See para. 34

Indexed as:

United Technologies Corp. (c.o.b. Pratt & Whitney) v. Platform Computing Corp.

Between
United Technologies Corporation carrying on business as Pratt & Whitney and Pratt & Whitney Canada Inc., plaintiffs, and Platform Computing Corporation, Platform Computing Inc., Songnian Zhou, Ming Xu and Jingwen Wang, defendants

[**1998**] **O.J. No. 883**

58 O.T.C. 81

83 C.P.R. (3d) 350

77 A.C.W.S. (3d) 1241

Court File No. 96-CU-113924

Ontario Court of Justice (General Division)

Wilkins J.

Heard: December 8, 1997, January 27-30, February 2-4 and 6, 1998.
Judgment: March 5, 1998.

(41 pp.)

Injunctions -- Interlocutory or interim injunctions -- Balance of convenience -- Circumstances when injunction will not be granted -- Requirement of irreparable injury -- What constitutes -- Practice -- Judgments and orders -- Summary judgments -- To dismiss action.

This was an application for an interlocutory injunction. The applicant, United Technologies, was an aerospace manufacturer. It developed a computer design program and processing system. United claimed a proprietary interest in concepts used in the system. The respondent, Platform Computing,

was a computer programming company. United and Platform were involved in a research venture initiated by NASA. Platform was given possession of technical information regarding United's system. It intended to use the information to develop a marketable computer program. Negotiations over a licensing agreement covering concepts used in United's system came to an end. United brought an action for conspiracy and breach of confidence, contract and fiduciary duty. It sought an interim injunction restraining Platform from using confidential information obtained from United regarding its platform pending trial. Platform brought a counter-application for summary judgment dismissing United's action.

HELD: The application was dismissed. United did not establish that Platform made actual use of any confidential information or intended to use the information. United was aware that Platform would acquire information in the NASA venture that could be used for its own commercial development. However, there was little evidence of an imminent risk that Platform would use any of United's confidential information. There was little evidence of irreparable harm to United. The balance of convenience favoured Platform. An injunction would prevent Platform from using general concepts in the public domain and seriously hamper the development of its business. United was not a direct competitor of Platform. The counter-application was granted, in part. United's claims in contract and breach of fiduciary duty were dismissed as not disclosing a genuine issue for trial. The claims regarding breach of confidence and conspiracy were allowed to continue.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 20.

Counsel:

Ronald J. Walker and Bruce C. Treichel, for the plaintiffs.
Robert H.C. MacFarlane and Scott Pundsack, for the defendants.

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1 **WILKINS J.**:-- The plaintiffs, Pratt & Whitney and Pratt & Whitney Canada Inc., are both part of the United Technologies Corporation group of companies. Collectively, they shall be referred to as P & W.

2 Platform Computing Corporation is an Ontario corporation and Platform Computing Inc. is a wholly owned United States subsidiary. These defendants shall be identified as PCC.

3 The individual defendants, Songnian Zhou, Ming Xu and Jingwen Wang, are respectively employees of PCC and shall be identified as Zhou, Xu and Wang.

4 P & W is primarily engaged in the design, manufacture and sale of aerospace technology and,

in particular, engines.

5 PCC is a youthful but nonetheless highly successful computer programming company specializing in the design of programs for the management of complex systems and other problems.

6 During the 1980s, P & W engaged in a very significant in-house program to develop special systems for the purpose of assisting and/or solving complicated problems related to design in such areas as fluid dynamics in their aerospace business operations. With the assistance of their in-house engineers and computer specialists, including one Carl Fischberg, they spent a significant amount of time, money and effort in developing a parallel processing system which could utilize their own existing computer workstations. The program or process by which they managed these highly complex technical tasks eventually became known as PROWESS and the significant features of that program for which the plaintiffs assert a proprietary interest are set out in detail in Schedule A to the statement of claim.

7 A very significant volume of evidence was placed before me setting out how the PROWESS system operated and there was a great deal of expert testimony put before me by the plaintiffs in support of the proposition that certain concepts expressly enunciated in Schedule A were capable of a proprietary interest and, as such, matters of confidence. All of the experts seem to have agreed that PROWESS displays confidential methods of implementing a number of the concepts set out in Schedule A, however, Schedule A itself does not set out what those implementation methods might be.

8 The plaintiffs have moved for an interlocutory injunction enjoining the defendants from utilizing confidential information obtained by the defendants in the course of the parties' business dealings. Upon a complete review of the evidence and the argument made before me, the core of the plaintiffs' presentation is that the whole of Schedule A ought to be treated as confidential information and its use enjoined on the basis that Schedule A as a whole is unique and that its operation as a complete program is a confidential trade secret.

9 The plaintiffs further put forward the proposition that the various combinations of implementations which make up the function of PROWESS ought also to be enjoined as confidential information. In addition to the technical implementations of the various functions as they work together in PROWESS, the plaintiffs also assert that there are two concepts contained in Schedule A which the plaintiffs assert are capable of a proprietary interest and are confidential. These two concepts are known as "cluster hierarchy" and "file configuration".

10 The plaintiffs argue that the expert evidence on the uniqueness of cluster hierarchy and file configuration is in conflict and that, in the event the experts are in dispute on this issue, that alone raises enough to constitute a serious issue to be tried. It is the plaintiffs' position that, if the evidence of one expert supports a finding of confidentiality in respect of these concepts, the motions judge cannot look behind that evidence and, even though it is controverted, the test of serious issue has been met. An interesting adjunct to this proposition, however, which was not argued by plaintiffs'

counsel is the fact that the controversy as to the unique nature of the two concepts referred to arises out of contradictory evidence by the experts tendered by P & W itself.

11 As well as responding to the plaintiffs' motion, the defendants launched a counter-motion pursuant to Rule 20 for an order dismissing some or all of the plaintiffs' causes of action on the grounds that the evidence before the court did not disclose a genuine issue for trial. This was a rather interesting tactical step taken by the defendants as the evidence on which the defendants respond to the plaintiffs' motion is the same evidence on which they rely in assertion of their own motion under Rule 20. It is also of significant interest as it draws an interesting comparison between the concepts of a serious issue for trial as it ought to be considered in a motion for an interlocutory injunction and the concept of a genuine issue for trial as it is to be considered under Rule 20.

