

Neutral Citation Number: [2008] EWHC (Ch) 2428

Case No: HC 06 C 02874

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/10/2008

**Before :**

**Mr Justice Norris**

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**Between :**

**(1) Magical Marking Limited** **Claimants**  
**(2) Andrew Warden Phillis**

**- and -**

**(1) Sean Patrick Holly** **Defendants**  
**(2) Mark Keane**  
**(3) Wayne Canavan**  
**(4) Education & Special Projects Limited**  
**(5) Addlestone Keane**  
**(6) Simon Westmoreland**  
**(7) NextGen Technical Services Limited**

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**Mr Giles Fernando and Miss Anna Edwards- Stuart** (instructed by **Walker Morris**)  
for the Claimants

**Mr Jonathan D C Turner and Miss Marianne Perkins** (instructed by **Taylor**  
**Solicitors**) for the Third and Seventh Defendants

Hearing dates: 7,8,10,11,14-18<sup>th</sup> July 2008

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Judgment

**Mr Justice Norris :**

1. During the course of her career Jean Phillis (“Mrs Phillis”) came to work as publicity officer for a safety product company. One of the company’s products was a safety spray paint which Mrs Phillis was asked to promote. She conceived the idea that it could be used for marking out school playgrounds for games such as hopscotch. To generate interest she organised and promoted a “National Design Your Playground Competition”. Whilst the competition was successful Mrs Phillis was impressed neither by the designs that emerged nor by the skills of those who executed the designs with the company’s products. When she was made redundant in 1995 Mrs Phillis therefore decided to establish a playground painting business using sprayed paint. For that purpose she incorporated the first claimant Magical Marking Ltd (“Magical”); although initially the company remained dormant and she traded as a sole proprietor.
2. Mrs Phillis decided to promote Magical’s business by exploiting contacts with Liverpool John Moores University and with the University of Hull. In that context she created a series of playground markings and games to motivate children and to encourage them to be active; and she developed a series of spreadsheets containing costing models for the marking and installation of each of the games.
3. Once this business was established Mrs Phillis turned her attention to improving it. She addressed the issue of the seasonality of the business (because spray paint applications are difficult in winter) by developing a series of marked mats. She personally created a portfolio of games, producing

freehand coloured sketches which were then worked up in a process of close collaboration between herself and a designer. During 1998 she began to develop techniques of playground marking using thermoplastic (which overcame the issue of seasonality, but required modification to the designs because of the inability to reproduce the fine detail of designs executed in paint). These designs were all recorded and implemented in production processes using CAD technology.

4. By 2003 Magical's business had become heavily dependent upon computers. The design and design-related work was undertaken on networked Apple Macintosh computers, linked to a server. The correspondence, administration, accounts and other business related activities were carried out on networked PC workstations, again linked to a server. The server itself was (according to the expert evidence at trial) of a relatively high specification for a business of Magical's size, storing all of its data on a RAID mirrored disc drive which (said the third defendant's expert) demonstrated the value which Magical place upon its information.
5. On the unchallenged evidence led at trial I find and hold:
  - (a) that Magical owned the copyright that subsisted in each of the designs created for painting onto playgrounds:
  - (b) that Magical owned the copyright that subsisted in the instruction sheets for the preparation and installation of the playground designs and the production of the furniture:

- (c) that Magical owned the copyright that subsisted in the training and assessment material used in relation to Magical's staff:
- (d) that Magical owned the copyright that subsisted in the pricing models and progress charts used in the course of Magical's business:
- (e) that Magical owned the copyright in all of the business documents generated in the course of Magical's business (in particular marketing materials, customer contracts and correspondence, and customer enquiries):
- (f) that Magical owned the goodwill in the name "Magical Marking" when used in connection with playground designs and playground furniture:
- (g) that Magical is the owner of the database rights subsisting in the ACT database (containing 7000 customers) residing on its server and networked computers, the data residing in the detailed order book spreadsheet and associated response spreadsheets and in the spreadsheets containing the pricing models:
- (h) that Magical is the owner of confidential information relating to the business and customers of Magical contained in the various databases maintained on Magical's computer system.

(For the sake of clarity I should make plain that my finding and holdings, although expressed by reference to the various proprietary rights in the identified categories of documents, in fact relate to each proprietary right in each of the closely specified and listed documents set out in the sundry

schedules to the lengthy Re-amended Particulars of Claim. I have summarised the position in the interests of brevity).

6. Mrs Phillis's considerable skills did not extend to business development. For that she sought help elsewhere. After one false start she was introduced to the first Defendant Sean Holly ("Mr Holly") in October 1998. Mr Holly originally provided business development advice as a consultant for a daily fee. This proved expensive and the arrangement was renegotiated to a monthly fee plus motoring expenses in return for eight days' attendance (plus telephone support) per month. However, under this arrangement some arrears built up. Mr Holly proposed to Mrs Phillis that she should activate the dormant company and transfer the business to it, and that he would write off £2,500 of the arrears and accept the balance by monthly instalments in return for a 25% shareholding in Magical. Mrs Phillis accepted this advice. Mr Holly became a Director and the Company Secretary of Magical, but he did not become an employee: he retained his consultancy agreement. Mr Holly had other business interests which took his time, so he continued to attend Magical's premises on about two days per week.

7. Mr Holly did not attend the trial; but the nature and extent of his involvement was an issue raised by the third defendant as one relevant to his own defence, and was the subject of considerable cross examination of Mrs Phillis and of other witnesses called by Magical. My findings, so far as they relate to the period up to October 2002, are:-

(a) Mr Holly's primary role as Director was to provide business development consultancy services, that is to say, financial and business advice to Mrs

Phillis as effective proprietor of the business. He did not directly undertake daily management tasks relevant to Magical's business save in relation to financial matters (where he took a lead in co-ordinating the financial record keeping, analysing the management accounts, liaising with the accountants, and explaining the financial position to Mrs Phillis). She did not, however, delegate to him financial decision making which, as one might expect in a relatively small company, continued to be the joint responsibility of Mrs Phillis (as Director and 75% shareholder) and Mr Holly (as the other Director and 25% shareholder). It was, for example, Mrs Phillis who selected the company accountants and auditors. The rare occasions when Mr Holly acted without Mrs Phillis' prior approval (e.g. in repaying certain loans to Andrew Phillis) stand out as exceptions.

- (b) His role as company secretary appears to have been a purely formal one. The evidence did not establish that any particular executive authority was attached to the role. Perhaps the most significant was that as Director and company secretary Mr Holly chaired and set the agenda for management meetings of Magical, which at times could last all day:
  
- (c) The fact that Mr Holly's role was broadly strategic and consultative does not diminish its importance to Magical's business. Mrs Phillis was very ready to acknowledge that Mr Holly had made a major contribution to Magical's business and gave no sign of regret at having given Mr Holly a 25% shareholding. Indeed, when the split between Mr Holly and herself came she described herself as devastated by it and sought to re-establish a working relationship with him and to bring him back into the business:

- (d) Although Mr Holly's primary focus was on the financial and business side of Magical's affairs, he was also involved in other areas including staff recruitment and training (particularly sales staff), the setting of staff budgets, variation of employee remuneration and bonus schemes, and obtaining advice from human resources consultants. The evidence however falls short of establishing that he discharged these functions alone. The occasions when he did so appear to have been notable and to have stood out (for example in relation to his adjustment of Mr Hargreaves's bonus scheme).
- (e) So far as information technology is concerned, Mr Holly had limited experience to offer and no definite role to play. One of the first pieces of advice which Mr Holly tendered when he became involved in Magical was that Mrs Phillis should purchase the ACT database (a programme used by one of Mr Holly's other businesses) and to transfer the paper based customer records onto computer. Mrs Phillis again accepted this recommendation and decided to purchase the database. In cross examination Mrs Phillis said that "possibly" Mr Holly had ordered it. If he did so it was because Mrs Phillis made the purchase decision. By October 2002 Magical had identified one employee (Mr Scarfe) as having the primary IT responsibility within Magical: and the computer network then operating had been selected and installed by Andrew Phillis.
- (f) So far as dealings with third parties are concerned Mr Holly was undoubtedly known as a Director of Magical, he attended meetings with Mrs Phillis as such, and he would represent Magical in negotiations. He

was involved in the commissioning of architects to prepare alterations to the company's premises, and with the obtaining and consideration of quotations for the relevant work: but the evidence is clear that the ultimate decisions were taken jointly by Mrs Phillis and Mr Holly. The evidence does not establish that Mr Holly ever exercised any sole authority to commit Magical to any contract for the provision of consultancy or other services or for the supply of materials. The clear picture that emerges from the evidence is that Mr Holly would make recommendations, they would be considered by Mrs Phillis and Mr Holly together and a decision taken, which decision was then implemented using whatever contacts Mrs Phillis or Mr Holly had.

(g) In reaching this conclusion I have not overlooked the evidence of Mark Booth (one of Magical's witnesses) that Mr Holly seemed to be responsible for the sales and business side of the business, and that Mr Holly would attend Magical's premises once or twice a week and explain what he wanted to happen and how he wanted it to happen. In the context of the evidence as a whole this evidence does not provide a sure foundation for the proposition that Mr Holly exercised extensive unilateral authority.

