned to the defendant.

25. The claimant also refers to the fact that Aditi has entered into a confidentiality agreement with the claimant in respect of material disclosed by the claimant. The claimant submits that it has every reason to enforce that confidentiality agreement rigorously if there are any issues, not least because of its claim that the materials in question in fact belong to it, and so it would have every reason to protect its own information and to enforce the agreement.

26. The claimant refers to the undertakings that it would give, together with the additional undertaking provided by Aditi in a letter yesterday. I will quote from

the operative part of that letter:

"In pursuance of the above understanding, Aditi confirms and undertakes to [the defendant] that:

1. It will strive to adopt industry best practices in keeping the source code secure.
2. It will not use or apply the source code or any know-how or technology insights derived from reviewing, utilising or developing the source code for any purposes other than as instructed by [the claimant].
3. On the instructions of [the claimant], it will return the source code to [the defendant] and/or destroy the source code which is in possession of Aditi insofar as technically practicable and certify in writing that the same has been destroyed."

27. The claimant suggests that this is an appropriate and proportionate way of holding the ring until the main application can be determined in January or February 2015.

It means, in particular, that if the claimant is successful on that further application, it will have lost no time in its efforts to meet the particular business opportunity that it says it is prevented from pursuing by reason of not having access to the combined source code. If the defendant were to be successful on that application then, the claimant submits, it would not itself have obtained access to the data or gained any commercial advantage to which it was not entitled.

28. According to the evidence of Mr Dembry, it would take about three weeks for Aditi to review the combined source code in order to assess its suitability. This is a time which is strongly contested by the defendant, who submits that if it is going to be properly reviewed it will take a lot longer than that. The claimant states that if there is any prospect of Aditi completing the development work in time to meet the customer's requirement, then that assessment needs to begin immediately and the work needs to continue, unless and until Aditi is told to stop following an unsuccessful application to the court in January or February 2015.

29. In addition to the risk to the possible contract with Virgin Media, the claimant contends that it is prevented from making a critical strategic decision as to whether to invest in a wholly new platform, or whether the combined source code

now held in escrow would be an adequate basis for its work. To quote a passage in one of Mr Dembry's witness statements:

"Once [the claimant] has received and reviewed the source code, it and Vubiquity will make a very important investment decision. They will either choose to operate the platform and add the planned functionality as [the claimant] is entitled, or they will choose to build an entirely new platform from scratch with the functionality of the existing platform plus the functionality in Vubiquity's development program."

30. According to the claimant there are other reasons why it is important that it should have the combined source code delivered as soon as possible. It submits that it has already missed out on other opportunities in what is described as a fast moving market.
31. That, in (inevitably) summary form, is the basis for the present application.
32. The defendant opposes the order sought, on a number of grounds.
33. First, it submits that damages would be a wholly adequate remedy for any wrong that the claimant has suffered, and that therefore the claimant fails at first base in relation to this application. The defendant also argues that it would suffer irreparable prejudice if the material was delivered up to Aditi, its direct competitor.
34. The defendant's evidence is that it developed the combined source code for the claimant, so that the claimant could offer to its own customers video on demand as a platform, and that, as I have said, the parties enjoyed a collaborative relationship which extended from as far back as 2007 up until September of this year. The defendant says that things began to go wrong when Vubiquity, a direct competitor of the defendant, acquired the claimant in May this year. It is also said by the defendant that the claimant acts in the same sector of the technology market, and the defendant points to the claimant's acknowledgment that the its

purpose in seeking the combined source code is so that it is able use and manipulate the content. There is no real issue about that.

35. The defendant, therefore, states that the claimant clearly intends to offer services and products that will compete with those of the defendant. Similarly, Aditi is acting in the same market sector, and the envisaged scoping exercise would involve a detailed review and what the defendant describes as a granular analysis by Aditi of the workings of the combined source code in order to report on its architecture and its approach to programming; this would enable the claimant to know whether it could serve as a basis for future development and if not, to pursue an alternative course. The defendant contends that if the order for delivery up is made, Aditi will not be in a position to unlearn the knowledge that it will gain from carrying out the intended scoping exercise, and that knowledge will extend to the computer programming logic behind the source code and its basic building blocks.