12 By way of background, I do not intend to go into the facts in the depth in which they were presented to me. Sopinka J. in R.J.R. MacDonald Inc. v. Canada (Attorney-General) (1994), 111 D.L.R. (4th) 385 (S.C.C.) essentially described the process by which the motions judge on an interlocutory motion for an injunction ought to consider and review the evidence. The test which the court must apply in order to decide whether or not injunctive relief ought to be afforded on an interlocutory basis are well established and well set out in that authority. Similarly, for purposes of a determination under the provisions of Rule 20, it is not appropriate for the motions judge to go through a detailed analysis of the evidence as it might be presented at trial. The judge on a Rule 20 motion is not determining or deciding the issues or making findings of fact but, rather, only having a good hard look at the factual information as presented to the court in order to determine whether or not there is indeed a genuine issue for trial. In order to make that determination, it is unnecessary for the motions judge to go through the various contradictions and/or conflicts in the evidence or to create a lengthy presentation of the factual lis between the parties. In a case such as this, where a rather extensive amount of factual information was presented to the court, the court's task is merely to examine the information as a whole to determine whether or not genuine triable issues have been presented.

13 During the 1980s, P & W set about developing an in-house program which could combine the available computer power, time and space on the thousands of workstations situated at their offices across America. The purpose of this effort was to increase computer resource efficiency and, correspondingly, assist in the solution of complicated problems related to engine design and, more particularly, fluid dynamics. Utilizing in-house engineers and computer specialists, a significant amount of time, money and effort was spent to develop a parallel computing system which would allow P & W to achieve these goals. By dint of the application of existing technology in concert with a number of innovative techniques, P & W satisfied their aims. Ultimately, a complex process was designed, which allowed over 2,000 workstations to be linked together. Once linked, the space, time and capacity of these machines could be harnessed for the solution of engine design problems. In order to attain the function level of the present PROWESS program, many difficulties had to be overcome. Each workstation linked into the parallel process had to be available for its normal day-to-day use. A number of significant computer problems had to be resolved in order that clusters

or groups of workstations could be continuously varied to allow the day-to-day company business to be transacted without interruption. A constant migration of the larger work task problems from station to station and from cluster to cluster had to take place to accommodate the variations of available computer capacity. Obstacles related to the technical issues known as check-pointing and fault tolerance had to be overcome. It was necessary to develop an appropriate task control mechanism for the passing of messages between workstations and clusters so as to resolve difficulties related to language of machines, protocol of conduct, the saving of work product and the creation of an orderly structure, just to name some of the features set out in Schedule A and in the evidence before me. It would be unnecessary and probably counterproductive for me to go into a detailed explanation of the technical issues that had to be resolved and the mechanical details related to them. Different machines and different programs all have their own limitations, restrictions. problems and "bugs". Through hard work and diligent application, P & W designed the implementation process necessary to work around the various hindrances they encountered and ultimately developed the program at issue in this motion, PROWESS.

14 Among the many impediments confronting P & W were the complexities of managing and passing the many messages necessary to ensure the continuation of the work process and the preservation of the work being done as it had to be migrated across the network of machines. PCC had become a leader in the development of programming technology relating to message-passing systems. One of their particular programs, L.S.F., was determined to be particularly suited to working within the overall process being designed by P & W. As a consequence of this determination, P & W and PCC entered into a licensing agreement for the use of this particular technology and it was adapted into the P & W parallel process system, becoming an important part of the task management process which allowed for much of the accuracy, reliability and high level of success ultimately attained by P & W.

15 In business terms, the licensing arrangements between P & W and PCC became one of the most significant sources of income for PCC and it might well be said that P & W was PCC's most significant customer. The two companies also became involved in a research effort encouraged by the United States National Aeronautics and Space Administration ("NASA").

16 Among its different roles, NASA plays a facilitating role in the development of aerospace technology, in order to assist that industry to remain at the leading edge of competition. Through joining members of private enterprise in cooperative ventures with NASA on a matching fund basis, projects of research and development are embarked upon, the product of which is made available to the industry as a whole. The operating parallel process system ultimately developed and used by P & W, in combination with the licensing of L.S.P., was a technology of interest to NASA. For purposes of developing an enhanced level of communication in the interface between PROWESS and L.S.F., along with other functions, P & W, PCC and NASA entered into agreements for a cooperative venture into the research and development necessary, with the ultimate goal that the result be made available throughout the aerospace industry.

17 Funding for the venture was to come from the private sector parties as well as NASA. The overall goal of what is to be called the NASA agreement, would be that there would be created an end product useful for NASA which could be released into the general use of the aerospace industry, hence benefiting the industry, NASA and the United States of America. The agreement makes it clear that the parties were to remain independent but cooperative. A significant part of the reward to the private sector partners for entering into the agreement was to be that they would independently benefit from their mutual cooperation. Among other potential benefits, P & W would have its in-house systems enhanced and significantly improved. Through the auspices of a beta testing program, P & W would receive significant industry feedback to assist in expanding and advancing the technology and, in particular, in using that technology to solve additional problems.

18 In terms of the potential benefits which might flow to PCC, there would be presumably, some enhancement of the L.S.F. message-passing system. As a relatively young company, there would certainly be industry recognition of the quality of its work and products. PCC, however, is a company that engages solely in the marketing of problem-solving computer technology. The life blood of the company is the development of this new technology under circumstances in which it may be sold into the marketplace. For purposes of the in-house uses to which P & W put PROWESS and L.S.F., there was a great deal of homogeneity within the system. For purposes of marketing a problem-solving program, PCC would be anxious to develop a product that was heterogeneous. Simply to develop a product of superior quality for use in the aerospace industry alone would not be of any particular economic benefit to PCC and, of course, they would be obliged to make their financial contribution under the NASA agreement.

19 Upon a review of the NASA agreement and the circumstances surrounding the pre-NASA agreement as well as the final arrangement and the conduct of the parties after entering into the NASA agreement, it is my view that, at least on the basis of the evidence as it was placed before me, the intentions of the parties were relatively clear. The NASA agreement itself makes special provisions for the mechanics of preservation of trade secrets by cooperating parties. Similarly, it makes reference to licensing arrangements that may be entered into between those parties. Having regard to the marketing documentation created by P & W and the research commissioned by it through a company described as TRAC, it is more than apparent to me that, at all material times, P & W and PCC intended that there could be developed some forms of problem-solving computer technology utilizing the benefits of both PROWESS and L.S.F., which products could be made heterogeneous and sold into the marketplace for profit. On the basis of the evidence as it was placed before me, there would be no other significant advantage to PCC in entering into the NASA agreement unless it could contemplate a licensing of P & W's technology for the creation and marketing of a suite of products capable of use in all other sorts of industries beyond aerospace.

20 A reading of the pre-NASA agreement and the NASA agreement makes it very clear that the cooperating parties contemplate the sharing of technological information for purposes of advancing the goals desired in that agreement. The provisions of the agreement specifically set out the mechanics by which any party could protect its unique or confidential information. The agreement

contemplates that information could be documentary or oral and it not only provides that documents should be marked confidential if they were to be treated as confidential but it also provides that minutes of meetings and conversations were to be created and marked confidential and, by this method, the oral passing of trade secrets or unique technology which could be described as confidential was to be identified and the proprietary interests preserved. At least for purposes of this motion and relying on the evidence as it was placed before me, the natural inference to draw from the arrangements set out in the NASA agreement would be that, notwithstanding information delivered by one party to another might be capable of being the subject-matter of a trade secret, the failure of the party to identify it in accordance with the NASA agreement would mean that the court should infer that the parties intended the information to be passed without restriction on its use.

