IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008469

BETWEEN TRANSACTOR TECHNOLOGIES
      LIMITED
      First Plaintiff

AND   LOYALTY APPLICATIONS NEW
      ZEALAND LIMITED
      Second Plaintiff

AND   EVOLUTION E-BUSINESS LIMITED
      First Defendant

AND   MARKETSMART INTERNATIONAL
      (NZ) LIMITED
      Second Defendant

Hearing: 24 April 2009

Judgment: 21 May 2009 at 12:30 pm

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 21 May 2009 at 12:30 pm
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date……………………….

Introduction

[1]   In this proceeding the plaintiffs, Transactor Techologies Ltd and Loyalty Applications New Zealand Ltd, allege breach of copyright, breach of confidentiality and breach of trust by the second defendant, MarketSmart International (NZ) Limited.   The subject matter of the allegations is a software system known as "Thor", which is a form of customer management and database software used by retailers to maintain their loyalty programmes. The plaintiffs are, respectively, the licensee and owner of Thor. MarketSmart competes with Transactor and has its own proprietary software which Transactor says is similar to Thor but lacks Thor's unique features, such as the ability to combine gift and loyalty transactions on one card. The plaintiffs allege that MarketSmart has accessed and used the Thor system when it had no right to do so. For convenience I refer only to Transactor in relation to both plaintiffs.

[2]   The Thor system used to be marketed in New Zealand by Transactor and the first defendant, Evolution E-Business Ltd, pursuant to a joint venture agreement, under which Evolution dealt directly with the retail customers and had access to the Thor system.   Under the agreement Evolution was required to maintain confidentiality in relation to Thor, including not allowing any other party access to the system.   In 2008 Transactor terminated the joint venture agreement alleging various breaches by Evolution. When it realised that the joint venture agreement was likely to be terminated Evolution consulted MarketSmart for assistance in continuing to service customers without the Thor system. It provided MarketSmart with a copy of the Thor system, which Transactor claims was a breach of its obligations under the joint venture agreement.

[3]   Transactor commenced this proceeding against both Evolution and MarketSmart but has settled the claim against Evolution. It continues to seek substantive relief against MarketSmart in the form of an injunction restraining MarketSmart from disclosing, adapting or copying confidential information or the Thor system software and programmes together with an accounting of profits. In

December 2008 it obtained interim relief in the form of an order that MarketSmart not access, use, disclose, provide access to, adapt or copy Thor to any person.[1] However, in January 2009, with evidence that MarketSmart did still hold copies of Thor it obtained a search order, which was executed on MarketSmart's premises on 22 January 2009.[2]

[4]   The search order required MarketSmart to provide an affidavit setting out its possession, use and communication of Thor. Transactor considered that the affidavit filed by MarketSmart did not comply with the order. Duffy J made directions as to the effect of the order and required MarketSmart to file a further affidavit by 11 March 2009. The affidavit that was filed admitted that MarketSmart had deleted documents and computer files without keeping a record of what had been deleted. Transactor still considers that the terms of the search have not been complied with, in that there are matters that have still not been covered in the affidavit.

[5]   In this decision I deal with the following interlocutory matters:

[a]   Transactor's request for a Tomlin order in respect of the settlement between it and Evolution;

[b]   MarketSmart's application for an order discharging the search order;

[c]   Transactor's application to inspect documents seized pursuant to the search order;

[d]   Transactor's application for enforcement of MarketSmart's obligation under the search order to provide an affidavit in relation to certain matters;

[e]   Transactor's request for orders addressing MarketSmart's continuing non-compliance with the amended interim orders.

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[1] Harrison J 22 December 2008
[2] Venning J 22 January 2009

[6]   The plaintiffs have also applied for indemnity costs against MarketSmart in relation to its previous applications.   However, I have adjourned that matter for argument following delivery of this decision.   This is mainly due to the fact that MarketSmart's counsel, Mr Gedye, only received instructions a few days before the hearing and was not in a position to deal with the serious matters that this application raises.

Tomlin order

[7]   On 9 February 2009 Transactor and Evolution entered into a confidential agreement that resolved all the outstanding matters between them.   It is a term of the agreement that, whilst the parties may disclose the fact of settlement, the terms of the settlement were to be kept confidential.   A copy of the agreement is before the Court, annexed to a joint memorandum of Transactor's and Evolution's solicitors in support of an application for a Tomlin order staying the proceedings against Evolution to enable the settlement to be carried out.

