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**TRANSCRIPT  
OF PROCEEDINGS**

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**FEDERAL COURT OF AUSTRALIA**

**VICTORIA DISTRICT REGISTRY**

**GOLDBERG J**

**DIRECTIONS and NOTICE OF MOTION**

**No V 83 of 2003**

**FOUNDATION FOR INNER PEACE INC and ANOTHER**

**and**

**NEW CHRISTIAN CHURCH OF FULL ENDEAVOUR  
ACN 067 570 870 and OTHERS**

**MELBOURNE**

**11.30 AM, TUESDAY, 1 APRIL 2003**

MR D.K. CATTERNS QC, with MR A.J. MARYNIAK (instructed by Michael Brereton and Co) appeared on behalf of the applicants

MR A. CROWE SC, with MR T.C. SOMERS (instructed by Russell and Company) appeared on behalf of the respondents

HIS HONOUR: Mr Catterns, I've read the application, I've read the statement of claim, I've read all the affidavits, I've read all the correspondence, I've glanced at the text and I've read the American judgment and I've read the submissions of both sides.

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MR CATTERNS: Your Honour, thank you very much, that will enable us to be brief. Might I hand your Honour a proposed minute of order where I can identify the fairly narrow - - -

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HIS HONOUR: It also seems to me that the parties are very close as to what should happen from here on, apart from the issue of security for costs that can be resolved on a - - -

MR CATTERNS: That has been resolved.

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HIS HONOUR: - - - staged basis I would have thought.

MR CATTERNS: Yes, your Honour, we have agreed on that.

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HIS HONOUR: I'm not surprised.

MR CATTERNS: Your Honour, may I hand your Honour the short minutes and identify where the - - -

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HIS HONOUR: Of course. Mr Crowe has no objection to this?

MR CROWE: No, your Honour.

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MR CATTERNS: There is a debate to some extent, if I could just identify that.

HIS HONOUR: Just let me glance at this order.

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MR CATTERNS: This is not by consent. I will identify the disagreements.

HIS HONOUR: I understand that. Yes, Mr Catterns.

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MR CATTERNS: Your Honour, orders 1 and 5 are in effect interlocutory injunctions of a conventional type to prevent copyright infringement. Your Honour sees from our learned friend's submissions and from Mr Poppy's evidence that the respondent would agree to them if they thought we had a serious question to be tried. They're not proffering them ab initio as it were so there is a dispute which your Honour might take a few minutes to resolve about our title, which our learned friend wants to agitate. If I do him justice it is -

while he accepts that an oral assignment can be sufficient to convey an equitable interest to allow you to commence at an interlocutory level, and we agree we will need to bring in the legal title, nevertheless the oral assignment that we've got our hearsay evidence about was limited to America. That will  
5 take your Honour a moment to - - -

HIS HONOUR: And also the evidence - on one view - the evidence about the oral assignments is tenuous.

10 MR CATTERNS: Yes, your Honour.

HIS HONOUR: I don't say that in a critical way, Mr Catterns. I'm looking at it objectively.

15 MR CATTERNS: Yes, your Honour. With respect, I see the force of your Honour's submission and of course at trial we would have to do as best we could, given the fact that some of the participants are dead. So, your Honour, there is a debate about the orders 1 and 5 as to our standing and I think our  
20 learned friend no longer submits that we were guilty of any material non-disclosure to his Honour Gray J on the granting of the Anton Piller order, but submits that the weaknesses in our case now also applied then and that the orders shouldn't have been made and a fortiori shouldn't be made today. We think it's the same issue, your Honour. In effect we're moving afresh for  
interlocutory relief with all the onus on us in the usual way.

25 HIS HONOUR: Yes, I understand.

MR CATTERNS: So, your Honour, that's orders 1 and 5. They are linked.

30 HIS HONOUR: Just let me look at 5 again. Yes.

MR CATTERNS: Your Honour, they are not the words that Mr Poppy put in his affidavit or my friend in his submission because in particular we've added  
35 "importing and exporting" into it.