21 In the prior contractual dealings between P & W and PCC, there had also been arrangements for the protection of proprietary information. It is quite apparent that, in the history of the dealings between the parties, each was acutely aware of the concept of protection of its proprietary interests and, during the time frame in issue between the parties, a significant number of documents and minutes of oral exchanges clearly do not bear the designation that they are confidential and then, at a critical time during the parties' negotiations for a licensing agreement on the PROWESS technology, P & W, for the first time, began to mark certain items as confidential. After the execution of the NASA agreement, the parties exchanged information through documentary disclosure, e-mailing, oral discussions and formal meetings. It is quite apparent that the parties cooperated well in solving technical difficulties to be found at the interface between PROWESS and L.S.F. In particular, PCC moved to resolve the specific problems which had been designated as work tasks to it. P & W, however, only worked on one of the three areas of problem which had been specifically assigned to it. It would seem, however, that all was proceeding well. In the case at bar, the difficulties between the parties seem to have arisen during a narrow time frame starting in February 1996 and running to approximately August 6, 1996. On the evidence before me, there seems no question that all of the dealings between the parties prior to February 1996 were covered by their written contractual arrangements. It is only from February 1996 that P & W asserts that PCC commenced to act in a manner which is asserted to be outside of the written terms of the NASA agreement.

22 A meeting took place on February 19th. Although there seems to be some controversy in the evidence as to just what might have taken place at this meeting and who was present and for how long, it is sufficient to say, for purposes of this motion, that the representatives of PCC requested the delivery of certain manuals and other information developed in the creation of PROWESS. In particular, they requested information which would be contained in source codes and object codes which had been created by P & W for that program.

23 The manual was sent by P & W to PCC in the form of electronic mail. The source code was delivered to PCC. P & W asserts that, having delivered the source code, it would then have been available to PCC to read the source code. It is the evidence of PCC, however, that it never received the source code in a format which could be read by it and, although there were a number of requests

for changes in the format and a representative of P & W created a source code in the format which could be read by PCC, that particular copy of the source code was never handed over. The object code was delivered to PCC. Under ordinary circumstances, this is something which a human cannot read. The evidence before me, however, disclosed that the mode in which it was sent to PCC was one described as "verbose". This means that it would be capable of being read to a limited extent. It was the evidence of PCC, however, that they were unaware that the object code was in this particular "verbose" mode and, as such, it also was never read by them. It is uncontroverted, however, that the manual, the source code and the object code were placed in the possession of PCC.

24 In April 1996, Dr. Zhou and Dr. Ming Xu, both experts at PCC, created what has been described as a technical note. On the basis of information and belief, Zhou says that Xu sent that technical note to P & W. This document appeared as Exhibit X to the affidavit of Zhou and, for purposes of the argument of counsel, it became described as Document X.

25 A reading of Document X makes it clear that PCC intended to utilize the information that it has obtained in its meetings, discussions and productions with P & W and that it was progressing in the development of a generic program utilizing the capacities of P & W's PROWESS, as well as the capacities of the L.S.F. program. That document makes it clear that PCC was working with the information it had obtained from P & W and that it was progressing in the direction of creating a marketable product with the full intent that the final result be sold to interested users.

26 Dr. Zhou, in his affidavit, by information and belief, sets out that Dr. Xu sent Document X to P & W. The evidence delivered on behalf of P & W and the cross-examination of Mr. Minor, definitively asserts that Document X did not come to the attention of P & W or that they never received it.

27 During this time frame, negotiations were taking place between P & W and PCC as to the licensing cost to PCC for the use of the technology contained in the PROWESS system. Documents related to the entering into of the NASA agreement, as well as documents which relate to feasibility and marketing created by P & W, set out that, in terms of the work tasks to be performed in a highly-reliable, functioning, parallel process system, the combination of choice would be P & W's PROWESS and PCC's L.S.F. system. Document X made it clear that it was the intention of PCC to develop a system to be called L.S.F.-PASS, which would be a commercial off-shoot from the results obtained from the marriage of the systems under the NASA agreement. The licensing negotiations, along with the obvious willingness of PCC to pay a licensing cost, are, in my view, demonstrative of the existence of perceived benefit to PCC in being able to use the information generated by P & W. Although the evidence put before me by PCC suggests that a comparable result could be obtained by utilizing different technology, it is quite clear, for purposes of the proceedings before me, that the intentions of the parties, as expressed in the documents and their conduct, allow me to infer that, for purposes of a commercialized product, it was more advantageous to merge L.S.F. with PROWESS than with those other technologies and that, in utilizing the PROWESS technology

in combination with L.S.F., there would indeed be a proprietary interest in P & W for which the parties expected a licensing cost to be paid.

28 The information before me on the subject of licensing negotiations is quite limited. What little there is suggests that the negotiations may have been somewhat one-sided. The initial proposal by P & W was for a 15% shareholding in PCC, as well as a 15% commission. Ultimately, P & W reduced its commission request to 6.5%. Zhou, on behalf of PCC, rejected these licensing costs as being excessive in relation to the benefits PCC anticipated receiving.

29 On July 19th, Zhou sent to P & W a marketing document known as "It's Time for PASS". This document makes it clear that the information obtained from P & W was to be utilized in the commercialization of the L.S.F.-PASS program and that this program was intended to be aggressively advanced to the point of beta testing in the near future. In a similar vein, Xu created his work plan around April 4, 1996. This work plan strategy clearly demonstrated the intent of Xu to advance the L.S.F.-PASS program to a state of commercial viability.

30 By the end of July 1996, the documentary evidence placed before me demonstrates that, notwithstanding there had not been any agreement as to the terms of licensing between P & W and PCC, PCC had been forging ahead with the plans and steps necessary to bring the technology of L.S.F.-PASS into a viable and marketable condition.