[8]   MarketSmart does not oppose the making of a Tomlin order but says that it ought to have disclosure of the settlement agreement.   Mr Hunter, for MarketSmart, submitted that the terms of settlement between Transactor and Evolution were relevant or potentially relevant to the issue of costs between the parties.   In particular, given Transactor's application for indemnity costs, it says that it should be able to see what, if any, payment towards costs Evolution has agreed to make. MarketSmart would accept disclosure of the agreement with any settlement sums redacted.

[9]   I have considered the terms of the settlement agreement.   In my judgment they do not bear either at all or to any significant extent on the issues between Transactor and MarketSmart.   I certainly do not consider that they have significance to the issues confronting MarketSmart that would justify interfering with the confidentiality agreement that the parties have reached.   I therefore make a Tomlin order in the form attached to the joint memorandum of counsel 10 February 2009.

MarketSmart's application to discharge the search order

[10]   A few days before this hearing MarketSmart filed an application for an order discharging the search order. The grounds advanced include that Transactor had not provided evidence in support of its application for the search order relating to actions taken by MarketSmart between the time of the original interim injunction on 22 December 2008 and the application for the search order in January 2009 and that the search order went beyond the usual scope of an ancillary order and effectively required it to provide its evidence in full. In the event, I was not addressed in any detail in relation to this application and I do not need to spend a good deal of time on it.

[11]   The circumstances in which a party may apply to discharge a search order are concisely stated by Henry J in *DB Baverstock Limited v Haycock*[3], affirmed by the Court of Appeal in *Fujitzu General NZ v Melco NZ*[4]:

> In my view the principle to be applied in respect of an application to discharge an executed Anton Piller order is that it should only be entertained prior to trial if the order has been obtained *mala fide*, or on material non-disclosure, or if there are other special circumstances which clearly demonstrate the need for immediate relief.

[12]   Since the search order was executed this matter has come back before the Court twice including, on 27 January 2009, before Wylie J when the terms of the order were varied. MarketSmart's solicitors have communicated many times with Transactor's solicitors over the issues of confidentiality and relevance. There is no indication that concerns of the type identified in the current application have ever been raised and certainly never pursued notwithstanding the obvious opportunities to do so.

[13]   There is no basis on which MarketSmart can now seek to discharge the order and its application is dismissed.

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[3] [1986] 1 NZLR 342; (1986) 1 PRNZ 139 at 345
[4] (2002) 16 prnz395 at 397

Inspection by Transactor of documents seized from MarketSmart

The terms of the search order

[14]   In December 2008, following Transactor's filing of its application for interim orders against both Evolution and MarketSmart, MarketSmart provided an undertaking confirming that it had "no copies or adaptations of the Thor Transactor software or any material derived from the Thor Transactor software it its possession, custody or control". Its solicitor subsequently confirmed that MarketSmart would give that same undertaking to the Court but added that

> Our client cannot consent to the order [for delivery up]…as it has nothing to deliver up to the Registrar.

[15]   Notwithstanding those undertakings, Transactor had sufficient evidence that MarketSmart did hold material that was either copied or derived from Thor to obtain the search order on 22 January 2009. Upon execution of the order copies were taken of hard and soft documents, computers and email drives found at MarketSmart's premises. Transactor concluded from the material obtained as a result of the search order that MarketSmart continued to hold confidential information. It obtained an order varying the search order to require MarketSmart to either deliver up or delete all documents or information belonging to Transactor.[5]

[16]   Initially, all the material obtained as a result of execution of the search order was held by Transactor's forensic computer expert PricewaterhouseCoopers (PwC). PwC provided copies of relevant, non-privileged material to Transactor's solicitors but not to Transactor. The search order was varied on MarketSmart's application to preclude these documents being disclosed to Transactor itself except with the agreement of the parties in writing or pursuant to a further order of the Court.[6] The varied order required MarketSmart to provide a list identifying documents in respect of which confidentiality was asserted, with Transactor's solicitors to respond to that claim and any applications regarding confidentiality to be made to the Court by 3 February 2009. Any documents not the subject of a claimed confidentiality by MarketSmart, provided they related to an issue in the proceeding and were not

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[5] Duffy J 25 February 2009

privileged, could be made available to both Transactor's solicitors and Transactor itself.