8. I have made my findings in relation to the position as it was at the beginning of October 2002 because in that month a significant change occurred. The origins of the change are not material to any issue before me, and I will therefore deal with the context very shortly. Mrs Phillis's son Andrew Phillis ("Andrew") had come to work for Magical with responsibility for the



development and production of a wooden games table. Mrs Phillis's son-in-law, Mark Booth ("Mark") was also an employee of Magical, the plan being that he would be groomed to become Managing Director (and so to facilitate Mrs Phillis's retirement), and Mr Holly was his mentor for that role. The boundary between Andrew's and Mark's respective areas of responsibility was not clearly defined, and was productive of tensions which Mrs Phillis considered Mr Holly exploited. Magical was presented with a significant business opportunity under a programme called "Zonepark" (an initiative for dividing up a playground into coloured zones marking areas of different activity), and the management team had to reach decisions as to the timing and level of investment. Mr Holly made a presentation to a management meeting at which he posed the question of who the Managing Director of Magical was to be. Mrs Phillis was shocked by the question, and stated to the meeting that she was the Managing Director and would continue to be so, and terminated the meeting. Mr Holly then announced that he was going and that he no longer wished to be an operational director.

9. In the immediate aftermath of the meeting Mrs Phillis tried to change his mind, but Mr Holly was adamant. However he said it would cost Mrs Phillis to get rid of him; and when she enquired "How much?" he informed her that it would be £200,000. On 24 November 2002 Mrs Phillis wrote to Mr Holly setting out four options as she understood it (to return as Managing Director at a salary; to return as an operational director reporting to the Managing Director and at a monthly fee; to sell his shares (in which case she would seek an accountant's valuation); or to continue as a shareholder but with no employment or consultancy relationship). She concluded her letter with a

sentiment that she would respect Mr Holly's wishes if he no longer wished to be part of the Magical team. Mr Holly indicated a preference for looking at the valuation of the business, and Mrs Phillis put the appropriate steps in train.

She told Mr Holly:-

“I have also spoken to the staff and let them know that at this moment you are still a director and a shareholder but you wish to have a non-operational role at this time within Magical Marking.”

I find that that correctly reflects Mr Holly's then current role and encapsulates what Magical was saying about it to staff and third parties.

10. By a letter of 12 December 2002 Mr Holly confirmed that his preferred option was to be bought out; but he expressed dissatisfaction at the pace of the valuation process and stated that “due to the protracted nature of these discussions I will resume a proactive operational involvement in January.” In due course he visited Magical's premises on 7 January 2003. The nature of the visit prompted Mrs Phillis to write the following day:-

“Following the disruptive nature of your visit to the offices yesterday I must insist that you do not make any further visits to the site without my prior approval.”

But the terms of the letter made clear that Mr Holly would be invited to a directors' meeting. However, Mr Holly appears to have made another visit to Magical's premises at a time when he knew Mrs Phillis was not there and to have sought information from the staff in such a way that Mrs Phillis felt that he was not working in unison with herself or other members of the management team. On 14 January 2003 she therefore confirmed Mr Holly's “immediate exclusion from the company premises [because] your presence is not in the best interests of the company”, and she gave notice of an

extraordinary meeting of the company to be held at noon on 13 February 2003 in York (about 45 minutes drive from Magical's premises). The purpose of the EGM was to remove Mr Holly as a director and as secretary of Magical and to appoint Andrew and Mark as directors in his place. The covering letter made clear that Mr Holly had a right to be heard on the resolution and to make representations, and it invited their receipt by 24 January.

11. This now provides the essential background for the key event with which I am concerned. This is a visit (Mr Fernando, Counsel for Magical, described it as "a raid") by Mr Holly and others on 13 February 2003 in the course of which a complete copy of Magical's electronic business records was created and taken away, its latest data back up tape removed, and its computer system disabled by the insertion of passwords which were not provided to any of Magical's staff. Those key matters were not in dispute at trial. What was in dispute was the nature of the participation in these events of the third defendant Wayne Canavan ("Mr Canavan") and of NextGen Technical Services Ltd (the company of which he was sole director and proprietor) ("NextGen"). These were the only two defendants to be represented at trial, both in defence of the claim of Magical and Mrs Phillis against them and in prosecution of their own Part 20 proceedings against Mr Holly.
12. Mrs Phillis had departed for an intended five week stay in New Zealand on 10 February 2003, having appointed her solicitor her proxy to exercise the votes attaching to her shares at the meeting summoned for the 13 February. She accordingly took no part in these events. I therefore received evidence from the following witnesses:-

- (a) Andrew: he remains much involved in the affairs of Magical and has taken an active part in this litigation. I judged him to be a straight forward witness, but one whose evidence needed to be approached with care precisely because of his continued involvement, and because of the speed with which events occurred and the number of occasions that he has subsequently been called upon to recollect them. I have sought to be alert to the distinction between recollection and reconstruction in relation to his evidence.
- (b) Mark: I regarded him as an unflinchingly honest witness. He parted company with Magical in 2004 and has no reason favourably to colour his recollection. He was confronted by Mr Turner (Counsel for Mr Canavan and NextGen) with a passage in Andrew's evidence in which Andrew expressed the opinion that Mark had been faced with a challenge of standing up to his mentor, Mr Holly, but had singularly failed to demonstrate leadership qualities. Mark could easily have sought to justify his conduct that day: but with total honesty he told me that there are defining moments in our lives, that he was put in a position which called for action and with hindsight wished he had taken action, but he froze, and that credit should be given to Andrew for facing up to the appalling situation, when he did not. He was an impressive witness.
- (c) Nigel Scarfe: he had joined Magical in April 2002 but parted company in May 2007. At the date of his witness statement (5 February 2008) he had no apparent reason to view Magical favourably and I regarded him as a reliable and independent witness. He had been in charge of IT at Magical,

and I was alert to the possibility that his evidence might be coloured by a desire to demonstrate that he had done a professionally competent job of protecting Magical's computer network. He had made a note immediately after the events in question, though it was not available to him when he made his statement.

(d) Paul Hargreaves: he was the former production manager of Magical, but is no longer so employed. I regarded him as a reliable witness. He had been invited to make a note of events immediately after 13 February, though he had not consulted this note in the preparation of his witness statement. The two were largely consistent, although the witness statement was of course much fuller, since subsequent events enabled one to see what of the extraordinary events of 13 February was truly significant.

(e) The witness statements of Jean Murphy and of Simon Mountain were not challenged.

13. The only factual evidence tendered on behalf of Mr Canavan and NextGen was given by Mr Canavan himself. He had suffered a family bereavement shortly before he tendered evidence and I sought to make full allowance for that when assessing the way in which he answered questions. Even making that allowance I consider that I must approach his evidence with great caution. He frequently complained that proceedings had only been commenced against him in 2006 (instead of soon after the events of 2003) thereby himself undermining confidence in the accuracy of his recollection. Moreover, it was evident that since the commencement of the proceedings he had consistently lied as to what had actually occurred and as to his part in it.

14. In early July 2006 Magical's solicitors sent a detailed letter before action enclosing draft Particulars of Claim. On 3 August 2006 Mr Canavan's solicitors responded, setting out his case that Mr Holly had told Mr Canavan that Magical was in the hands of individuals whom Mr Holly did not trust and engaging Mr Canavan to accompany him to Magical's premises and "undertake the necessary steps to protect the company's IT systems and prevent the deletion of information by individual users". Through his solicitors Mr Canavan denied accessing Magical's server; denied copying the files stored on that server; asserted that the only step he took was to change "the administration passwords"; asserted that whilst he had worked on the PC workstations his sole reason for doing so was "to ascertain the level of user rights at each workstation"; denied copying the information stored on the local computer hard drives; denied deleting the backup log file; and asserted that whilst he had removed the DAT backup tape he had simply placed it in a more secure location.
15. On 8 November 2006 Mr Canavan then signed a statement of truth at the foot of a Defence. This Defence now admitted that Mr Canavan had accessed the server, but continued to deny that any copying took place on the server or on the work stations, continued to assert that the only reconfiguration undertaken was the insertion of administration passwords, and continued to deny the deletion of the backup log file or any dealing with the DAT tape beyond its delivery to a secure location.
16. When he came to provide disclosure on 14 January 2008 Mr Canavan signed a statement of truth saying that he had no relevant documents to disclose. When

this was challenged by Magical's solicitors Mr Canavan's new solicitors referred to the Defence (as elaborated in a Part 18 response) stating that it "clearly demonstrates the limit of our client's involvement". They specifically confirmed that Mr Canavan simply did not have any documents in a number of categories about which Magical's solicitors had raised detailed enquiries (such as purchase orders and invoices rendered by Mr Canavan to Mr Holly or his companies). The impression that was thereby created was that Mr Canavan's involvement was (as had been stated on his behalf at a case management conference in May 2007) limited to "one afternoon four years ago" (on the back of which Mr Canavan sought and obtained an order that Magical provide security for his costs).