31 The internal memoranda of P & W and the marketing documents related to the reports of a company known as TRAC demonstrate that P & W and PCC had both been significantly active in exploring the viability of this commercial venture. The TRAC reports suggest that the commercial viability of L.S.F.-PASS was excellent. The market is demonstrated to be narrow and the window of opportunity for that market is described as highly time-limited. The need for the technology in L.S.F.-PASS to be advanced fast enough to meet the market opportunity is apparent on this evidence as it was placed before me. Looking at the nature of the market opportunity, the nature of the industry and the speed with which competitors catch up and looking at the evidence as it was placed before me, there is a clear inference to be drawn that, with time and opportunity limited, market viability studies, licensing negotiations and work by PCC in advancing the technology were all progressing at the same time. If the marketing information created by TRAC was accurate, this multiple co-temporal advancement on all fronts would be necessary, otherwise a viable product could not be placed in the marketplace in a timely fashion and the opportunity to seize the main chance would be lost. In a perfect world, presumably, licensing negotiations would be completed before other steps might start. In the case at bar, the information sets out that time was of the essence and it would appear that PCC was moving ahead and, presumably, the licensing arrangements would catch up.

32 As it would happen, the licensing negotiations broke down. PCC proceeded to develop two products -- L.S.F. -PASS 1.0 and L.S.F. Suite 3.0 -- both of which have been placed in the market for sale. Against this backdrop of events, the current litigation was commenced. In the course of this

litigation, the products created by PCC have been examined by leading experts in the field on behalf of P & W. Contrary to the initial belief of P & W, no clear or overt evidence was capable of being developed which would demonstrate that PCC had utilized any of the confidential information contained in the P & W PROWESS technology which it may have obtained either within the NASA agreement or between February and the end of July 1996.

33 Although P & W has not been able to demonstrate an actual use of their trade secrets by PCC, it is their position on the interlocutory injunction motion that PCC has been placed in the position where it either possesses the confidential information or is capable of obtaining the confidential information and that, through documents created by PCC and by oral statements made on behalf of PCC, it has expressed an intention to utilize that confidential information in the preparation and marketing of an L.S.F. product or series of products. The core documents relied on for P & W's assertion that there is an imminent intent on the part of PCC to use its confidential information are Document K, the document known as "It's Time for PASS" and a conversation between Dr. Zhou of PCC and Dan Minior of P & W in August 1996 in which P & W alleges that Dr. Zhou informed Minior of P & W that FCC would proceed with the use of the technology notwithstanding there was no licensing agreement. Needless to say, this particular conversation has been specifically denied in the evidence tendered by PCC.

34 In my view, it would be inappropriate to simply take the fact of the delivery of the manuals, the source code and the object code and then look at Document X and "It's Time for PASS" in isolation. If one was to do this, then it would be very easy to raise the strong inference that FCC had manifested a bloody minded intention to proceed with the use of confidential information in the absence of a licensing agreement. In essence, this is the approach which has been taken by P & W in asserting that there is a clear and imminent probability that its confidential information is about to be used, although it is apparent that it has not been used to date. The documentation in question, however, was created as part of a series of events that were taking place all at the same time. The document "It's Time for PASS" was a marketing document and, in my view, it has to be read and considered against the backdrop of the totality of the events which were taking place around it. Similarly, Document X is a form of working plan to attain a mutually desirable goal which was created during a time when both parties were cooperating on all fronts to progress to this result. The evidence discloses that a review of these two documents could be described as demonstrating a manifest intent to use some of the information set out in Schedule A. At the time of the preparation of those documents, there appears to be no dispute by PCC that that was in fact their intent. On the evidence before me, it would seem that it was not only the intent of PCC but clearly the intent of P & W that these very things be done in order to obtain a result of mutual economic benefit. The only feature which seems to have changed during that time has been the failure of the parties to obtain a mutually satisfactory licensing agreement. I think, having regard to the position taken by P & W it is also not without significance that the efforts to obtain a licensing agreement continued even after the commencement of litigation.

35 In the motion before me, P & W has attempted to develop support for the proposition that it

had nurtured PCC through their cooperation under the NASA agreement and in their general relationship of information exchange. The evidence of Zhou, however, was that their technology was assisted greatly from other sources and, in particular, he pointed to Bell Northern Research. Clearly, there is a great disparity in size between P & W and PCC. P & W, however, carries on a very significant business in the aerospace industry, in particular, with respect to the research, development, manufacture and sale of engines. I think it is important that the PROWESS system designed by P & W for their in-house use was specifically geared to the resolution of design problems related to the production of new engines. The evidence before me discloses that, in that particular industry, technological advances are driven primarily by the needs of the end users, that is to say the aircraft producers and designers and the ultimate buyers of the aircraft who must meet their own marketing needs. P & W did not develop PROWESS as research for the sake of research but, rather, for its practical application in the solving of complex problems by the utilization of existing resources as an adjunct to the company's production process for its main line of business. PCC, on the other hand, has no business other than the research, development and adaptation of technological advances into a product line of programs for sale in the commercial marketplace as it perceives windows of opportunity to arise. In its work, PCC utilizes products, research and concepts developed and obtained from research laboratories, its own researchers, universities, the Internet and, from such cooperative ventures as the NASA agreement or licensing agreements which may be entered into. The recognition and utilization of changes in concepts and technology are the very life stuff of the business of PCC.

36 P & W has taken the position in the motion before me that, if it had known that PCC would have used the information obtained from it for any purpose beyond the NASA agreement, it would not have made the disclosures which it made outside the NASA agreement. The totality of the evidence before me, however, would suggest otherwise. The NASA agreement itself suggests that cooperative partners might anticipate developing an atmosphere of mutual benefit from which each could obtain some commercial advantage. Information exchanged between the cooperating parties and imparted to NASA which is not marked confidential in accordance with the terms of the NASA agreement, is expected to be released into the public domain and made available to the general aerospace industry. In the case at bar, the parties had embarked upon a course of conduct designed to commercialize products arising out of their cooperative efforts. The reports of TRAC, the minutes of discussions and the in-house marketing documents of P & W clearly set out that the product of their joint efforts could be commercialized for significant economic advantage. Document X and "It's Time for PASS" display a clear and obvious intent that PCC would develop a product which would be salable in the marketplace. The licensing negotiations coterminous to all this activity were obviously intended to create a result where P & W would share in the economic advantages of PCC using information from PROWESS. In imparting the information to PCC between February and July 1996, there would seem nothing in the circumstances surrounding those acts which could be construed as placing P & W in a circumstance of vulnerability or one in which there was an implicit or explicit understanding that the information was sent under circumstances which would give rise to a duty of good faith and prohibit its use by PCC. The relationships between the parties, however, were such that it is more than apparent that the information was

intended to be used in circumstances of mutual benefit. During the currency of the licensing negotiations and up to the end of July 1996, the evidence before me does not support any suggestion that PCC should not use confidential information obtained from P & W or that it would be in any way inappropriate to create documents expressing an intent to use that information. The facts, as I see them, are supportive of a conclusion quite to the opposite and that, for as long as the relations between the parties were on a good footing, PCC was expected to take such steps as might be necessary to produce a commercial product from which both parties would benefit. After the end of July, however, and upon the delivery of a cease and desist letter, the circumstances would have changed.