36. In that regard, the evidence of Mr Mark Christie, the chief technical officer of the defendant, to whom I have already referred, first sets out in some detail the reasons why Aditi is said to be in direct competition with the defendant. I will not dwell upon that, as it has not really been contested. Next Mr Christie explains why it is suggested that access to the combined source code would give Aditi a significant competitive advantage, in that Aditi would obtain access to business secrets of the defendant. In relation to this, Mr Christie refers to algorithms belonging to the defendant, to the defendant's approach to domain expertise, and to the defendant's software development know-how.

37. The one specific example given by Mr Christie relates to algorithms. He states:

"If Aditi were given access to the combined source code, this would spell out in terms to Aditi how Pikel's algorithms are implemented as part of our so-called entitlement service. This service deals with the complex chain of business logic that determines whether an end user is entitled to watch the content item that they are requesting to view. Pikel has developed this highly specialised module of its software, using knowledge gained from multiple implementations for different customers over the past ten years. If Aditi had access to the combined source code, it would be possible to see the design pattern that the defendant has optimised over a period of years to deliver this service. This is more nuanced than the simple risk of the combined source code being copied or kept or developed by Aditi in an unauthorised manner. If the court were to make the delivery up order sought by the claimant, Aditi would be in a position to understand the entirety of Pikel's business logic or thinking that it had used over the last decade in constructing the module in question. This is not something that Aditi can later unlearn, nor is it information the use of which Pikel believes, with respect, that the court can police in terms of Aditi's future relationship with the claimant if Pikel succeeds at trial or by the same token, Aditi's future relationship with others in the same market sector. The damage will have been done and it will not be possible to undo it. If Aditi gains access to Pikel's proprietary information, then it will also be in prime position to deploy that information in order to develop a competing product. Aditi would never have been in this position without an order for delivery up of the combined source code."

38. Mr Christie goes on to say that once the combined source code has been looked at by Aditi, and once it has been able to manipulate and use it, then he believes that the *status quo ante* can never be restored. Having seen the combined source code, that knowledge cannot be reversed, and the defendant's trade secrets cannot be unlearned.

39. Issue was taken with those concerns by Mr Dembry, in his third witness statement, in the following terms:

"Although Pikel complains that Aditi would gain advantages if it was supplied with the source code, the Pikel statements could only provide one specific example, the so-called entitlement service referred to at paragraph 28.1 of Mr Christie's witness statement. Entitlement services are nothing unusual and are an integral part of any VOD capability or indeed any content delivery system that must ensure that the recipient is entitled to receive the requested content, including to protect from giving away content for free. Aditi will have developed entitlement services functionality for many of its customers, and I doubt that Aditi would gain any particular insight from how Pikel has approached this commonly faced problem, and, as is explained elsewhere, Aditi would be precluded from deploying any advantage in the very unlikely event that it might exist."

40. In relation to the claimant's suggestion that further protection would be provided to the defendant by the non-disclosure agreement of 1 December 2014, the defendant responds that, first, the defendant is not a party to that non-disclosure agreement and therefore cannot enforce it; second, it applies to confidential

proprietary information owned by Vubiquity, Aditi or the claimant, and not to any information owned by the defendant; third, it establishes a confidentiality arrangement between the three parties and provides no barriers to information passing between them, but only between them and third parties; in any event, it allows the parties to it to use any applicable confidential proprietary information for business purposes, which are widely defined as purposes in connection with the pursuit and/or evaluation of a business relationship and/or the consummation of a transaction between the parties. In those circumstances the defendant submits that it provides no additional protection.