[17]   Correspondence between the respective solicitors failed to produce agreement on the issue of confidentiality. Transactor complains that MarketSmart's claims of confidentiality are so broad they would effectively prevent Transactor from considering plainly relevant material. It has therefore applied for an order that it be entitled to inspect relevant, non-privileged documents obtained under the search which it says is, in effect, nothing more than it would be entitled to under the normal rules of discovery.

[18]   Although there are some documents that MarketSmart does not object to Transactor having access to, it resists it seeing documents that it considers are confidential and does not consider that Transactor's solicitors should be permitted to make the decision as to whether material is relevant. MarketSmart does not object to Transactor having copies of the documents disclosed to Transactor's solicitors pursuant to the amended order 25 February 2009. They are copies of Transactor's own information held by MarketSmart and which MarketSmart was required to deliver up. In relation to the remainder of the documents Mr Hunter drew a distinction between MarketSmart's source code for its own CIS proprietary software and all other documents.

The source code for CIS

[19]   When the search order was executed PwC took a complete copy of the source code for MarketSmart's own CIS software (i.e. the software written in an English readable programming language). Mr Hunter submitted that the source code was amongst the most confidential information that MarketSmart had. Transactor and MarketSmart are direct competitors and issues of confidentiality in relation to the source code therefore assumes greater significance than usual. Mr Hunter submitted that Transactor did not need access to the source code because the fact that PwC already had access to it was sufficient.

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[6] Wylie J 27 January 2009

[20]   In an affidavit filed in support of Transactor's application Mr Kidd of PwC deposed that he has a basic understanding of the Thor system which is based on sample documents provided by Transactor and the files viewed during his analysis so far. However, he says that Thor is a complex system and he is unable to conclusively determine precisely the extent of use by MarketSmart without the assistance of Transactor staff. He has deposed that among the documents obtained is a source code that appears to have been adapted from Thor and this new source code contains reference to CIS. Mr Kidd considers that if Transactor's employees have access to all the material including the MarketSmart source code they will be able to quickly identify any matching and altered files. His limited knowledge of Thor will make it difficult and, perhaps impossible, to do that.

[21]   Mr Hunter pointed out that Mr Kidd did not actually explain why he says that the level of his knowledge will preclude him from identifying matching or altered files. He said that PwC should be able to determine whether any of Transactor's own source codes had been incorporated into MarketSmart's software without the assistance of Transactor staff. MarketSmart's IT Manager, Mr Snowball, has provided an affidavit in which he deposes that the process of comparing MarketSmart's source code with Transactor's source code is similar to the process of comparing any two English texts and identifying potential similarities between the programmes. He considers that this could be easily done by PwC without reference to Transactor.

[22]   Mr Kidd did not respond to Mr Snowball's affidavit. Nevertheless, Mr Kidd occupies an independent position in this proceeding, having acknowledged his obligations under the Code of Conduct for expert witnesses. I take seriously his concern that he will find it difficult or impossible to accurately assess the use to which MarketSmart has put the Thor source code without the assistance of Transactor staff. There is also an issue regarding the practicality in terms of time and expense involved of PwC attempting this task without the assistance of Transactor staff. Mr Hunter submitted that Transactor should not have access to the CIS source code because, even though PwC has had the source code, a complete copy of MarketSmart's email server and all of the hard copy documents seized at the time the search order was executed (over three months), they have not provided any

evidence that any part of the Thor system has been incorporated into MarketSmart's software. However, Ms Cooper advised that little work had been undertaken because it was regarded as unnecessarily expensive to allow PwC to attempt to make progress without the assistance of Transactor staff.

[23]   In the circumstances, I accept PwC's view that it is not feasible to progress its assessment without the assistance of Transactor staff. I therefore direct that the CIS source code obtained during the search be made available to the matter. Although I appreciate MarketSmart's sensitivity over access to its source code, Transactor's solicitor's will ensure that the Transactor staff involved fully understand their obligations in relation to the material they see.