17. It was only when Mr Canavan was ordered by the court to provide standard disclosure that he served a list of documents disclosing 934 documents (including many invoices rendered by NextGen to Mr Holly and his companies) demonstrating something far more than involvement on one afternoon four years ago. It was only on the 17 June 2008 that Mr Canavan served a witness statement admitting copying the entire contents of Magical's server onto CDs and handing them together with the DAT tape to Mr Holly. Some credit must of course be given to Mr Canavan for eventually admitting the truth rather than requiring it to be proved (as could have been established by a simple comparison between the designs and marketing material used after February 2003 by Mr Holly and his company Education & Special Projects Ltd ("ESP") and that used by Magical). But the willingness to lie if it is to Mr Canavan's advantage in the presentation of his defence must inevitably cast a long shadow over the evidence he gave at trial. He is not however to be

treated as from first to last a liar: and I have not so treated him. I simply regard his evidence as inherently less reliable than that of other witnesses.

18. Along with that witness statement came an Amended Defence. This now admitted the essential acts of copying of which Magical had been complaining; but it asserted (for the first time on the pleadings) that Mr Holly had the actual or ostensible authority of Magical to instruct Mr Canavan to undertake the work he did. In fairness to Mr Canavan it should be recorded that this line of defence had been foreshadowed at a Case Management Conference in May 2007 when Mr Turner had submitted:-

“It follows that [Magical] cannot complain of acts carried out by [Mr Canavan] in accordance with [Mr Holly’s] instructions and within his actual or ostensible authority as a Director of [Magical]. And furthermore...[Mr Canavan] is not liable for carrying out such instructions, even if [Mr Holly] had an ulterior motive, an ulterior illicit motive, unless [Mr Canavan] was aware of the motive so that the instructions were outside [Mr Holly’s] ostensible authority.”

That, in a nutshell, is the issue before me at trial.

19. Following the extensive disclosure and the revelatory witness statement Magical successfully applied at the commencement of the trial to amend its pleadings to allege infringing acts not only on 13 February 2003 but also thereafter (based on the work described in or properly to be inferred from the invoices that Mr Canavan had disclosed). By a case management direction I ordered that the trial should be confined (so far as liability is concerned) to events occurring before 1 January 2004, and I adjourned for further consideration all questions of liability arising after that date. I did, however, permit Magical to lead evidence on and to cross examine Mr Canavan upon post 1 January 2004 events to the extent that they bore upon or cast light upon



pre 1 January 2004 events. I turn to my findings of fact. (Generally, I will state my conclusions: I will only recite and analyse the evidence on matters of a special contention or relevance).

20. In 1998 Mr Canavan established Next Gen to provide independent IT consultancy services. He operates as a “one man band”, responding to requests for assistance from clients without any significant office back up. Until December 2002 (when he acquired time recording software) he kept an informal record of work undertaken and time spent on individual client business, incorporating this raw data on invoices which he prepared using a proprietary small business accounting system. Because the invoice was the key document received by the client it would in general contain sufficient information to explain to the client and justify the invoice amount. One of NextGen’s customers was Quest (a company connected with Mr Holly). An invoice from NextGen to Quest dated 29 November 2002 is typical: it requires payment of £360 representing eight hours work described as “timesheets from 15/11/02 – 12/12/02. Attached spreadsheet: Quest electrical timesheets nov-dec.xls”.

21. Mr Canavan had never had any dealings with Magical. He had learned that Mr Holly was a Director of Magical from an occasion when he was working at Quest. He had needed the programme discs for work on the ACT database maintained by Quest, but the relevant discs could not be found. Mr Holly had said that he was a Director of Magical, that Magical also operated the ACT database programme, and that Mr Canavan should ring Magical and ask to borrow the discs. Mr Canavan did so and received the cooperation of

Magical's staff through that introduction. Beyond that, Mr Canavan was entirely unaware of Mr Holly's role at Magical (and in particular was unaware of any of the activities which I have described Mr Holly as undertaking in relation to Magical's business).

22. On 13 February 2003 Mr Canavan was working at Quest. His evidence was that he intended to install three basic entry level computers. I accept Mr Canavan's evidence that he was at Quest's premises: but I do not accept that he was there installing three computers. There is a NextGen invoice for such work but it is dated 10 February 2003. Mr Canavan would not have rendered an invoice for work which he had yet to do. When faced with a difficulty over dates Mr Canavan's response was that although his invoices were sequentially numbered by his computer system, the dates were not reliable because he would create a series of blank templates for a customer and then use them up not necessarily in date order. I found the explanation itself unconvincing when applied to this invoice, and inadequate to explain why the invoice predated the work. What Mr Canavan was doing at Quest on 13 February was unexplained.

23. Mr Holly had received notice on or soon after 14 January 2003 of a meeting being convened for the 13 February at noon to remove him as a Director. I am in no doubt that the events of 13 February 2003 were planned to occur whilst Mrs Phillis was in New Zealand and whilst Andrew and Mark were attending a meeting at York (and so would be absent from Magical's premises). Although Mr Holly had, and took, the opportunity to plan what was to happen Mr Canavan says that Mr Holly had not discussed anything with him. I accept

this evidence (because I am not prepared to treat everything that Mr Canavan told me as untruthful, there is no evidence to contradict Mr Canavan, and his evidence is not so improbable as to be unbelievable). Accordingly, the first Mr Canavan knew of the events of the 13 February was that he received a telephone call from Mr Holly requesting him to leave Quest's premises in Burnley and travel immediately to Magical's premises in Yorkshire (about an hour's drive away). A rendezvous was arranged at the Ferrybridge service station on the M62. Mr Canavan said that he had no idea what he was going to do. I do not believe that evidence. If, as Mr Canavan says, Mr Holly and Quest were not particularly important clients, then I regard it as almost certain that he would have wanted to know (a) why he was expected to undertake significant travelling for work (b) whether he was competent and willing to undertake the task that Mr Holly had in mind, and (c) what equipment he needed for the tasks he might have to undertake. Mr Canavan is trying to limit his involvement: I consider that he knew he would be accessing and dealing with data and copying some of it.

24. Mr Canavan duly arrived at Ferrybridge service station. There he met with Mr Holly and the rest of the party, consisting of Mr Holly's girlfriend, his solicitor, two large security men, another computer expert (Mr Kelly who specialised in Apple Macintoshes) and Mr Sykes (an employee of Magical). According to Mr Canavan's evidence, at the Ferrybridge service station he met Mr Kelly (who said he did not know why he had been asked to meet up at Ferrybridge): but otherwise the group simply stood around drinking coffee until Mr Holly arrived with his solicitor. Mr Canavan acknowledges that he cannot remember exactly what was said, but recalls being told by Mr Holly

that members of Magical's staff were trying to copy important information that could be detrimental to the business and to his interests, that he believed he was going to be denied access to the computer system and that certain information within it was going to be hidden or destroyed, that he was concerned that if financial information was withheld it would be manipulated, and that he wanted to make sure that Magical' computer system was secure in order that the position could be preserved and that his fellow director could not do anything to the system without his knowing about it. It is quite clear that Mr Canavan understood that there was a dispute at the company and that Mr Holly was trying to protect his position. Mr Holly's solicitor then spoke (the two addresses lasting some twenty minutes). Mr Holly's solicitor, Mr Keane, confirmed that he was a Director and shareholder of Magical, that there were certain things that were going on there that meant that the company was in difficulty and that Mr Holly had a right to go there and a duty to actually run the company. Mr Keane clearly represented Mr Holly: he never suggested that he represented Magical, or that the proposed visit was permitted by Magical or by a court Order or by any other papers. Mr Canavan's account can only be the very shortest of summaries of two addresses lasting 20 minutes: I consider it likely that a much more detailed explanation of the layout of Magical's premises and of each party's role took place. The party then left the Ferrybridge service station in a convoy of cars.

25. There is contention as to the time at which and manner in which they arrived at Magical's premises. The issue of timing may be relevant to the ease with which Mr Canavan was able to access the server, work stations and data (from which a judgment may be made about the inherent security of the system) and

the credibility of the view that it was in the interests of Magical rather than of Mr Holly to have certain work undertaken on the server and work stations. The manner of entry may be significant in assessing whether the visit could reasonably be viewed by an onlooker as being made for the benefit and the interests of Magical or for the benefit and the interests of Mr Holly.