HIS HONOUR: I had understood the flavour, if I can put it that way, that I got from Mr Poppy's affidavit was that he wants he and his colleagues and associates - want to use the text for prayer and meditation for the time being until this matter is finally determined but has no intention of distributing it.

40 MR CATTERNS: Your Honour, that's precisely our understanding.

HIS HONOUR: If that's so, on a balance of convenience issue that seems to be, on one view, an appropriate situation to be maintained.

MR CATTERNS: Your Honour, with respect there's little one can say when a minister swears that, "I need version A as opposed to version B." So, your Honour, in a sense on the balance of convenience that really - - -

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HIS HONOUR: And no harm is being done to you at this stage because you know where the text is and you know how it's being used.

MR CATTERNS: With respect I can't disagree with that either, your Honour. What would flow from that is orders 1 and 5, if we're otherwise right, on the balance of convenience would be made and I think my friend would probably recognise that, with respect. But orders 2 and 4 are the linked ones that relate to the handing back. Your Honour, our answer - and I don't want to take too much time on it, but our answer to the question of handing the books back for continued use and worship is, "You can use our copies that we will give you rather than what we say are infringing copies," and I accept that Mr Poppy says they are unsatisfactory from his point of view and there's no question of any cross-examination today of course.

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Our response to that is, well, that's really just an assertion of what he regards as the inferiority of our version over his version. Because that's not been supported by any textual analysis your Honour ought not to accept it on the balance of convenience. Against that is the matter that your Honour put to me. So, your Honour, that would - if your Honour adhered to the view your Honour just mentioned, I submit your Honour would make orders 1 and 5 but not make orders 2 and 4. That would be the consequence of the debate.

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HIS HONOUR: I understand that.

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MR CATTERNS: Then it gets easy because we agree to orders 6 and 8 which will resolve pro tem. The parties have liberty to apply to top up, perhaps, or vice versa if the case went the other way.

HIS HONOUR: It's been my practice in cases similar to this to provide for what I will call staged security for costs, which I think is a more sensible way to go about it. There has been a great rush at the moment to get to this stage of the proceedings. There will have to be stages of pleadings, particulars and discovery and probably subject to what either you or Mr Crowe may say, the matter can be revisited after discovery.

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MR CATTERNS: Your Honour, with respect we agree I think and I think our friend does.

MR CROWE: Yes.

MR CATTERNS: So, your Honour, orders 6 and 8 have that effect, of our taking \$30,000 out of the money we've already deposited - sorry. We have already deposited 30,000 as security for our undertaking as to damages. 25 of  
5 that would be released to be used towards the security. We would give an extra 50, adding up to the 75 in order 6, leaving behind security for compensation of 5000 in order 8. That means we have no disagreement on that, your Honour. Your Honour, then order 7 is our friend's venue motion which, with respect, sensibly they have suggested be revisited.

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HIS HONOUR: Yes, I have followed that in the correspondence.

MR CATTERNS: Thank you, your Honour. Then, your Honour, order 6, 7 and 8 are agreed as are the remaining orders, your Honour, except for one tiny  
15 point: order 9, our friends volunteered in the letter that I think we didn't get from some slip up, but there's no problem about it, that there are some unbound copies of the works and we agree that they be kept by our learned friend's instructing solicitors for safekeeping.

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HIS HONOUR: That's not in dispute at the moment?

MR CATTERNS: I believe not, your Honour. Our friends indeed volunteered it.

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HIS HONOUR: Yes, I understand.

MR CATTERNS: Then, your Honour, there is particulars and pleadings and we've given ourselves a month because we have got a complicated job in tracing our way back to the dead author to prove a chain of title and to work  
30 out whether we need to join any parties, either as applicants or as respondents to compel an assignment if one needs to be compelled and so on.

HIS HONOUR: Yes, the material that's been placed before this court is sparse on that issue but the reading of the judgment of the American judge on the  
35 motion for summary judgment shows there are quite a number of participants.