37 After the change of circumstances, the only evidence which P & W points to in support of their contention that there is an imminent risk that PCC will probably utilize their confidential information is a conversation which allegedly took place between Dr. Zhou and Dan Minior on August 6, 1996. Both the truth and the content of that conversation are denied by Zhou in his affidavit and cross-examination. Whether or not such a conversation took place is not for me to decide. For purposes of the interlocutory motion before me, it is sufficient that I examine the overall facts of the circumstances and reach a conclusion as to whether or not there is a real risk that the plaintiffs' confidential information will, on the balance of probabilities, be used by PCC.

38 I think it would be fair to say that, once the licensing negotiations broke down and the cease and desist letter was sent, for purposes of this motion, I should conclude that the information imparted by P & W to PCC would reasonably be expected to be treated as confidential. In my view, the use of the confidential information and the expressions of intent to use the confidential information made prior to the cease and desist letter would all be steps which could reasonably be inferred to have been taken in an atmosphere of mutual agreement. After the cease and desist letter, however, it is my view that it would be reasonable to infer, for purposes of this motion, that the evidence before me supports a conclusion that there would be a duty of good faith not to use information obtained during the early period of mutual cooperation. The circumstances surrounding the totality of the relationships between the parties, in my view, make it clear that they anticipated that there would be a satisfactory licensing arrangement and that, on the basis of the evidence before me, all the steps taken by both of the parties prior to the end of July 1996 would have been founded on the tacit and implicit belief that any confidential information disclosed would be for the purpose of the cooperative venture and that it was not being released for general use or into the public domain.

39 The evidence placed before me demonstrates that the two products, L.S.F.-PASS 1.0 and L.S.F. Suite 3.0, both of which are not the subject-matter of this motion, were examined by experts and no evidence was developed to demonstrate improper use of confidential information obtained by P & W. It was the evidence of Zhou that, upon receiving the cease and desist letter, PCC stopped utilizing any of the confidential information that they might have obtained from P & W and that they no longer proceeded with the development of any product contemplated by Document X or "It's Time for PASS" using the PROWESS technology. It was his evidence that PCC used other

alternate substitute technology which was available in the development of these products and this evidence would seem to be correct.

40 One must keep in mind that PCC had developed its own L.S.F. program which was being utilized by P & W as a distinct and separate entity capable of identification and licensing. Similarly, P & W had developed its PROWESS program as an equally separate and independent item interfacing with the L.S.F. program to attain the results desired by P & W. The cooperative venture contemplated by the parties was to create wholly different programs capable of being commercialized and utilizing the benefits of each of their respective work. The evidence before me indicates that PCC would be quite capable of producing commercially viable products using technology other than PROWESS and that this is in fact what was done. Upon looking at these products, the experts retained by P & W, placing their evidence at its highest, could only conclude that there might be a suggestion that the L.S.F. Suite 3.0 could have benefited in its production by PCC having been exposed to the PROWESS technology.

41 Having regard to the evidence of Zhou that PCC has not utilized the PROWESS technology and does not intend to utilize the PROWESS technology in the future and, as set out above, having regard to the fact that licensing negotiations continued after the litigation commenced, there would seem, for purposes of this motion, to be some merit in the position taken by Zhou. It may well be that there might be different or stronger evidence before the court at trial. For purposes of the motion before me, however, there appears to have been no demonstrable use of the confidential information and, beyond a highly-controversial and controverted conversation, no evidence to point to which would suggest that PCC has any intention of acting in contravention of the cease and desist letter.

42 A great deal of time was spent in the motion arguing over whether or not the information sought to be protected by P & W is in fact information capable of a proprietary interest sufficient to constitute it as confidential information. There seems no doubt that there is expert evidence to support the proposition that the entirety of Schedule A is unique and, as such, capable of being treated as confidential information. P & W argued that the concepts of cluster hierarchy and file configuration as they appear in Schedule A are also confidential information. This is in dispute among the experts and, as pointed out above, it is, apparently in dispute among P & W's own experts.

43 With respect to the concept of cluster hierarchy, P & W asserts that, in the context of PROWESS and Schedule A, this concept has a different meaning and, as such, should be treated as confidential information, notwithstanding the concept of cluster hierarchy has been frequently referred to in research papers and other documentation in the public domain. I pressed counsel to explain what the difference was, without satisfactory response.

44 For purposes of the injunction motion, it may well be sufficient for P & W to demonstrate a serious issue to be tried if only one expert asserts that cluster hierarchy and file configuration are

confidential information unique to PROWESS. Similarly, it may be sufficient for P & W to say that any differences in cluster hierarchy as they may be considered in the public domain and as it may appear in the context of PROWESS and Schedule A are not to be determined by the court at this stage and that it is sufficient that any expert will state that the concept is confidential. To this extent, I think P & W raises a point. On the facts of the case at bar, however, it is difficult for the court to determine that these become a clear and defined serious issue for trial when they appear in a not particularly well-defined state in Schedule A, the plaintiffs' own experts are incapable of agreeing that they constitute confidential information and concepts of a similar nature appear in the public domain. Perhaps if cluster hierarchy and file configuration were the only items of confidential information sought to be enjoined, I might consider that the plaintiffs have raised a serious issue with respect to them. These items, however, are only two of many set out in Schedule A. The other concepts set out in Schedule A do not appear to be confidential although the expert evidence does establish that certain implementations or configurations of those concepts are in fact unique.

45 The source code and object code referred to above were both marked confidential. Similarly, a quarterly report for April-June as required under the NASA agreement was also marked confidential. If the evidence had been that cluster hierarchy and file configuration or other specific items that appeared in any of the three disclosures that had been marked confidential were the specific subject-matter of the injunction sought to be obtained, a court might look somewhat differently upon them within the context of serious issue to be tried. As it stands, however, cluster hierarchy and file configuration, at their highest, are only confidential information as they are referred to within the context of Schedule A. As concepts in general they are known within the industry and are part of the public domain.

46 Because of the manner in which P & W elected to identify its confidential information in satisfaction of the order of Keenan J., I am left with a circumstance in which I am unable to identify the manner in which PCC could be enjoined from using the concepts of cluster hierarchy and file configuration in the manner in which they are confidential without having the order so broad that it would impair the use of those concepts in other facets of the company's work which are in the public domain and clearly available to its competitors.