The other documents

[24]   Apart from the source code there are a variety of other documents that MarketSmart does not wish Transactor staff to see. These include hard copy documents, copies of six PCs and a complete copy of the office server which includes the source code for CIS software and emails. Transactor says that being able to see these documents is no more that what it would be entitled to see on discovery. Mr Hunter, however, submitted that on discovery the question of relevance would be decided by MarketSmart's solicitors whereas Transactor is proposing that its solicitors determine that issue. Mr Hunter says that because of previous requests by Transactor's solicitors for plainly irrelevant material MarketSmart is not confident that only relevant material will be provided to Transactor. He gave as an example two emails that Transactor's solicitors had asked to be permitted to release to Transactor but which plainly have no relevance to the issues between the parties, as Transactor's solicitors now acknowledge.

[25]   Mr Hunter proposed the following resolution in relation to emails: any emails already identified by MarketSmart as relevant can be provided to Transactor and if Transactor's solicitors thought that there were other emails that were relevant they could identify them and seek MarketSmart's specific agreement to disclose them. Ms Cooper did not consider this proposal to be satisfactory because it simply recreates the problem that led to this application, namely that MarketSmart's view of

what is relevant or confidential inevitably conflicts with the view taken by Transactor's solicitors.

[26]   Whilst acknowledging the instances of requests made in respect of clearly irrelevant documents Ms Cooper is opposed to the idea of being required to consult further with MarketSmart's solicitors because of the likelihood that they will not reach agreement and will have to resort to a further application.   Given the background between the parties, Ms Cooper's concern is well founded.

[27]   As to the issue of who should assess the relevance of the material to be disclosed, the instances in which Transactor's solicitors have sought to release irrelevant material to Transactor appear to have been isolated ones. I consider that the issue of relevance can safely be left with Transactor's solicitors and I direct that Ms Cooper personally attend to the assessment as to relevance of any documents obtained under the search order that are to be provided to Transactor, in consultation with Mr Tingey.   That should provide sufficient comfort to MarketSmart that instances such as those complained of will not occur again.

[28]   The relevant computer files other than emails were taken from the PC belonging to a MarketSmart staff member, Mr Chen. MarketSmart is content for those files to be disclosed to Transactor.

[29]   This leaves the office server, which MarketSmart does not wish Transactor staff to have access to for reasons of confidentiality. I approach this issue against the background that MarketSmart appears not to have been completely reliable in relation to relevant material held by it, having originally asserted that it had nothing to deliver up when, quite plainly, it did.   The real issue is relevance, not confidentiality. There is no good reason to deny Transactor access to this material that its solicitor considers is relevant and non-privileged.

[30]   I therefore make an order permitting Transactor to inspect all documents (soft and hard) obtained under the search orders which either its solicitors or PwC consider to be relevant.

Enforcement of search order

[31]   Paragraph 1(j) of the interim order 22 January 2009 required:

>   (j)   The first and second defendants each provide an affidavit to the plaintiffs' solicitors, Bell Gully, within 10 working days setting out their possession, use and communication of the Thor system software and the presence and location of any other material as described in paragraph (c) above and specifically describing any deletion or destruction or attempted deletion or destruction of any such material at any time before or after the issue of these proceedings, including the time and date on which this occurred and the method used (including any deletion programme used).

[32]   Mr Harper, the general manager of MarketSmart, filed an affidavit sworn 5 February 2009 in response to paragraph 1(j). Transactor's solicitors responded by identifying what it considered to be deficiencies and asking that an affidavit be filed that complied with the requirements of the search order. MarketSmart did not do so which resulted in an application by Transactor and a direction by Duffy J clarifying what was required by MarketSmart and requiring it to provide any further affidavit by 11 March 2009. MarketSmart provided a further affidavit by Mr Harper sworn 13 March 2009, which Transactor says still does not comply.

[33]   First, Transactor says that MarketSmart has not addressed the use to which Thor was put, asserting that material obtained under the search order showed a greater use by MarketSmart of the Thor system than indicated by Mr Harper's affidavit. In his affidavit 13 March 2009 Mr Harper acknowledged that MarketSmart had undertaken certain activities in relation to the Thor system, namely investigating the possibility of altering the system so that it could not be disabled remotely, studying the XML transaction gateway with a view to writing its own software, studying the way in which data is stored in the Thor system and experimenting with ways of extracting it and developing banking formats based on specifications provided by Evolution and extracted from the Thor system. However, Transactor's solicitors consider that material obtained under the search order shows more extensive use of the Thor system than that acknowledged by Mr Harper. Ms Cooper was critical of the fact that Mr Harper did not refer to having made any inquiries of his staff in providing that affidavit. For example:

- In his affidavit 3 February 2009 Mr Campbell of PwC identified that Mr Chen (a MarketSmart employee) had accessed files relating to the Thor system after the date of the interim orders.