MR CATTERNS: Yes, your Honour. But we're agreed at least on the timetable for pleadings which is 10, 11 and 12; pleadings and particulars. Ideally most of our particulars will be in the pleading and - - -

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HIS HONOUR: I think it's an appropriate case, Mr Catterns - again this is not a criticism but it's a suggestion - that the pleading be fulsome, so far as particulars are concerned, because I think this is an important case where the court needs to be as fully informed as well as the parties well in advance of

how you put your case on chain of title.

5 MR CATTERNS: With respect that's right, your Honour, and we will embrace our friend's suggestion that we plead those as facts rather than as particulars.

HIS HONOUR: Yes, I understand that.

10 MR CATTERNS: Then, your Honour, 12 just follows; the extent of our friend's success will slightly depend upon the - we've agreed on security and we submit so far as the security question goes there was no need to bring a motion because we've been able to do a deal. But your Honour knows we have a slight argument on the first step in our chain of title, ie a serious question to be tried and then there's the balance of convenience issue identified by  
15 your Honour. In short the form of orders 12 and 13 is not in dispute.

HIS HONOUR: Yes, thank you.

20 MR CATTERNS: I don't know whether - if your Honour would perhaps treat that as an opening and then if there's anything my friend wanted to say before I just quickly take your Honour to the questions of substance?

25 HIS HONOUR: What I would prefer to do is I would treat it as an overture rather than as an opening and perhaps give - if I could hear from Mr Crowe at this stage as to how he defines the issues because as presently advised they seem to be either almost resolved or so close to resolution that with a little dialogue they may be resolved.

30 MR CATTERNS: A little dialogue from the bench as well, with respect.

HIS HONOUR: I think that may well be.

MR CATTERNS: May it please the court.

35 HIS HONOUR: Mr Crowe?

MR CROWE: Thank you, your Honour. In relation to the ex parte Anton Piller orders that were made we do - - -

40 HIS HONOUR: It's not quite an Anton Piller order though, is it, because there was no order for entry, search and seizure.

MR CROWE: No, and we say the only reason for that is that they didn't need that type of order because they knew before they got the order that the books

were very likely to be there because of the evidence they had already gained.

HIS HONOUR: I understand that.

5 MR CROWE: But we do seek to set aside the Anton Piller order. It either is  
an Anton Piller order watered down or it's an order 15A order. It's not an order  
15A order, because it is not a case where someone was searching for a cause of  
action, where someone was searching for documents. It's not that preliminary  
type of discovery order. It's a watered down Anton Piller order.

10 HIS HONOUR: My understanding is, and I think it was Mr Maryniak who  
applied for the order, I took the liberty of speaking to Gray J to satisfy myself  
as to what had occurred and I understood that his Honour had indicated that he  
wouldn't grant an Anton Piller order which was why practice note 10 wasn't  
15 complied with but his Honour was prepared to grant a limited order for  
delivery up. Is it impertinent if I ask Mr Catterns through you, Mr Maryniak,  
whether I've got it roughly correct?

20 MR CATTERNS: It's not impertinent and your Honour is exactly correct. We  
have the transcript here if my friend and your Honour need to look at it but  
that's - - -

HIS HONOUR: I haven't seen the transcript but no doubt it can be made  
available to Mr Crowe if need be.

25 MR CROWE: Be that as it may, your Honour, we take the - we don't dispute  
anything that's just been said. Nevertheless we say it was an order that should  
never have been made or another way of putting it is, an application that should  
never have been brought in an attempt to persuade the court that the order  
30 should be made.

HIS HONOUR: Looking at it now with hindsight and looking at the material  
that was before his Honour it's not immediately clear to me what was the  
urgency or the irreparable harm that might occur if delivery up didn't occur.

35 MR CROWE: Quite, your Honour.

HIS HONOUR: That seems to be how you're putting it.

40 MR CROWE: Exactly, your Honour. There was no need for the urgency,  
there was no need for the delivery up. The affidavits in support of the  
application for the order showed that I think three or four of these books had  
been obtained, obtained easily and at no cost. They had the evidence that my  
client had in its possession the books which were said to be infringing copies.