26. It was the evidence of Mr Canavan that the party arrived at Magical's premises at about 2:00pm. The difficulty with this evidence is that it does not fit with Mr Canavan's account of his movements that day and with known journey times. It was the evidence of Andrew and of Mark that Magical's EGM was a brief affair and that following some advice from Magical's solicitor, they left York at about 12:30pm and stopped for a sandwich about fifteen minutes into their journey; and whilst eating their lunch received a text, which prompted them to leave immediately and to arrive at Magical's premises at about 1:30pm (to find the police already there). The difficulty with this evidence is that it is at odds with the police log of the incident (which I regard as independent and reliable). This log records Andrew making a telephone call to the police whilst "on route back to the premises", which call is logged at 2:24pm and led to police attendance at 2:40pm. This places Andrew's telephone call an hour and a half later than his reconstructed account of the day would suggest. Mr Scarfe places the visit "in the early afternoon": Mr Hargreaves "sometime after 1:00pm" and "slightly earlier than 2:00pm".
27. I find on this evidence that the visit began at about 1:30pm. I start from the inherent probability that Mr Holly (having arranged the visit specifically for

13 February) would have wished to ensure that it began at a time when he could be confident that both Andrew and Mark were still in York or on the journey home; in that connection he would know that the midday meeting would be short (because of his deliberate absence). He is likely therefore to have wanted the Magical visit to begin before 1:30pm. The evidence of Mr Scarfe and of Mr Hargreaves is consistent with this timing. My own examinations of the log of the computer activity at Magical tend to confirm this timing. Andrew and Mark are unlikely to have had much debate about what to do before calling the police. The puzzle then is “If the raid began at 1:30pm, why were Andrew and Mark not told of it until shortly before 2:20pm?” The answer to that is that it was difficult for Magical’s staff to make the warning call. This brings me to the nature of the visit.

28. The evidence of Mr Canavan is that the convoy arrived in an orderly fashion, that Mr Holly, his girlfriend and Mr Keane, Mr Kelly and two security staff calmly entered the main office and took him through to the adjoining office where he immediately commenced work on the server, whilst Mr Holly and Mr Keane addressed Magical’s staff. Mr Canavan recollects Mr Holly saying something along the lines that he was taking control of the company: and Mr Keane stating that Mr Holly was fully authorised to take that action. In cross examination he accepted that Mr Holly may have said that he was going to “sort out a few things and take back what was rightfully his”. He accepted that Mr Holly warned Magical’s staff not to use their phones or mobile phones or to touch their computers; but Mr Canavan says that the staff were not intimidated by that, but cracked jokes. Mr Canavan’s evidence is that when the police arrived he did become concerned, but that Mr Keane confirmed that

what Mr Canavan was doing was in order. In his written evidence he said that he told the police what he was doing, that it had been approved by Mr Keane, and that the police accepted his response. In cross examination he elaborated this to say that the police confirmed that what he was doing was not illegal and that he was further reassured by this advice.

29. The picture painted by Magical's witnesses could not be more different. They all speak of being intimidated by two security staff (some witnesses described them as "thugs"), one of whom was very large, who accompanied Mr Holly and acted aggressively. Mr Hargreaves has 32 years service in the Territorial Army. He describes the visit as a very professional operation in which the raiding party systematically took over the building and extracted information from frightened staff. He says that there was a clear intention to create the impression that if the staff did not cooperate they would suffer serious violence. He says he was personally frightened, and that there was lots of aggravation and a very tense atmosphere. He says that Magical's staff were told that they could not make use of the telephones or computers, that they could not go to the toilet and that they could not leave the building. It is his recollection that Mr Keane said that he had some papers which gave him permission to be on the premises: and that the police seemed to take the same view when they arrived. He described the situation as "like a gangster movie". The evidence of Mr Scarfe was to the same effect. He recalled one thug saying "don't mess us about: stay away from the computers", and that the very large security guard stood in the doorway between the operations room and the sales room making sure that everyone obeyed the orders.

30. I have no doubt that (even allowing for a degree of exaggeration in the retelling) the picture painted by Mr Hargreaves and Mr Scarfe is true. It is confirmed by the unchallenged evidence of Mr Mountain (who describes one of the security personnel as “big and intimidating...about 6 feet 8 inches tall and just as wide”); and by the unchallenged evidence of Jean Murphy (who went home that evening in tears and was so traumatised by events that she was off work for a fortnight).
  
31. It is unnecessary to record the precise course of events during the raid. I shall focus on the activities of Mr Canavan. His evidence (which is not contradicted by any witness) is that he went straight to the server and unplugged the work stations, thereby isolating them and preventing anyone accessing or altering information stored on the server’s hard drive. This hard drive has been the subject of forensic analysis (to recover deleted files) and of two expert reports (by Mr Haggerty for Magical and Mr Croall for Mr Canavan). As between those two experts I found Mr Haggerty (to whom substantially larger resources were available) to be more reliable than Mr Croall (who had significantly less experience in giving expert evidence and was tempted to adopt a partisan attitude and to become an additional advocate in Mr Canavan’s cause). In their account of what Mr Canavan did I will simply record my findings on the issues as between the experts (covering areas on which there was in any event significant agreement) save for one issue (“deletions”) to which I must give more detailed consideration. My account will also focus on certain relevant themes rather than attempting a complete chronology.



32. The first recorded computer activity which I can be confident was undertaken by Mr Canavan occurred at either 2:04 or 2:06pm on 13 February. The question arises: what did Mr Canavan do between the time of his arrival and the time when he began to create files on the server? The claimant's case was that the entire system was password protected i.e. secure and that Mr Canavan spent the time trying to extract the relevant passwords from Mr Scarfe or alternatively to discover them in some other way. Hence their tendency to put the commencement of the visit about an hour before the time for which I have found. Mr Canavan's case was that there were no effective passwords on any part of the system so that he was simply able to access it.
33. I did not in the event find that the timing of the visit (and so the period that elapsed before Mr Canavan began serious work on the computer system) was of itself of great assistance in forming a view about the extent of password protection on Magical's computer system (and hence its inherent security). For Magical the 13 February 2003 was an ordinary working day. So far as I can understand from the reproduced computer logs, they show ordinary routine activity in the morning. There is no real warning of the raid or visit. Mr Sykes had been dispatched from the Ferrybridge service station to announce to Magical's staff the arrival of Mr Holly: but nobody knew precisely why Mr Holly was coming, and in any event he arrived immediately afterwards. I consider it inherently unlikely that anyone closed the server down. Accordingly when Mr Canavan arrived I regard it as probable that the server was up and running. He therefore did not need a password for any start up routine. He would have needed a password if he intended to use any of the "administrator privileges" on the server (such as resetting the work station

passwords or those on any other password protected files) and to access any password protected files that were not then open. He would also have needed passwords to access the work stations which he had disconnected from the network by pulling out the plugs. I therefore regard it as likely that Mr Canavan was able to commence a survey of the computer system and to undertake some tasks without knowing any passwords. I find that that is exactly what he did, reviewing the back-up log so as to discover what was on the system and where.

34. But I do not accept Mr Canavan's evidence that there was no password protection on the server or the network so that the whole system was "insecure".

(a) Mr Canavan's expert commented on the quality of Magical's server and said that it demonstrated the value which Magical placed on its information. A company which values its information is unlikely to omit taking the simple step of applying password protection in some measure.

(b) Andrew had installed Magical's computer system. He told me that when he did so he applied password protection. He fairly said that he could not be sure that it had subsequently been removed: but I can think of no circumstances which would make it probable that the protection was disappplied.

(c) Mr Scarfe told me that the system was password protected and that Mr Canavan repeatedly demanded that the passwords be given to him. It is telling that this is recorded in Mr Scarfe's near contemporaneous note, made at a time when no-one knew what Mr Canavan had actually done to

the system and well before anyone could anticipate what the significance of system password protection might be.

(d) Mr Hargreaves says that he could see Mr Scarfe becoming very agitated and that he advised him firmly to disclose the passwords because of the threats of violence. Mr Hargreaves says he believes Mr Scarfe did provide the passwords (though he is not sure): Mr Scarfe says he did not provide the passwords. Mr Hargreaves' evidence was convincing and survived cross examination. I consider it likely that there were passwords which protected some (if not all) of the functions and files.

(e) Mr Wood (a witness who was not called by either side) had given Mr Holly a witness statement to the effect that passwords had been inserted on the work stations with a view to denying Mr Holly access to them: this evidence was adopted on behalf of Mr Canavan and put to Magical's witnesses (in support of a case that Mr Holly was being wrongly excluded from the business). The evidence so introduced confirms that passwords were installed on part of the system, and I can see no reasonable grounds for thinking that they were installed on the work stations but not on the server.

35. I therefore reject Mr Canavan's evidence that the computer system was entirely insecure and without any password protection. This seriously undermines his case that he thought he was acting in Magical's best interests in "protecting" the system by the installation of his own passwords. There were undoubtedly passwords on each of the work stations and I find it probable that the administrator privileges and some other files (in particular

the ACT database) were password protected on the server. I consider that because the server was running Mr Canavan was able to conduct a survey of the system but that he required passwords to undertake some of the work which he intended. He was provided with the work station passwords by Magical's staff in the intimidating atmosphere which existed. Mr Canavan repeatedly asked Mr Scarfe for the other passwords, and the probability is that Mr Scarfe acted on Mr Hargeaves's advice (though he is reluctant now to acknowledge that he did so) and disclosed the necessary passwords.