41. The defendant also submits that the undertakings by Aditi in the letter of 11 December 2014 (ie yesterday) to which I have already referred, are framed in very wide terms, and effectively leave it to the claimant to indicate what use may be made of the information; also, they do not have any contractual or binding force and, on any view, cannot deal with the point the defendant makes about the inability to “unlearn” know-how that has been acquired in that way.
42. I have already indicated that the defendant's main argument in response to this application is that damages would be an adequate remedy for the claimant. In that regard the defendant points to the letter from the claimant's solicitors dated 8 September 2014 which contains the following statement:

"The full extent of the claimant's losses are not yet clear, and given their nature they are not amenable to precise ascertainment, and will escalate if further customer opportunities are lost because of Piksel's refusal to supply the combined source code."
43. The letter then goes on to identify potential losses under two specific heads. First, if the defendant's refusal to deliver the source code forces the claimant to develop a new content delivery solution, the defendant will be liable for the replacement

system development costs, currently estimated at USD 2.5 million, plus the estimated cost of migrating customers to a new platform, ie USD 600,000. The second head identified consists of losses of EST revenue and management fees from Virgin Media if the defendant's refusal to supply the platform source code results in the claimant losing the Virgin Media EST opportunity to which reference has been made. The letter states that these losses are potentially open-ended, but the claimant's estimated profit from the EST opportunity for the first five years exceeds £2 million.

44. The letter also indicates that those figures do not include losses incurred by the claimant as a result of being unable to service further potential contracts with other customers, or losing market opportunities it would otherwise gain from its position as supplier of EST to Virgin Media; nor losses suffered by the claimant should its existing revenue streams from Virgin Media be harmed by its inability to provide the EST solution.
45. The letter does not suggest that those further items could not be quantified if they materialised. Mr Howe for the defendant also drew attention to the two versions of the particulars of claim which are before me, in which some of those same heads of claim are identified.
46. Mr Peto, and the claimant in its evidence, called into question the ability of the defendant to pay any damages that might be ordered. However, I was shown a balance sheet for the defendant for the year ended 31 December 2013 showing current net assets of between £22 million and £23 million. I was also told - I do not recall there being any specific evidence - that the parent company of the defendant has a turnover of USD 100 million. Mr Peto indicated that that was just

turnover. However, so far as the defendant's own audited accounts are concerned, these on their face show that the defendant is a reasonably solvent company.

47. The question of the adequacy of damages on the claimant's cross-undertaking if the order sought were to be given has not been dealt with in great detail, except that the defendant has argued that such damages would not be an adequate remedy for the defendant because, as already outlined, if Aditi learnt the details of the source code which it could exploit as a competitor, it could not unlearn them and the damage to the defendant would be incalculable. Also, the use to which any knowledge or know-how acquired from a detailed examination of the source codes might be put in the future, whether knowingly or unknowingly, would be impossible for the court to police effectively, or indeed for the defendant itself to police.

48. Mr Peto forcefully submitted that that was an empty argument. There was nothing in the source code details which was of any value. In particular, he emphasised the broad nature of the provisions in the master services agreement to which the defendant had been willing to enter into in 2012; these provisions, he submitted, effectively give *carte blanche* to the claimant to appoint a third party subcontractor in order to use, manipulate, etc the source codes, including the combined source code to which the defendant lays claim.

49. That point is to some extent counterbalanced, it seems to me, by the fact that whatever the position was then, the position now is that we will not know what the defendant's rights are in relation to its own source code, ie the pre-identified date source code, until the hearing takes place next year on the construction of the various contractual arrangements. One token, as it were, of the value of the

information and data in the combined source code, is the fact that the claimant is willing to go to considerable lengths, including this application, in order to obtain it. Mr Peto says that is not because it has any intrinsic value or because there is anything in it that is secret or better than anything else: it is simply that given that (as he submits) his client owns the source code or has a perpetual licence to use it, why should his client go to the expense of, as it were, reinventing the wheel? To do that would, he argues, be time-consuming and expensive. I will touch on these points again in a moment.