It did not need the further evidence. It was really a fishing-type expedition. There was no need for the order to be made at all. There was no evidence at all, we say, which could give rise to a reasonable inference that absent the order that my client would destroy or hide or otherwise dispose of the  
5 evidence. It is only if there was some suggestion of that, some real suggestion, that there was any need for the application to be made ex parte. It was only if there is a reasonable inference of - - -

10 HIS HONOUR: Yes, I understand that.

MR CROWE: Your Honour obviously doesn't need me to go to authority on that point.

15 HIS HONOUR: I understand your submission.

MR CROWE: The fact that we are here today talking about whether or not the books seized, or at least some of them, are returned, goes to that very same issue. What has been gained by the order? What has been gained is that a competing church, if I can put it that way - another church - by seizing these  
20 documents has prevented my client, on my client's affidavit material, from in effect practising their religion using their books of worship.

HIS HONOUR: As I understand it that issue is proposed to be redressed forthwith by return of a significant number of texts.

25 MR CROWE: What is suggested in the draft order is somewhat different. We suggest that should flow from setting aside the ex parte order. The books seized - - -

30 HIS HONOUR: You mean if I set aside the ex parte order, the books are returned to you?

MR CROWE: Quite, your Honour.

35 HIS HONOUR: How many were taken?

MR CROWE: About 10 I think, your Honour.

40 HIS HONOUR: If those books were returned to you would your clients undertake until the hearing and determination of the proceeding not to part with the possession of them?

MR CROWE: Yes, your Honour, and not to import further, not to export and not to publish further.

HIS HONOUR: And not to import further. That preserves the status quo.

5 MR CROWE: Yes. What our learned friends are suggesting is not that they return the books seized but that they in effect foist upon my clients their book and that we have to use their book as our book of worship. Your Honour - - -

10 HIS HONOUR: There are differences I take it from what I've read in the material.

15 MR CROWE: According to my clients on their affidavit material yes. The whole basis of their approach is that - if I can put it this way - the book which the applicants use is not good enough or does not suit their purposes. In fact their evidence is since their books were seized they've not been holding their church services. The inference clearly from that is that they are not prepared to use an alternative book so the effect of the granting of those ex parte orders is that my clients have been prevented from carrying on their worship, at least with reference to their book of worship.

20 HIS HONOUR: It's a rather unusual breach of copyright claim, isn't it, in the sense that the books aren't - I'm speaking generally for the moment - being distributed in trade or commerce but are being kept for a personal use and that can be tracked during the currency of the progression of the proceeding I suppose.

25 MR CROWE: Yes, and issues about whether or not they were sold or handed out, as my clients assert, the numbers that have been handed out, to whom they've been handed out, that will be covered by particulars and by the discovery and inspection process.

30 HIS HONOUR: Yes, I understand.

35 MR CROWE: That goes - just while we're dealing with it, your Honour - to the relief sought in the proposed orders in paragraph 3. What is proposed - - -

HIS HONOUR: Of Mr Catterns' minute?

MR CROWE: Yes, your Honour. Just while we're on that issue - - -

40 MR CATTERNS: Sorry, I forgot to take your Honour to that. I'm happy for my learned friend to do it.

MR CROWE: We say paragraph 3 is unnecessary.

HIS HONOUR: I don't need to hear any further at this stage on that matter.

MR CROWE: The issue we were just talking about, your Honour, is paragraph 4. So your Honour understands what is proposed there in the draft  
5 as opposed to what we were just talking about, the reference to MJB2 is a reference to the applicant's book not the alleged infringing book.

HIS HONOUR: Yes, that's the one that Ms Ball did a textual analysis from as I recall it.  
10

MR CROWE: Quite right your Honour. At the risk of repeating myself, what is being suggested in paragraph 4 is that we have to use their books, not that we get our books back.