47 The expert testimony, although contradictory, supports a finding that certain combinations in Schedule A are unique. If Schedule A had identified those specific combinations, then it might have been available to determine which specific items constituted serious issues to be tried. As it stands, however, Schedule A does not describe in sufficient detail the implementations, problem work-arounds or combinations of concept which are unique such that the serious issue to be tried in respect of any one or a number of them can be properly described or identified. It is inappropriate, in my view, for the court to enjoin what it cannot identify and, as such, within the context of the totality of the expert evidence and Schedule A as a whole, there does not seem to have been demonstrated a serious issue to be tried for the purposes of the injunctive relief requested. The expert evidence as a whole supports the contention that certain implementations and combinations as might be set out in Schedule A are confidential information, however, the evidence of the experts

and Schedule A itself, when looked at together, wholly fail to identify which those items might be.

48 It was argued by P & W that the entirety of Schedule A is unique and, as such, constitutes of itself a serious issue to be tried. The evidence does support a finding that Schedule A as a whole is in and of itself unique. But, few, if any, of the component parts in and of themselves would constitute confidential information. On the facts of the case at bar, it is not sufficient for P & W to just point at the totality of Schedule A and the expert evidence as to the uniqueness of that schedule as a whole in order to demonstrate that there has been shown that there is a serious issue for trial.

49 In a breach of confidence action, a plaintiff must demonstrate three essential ingredients. The information has to be confidential, the communication of the information has to be in circumstances in which an obligation of confidence is imposed and then there has to be evidence to demonstrate some use of that information to the detriment of the plaintiff. It may well be that Schedule A as a whole has the necessary quality of uniqueness to constitute confidential information. It may well be that, once the licensing negotiations broke down and the cease and desist letter was sent, the circumstances in which it was imparted would impose some duty of confidence on PCC. If there was some evidence to demonstrate that PCC had received PROWESS and, to that extent, Schedule A as a whole and that they were using Schedule A as a whole, matters would be quite simple and straightforward.

50 As it happens, while PCC may well have had disclosed to it Schedule A as a whole, the evidence does not disclose any intention of PCC to utilize Schedule A as a whole in the commercial venture contemplated by the parties. Rather, it demonstrates an intent to utilize unidentified components of Schedule A in unidentified combinations and implementations. In order to demonstrate that there is a serious issue for trial warranting consideration of injunctive relief, there must be an air of reality about the proposition put forward by the moving party which requires the intervention of the court to protect that party's interests. There seems no doubt that Schedule A as a whole was imparted to PCC. Nowhere in the evidence does it appear that it was intended that it be used as a whole outside of the NASA agreement. The evidence before me seems quite to the contrary.

51 The actions of the parties, the documentation and the information exchanges which took place were not designed to duplicate what was being done under the NASA agreement but, rather, to utilize certain practical implementations developed by P & W under a licensing agreement in order to create a commercial product capable of sale in the marketplace for task management and problem solving in parallel processing under heterogeneous circumstances. P & W asked its experts to review "It's Time for PASS". A review of this document and Xu's work program and a review of the expert evidence as a whole demonstrate that those documents manifested an intention on the part of PCC to utilize some of the functions in combinations of Schedule A and that some of the combinations and implementations in Schedule A were confidential. The expert evidence placed before me does not match up which implementations and combinations in Schedule A which are confidential with the implementations and combinations implicitly to be used if one was to proceed

with "It's Time for PASS" and the work schedule of Xu in order to allow identification by matching. As I read the expert evidence as a whole, it points to the documents and says that, if they were to be proceeded with, confidential information would be used and then it points to Schedule A and says that some of the implementations and combinations set out in Schedule A are confidential but it does not then proceed to identify which they are and which ones would be used if someone was to proceed with the steps contemplated in "It's Time for PASS".

52 Having regard to my comments above and the fact that I cannot accurately identify exactly what is to be enjoined and looking at the context of the totality of the expert evidence as it was placed before me and the manner in which P & W set out the information in Schedule A, I am of the view that there is probably not a serious issue to be tried for purposes of the interlocutory injunctive relief requested.

53 P & W has argued that, if an injunction does not issue, PCC will proceed with "It's Time for PASS" and, as a consequence, the confidential information as described by the experts and to be found in Schedule A will fall into the hands of its competitors, causing P & W irreparable harm.

54 It was the position of P & W that, even if a serious issue to be tried could not be demonstrated on the testimony of the experts with respect to "It's Time for PASS" and Schedule A, the expert evidence did demonstrate that there was a suggestion the confidential information of P & W might have been used in the preparation of L.S.F. Suite 3.0. The theory was that, having made the information available to PCC, they would have been able to look at the manual, the source code and the object code and then, having learned from what P & W had done, they could, in effect, spring-board into a different form of program which would conceal the learning process. As I read the expert testimony placed before me, they do not give evidence on this subject beyond the suggestion referred to above. In any event, PCC and P & W are not head-to-head competitors and the two programs placed into the marketplace to date have not been the subject of that sort of comment from the witnesses. It might be possible for PCC to have learned something from the information in Schedule A which has enabled them to produce a product or might enable them to produce a product in the future. The intellectual exercise which concerns P & W is one which, of necessity, must be extraordinarily difficult to trace. In the case at bar, P & W's concerns, however, are the dissemination of the contents of Schedule A such that its competitors might learn the manner in which P & W problem solves by parallel processing and, as such, they might lose a competitive advantage in design technology. If any spring-boarding effect has taken place here and if PCC has enabled itself to advance its program technology, the evidence to date would seem to suggest that it is in a manner that would not disclose the contents of Schedule A to any competitor of P & W. If P & W and PCC had been head-to-head competitors in the programming business, the circumstances might be different in the sense that the advancement that could theoretically be obtained by PCC would be one of competition within the same field. In the case at bar, however, that line of thought is not applicable.

55 As I have set out above, the two programs placed in the marketplace by PCC do not show

evidence that any confidential information of P & W is contained in those two products. The highest the evidence rose was that L.S.F. Suite 3.0 had a suggestion that information in Schedule A might have been used.

56 One thing is clear from the expert testimony and that is that L.S.F.-PASS 1.0 and L.S.F. Suite 3.0 do not disclose any confidential information contained in Schedule A. Dr. Zhou, in his affidavit and cross-examination, has testified that, when the cease and desist letter was received, PCC stopped working on the products contemplated in "It's Time for PASS" and began to utilize alternate available technology to develop programs of a similar nature. Certainly, if the proof of any pudding is in the eating, the experts' examinations of the two programs produced to date would seem to suggest that this is correct.

57 Despite the plaintiffs' failure to really meet the serious issue to be tried standard, it remains useful to consider the irreparable harm and balance of convenience tests, as they lend further perspective to the instant situation.

58 The concern of P & W is that, theoretically, PCC, having obtained the manual and the two source codes, is in a position where it could produce a program of the type described in "It's Time for PASS" and they point to the conduct of PCC prior to the cease and desist letter to demonstrate their clear intention to so do. After the cease and desist letter, they point to the alleged conversation in which it is asserted by P & W that Zhou informed them that PCC would proceed with "It's Time for PASS" regardless of P & W's cease and desist letter.