36. Before he left that evening Mr Canavan installed his own passwords on the work stations and on the server. His justification for doing so was that he found the system entirely insecure and as a competent IT professional who was hoping to engage Magical as a client he rendered their system secure. I have rejected his evidence as to the existence of passwords. I also reject his evidence as to his reason for installing passwords. When he left the premises he did not give those passwords to Andrew or Mark (who were asserting that they were Directors (following the EGM) and had satisfied the police that this was so); nor did he give the passwords to Mr Scarfe (who was responsible for IT) or to any other employee of Magical. Accordingly when he left the premises Mr Canavan had locked out all of the directors and staff of Magical (save Mr Holly) and rendered its business systems completely inoperable. His explanation was that he was hoping to be invited back the following day (and indeed had offered to attend) and to secure Magical as another client for NextGen. I find that explanation wholly incredible.

37. The computer log shows that at 14:06 Mr Canavan accessed and copied the back up log on the server. After a gap during which it seems to me likely that Mr Canavan was trying to retrieve passwords he begins a process of copying files. When this process was completed he then appears to have gone round the work stations to copy the contents of each hard drive onto the server. In evidence Mr Canavan expressed the view that as a competent IT professional he considered that the entire contents of every PC hard drive should be mirrored on the server and that he undertook that task in order to effect a general improvement to Magical's computer records. The evidence of Mr Scarfe was that in fact there was already an automatic back up of all important files stored on work station hard drives (and indeed on the Apple Macintosh design machines). I reject Mr Canavan's explanation. I accept the view of Mr Haggerty that no competent IT professional could set about creating back up rules for a network computer system without knowing the client's business and taking the client's instructions as to what files it required to be backed up and how that could conveniently be achieved. I consider that Mr Canavan copied the work station data across to the server purely and simply in order to ensure that he created on the server a complete copy of every electronic record which Magical had.
38. When copying the data across it appeared from a screen shot of the EnCase forensic analysis tool produced at trial that Mr Canavan created a fresh hierarchy of files. Mr Canavan's explanation at trial (hitherto never adverted to in his pleaded case, in answers to requests for further information or in his witness statement) was that he decided to tidy up Magical's data, again for Magical's benefit. This was not done in consultation with any of Magical's

staff (as is evident from the misspelling of their names in the hierarchy). It was in my judgment done prior to or in the course of copying the Magical data onto CDs and with the object of enabling Mr Holly to find his way round the copied data. (That is why the hierarchy was not to be found on the server when Mr Canavan left at the end of the visit, but is only to be found by tracing deleted files with the aid of the EnCase forensic programme). The creation and deletion of the file hierarchy seriously undermines Mr Canavan's case that he was tidying up Magical's data as a service to and for the benefit of Magical.

39. At about 16:40 a process of the deletion of files began. I should make abundantly clear that the files that were being deleted were not Magical's original business records: they remained intact (if inaccessible because of the secret passwords which Mr Canavan installed). What was being deleted was the copies of those files (derived from the server and from the work stations) which Mr Canavan had created and reorganised for the purpose of copying onto the CDs. It was the claimant's case that when this process was completed there would be no trace on Magical's system of the copying process having been carried out (although there were, in fact, five automatically generated files which would give a clue and which the claimants said, by oversight, Mr Canavan forgot to delete). The claimants say that Mr Canavan was covering his tracks. Mr Canavan says that he did not cover his tracks, and if there are deletions then they are probably the result of the way the computers were stored after 13 February, or are subsequent accidental deletions (made when the system shut down unexpectedly whilst Andrew or IT consultants retained by him were examining what had happened to the system or were trying to access data). This issue of deletions was hotly

contested because each side thought that it threw great light on the state of mind of Mr Canavan at the time when he undertook the work.

40. It was the evidence of Mr Haggerty that there was exceptionally high server activity on the 13 February 2003, with 9,898 files being created, of which 9,852 were both created and deleted on that day. He based this view on running Magical's hard disk using the EnCase forensic analysis tool, and then interpreting the results in the light of tests carried out on a clean build computer running MS Windows 2000 server (upgraded to SP2), which was the actual operating system then current on Magical's computer. These tests enabled him to form a view about the behaviour of the date and time stamps of files and folders when deleted using either the "drag and drop" or the "cut and paste" facilities within the operating system, both within a volume (e.g. on the server's hard disc) and between volumes (e.g. from the hard disc of a work station to the server's hard disc or from the server's hard disc to a CD). The date and time stamps to which he referred are those denoted as "file created", "entry modified", "last written" and "last accessed". He concluded from his analysis that when dealing with files "last accessed" denotes the last activity that was carried out on a file, and that since deletion of a file must of necessity be the last activity, the "last accessed" time stamp was a reliable indicator of the date of deletion. The deletion of a folder will, of necessity, delete all the files within that folder. He therefore revisited the conclusion that he had expressed in relation to files and considered it in terms of folders. He concluded that 1,233 folders were created between 14:03pm and 16.34pm on 13 February 2003 and of those 1,228 had been deleted between 16:09 and

16:58pm that day. The only folders not deleted were those that had been automatically generated by the Windows NT back up utility.

41. In his report Mr Croall did not agree with this conclusion. He examined the same material but using different resources. Instead of using a clean built computer he used a software programme which created a “virtual machine” on his own computer – a technique which he acknowledged introduced additional variables into the process. He also relied heavily on a publication called “File System Forensic Analysis” by Brian Carrier. As a result of considering this material, whilst he agreed that deleting a folder was the last activity that could be carried out, he did not consider that “last accessed” time stamp could be relied upon as indicating the time of deletion. In his view only 215 folders were deleted before Mr Canavan left on 13 February.
42. Mr Turner (Counsel for Mr Canavan) built upon this. He first sought to undermine the value of Mr Haggerty’s testing procedures. He established (in cross examination of Andrew) that over the weekend following the 13 February 2003 the server and work stations were removed from Magical’s offices and stored in the loft of Mrs Phillis’s house. He established from the experts that these were not ideal storage conditions. He established in cross examining Andrew that the server hard drive had been accessed on at least four occasions between 13 February 2003 and 11 April 2003 when Andrew sought to extract data for the purpose of conducting the business, by uploading it onto the new computer system which he had installed. He finally established that between the 11 and 14 April 2003 Magical’s IT consultants (Paralogic) had accessed the system for the purpose of ascertaining what had



been done to it on 13 February 2003, and that in the course of their examination there were some accidental shut downs, probably occasioned by them booting up the machine and then encountering a password that they did not know. He finally established that in an accidental shut down there was a possibility that the “last accessed” time stamp might not be updated if a particular folder was open but the computer was utilising all of its available memory so that there was a backlog in updating the time stamps.

43. Mr Turner’s campaign was valiant and ingenious: but it has not succeeded. I am impressed by the logic inherent in Mr Haggerty’s approach and by the quality of the testing that underpins his conclusions. Mr Croall’s whole approach appeared to me to be based on a partial reading of Mr Carrier’s publication, and if one read the entire passage (on one clause of which Mr Croall placed heavy reliance) Mr Carrier would have agreed with Mr Haggerty that the one value which *always* changed when a folder was deleted was the “last accessed” time stamp. Moreover, I am impressed by the inherent probabilities. The idea that something over 1,000 folders (all now deleted and all coincidentally last accessed at about 16:40pm on 13 February) have all been accidentally deleted at some later date or dates *without any of their other time stamps having been affected* strikes me as hugely improbable.

44. I therefore find that the deletion of the copy files which Mr Canavan had created was achieved by Mr Canavan in part by the use of the “drag and drop” or “cut and paste” facilities within the Windows operating system (which process he knew would delete his copies from the server hard drive volume) and in part by deliberate deletion of any remaining copies. He did so in order

to conceal that he had accessed and copied all of the data, and so that he could deny (as he did deny) what he had done.

45. To complete my review of the events of 13 February 2003 I should record Mr Canavan's admission that he gave Mr Holly the CDs containing a complete electronic record of Magical's business together with the DAT back up tape that was in the server. I should also record that Mr Canavan was unable to access Magical's Sage accounting system as stored on one of the work stations (because it was password protected and no-one would give him the password): and that accordingly the copy of the financial records he took was that contained on the server which might not have backed up the most recent entries. With that qualification he handed Magical's entire business records to Mr Holly and locked Magical's staff out of their computer systems.
46. When Mr Holly's party departed nobody at Magical actually knew what had occurred. Andrew suspected that Mr Holly had taken with him some sort of electronic record or the DAT back up tape, and he alerted the police to his concerns. The computer records show that he immediately tried to access the computer system, but could not do so. Andrew says that he promptly rang Mr Holly to ask for any passwords, but was not given any. He therefore did not know whether Magical's records had been destroyed or whether some sort of spyware programme or data corrupting virus had been put on Magical's system or what had happened: he therefore told the staff not to attend the following day. Andrew says that he rang Mr Holly the following day to make further requests for the passwords. It is common ground that Mr Canavan was present with Mr Holly when that call was received. Mr Canavan's account is

that he immediately provided all relevant passwords to enable the server and work stations to be accessed. Andrew's account (supported by Mr Scarfe) is that Mr Canavan said that he had forgotten the passwords (mockingly repeating an answer that Mr Scarfe had given to him when he had sought Magical's passwords) and then provided a number of false passwords. The computer logs certainly suggest that there were a number of unsuccessful attempts to access Magical's system made during the course of that day. It is unlikely repeated attempts would be made to access the system by Andrew once it was discovered that the passwords had been changed. It is likely that enquiry would immediately be made for the password. I find that Mr Canavan did not immediately upon request disclose all passwords to Andrew and Mr Scarfe to enable the system to be fully operated (which accounts for the unsuccessful attempts). Andrew summoned assistance from Paralogic, but they were unable to access the system. Eventually Mr Canavan did provide the key passwords. This confirms my finding that in inserting passwords Mr Canavan was not trying to protect Magical's data for its own good: he would otherwise have immediately provided the correct passwords.