50. The urgency of the present application is dealt with in the evidence and, in particular, in Mr Dembry's first witness statement at paragraph 71 onwards.

51. One rather surprising aspect of this witness statement, which is dated 24 November this year, is that the element of urgency which is now centre stage in the claimant's application, namely the risk of losing a possible deal with Virgin Media, is almost an afterthought, included only towards the end of the relevant passages as one example of existing customer opportunities which the claimant says are endangered by the failure of the defendant to hand over the combined source code. A number of other matters are mentioned before this one. These include the claimant's desire to have a presentation ready to showcase to the industry at the consumer electronics show in Las Vegas in January 2015. Understandably that has now fallen out of focus, hardly being a matter of earth-shattering urgency, however desirable it may well be to make a good presentation at the show. The claimant is now focusing on the assertion that its relationship and a specific contract with Virgin Media, are going to be endangered.

52. Mr Dembry states the position as follows:

"At present they [that is Virgin Media] are requesting functionality delivery by the end of the first quarter 2015. I believe that they will accept us as a service provider if we can commit to delivery by the end of the second quarter in 2015. If we receive the source code within the next three weeks and if the source code is in the form we hope, ie there are not difficult architectural hurdles to adding functionality, I am optimistic that we could achieve this timeline."

53. So, the timeline in question, so far as that is concerned, is effectively towards the middle of next year.

54. In his second witness statement, Mr Dembry again touches on the question of urgency, now effectively dealing just with the Virgin Media matter, repeating and updating in paragraph 13 what was said about the timeline in the first witness statement:

"I am hopeful that we can achieve this timeline if the source code is delivered to the claimant immediately. However, even if the source code is provided immediately, delivery might be problematic, if, for example, the source code architecture is sub-optimal, making it more difficult to develop functionality, including that required for any EST solution. We are unable to start development work on this contract until we receive the source code. The longer our receipt of the source code is delayed, the less likely the claimant will be able to provide the EST solution to Virgin in the timeline requested."

55. That appears to be the highest it is put, so far as this contract is concerned.

56. There are other factors which have been put before me, but I have endeavoured to refer, in what is an *ex tempore* judgment given at a rather late hour in the day, to the main matters which have been urged as justifying the interim relief sought.

57. So far as the applicable principles of law are concerned, these are not really in dispute. They are well-established in the *American Cyanamid* case. It is recalled that the existence of an arguable case is not an issue for present purposes. As to the other criteria, first, if damages would be an adequate remedy for the claimant in relation to its claim against the defendant if it succeeds at the substantive hearing, then that would usually be the end of the matter, and interim relief would not normally be given. Similarly, the damages available to the defendant under

the cross-undertaking which would be required of the claimant would, if adequate, normally resolve the matter in favour of the claimant. If damages would not or might well not be an adequate remedy for either party, then the question of the balance of convenience comes into play. There the court must assess the risk that the grant of an injunction or the refusal of an injunction would cause irreparable or significantly greater prejudice to either party; and if matters are evenly balanced, then of course other considerations may arise, including whether the *status quo ante* should be preserved pending trial of the substantive issues.

58. Perhaps the most succinct and helpful summary of those principles is that by Mr Justice Christopher Clarke (as he then was) in the case of the *SABMiller Africa v Tanzania Breweries* [2009] EWHC 2140 at paragraph 47:

"If the court is satisfied that there is a serious issue to be tried, it must then go on to consider whether the claimant would be adequately compensated in damages and whether the defendant would be in a financial position to pay them. If the answer to both those questions is in the affirmative, no injunction should normally be granted. If not, the court must consider whether the defendant would be adequately compensated under the claimant's undertaking as to damages in the event of his succeeding at trial. If the answer to that question is yes, the fact that the defendant may succeed at trial is no bar to the grant of an injunction. Where there is doubt as to the adequacy of damages for both parties, the court must determine where the balance of convenience lies. If the matters are evenly balanced, it may be wise to take such measures as are calculated to preserve the *status quo*."