59 As I have set out above, I see a significant difference between the conduct of the parties before the cease and desist letter and the one alleged conversation after the cease and desist letter. Not only is that conversation highly controversial, there is no evidence that P & W can point to subsequent to that conversation to demonstrate any continuing intention on the part of PCC. The passage of time and the two programs produced would, in my view, suggest to the contrary.

60 In order to demonstrate the prospect of suffering irreparable harm, it is necessary for P & W to satisfy me that there is some reasonable prospect that there is an imminent risk that PCC is ding to proceed with conduct which would place their trade secrets in the marketplace, hence causing P & W the irreparable harm they fear.

61 First off, I am of the view that the evidence does not disclose that there is any imminent risk of this form of conduct by PCC. There is, further, a significant question as to whether they were even able to read the source code or the object code. The evidence of Dr. Zhou further points out that there is alternate technology available that allows PCC to develop products without using Schedule A or the PROWESS program and the experts' examinations of the two programs placed in the marketplace would seem to confirm this as accurate.

62 The test for irreparable harm is that there should be demonstrated a real risk that the disastrous consequences feared might take place. The circumstances relied on by P & W to demonstrate a

manifest intent to embark on a form of conduct leading to these consequences are virtually all the actions of PCC during the cooperative head-long dash to commercialization. Since that has come to a halt, at the time of the return of this motion, there seems little to suggest to me that the risk is real or imminent.

63 For purposes of considerations related to the concept of irreparable harm, I think it is also very significant that the in-house marketing documentation created by P & W during the halcyon days of cooperative efforts to commercialization suggests that the programs to be created by PCC might undergo beta testing arrangements which would include P & W's chief competitor, General Electric. From the information placed before me, it would seem that, at that time, P & W was not concerned that the commercial products created by PCC under what was anticipated to be a prospective licensing arrangement would cause them irreparable harm when disclosed to the marketplace and, in particular, P & W's competitors.

64 The evidence of Dr. Zhou is to the effect that one of the chief architects of PROWESS, Dr. Fischberg, is now working at General Electric. Although nothing can be drawn from this in the absence of evidence, it is certainly an interesting comment. Dr. Zhou's evidence goes on to demonstrate that General Electric is fully engaged in utilizing a parallel process system of its own and there is a suggestion from that evidence that the parallel process system being used by General Electric may very well be superior to PROWESS. P & W suggests that it has been placed in a position of great vulnerability in the event of the marketing of products contemplated in "It's Time for PASS". Perhaps there might have been some strength to that position if the evidence had disclosed that the entirety of Schedule A was to be used in the commercial product contemplated in the proposed cooperative venture between the parties. As I understood the evidence before me, the concept in "It's Time for PASS" is to create a number of problem-solving programs and to include in a group of tasks which the programs would be designed to accomplish problem-solving methods which would use some of the implementations and innovative work-arounds P & W developed in PROWESS and which, although not properly specified, can, apparently, be located in Schedule A.

65 Had it been the express intent or the de facto conduct of PCC to market a program which directly exposed all of Schedule A or the entirety of PROWESS, perhaps things would be very different. On the evidence before me, however, this was never the intent of the parties and there is nothing to suggest that there is any real risk or even an imminent risk that this might happen.

66 In terms of irreparable harm that is not capable of being compensated for in damages, P & W points out that, if its competitors were able to duplicate the parallel process system they have created, they would lose a competitive advantage in design technology which could not be demonstrated anywhere in sales or other figures to enable damages to be calculated and, as such, damages would be no substitute for their loss. When one considers the evidence of Dr. Zhou on the present status of General Electric and the concept of the commercial product being beta-tested at General Electric, one can only say that there are some serious concerns as to the accuracy of that position.

67 Having regard to my comments above, there is no real risk of imminent harm befalling P & W and I have some significant question as to whether or not the sort of harm that might arise, if any, in the event PCC had proceeded with the commercialization of "It's Time for PASS" would have been anything like the sorts of concerns that were expressed before me. In any event, there is insufficient evidence before me to satisfy the test for the granting of an injunction such as the one being requested on this motion, as I am of the view there is very little prospect that P & W will suffer any form of irreparable harm if the injunction is not granted.

68 On the question of the test of the balance of convenience, I am of the view that an injunction to prohibit PCC from doing any and all of the things stipulated in Schedule A would deprive that company of utilizing general concepts which are available in the public domain which could, in effect, seriously hamper the development of their business. The evidence makes it clear that there are alternate programs available which can be used in conjunction with L.S.F. to attain similar results. Preventing PCC from utilizing the concepts set out in Schedule A as opposed to some unique implementation of those concepts could well significantly hamper their development in this entire area of problem resolution. The consequences to PCC might well be disastrous.

69 P & W are not in the same business as PCC. There is no product made by them which will be affected in the manner in which PCC would be affected. Their complaint is that a competitor might catch up to their level of technology and, hence, be able to compete on an equal footing with them when it comes to designing engines to meet the needs and requirements of their end user customers. The evidence does not point to any particular engine or customer or contract which might be affected. There is no evidence before me to demonstrate any business that would be lost or that P & W would have its reputation in the marketplace varied or to any degree lessened. The core business of P & W is not at stake on this motion. The core business of PCC, however, may well be significantly damaged should an injunction issue. At worst, competitors of P & W, on the arguments it placed before me, might be able to harness the technology to solve fluid dynamic problems in the method in which P & W solves it problems. The dissemination of information in Schedule A into the aerospace industry would, at its highest, disclose how P & W solves internal fluid dynamic design problems but it would not impact on the business of P & W itself.

70 I am of the view that, on the totality of the evidence before me, the balance of convenience favours PCC in this matter.

71 I turn now to the motion brought by PCC pursuant to Rule 20.

72 In my view, there is a significant philosophical difference between a party requesting relief in the form of an injunction to prevent another party from undertaking certain conduct and a party moving under Rule 20 to have a plaintiffs action dismissed on the basis that no genuine issue for trial has been demonstrated. In the former, the moving party must satisfy the test set out in American Cyanamid Co. v. Ethicon Ltd, [1975] A.C. 396 (H.L.). In considering whether the moving party has met those requirements, the court must look at the issues raised as they apply to

what might ultimately be the request for a permanent injunction. It may well be that a party might not have a serious issue to be tried in respect of the injunctive relief claimed on an interlocutory basis but, for purposes of the civil damage action, that same party may well have genuine issues which should form part of the proper subject-matter of a trial. Although, in the case at bar, I am satisfied that P & W has not met the requirements of demonstrating that, for purposes of the injunctive relief claimed, there is a serious issue for trial or that there is a real and imminent prospect that the defendant will embark upon conduct giving rise to irreparable harm, this does not mean, however, that the plaintiff has not raised issues, including issues of credibility, for which it might become entitled to an award of damages.