HIS HONOUR: Yes, thank you.  
15

MR CROWE: As to the setting aside of the order, your Honour, I will - - -

MR CATTERNS: Would your Honour just pardon me a moment. May I  
20 interrupt my friend for a moment just to make one dialogue suggestion.

HIS HONOUR: To Mr Crowe or to me?

MR CATTERNS: To my learned friend, your Honour.  
25

HIS HONOUR: Yes, of course. Do you wish me to leave the bench for a few minutes?

MR CATTERNS: Your Honour, perhaps - I do apologise for interrupting but  
30 given what's fallen from your Honour on a number of matters I would like to just suggest a way through to my learned friend. Whether or not he's able to accept it is another question.

HIS HONOUR: I think that's desirable.  
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MR CATTERNS: It would only take five minutes, your Honour.

MR CROWE: I have no problem with that, your Honour.

HIS HONOUR: I'll adjourn for five minutes.  
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**ADJOURNED** **[11.52 am]**

**RESUMED** **[11.58 am]**

MR CROWE: Thank you, your Honour. We weren't able to take the matters any further though we have already I think substantially reduced the areas of dispute. We couldn't reduce them any further is a way of putting it.

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HIS HONOUR: Yes, I understand.

MR CROWE: Just as to the setting aside of the Anton Piller order, or whatever we wish to call it, your Honour - the order that was made on 10 20 March - it might be said what is the point? We're here today arguing about interlocutory injunction in any event. The point, your Honour, is that there are costs associated with that which will eventually, if the applicant wins these proceedings, have to be paid by my client, so there's that very practical issue. Also it's an order which had quite a dramatic effect upon my client's ability to 15 worship. It is quite entitled to assert that it's an order that should never have been made even though one might say the horse has bolted. There are practical consequences which flow, particularly in costs, from setting aside that order.

If I could hand up to your Honour a decision of Microsoft Corporation 20 v Goodview Electronics 46 IPR 159, a decision of Branson J,. Your Honour of course will be very much aware of the principles I'm taking your Honour to but I do wish just to highlight the issues, your Honour. I go to this case not for its particular facts but for the principles enunciated in it, first of all at paragraph numbered 9.

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HIS HONOUR: Yes, I'm familiar with those principles.

MR CROWE: And paragraph 13. The point of taking your Honour to this is, no matter how you dress up the order that was made it should only have been 30 an order made, as your Honour has already said you understand, if there was a real risk, a reasonable risk, that the evidence, if not seized, would have been destroyed. In that context if I could take your Honour to paragraph 26 of this judgment and just ask your Honour to read paragraph 26. We say that what the applicants did here was to use a watered down Anton Piller order as an 35 investigatory tool.

HIS HONOUR: Just bear with me for one moment.

MR CROWE: I apologise, your Honour.

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HIS HONOUR: Yes, I take the point you're making. What's intriguing about it is it's not - in a sense it is a hybrid Anton Piller or it's a hybrid order. I would hesitate to call it even an Anton Piller by characterisation because an Anton Piller order, the gravamen of an Anton Piller order in the extraordinary nature

of it is not so much the delivery up but the invasion of premises and the requirement that a person open up their house or their building for entry.

MR CROWE: It's a combination.

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HIS HONOUR: But your point is still - I understand how it's made. You would say that given all that why the need for an order in paragraph 3 for the delivery up of the books?

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MR CROWE: For example, if there was some concern that they weren't going to be destroyed, that they might all be given away, a preservation order could have been made without an order for delivery up. But here we had, in effect, a preservation order and an order that you give up all the copies. So the order was not only we say with absence of there being any evidence that they would be destroyed or all given away - they are their books or worship - but not only did you have to in effect preserve the books but you had to stop using them in the conduct of your religion.

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HIS HONOUR: I suppose the protection could well have been obtained by a simple order for an injunction, ex parte injunction, restraining them from disposing.

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MR CROWE: We say there was no need for an ex parte order at all. We say - - -

HIS HONOUR: No, but as I understand your submission that would have provided the adequate protection.

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MR CROWE: Yes, that would have, and an order on notice, an application on notice would have had the same effect. There was no need for any urgent ex parte order to be made.