47. Mr Canavan did not render a bill to Magical for the services which he says he performed for their benefit. Indeed, he did not do so until shortly before the trial. That is curious if he thought he was doing work for Magical (rather than for Mr Holly). At trial he offered as one explanation for this that every potential client was entitled to an initial free consultation. This struck me as singularly hollow (and as failing to explain the submission of the bill immediately before trial). Indeed, it was Mr Canavan's case that he did not render a bill to *anyone* for the days' travelling and work that he had

undertaken on 13 February although it was (on that case) an ordinary day's work for a not very important client. However on 31 March 2003 Mr Canavan rendered to Quest invoice No. 5286 which bears the following details:-

“1.00 Feb activities unit price £652.50.”

Mr Fernando (Counsel for Magical) suggested to Mr Canavan that this was his fee for the February “raid”, drawing attention to the lack of any specific description, or to any spreadsheet or to any timesheet (this being a period after Mr Canavan had acquired time recording software). Mr Canavan denied this saying that it was simply for general activities at Quest (which at his usual unit rate would have amounted to fourteen and a half hours work). He said that this was for installing a new computer network. I find that this is an invoice rendered to Quest for the work Mr Canavan undertook on Magical's computer system on 13 February and possibly subsequent work. It did not relate to the installation of a computer network at Quest. I have already drawn attention to the invoice of 10 February 2003 for just such work. There was a further invoice for the installation of three computers rendered on 31 March 2003 (again charging £90 for the installation of the first and £45 each for the installation of subsequent machines). So this invoice does not relate to that work. Mr Canavan has disclosed details of no other work undertaken at Quest such as would justify this charge. His explanation that it is for an accumulation of minor jobs is undermined both by the absence of a supporting spreadsheet or timesheet, and by the form of the invoice as apparently charging for a single item of work for a fee of £652.50.

48. This is the context in which the legal argument that Mr Holly had Magical's authority to commission Mr Canavan to undertake the work on its server must be examined. Mr Turner's first argument was that as a director of Magical Mr Holly had actual authority to retain Mr Canavan as an IT consultant to upgrade the security on Magical's system and to take a copy of its records for security purposes. Mr Turner relied first on Regulation 70 of Table A. This provides that (subject to immaterial qualifications) "the business of the company shall be managed by the directors who may exercise all the powers of the company". He submitted that the plural "directors" should be taken to include the singular "director" so that any individual director could exercise all of the powers of the company. I reject this submission. In my judgment Regulation 70 confers the power of management upon "the directors" i.e. the entire Board. That is why the Regulation concludes with the provision that "a meeting of directors at which a quorum is present may exercise all powers exercisable by the directors". It is also why Regulation 71 confers a specific power upon "the directors" to "delegate any of their powers to any committee consisting of one or more directors". In my judgment Mr Holly had no authority under the Articles to exercise sole management and control of the business of the company, that power being vested in the Board.

49. Mr Turner next argued that Mr Holly had actual authority because that was a correlative of the duties which he owed as director. He submitted that "each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them" (see Re Barings No.5) [1999] 1 BCLC 433 at 486 per Jonathan Parker J). He then placed reliance on the observation of Sir John Chadwick in the Oxford

following:-

“Where there is suspicion and lack of cooperation, a director is all the more entitled, perhaps even obliged, to inspect company accounts to protect the interests of the company and its shareholders. The right is not only to be exercised or the duty imposed where there is harmony within the company”.

Mr Turner therefore argued that the dispute between Mrs Phillis and Mr Holly imposed on Mr Holly the obligation to protect the interests of the company and its shareholders and the authority to do whatever he thought fit in performance of those duties (including the authority to instruct Mr Canavan to protect Magical’s computer system and the integrity of its data).

50. I reject this submission. This case is not about the inspection of accounts. It is about the creation of copies of Magical’s essential business information: I find that those copies were not prepared in the interests of Magical but in pursuit of Mr Holly’s personal interests because he was dissatisfied at the pace at which the valuation of his shareholding was proceeding and because he wished to assert his part ownership of Magical’s business. The raid on 13 February 2003 was undertaken (and expressed to be undertaken) in the prosecution of those interests. Mr Holly was not acting bone fide in the interests of the company and was using his powers as director for improper purposes. That could never be within his actual authority.
51. Mr Turner next argued that Mr Holly was acting within the scope of his implied actual authority because he was a director and an operational one. I reject this submission. Mr Holly was purporting to take control of Magical and (without apparent reference to anyone else) to create a duplicate of its

records for himself. The evidence did not establish any course of conduct or dealing whereby Mr Holly exercised unilateral authority without reference to Mrs Phillis to enter contracts of the relevant kind (whether that “kind” be the engagement of consultants or dealings with the IT system). Such operational responsibilities as he had had come to an end in October 2002. There was no evidence that he had undertaken any operational responsibility at all from that date. The staff had been told that he was no longer an operational director and he had been requested not to attend the premises. Whatever implied actual authority he may have had was expressly terminated. His unilateral announcement that he intended to resume a proactive role could not reclothe him with the authority which he had renounced (and which renunciation the company had accepted).

52. Mr Turner then argued that Mr Holly had actual authority to commission Mr Canavan because he was company secretary. He relied on the observations of Lord Denning MR in Panorama Developments v Fidelis Furnishing Fabrics [1971] 2 QB 711 at 716h that:-

“A company secretary is a much more important person nowadays...he is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day to day business of companies....He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day to day running of the company’s business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company.”

Mr Holly was indeed company secretary. But he never purported to act as such in relation to the raid and Mr Canavan gave no evidence that he was ever told that Mr Holly was Magical’s company secretary. The evidence simply

did not disclose that in relation to Magical the company secretary exercised any executive authority or in his capacity as such had any authority to enter contracts. I hold that Mr Holly did not, as company secretary, have actual authority to engage Mr Canavan either to “protect” Magical’s IT system (or make it “secure”) in whatever way Mr Canavan chose: nor did he have actual authority as company secretary to engage Mr Canavan to make a complete electronic record of Magical’s designs and business documents and to deliver it to him. Moreover, because of my finding that Mr Holly was not acting bona fide in the interests of the company, any actual authority he had as company secretary was not being exercised.

53. Mr Turner then argued that in the absence of any actual authority (express or implied) as director Mr Holly had ostensible authority to act as he did. Ostensible authority is a species of estoppel, dependent upon representations. Magical will be estopped from asserting that Mr Holly had no authority if they have represented that he did have authority. As will be apparent from my recitation of the facts, Magical made no representation at all to Mr Canavan: and the only representation made by Magical to the world at large was that Mr Holly was a director. Mr Turner accepted that the only people who had actually made representations to Mr Canavan were Mr Holly himself, Mr Holly’s solicitor and (argued Mr Turner) the policemen. I hold that there is no question of anything that Mr Keane or the policemen said binding Magical: they had no authority of any sort to make any representations about Magical. The more difficult case is that of Mr Holly.



54. The four conditions which must be fulfilled before Mr Canavan can establish that Magical is bound by the contract entered into by Mr Holly (even though Mr Holly had no actual authority to enter the contract) were set out by Diplock LJ in a familiar passage in Freeman & Lockyer v Buckhurst Park Properties [1964] 2 QB 480 at 505 – 506. In summary, as applied to this case, they are:-
- (a) That a representation that Mr Holly had authority to enter on behalf of Magical into a contract of the kind entered into by Mr Canavan was made to Mr Canavan;
  - (b) That the representation was made by a person or persons who had actual authority to manage the business (either generally or in respect of IT matters);
  - (c) That Mr Canavan was induced by Mr Holly’s representations of authority to enter into the contract and so relied on the representations;
  - (d) That under its constitution Magical was not disabled from or prevented from entering into a contract of the type entered into by Mr Canavan.

It might be thought that, under this formulation, the representation about the scope of the agent’s authority would have to be made by someone other than the purported agent. But this is not so. In Hely-Hutchinson v Brayhead [1968] 1 QB 549 at 593 Lord Pearson identified “an awkward question...as to how the representation which creates the ostensible authority is made by the principal to the outside contractor”. He addressed the question in this way:-

“...there is not usually any direct communication in such cases between the Board of Directors and the outside contractor. The actual communication is made immediately and directly...by

the agent to the outside contractor. It is therefore necessary in order to make a case of ostensible authority to show in some way that such communication which is made directly by the agent is made ultimately by the responsible parties, the Board of Directors. That may be shown by inference from the conduct of the Board of Directors in a particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said they have in effect caused the representation to be made. They are responsible for it and, in the contemplation of law, they are to be taken to have made the representation to the outside contractor.”