73 The evidence placed before me is capable of raising the inference that PCC received confidential information or was placed in a position whereby it could have discovered the confidential information by analyzing the information which had been given to it. The parties were in the middle of negotiating a licence agreement which, in and of itself, suggests that there must be sortie economic price appropriately attachable to the confidential information. The parties could not agree and the negotiations broke down on what that price should be. The result leaves PCC in the position of possessing some information which is confidential or having the ability to find out for itself the confidential information. There has been an expressed intent to market a product utilizing certain aspects of P & W's PROWESS program. The expert testimony makes it clear that certain aspects of Schedule A would be used in creating a program as discussed in the document "It's Time for PASS". The evidence of Dr. Leiserson was to the effect that the program L.S.F. Suite 3.0 demonstrated certain suggestions that showed there might have been some benefit obtained by PCC in looking at PROWESS. The various marketing studies demonstrate that there is indeed a market for a product as described in the document "It's Time for PASS". In addition to the above, there is also the alleged meeting in August 1996 which raises significant credibility issues as to what was said about utilization of PROWESS by PCC.

74 All of the above, although not sufficient to disclose an imminent risk of future use of confidential information are still sufficient to raise the prospect that there is a possibility that there could have been a past use of that information as well as a present ability for a potential use of that information. Although the NASA agreement would seem to me to be contra-indicative of a pre-existing fiduciary duty, there is still the fact that PCC could be found to be in possession of confidential information or had the ability to obtain that confidential information which might then require the court to focus its attention on the protection of P & W from that potential risk. There could also be a form of intellectual spring-boarding which could have taken place. Under all of the circumstances that have been presented to me, a court could consider that PCC has obtained confidential information and benefited from it in a manner which might warrant an award of damages to P & W but which would not warrant the imposition of an injunctive order as it did not meet the test necessary to be met before a court will grant that relief.

75 Although there appears to have been no present use of the P & W confidential information, the fact that there might have been some past use from which the defendant could have benefited or

which might have allowed the defendant to get into its present position where it now no longer has to actually use that confidential information, could give rise to an award of damages if such forms of potential past use were found to have taken place.

76 Whether or not P & W might become entitled to damages for such past use of its information or, as a consequence of some form of intellectual spring-boarding, could well turn on whether or not they in fact had access to the source code and, if the object code in its verbose mode was in fact useful to them. The evidence before me is in direct conflict and raises issues of credibility upon which important issues affecting the result of the trial will be determined. In the same vein, there is a genuine question raised as to whether or not Document K was delivered to P & W. This issue could have a significant impact on the manner in which the court views P & W's claims for damages and any liability that there might be on PCC. The evidence on the issue of the delivery of that document, however, is in direct conflict and can only be determined by the trial judge making a finding on credibility. If, for example, a finding were to be made that no such document existed or was sent and that it was created for purposes of the litigation, the effect on the outcome of the action would be significant. On the other hand, a finding that the document was created, circulated and sent to P & W in the ordinary course of commercialization could well be argued to demonstrate a lack of secret misuse of P & W's proprietary information. Depending upon how other evidence impacted upon this factor, however, it could also be open to the court to regard that document as demonstrating that PCC was engaged in using confidential information during the currency of the negotiations for the licensing agreement and without permission under circumstances in which they have obtained a benefit without paying a price.

77 There is also a significant conflict between the parties as to the meaning and intent of Dr. Xu's work plan. There is a question raised as to whether it represents an intention of future conduct or a technical note demonstrating what has already been done. Presumably, Dr. Xu's work plan and the conflicts in the experts' testimony will have to be reconciled in determining whether or not Dr. Leiserson's evidence that there might be a suggestion of past use of confidential information in L.S.F. Suite 3.0 is in fact a reality or not. Depending upon which evidence is accepted, a court could reach the conclusion that there has been a breach of confidence for which the plaintiff would become entitled to damages.

78 Looking at the evidence that was placed before me as a whole, I am satisfied there are genuine issues for trial relating to the alleged use of confidential information by PCC and, presumably, the claims against the individual named defendants that they conspired in the use of the confidential information would also stand.

79 The plaintiff claims breach of contract and breach of fiduciary duty. The circumstances which give rise to the potential use of confidential information are not circumstances which are related to any contractual relationship between the parties. The claims put forward by the plaintiff relate to conduct which is described as being outside the NASA agreement and, as such, unrelated to the contractual relationship which governed those aspects of the parties' conduct. To the extent the

statement of claim puts forward a claim for breach of contract, I find that there is no support for such a claim anywhere in the evidence placed before me and that those portions of the statement of claim should be struck out and that cause of action dismissed.

80 The plaintiff further claims in the statement of claim for breaches of fiduciary duty. On the evidence before me, I have some considerable difficulty in finding anything that suggests that there in fact ever developed a duty of good faith or a fiduciary duty as between PCC and P & W during the February 1996 -- end of July 1996 time frame in question. P & W was at no time in a position of great vulnerability. There was nothing particularly special about the relationship of the parties in their conduct outside the NASA agreement.

81 In my view, it is quite different for a party in the position of P & W to attempt to allege breach of a fiduciary duty in the circumstances of this case than it is for them to allege that they are entitled to damages arising out of confidential information which was used to the advantage of the recipient after the economic negotiations broke down.

82 To the extent that the statement of claim makes claims for a breach of fiduciary duty, those paragraphs should be struck out and that cause of action should be dismissed on the grounds that that issue is not genuinely demonstrated to be trial-worthy on the evidence placed before me.

83 In the result, the motion brought by P & W for injunctive relief is denied and the motion is dismissed. The motion brought for summary judgment pursuant to Rule 20 is granted in part in that the claims for contractual relief and breach of fiduciary duty are dismissed, however, the claims for breach of confidence and conspiracy survive.

84 The evidence for both motions was virtually the same. The arguments put forward by counsel in respect of both moving and responding to the motions respectively brought were virtually the same. Although P & W was not successful in its injunctive motion, it was significantly successful in defence of the Rule 20 motion. PCC, on the other hand, has been successful in defending the application for an injunction but has been significantly unsuccessful in its motion under Rule 20.

85 Having regard to the rather unique circumstances of this case and the manner in which each competing request for relief has been argued and the evidence prepared and put forward in combination with the mixed success of each party, I am satisfied that the most reasonable disposition for costs would be that each party should bear their own costs.

86 In the event that there are some compelling reasons upon which I might be convinced to alter my determination in respect of costs, counsel may take out an appointment within 15 days of the release of these reasons. If such an appointment has not been taken out, my order shall stand.

WILKINS J.