- Mr Harper said in first affidavit 5 February 2009 that MarketSmart had used a decompiler programme on the Thor system but did not make any changes to it. However, Mr Kidd of PwC has identified alterations or adaptations made to the Thor system source code which are not explained in the MarketSmart affidavits and inconsistent with Mr Harper's statement that no changes were made to the Thor system.

- A few days before the hearing Transactor filed an affidavit by its managing director, Mr Norrie, dated 22 April 2009. Annexed to this affidavit were two Power Point presentations by MarketSmart and its parent company Oncard International. He had received these from a senior marketing manager at Subway New Zealand, who had been a client of the Transactor/Evolution joint venture. The Power Point presentation was an Oncard International proposal for a Subway loyalty card and included the following statement about its proposed system "The system uses proven technology based on the successful New Zealand Subcard". Ms Cooper submitted that this statement was an effective acknowledgement that Oncard's proposed new system was based on Thor, given that the Subcard had previously been supported by Thor. It also suggested, Ms Cooper submitted, that MarketSmart was still in possession of Thor or an adaptation of it.

[34] Mr Hunter submitted that Mr Harper's affidavits do provide a full explanation of what MarketSmart did with the Thor software. In particular, in his affidavit 24 February 2009 Mr Harper addressed the fact that his earlier affidavit had not referred to any enquiries made of MarketSmart staff. Mr Harper explained that he did not consider such enquiries to be necessary because he was "quite closely" involved in the work that MarketSmart was undertaking for Evolution. He attended about half of the project meetings with MarketSmart's IT manager and staff who were working on the project. He attended the latter part of some of the remaining

project meetings. He received reports on other project meetings that he did not attend.

[35]   It was, however, obvious from Mr Harper's affidavits that he did not know everything that MarketSmart's staff did in relation to Thor. For example, in response to the assertion that Mr Chen had accessed files relating to the Thor system after the date of the interim order, Mr Harper explained that in the system used by MarketSmart, if any file in a particular folder is accessed the system accesses and re-saves all the files in the folder and, as a result, some of the files in Mr Chen's development folder "..may show as having been modified after 22 December 2008 even though he has not carried out on any work on them after that date." The obvious implication is that, whilst the work that Mr Chen was doing might have been unrelated to Thor, it might also have been related. It is apparent that Mr Harper had no direct knowledge of what work Mr Chen was doing that might have resulted in the development folder showing as having been modified. In the absence of a specific enquiry by Mr Harper of Mr Chen or of evidence from Mr Chen himself there is no way of knowing that.

[36]   Although Mr Harper clearly had a good overall knowledge of what his staff were doing it seems unlikely that he knew precisely what work each staff member did on any particular day. Paragraph 1(j) of the search order can only be complied with in this regard either by Mr Harper making inquiries of his staff as to exactly what use has been made of the Thor system or by MarketSmart providing affidavits from the staff members concerned.

[37]   There was no response to the matters raised in Mr Norrie's affidavit. However, Mr Hunter explained that this was because it was not clear to MarketSmart what significance it had. He submitted that it was not evidence of disclosure to or use of the Thor system and distinguished between the loyalty programme and the software used to support it with the Power Point presentation referring only to the programme operated by the end user. Ms Cooper sought a direction that, in complying with the search order MarketSmart be specifically required to address the matters raised by Mr Norrie. I agree that MarketSmart should address the matters that Mr Norrie has raised. If the references in the Power Point presentation have no

relation to Thor, then that can easily be explained. If there is some relation then that too should be explained.

[38]   Transactor also complains that MarketSmart has not properly addressed the extent to which it has disseminated Transactor's copyrighted or confidential information to third parties. Mr Hunter advised that MarketSmart considered that it had complied with this aspect of the order in stating that it had provided a copy of the software to Evolution after restoring it from the back-up copy provided by Evolution. If that is the extent of the dissemination, then MarketSmart should confirm that.