55. In my judgment Mr Canavan cannot rely on the ostensible authority of Mr Holly for two independent reasons. The first relates to the nature of the representations. I do not consider that there ever was any unequivocal representation by anyone that Mr Holly had the authority of Magical to engage Mr Canavan to work on its systems. The tenor of the representations made by Mr Holly was that he was a director who was in dispute with his co-director and as such had the *right* to do what he was doing. That is why Mr Keane was at pains to assure Mr Canavan that what Mr Holly was embarking upon was “legitimate”. I accept that there may have been passages of conversation in which Mr Holly said that he wanted to protect the records kept by Magical: but that was accompanied by assertions that he was going to take control of the business and is at best an equivocal representation that the raid or visit was in Magical’s own interest. If Magical is to be estopped from denying Mr Holly’s authority (even though he had no actual authority) it ought to be on the basis of clear representations by it and by its ostensible agent. Furthermore, I do not consider Magical ever held out Mr Holly to outsiders as having authority to commit the company to contracts or as having the ability to make representations about the scope of his authority. I cannot latch upon any proven facts which demonstrate that Magical themselves placed Mr Holly in a

position where he could hold himself out to third parties as their agent and then acquiesced in his activities by allowing the representations to continue and by accepting the contracts he entered (to adapt Lord Pearson's formulation).

56. Alternatively, I would hold that Mr Canavan is not entitled to assert that he relied on the representations where the representations were made in abnormal circumstances which should have put him on enquiry as to whether the transaction would bind Magical. The suddenly summoned meeting at the Ferrybridge service station. The presence of two large security guards. The dramatic takeover of the offices. The restrictions put on staff about making contact with the outside world. The intimidation necessary to persuade members of staff to disclose their passwords. The arrival of the police. The arrival of two persons (Mark and Andrew) asserting that they were Directors of the company and evidently trying to find out what was going on and objecting to it. All of these indicators must (if Mr Canavan was genuinely relying on a representation by Mr Holly that he had the authority of Magical to commission the work) have raised in the mind of any reasonable IT consultant questions as to whether he was truly working for the company or was simply aiding Mr Holly in the prosecution of his personal claims against Magical. But Mr Canavan never asked Andrew or Mark or Mr Scarfe or Mr Hargreaves. He sought reassurance from Mr Holly's solicitor, Mr Keane, and he relied on the fact that the police did not stop him carrying out his work. But if you have a doubt about representations that have been made to you and that doubt is not objectively and reasonably quelled by the circumstances, you do not ask the representor or his agents to quell the doubt. If you do, you are not making a

genuine enquiry to discover the truth: you are simply seeking reassurance from the original source of the representation. In my judgment that amounts to turning a blind eye to the difficulty. I find and hold that is what Mr Canavan did. He cannot therefore rely on any representations made by Mr Holly.

57. I therefore reject Mr Canavan's defence that Mr Holly had actual or ostensible authority to instruct him to undertake the work that he did. It follows that I find and hold that NextGen is an infringer (under section 16 and 17 of the Copyright, Designs and Patents Act 1988 ("CDPA 1988")) in relation to all copyright material and an infringer in relation to the extraction of the contents of Magical's database without its consent (within regulation 16 of the Copyright and Rights in Databases Regulations 1997 ("the 1997 Regulations")). No separate case relating to confidential information that was not included on a database was specifically put to Mr Canavan. But there was much cross examination as to what data was password protected (and so would be readily seen as confidential) on the basis of which I hold that NextGen knowingly copied Magical's confidential information. I will therefore grant an injunction restraining NextGen from infringing Magical's copyright or database right, or using or disclosing any of Magical's confidential information; I will order the delivery up of all such material as remains in NextGen's possession, and direct an enquiry as to damages (or as appropriate equitable compensation) for infringement of copyright, infringement of database right, and misuse of confidential information; I will give Magical the right to elect (a right unlikely to be exercised in NextGen's case) for account of profits in lieu of damages or equitable compensation. In

NextGen's case I do not order additional damages under section 97 of the CDPA 1988 or exemplary damages. I am in no real doubt that Mr Holly is the villain of the piece; Mr Canavan was his accomplice, but his wrongdoing was of a significantly different order.

58. The question arises whether I should grant the same relief in relation to Mr Canavan as I have ordered in relation to NextGen. NextGen is the *alter ego* of Mr Canavan. Mr Canavan was at all times the person who actually created the infringing copies, extracted the information from the database and copied the confidential information: and if NextGen acted it was because Mr Canavan procured it so to act. With commendable realism Mr Turner did not suggest in Third and Seventh Defendant's Defence or in argument at trial that a distinction could or should be drawn between them. I will accordingly grant the same relief against Mr Canavan as I have granted against NextGen.
59. I must now turn to those causes of action pleaded against Mr Canavan which arise out of his activities after 13 February 2003. In essence it is alleged that Mr Canavan uploaded the CDs and DAT tape onto server and computers which he supplied to Quest (and which were taken over by ESP for the purposes of its business).
60. It is acknowledged by Mr Canavan that before 1 January 2004 he sold PCs and lent a server to Quest or ESP which together ultimately constituted the computer network operated by ESP. He cannot do otherwise in the face of invoice No. 5284 rendered to Quest for the supply and installation of three PCs and No 5289 rendered to ESP for computer ancillaries and a support

package put in place on 20 May 2003. But he denies that this supply and installation creates any liability on the part of himself or NextGen for what is uploaded. I agree. As was explained by Lord Templeman in CBS v Amstrad [1988] RPC 567 at 606:-

“ Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even although the party who sells it know that he is going to infringe it and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes, and actually infringe”

61. I therefore turn to the alternative claim namely that Mr Canavan himself uploaded the relevant material onto the system and thereby committed further infringing acts. There is of course in connection with these allegations no possibility of any defence of “authority”. Mr Canavan denies doing any such thing. The case put on behalf of Mr Canavan was that the work may well have been done by a Mr McIlvenney who had some limited IT skills and actually became an employee of ESP in about October 2004, but who (it was suggested to Magical’s witnesses) might have been providing consultancy services in 2003. The question is whether Magical has proved its case in the face of that denial.
62. Magical cannot adduce any direct evidence. It cannot demonstrate from an investigation of ESP's computer system when the relevant programs and data were first uploaded. That is because immediately after its request for inspection ESP's entire computer system was rebuilt (incidentally by Mr Canavan). (Mr Canavan says that that is entirely coincidental and the result of an accident that befell the system. That issue remains to be tried and cannot inform the decision that now falls to be made). Accordingly the case is

founded on invoice No 5286 rendered on 31 March 2003 for unparticularised February “activities” being 14½ hours unspecified work. Magical invites me to draw the inference that this relates to the raid (when the CD copies were made and the DAT tape retrieved) and the uploading of the materials so obtained, because Mr Canavan was Quest’s trusted IT consultant who had previously been commissioned to effect data migration (which had led to his contact with Magical over the ACT discs), who had been involved in obtaining the material and supplying the hardware on which the data on the CDs was to be used, and there is no other realistic candidate who could have performed the task.

63. I make a finding to that effect notwithstanding Mr Canavan's denial. The primary facts from which the inference is invited are secure; and the inference itself entirely reasonable. The denial comes from a source which has consistently lied about his involvement; and although Mr Canavan’s case was put on the footing that the relevant work was probably done by Mr McIlvenney, Mr McIlvenney himself was not called (though apparently available). The inference I draw is that he would not support the line of questioning put to Magical’s witnesses. Moreover from what I saw from the records of Mr McIlvenney's participation in IT administration after October 2004 I would not regard it as probable that he had sufficient skills to replicate Magical’s design and business administration system on ESP's computers. I therefore find and hold that Mr Canavan did upload onto the Quest/ESP system the material that had been stolen from Magical.

64. These are the claims against Mr Canavan and NextGen which fall for decision at this trial. Those causes of action which arise out of events occurring after 1 January 2004 have been stood over: they are complex in nature, and the likely marginal return over and above that achieved in this action would (on a provisional view) suggest that they were best compromised.
65. There now arises the question of Mr Canavan's and NextGen's Part 20 claims against Mr Holly. These were not the subject of extensive analysis or argument (because Mr Holly did not attend trial). Mr Holly undoubtedly warranted to Mr Canavan and NextGen that he had power (as a director seeking to preserve his personal interests) legitimately to instruct them to do the work: that was the whole point of involving Mr Keane. He is in breach of that warranty. Moreover, save in respect of the claim to additional or exemplary damages, as regards the claims for infringement of copyright and database right and the misuse of confidential information, Mr Holly is liable in respect of the same damage as Mr Canavan and NextGen in the event that Magical elects to take equitable compensation. (Although the point was not argued it seems to me that if Magical elects to take an account of profits this cannot be "damage" for the purposes of engaging the Civil Liability (Contribution) Act 1978, nor can Mr Holly be a person "liable in respect of the same damage". An account of profits is essentially restitutionary not compensatory, and the profits made by Mr Holly from exploiting Magical's property will not be the same as the profits made by Mr Canavan/NextGen). If Magical elects for damages or equitable compensation I consider it just and equitable (having regard to the extent of Mr Holly's responsibility for the



damage in question) that Mr Holly should afford Mr Canavan and NextGen a complete indemnity.