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HIS HONOUR: Yes, I understand.

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MR CROWE: Good evidence of the attitude that my clients take to these books is seen from the affidavit of Mr Brereton, which your Honour has read, being the solicitor who supervised, if I can put it that way, the seizing of the books. Your Honour will see that he was dealt with very politely, the books were freely given over, there was no suggestion of hiding the books; there was full cooperation. The orders having been made my clients have voluntarily offered the sensible types of undertakings that are being put to the court today in terms of preserving the books but not further publishing them or importing or exporting. All this points, we say, to the fact that there was no need for this,

in the circumstances of the case, rather extraordinary relief: no need for people to fly from Brisbane to Byron Bay to seize these 10 or so books.

5 HIS HONOUR: The end result of your submission is that the order made by Gray J should be discharged, that the books should be returned to you on your undertaking not to part with possession of them pending the hearing and determination of the proceeding and as I understand it you are also prepared to undertake not to import or disseminate any other texts pending the hearing and determination of the proceeding.

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MR CROWE: Yes, your Honour. We're prepared to follow the relevant wording in the draft minutes on that issue.

HIS HONOUR: Thank you.

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MR CROWE: As to the interlocutory relief, and their argument that there was no serious question to be tried - and I run this at the same time as being a basis for also setting aside the Anton Piller - initially we wrote to the other side on 20 March asserting that there had been material non-disclosure about the true standing of the applicants. The reason for that, we not knowing what submissions had been made to the court on the ex parte application, was that the statement of claim asserts that the applicants are the owners of the copyright in the work. Now, it will be said that they're entitled to assert that and there's a presumption in their favour under the Copyright Act unless there is evidence to the contrary. But this was an ex parte application.

20

We were initially going to apply to set aside on the basis of material non-disclosure because of the fact that those issues weren't highlighted to the court. We have since found out that our learned friend, Mr Maryniak, quite properly put before Gray J the fact that the applicants assert that they are equitable assignees of the copyright. So just to put that on the record, that's why we don't pursue that - - -

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HIS HONOUR: I understand that.

35

MR CROWE: - - - particular issue any further. But we do say this, that although an assignee in equity can bring proceedings for infringement of copyright and we don't contest that, it must be on the basis that either that equitable assignment is made good by a subsequent legal assignment which can be pleaded now under the Federal Court Rules because you can plead under order 13 facts that have occurred since the proceedings commenced.

40

HIS HONOUR: Yes, indeed.

MR CROWE: Or then will have to join the legal owner or owners and that's something that is the subject of the directions. But what we have here; the outline of argument given to Gray J said that the applicants - the applicants - are the equitable assignees. They both cannot be equitable assignees of the copyright.

HIS HONOUR: Because they were sequential?

MR CROWE: Yes. The second can only be as good as the first. The second assignment - I will take your Honour to it very briefly - did not include as a party to it the owner.

HIS HONOUR: Yes, I recall that.

MR CROWE: So if I could go to the only evidence we have about this equitable assignment and that is an oral agreement which is set out in RBT1 - I don't know whether your Honour needs to actually go to it but I might.

HIS HONOUR: You can just remind me of it.

MR CROWE: This is the very short four paragraph affidavit of Dr Schukman's husband who has since deceased as well as Dr Schukman. He doesn't give the actual wording.

HIS HONOUR: No, it's cryptic.

MR CROWE: It is very cryptic. It's drawn in a very general way. He says in paragraph 2:

*In August or September 1975 I was present when Helen transferred and assigned her rights to a course in miracles to the Foundation for Parasensory Investigation -*

now known as the first applicant.

HIS HONOUR: That's rather a conclusion rather than evidence of an assignment.