Verification procedure

[39]   Pursuant to paragraph 3(a)(iii) of the amended order, following the delivery up of documents any remaining copies or adaptations of the Thor system software were to be deleted by MarketSmart. That deletion was to be independently verified by PwC. Despite requests by Transactor's solicitors to make arrangements for that verification MarketSmart has refused to allow it to take place. This is because PwC requires to search MarketSmart's live server for any of Transactor's software.

[40]   Although the live server fell within the scope of the search order it was not searched on the day the search order was executed. Ms Cooper says that because there was no MarketSmart technician available at the time it was not practical to include the live server in the search. However Transactor maintains that if MarketSmart has retained copies or adaptations of the Thor system it is likely that they will reside on this server and, given MarketSmart's previous failure to be open about the extent of its possession and use of the Thor system, Transactor does not accept any assurance from it and requires deletion of the Thor system to be independently verified.

[41]   Mr McKenzie of PwC has deposed that he has been involved in the copying and examination of data from numerous computer systems, including servers and has never damaged a live server. He considers that there are likely to be methods for transferring the data from the live server for the purposes of verification. He rejects

MarketSmart's assertion that there was damage caused to equipment during execution of the original search order. He says that, although there were some technical issues, they only occurred in relation to a few machines of a particular make and model, which suggested a hardware configuration issue rather than a user issue.

[42]   MarketSmart is accepting of PwC taking further copies of the hard drives in all of the computers that were copied during execution of the original search order but objects to any procedure that involves the live server because of the risk to its operation. In particular, it says that the continued operation and security of the live server is critical to it being able to service its clients and it does not have any confidence in the ability of PwC staff to take a copy of the live server without risking damage to it. It is not reassured by Transactor's proposal that MarketSmart staff carry out the necessary procedure on the live server under PwC supervision because it considers that any attempt to make a copy of the live server even if carried out by its own staff poses a risk to its operation.

[43]   The issue of verification has clearly been live between the parties for some time. However, in the face of what MarketSmart claims to be a real and significant risk to its continued operation and security it has not adduced any independent expert evidence to support its claim that the proposed verification procedure does pose this risk. MarketSmart is at a distinct disadvantage in asking the Court to accept such assertions given the background of this case and in particular its early undertaking that it had no copies or adaptations of Thor or any material derived from Thor and nothing to deliver up which was proven wrong.

[44]   Taking all of the circumstances into account I consider that Transactor is entitled to have the verification procedure previously ordered now enforced. I direct that PwC and MarketSmart (or an independent adviser on behalf of MarketSmart) confer with a view to identifying the most practical and appropriate method of completing the verification procedure.

Orders

[45]   In summary, I have made the following orders:

[a]   A Tomlin order in the form attached to the joint memorandum of counsel 10 February 2009;

[b]   MarketSmart's application to discharge the search order is dismissed;

[c]   Transactor may inspect all documents (soft and hard) obtained under the search orders which either its solicitors or PwC consider relevant;

[d]   MarketSmart should file a further affidavit or affidavits by 5 pm 22 May 2009 that fully complies with paragraph 1(j) of the interim order 22 January 2009;

[e]   Verification of deletion of remaining copies or adaptations of the Thor system as required by paragraph 3(a)(iii) of the amended search order must be complied with. MarketSmart, or an independent adviser on its behalf, is to confer with PwC within 14 days with a view to identifying the most practical and appropriate method of completing the verification procedure. That procedure is then to be completed within a further 21 days.

Timetable for costs application

[46]   Transactor has applied for costs against MarketSmart on an indemnity basis. They have been unable to agree on all aspects of a timetable but have filed a consent memorandum identifying the areas on which they do agree.

[47]   Having considered both proposals I make the following directions:

[a]   The plaintiffs are to file and serve any further evidence in support of the application on or before Friday 22 May 2009;

[b] The second defendant shall file and serve any evidence in opposition to the application on or before Friday 5 June 2009;

[c] The plaintiffs are to file and serve any evidence in reply on or before Friday 12 June 2009;

[d] The application shall be set down for a one-day hearing on the first available date after 12 June 2009.

[e] The plaintiffs are to file and serve their synopsis of argument five working days before the hearing; and

[f] The second defendant is to file and serve its synopsis of argument two working days before the hearing.

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P Courtney J