66. I turn to a consideration of the surviving claims against the other defendants. On the 27 May 2008 summary judgement was entered against Mr Holly for infringement of copyright, infringement of database right and misuse of confidential information; and an injunction was granted and an inquiry as to damages (including additional damages under section 97 of the Copyright Designs and Patents Act 1988) ordered (with a right being granted to the claimants to elect for an account of profits instead). This order did not however address all the causes of action pleaded against him and there remain additional claims in passing off and for harassment, trespass and conversion.
67. I have found in relation to Mr Canavan (and in any event Mr Holly admitted) that Magical owned the goodwill attaching to the business called “Magical Marking”. It was alleged in the Particulars of Claim that Mr Holly had wrongly claimed that he was connected with that business by representing to customers or potential customers that the ESP was operating the business previously carried on by Magical or that ESP was connected with or sister company to Magical. It was also alleged that Mr Holly had caused ESP to register the domain name [www.magicalmarkings.co.uk](http://www.magicalmarkings.co.uk) (a name confusingly similar to that of Magical itself), and had caused web customer enquiries to be diverted to a site operated by ESP. These allegations were proved in the evidence of Andrew, Mark, Mr Scarfe and Mrs Phillis. Mr Holly himself led no evidence. It is therefore proved to my satisfaction that the representations were made. In his pleaded case Mr Holly acknowledged that in that event the

representations would amount to passing off. I consider it clear that damage has been caused by those representations. ESP had a substantial turnover when it entered administration. Given that ESP was a start-up company with nothing other than Magical's designs, marketing material and customer database and some of Magical's former personnel it may be inferred that that turnover was generated largely by its exploitation of an alleged connection with Magical (which had hitherto dominated the market). Neither Mr Holly nor ESP led evidence to displace that inference. I consider that Magical is entitled to relief in respect of that passing off in the same terms as that granted in respect of the infringement of copyright and database right and misuse of confidential information claims.

68. There were in addition property-related claims against Mr Holly in trespass and conversion. I decline to grant any relief in respect of the conversion claim (which relates to the appropriation of the DAT tape in the server). This very minor matter was not pressed and no damage flows from the act of conversion that will not be caught up on some other head of claim. I likewise do not intend to address the trespass claim at any length. Mrs Phillis as Managing Director of Magical banned Mr Holly from Magical's premises (a position to which she adheres today). His inherent rights as a Director of Magical would have entitled Mr Holly to disregard this ban if it was in the essential interests of Magical's creditors and shareholders that he do so. But Mr Holly's participation in the raid in February 2003 was in my judgement not an exercise of any such inherent right, but was self-help in support of his attempt to sell his shareholding to Mrs Phillis. It therefore amounted to a trespass. Furthermore at the date of the trial and in the light of the findings I have made

it is plain that Mr Holly has no current right to enter Magical's premises. To avoid future contention I will grant an injunction restraining him from seeking to do so.

69. The Particulars of Claim also advance personal claims against Mr Holly for harassment of Andrew. The only form of harassment relied upon was telephone calls. The statement of case proceeded by reference to a single sample (which was admitted by Mr Holly, though he denied that it constituted harassment). This plea was correct in law on the pleaded case, since harassment requires (under the Protection from Harassment Act 1997 sections 1 and 3) a course of conduct and a single instance will not suffice. But unwisely Mr Holly required service of a schedule of all acts of harassment relied on. This enabled Andrew to supplement his pleaded and particularised case, which he did in Particulars dated the 10th July 2007 verified by statement of truth, and attested to in the witness statement to which Andrew swore at trial (and which was not challenged by Mr Holly). I find the following acts of harassment proved:-

- i) Between February 2003 and early June 2003 Mr Holly made a large number of unwanted and intimidating calls to Andrew (established by the "Caller ID" facility on Andrew's phone) in the course of which he used foul and abusive language and accused Andrew of "killing" his mother;
- ii) At 2 p.m. on 4 June 2003 Mr Holly made a telephone call which was recorded by Andrew in the course of which Mr Holly said :-

“ You are a liar, you're a cheat and I'm going to spend the rest of my working life getting even with you..... I will spend every penny that I have, every moment of the rest of my working life finishing you man. Finishing you. You watch me mate. You will be taking some calls very shortly from people who want explanations from you as to why the company you're involved in has got a winding up petition against it”.

iii) Following this Mr Holly received a police warning. The immediate consequence was a threatening telephone call from one of Mr Holly's “thugs” to Andrew announcing that he was coming “to sort you out and make sure this is finished”, in the course of which call a large 4 x 4 entered and did a spin turn in the drive of Andrew's house, the call then concluding with the words “You do not know who you are messing with. Sean [Holly] is the man”.

iv) In early July Andrew went fishing alone at a remote pond. As soon as he sat down the same “thug” made a telephone call and said

“Like a bit of fishing do you? Good time to be on your own.

We thought we would just let you know we are around.”

v) On 16 July 2003 Mr Holly telephoned Andrew indicating that he wanted settlement of his claim to a shareholding and warning Andrew that “the boys from Manchester would be in touch”.

These are serious acts of harassment. I hold that a breach of the 1997 Act is established for which Andrew is entitled the damages. I adjourn the assessment of the damages to the enquiry which is to proceed in relation to the other heads of claim.

70. So much for Mr Holly. I turn to other defendants. There is a claim against ESP for infringement of copyright in Magical's designs and documents. I have found that Magical owned the copyright in these works. I have also found that these works were copied onto two CDs and were also to be found on the DAT tape delivered to Mr Holly. It would constitute primary infringement under sections 16-18 CDPA 1988 to copy all or a substantial part of such copyright works without consent. It would constitute a secondary infringement under sections 16, 23 and 27 CDPA 1988 to possess, directly or indirectly, in the course of business any infringing copies which ESP had reason to believe were infringing copies. I find that Mr Holly was ESP's directing mind. I further find that ESP copied the CDs and the contents of the DAT tape onto the computer system (in part owned by it and in part borrowed from NextGen) and after minor and immaterial alterations falling well short of the creation of any new work utilised that material in the conduct of its business. This was proved in the evidence of Mrs Phillis, of Andrew and of Mr Ely. In some cases (for example photographs used for publicity purposes) the infringement constituted shameless use of the unaltered originals. I hold that Magical is entitled as against ESP to relief in the same terms as that already granted against Mr Holly.

71. Similar claims were made against ESP for abuse of database rights and the misuse of confidential information. I have already found and held that the collection of data relating to Magical's production, business administration and customer base constituted material that was protected by the 1997 Regulations. I have already found that this material was copied onto the computer system owned or used by ESP through the medium of the CDs and

the DAT tape. I am satisfied by the evidence of Mrs Phillis, of Andrew and of Mr Gornall (all of which was unchallenged by ESP) that there was wholesale infringement by ESP of these database rights. I hold that Magical is entitled to relief under this head of claim against ESP in the same terms as that granted against Mr Holly.

72. I am satisfied that ESP knew (because it is the *alter ego* of Mr Holly) that Mr Holly had breached his fiduciary duties to Magical in obtaining the material to be found on the CDs and the DAT tape and which was loaded onto the computer system used by ESP; and that ESP also knew that it ought not to use that material in the course of its own business. It had been stolen from Magical and was being used by ESP in an endeavour to appropriate Magical's business because Mr Holly was not being bought out of his interest in Magical in a manner and at a price which was satisfactory to him. This is exemplified in the telephone conversation of 4 June 2003 quoted above. It would follow that all of the information and documentation contained on the CDs and the DAT tape which Mr Holly provided to ESP was held on constructive trust for Magical. Accordingly that intellectual property was not available for exploitation or realisation by the administrators of ESP. I will grant a declaration to that effect and order for its delivery up: but I will grant no further consequential relief (adjourning it for further consideration on the application of Magical) since none was clearly claimed in the prayer for relief. The question arises not only between Magical and the administrators of ESP but also between Magical and the company now known as Educational & Special Projects Ltd (formerly Andjam Ltd) which purchased the undertaking and assets of ESP from its

administrators in the “pre-pack administration” that was put in place on the 31 March 2008.

73. Lest there be any doubt about the matter I order payment of all sums found due upon the making of the relevant inquiries or the taking of the relevant accounts, together with interest at judgement debt rate to be assessed as part of the enquiry or account.
  
74. I do not expect attendance of legal representatives when this judgement is formally handed down. The Order recording the outcome of the many causes of action against the several defendants which I have determined at this trial will be complex and ought to be the subject of considered argument, along with costs and interest. I will adjourn these matters (together with any other application of which I am given notice by 2.00pm on the day preceding the formal handing down) to a further hearing.

Mr Justice Norris.....16 October 2008