MR CROWE: Exactly, your Honour. Then the second paragraph:

*At the time she transferred and assigned her rights -*

another assertion -

*to the foundation, Helen stated that she was transferring and assigning her rights to the foundation for the foundation to publish the work and to register the copyright for it.*

5 We're getting into slightly more detail here. It's almost merely an assertion but we have a reference to the facts that she was allowing the foundation to publish it and to register the copyright for it. We say that is totally consistent in the context of the time that if she was assigning anything it was copyright in the United States and nowhere else. As at August/September 1975 the 1909 act  
10 applied in the United States - this is referred to in the judgment.

HIS HONOUR: Yes, I've read it; page 35.

15 MR CROWE: Quite, your Honour. The reference to registering the copyright is also consistent with it being a transfer of the American copyright, of course it having registration of copyright system. Then we have the consideration referred to in the next paragraph. We say that is extremely light on and that on the material there is not enough, we say, to establish that under Australian law, which applies and that's not in dispute between the parties, there was an oral  
20 assignment of the copyright, such that it was an oral assignment of copyright everywhere, including the right in Australia.

HIS HONOUR: I understand that. Your proposition is though, as I understand it, even if I were to decide there's a serious question to be tried I take that into account on the balance of convenience in conjunction with the  
25 undertakings which you're proffering.

MR CROWE: Exactly, your Honour, because I anticipate it will be said against us that - to the extent there is some ambiguity in that agreement - the  
30 court can look at the matrix of facts surrounding it. It might get better at trial. We understand that, your Honour.

HIS HONOUR: Yes, I understand.

35 MR CROWE: That goes to the standing of the second applicant. How can the second applicant have standing? To sue you have to be the owner, the exclusive licensee or an equitable assignee. The second applicant is not said to be the legal owner in Australia, it is not said to be an exclusive licensee. It is said, as we understand it, to be an equitable assignee. It holds under the transfer which is RBT3, it says, that document on its face, we say, purports to  
40 assign legal ownership not equitable ownership in the copyright. It simply could not under Australian law - because at the time of the purported assignment to the second applicant the equitable assignment had not been perfected, therefore the first applicant did not have legal ownership in the

copyright to assign.

HIS HONOUR: I think there's an expression the stream doesn't rise higher than its source.

5

MR CROWE: Yes, your Honour.

HIS HONOUR: That's what you're saying?

10 MR CROWE: Exactly. Yes, and to make the point in respect to the second applicant, even if somehow it could be regarded as an equitable assignment of its equitable rights to call upon an assignment in law it can't have operated as such absent the involvement of the legal owner in that agreement. It was simply misconception, if it does purport to amount to a further equitable  
15 assignment, if I can put it that way. We say, your Honour, that there is no serious question to be tried on the part of the second applicant's proceedings as brought against the respondents and the proceedings brought by the second applicant should be struck out.

20 HIS HONOUR: I don't know that I'd be disposed to do that at this stage. I don't think you've - I should, depending on where it goes from here, I think the applicant should have an opportunity, if they can, to have as it were a second chance to buttress their position. I'm not talking about the interlocutory orders at this stage.

25

MR CROWE: We understand that, in that the parties have already spoken about a regime for further amendments and it might be that somehow that is dealt with in the amended statement of claim. We understand that, your Honour.

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HIS HONOUR: Yes, I understand.

MR CROWE: We would ask however that if your Honour was to grant an interlocutory injunction that your Honour deal with whether there's a serious  
35 question to be tried in respect of the claim by the second applicant and we ask for reasons. Your Honour would obviously ultimately give reasons on this issue, I anticipate, but we would ask that in those reasons you deal with that issue, whether or not the second applicant has standing to sue and whether there's a serious question to be tried.

40

HIS HONOUR: I'm not so sure I'm disposed to do that at this stage.

MR CROWE: We're in your Honour's hands on that.

HIS HONOUR: One doesn't want - especially at a very early interlocutory proceeding one doesn't want to make pronouncements that are based on a very, very brief consideration of the material, not having all the material before you. If the matter can be disposed of on an alternative ground, nevertheless, to the satisfaction of the party making the submission as to no serious question to be tried, I don't think that's an inappropriate exercise of judicial power.

MR CROWE: We understand that, your Honour. Those are our submissions subject to anything we might wish to say in reply.