59. There is some authority to suggest that, where a mandatory relief is sought, modified considerations should apply because it is more intrusive. But even there it normally comes down to the fact that the court should take into account that mandatory relief sometimes carries greater risk of injustice if it turns out to have been wrongly granted than does merely prohibitory relief. Again, it all depends on the circumstances of each case.

60. Doing the best I can in the present case, in my view the remedy in damages available to the claimant is likely to be an adequate remedy. As I have indicated,

without any great difficulty a figure has been put on some of the anticipated losses by the claimant in the course of correspondence, and indeed in the particulars of claim. There is nothing magical about the loss of a contract. Usually a reasonable estimate can be made of the damage caused, and if it comes down to the question of a lost opportunity, then again the courts are often required to do that. There is no particular magic there either.

61. As far as the ability of the defendant to pay any damages having regard to the possible scale of them, although I take account of what Mr Peto says about the history of this group of companies, I am of the view that the audited balance sheet indicates that there would not be any obvious difficulty in the defendant paying damages of the stated scale.
62. Therefore, on that basis the court would normally be justified, all other things being equal, in refusing the interim relief sought.
63. As far as the adequacy of damages on the cross-undertaking is concerned, Mr Peto has eloquently argued against the allegedly irremediable loss and damage which the defendant claims will be suffered should its direct competitor learn about its proprietary algorithms and other know-how relating to the combined source code. However, notwithstanding the points he makes, on the basis of the material before me I have concluded that, in the context of this case, involving proprietary software and know-how developed by the defendant over a period of some ten years, the concern that the defendant has expressed cannot be so easily discounted, at any rate in an interim relief application. It seems to me that the damage which may be incurred is, by its very nature, of a category which is almost impossible to calculate. This is because it would simply not be known,

and it would not be possible to police, how the know-how might be used, particularly when it is in the hands of a direct competitor.

64. So, in my view damages available on the cross-undertaking would probably not be an adequate remedy as far as the defendant is concerned.

65. However, even if I am wrong on the adequacy of damages points, I have come to the conclusion that here the balance of convenience in any event lies against ordering the interim relief - at least the full interim relief - sought by the claimant.

66. First, the urgency of this matter has probably been exaggerated by the claimant, as can be seen from the somewhat shifting nature of the points made, which first focussed very much on the claimant's presentation at a show in Las Vegas – a factor that was discounted at the hearing before Mr Justice Mann, and understandably so. That has since faded into the background, really leaving only the Virgin Media matter as a concrete ground on which to allege urgency.

67. In relation to Virgin Media, however, the timeline, even on the claimant's own evidence, does not support any great urgency. By its own admission, the claimant thinks that if it were able to produce the product, or commit to producing the product, by the middle of next year, that would be adequate.

68. There is no evidence at all before me as to how long the work will take once the claimant has access to the combined source codes. All that one has are vague statements to the effect that the longer the delay, the less likely the claimant will be able to satisfy Virgin Media.

69. Given that aspect, and given also the relatively short time which it is hoped will elapse before this matter will be resolved by the court at a full hearing to construe the contractual obligations between the parties and to decide whether the claimant

is indeed entitled to the combined source code or not, in my judgment the risk to the claimant of suffering significant loss is small. Further, whatever happens on this application the claimant cannot give a firm commitment to Virgin Media until the court has decided what the entitlements are. Therefore, the claimant will not know until then whether it can continue to use the full combined source code or not.

70. Weighing all these circumstances in the balance, I am of the view that the interim relief sought should not be granted, and accordingly I refuse it, whilst being willing to hear Mr Peto and Mr Howe on whether it should be granted in part, in respect of those aspects of the source code which are not in dispute.