HIS HONOUR: Yes, thank you.

MR CATTERNS: May it please the court, your Honour it does seem that there is little debate, although I'm not quite sure how - sorry, given what's fallen from your Honour so far which I won't be canvassing, there seems to be little debate, though I'm not quite sure how far our friends' undertakings go.

HIS HONOUR: Let me put to you what my understanding is at the moment.

MR CATTERNS: Thank you, your Honour.

HIS HONOUR: Which can give you the opportunity either to address the issues or see where you propose to go. The tentative view I've reached having considered all the material and heard it again from you briefly, Mr Crowe, this morning is that I formed the tentative view that the order made by Gray J should be discharged on the basis of the material before him is such that the material was inadequate to support the proposition that in the absence of an order there might be irreparable harm done to your client by way of destruction of material or spiriting away of material. It seems to me that on that basis it is then necessary to look at whether or not an interlocutory injunction should be granted prospectively.

It seems to me the tentative view I've formed is this: I'm prepared for present purposes to assume without deciding there is a serious question to be tried on the issue of entitlement to copyright. Although the evidence is sparse in some respects it's sufficiently complex in terms of its legal and factual basis to require some consideration. I emphasise, assuming there is a serious question to be tried on the balance of convenience so long as the books which have been seized or were handed up are kept in the custody of the respondents upon an undertaking to the court which can be punishable if breached, to keep the books and not to import or disseminate any further texts, your client is protected from what I'll call loosely further breaches or alleged breaches of copyright. The books are kept as it were in a refrigerator. We know where they are and the matter can proceed to trial expeditiously.

MR CATTERNS: Your Honour, just one thing on that. I understand that, your Honour, and I wasn't going to canvass it.

5 HIS HONOUR: And I'm not disposed to accept Mr Crowe's invitation at this stage to make a pronouncement, as it were, ex cathedra, about the chain of title.

MR CATTERNS: Thank you, your Honour. Your Honour, may I come back to the question of his Honour Gray J's order in a moment and attempt to apply  
10 what your Honour says to our form of orders.

HIS HONOUR: Yes.

MR CATTERNS: As I understand it your Honour would grant order 1 or  
15 accept an undertaking to the court in similar terms.

HIS HONOUR: Well, if an undertaking wasn't given I would consider making an order but I understand an undertaking is offered subject to drafting.

20 MR CATTERNS: So, your Honour, we would redo order 1 in an appropriate format. Your Honour, a simple way of dealing with 2, given the undertaking of not getting rid of any copies in their possession, would be just to cross out in the third line "the applicants' solicitors" and put "the respondents" and that would give it back to the respondents with their promise not to part with  
25 possession et cetera, in light of what's fallen from your Honour. I beg your pardon, I'm happy to say, instead of "retained in safe custody," your Honour, "returned to the respondents". That's what your Honour is intending, with respect.

30 HIS HONOUR: Yes.

MR CATTERNS: I intuit your Honour is against me on 3.

35 HIS HONOUR: Yes, you intuit correctly.

MR CATTERNS: Your Honour, 4 becomes unnecessary because it was the counterpart of our 2.

40 HIS HONOUR: Yes.

MR CATTERNS: Then, your Honour, I think your Honour having held or indicated that there is a serious question to be tried at this interlocutory level, our friends would then proffer an undertaking in terms of order 5.

HIS HONOUR: That's my understanding.

MR CATTERNS: I think that leaves us with no other difficulties,  
your Honour, apart from the question of his Honour Gray J's order. I wonder if  
5 your Honour would mind if I made about two minutes' of submissions in  
relation to his Honour Gray J's order?

HIS HONOUR: Yes, by all means.

10 MR CATTERNS: Thank you. May I hand your Honour a copy of the  
transcript before his Honour and the outline that was given to his Honour. I  
think our friend got the outline yesterday which as he very fairly and kindly  
said is why he hasn't gone further on the question of material non-disclosure.

15 HIS HONOUR: Yes.

MR CATTERNS: Your Honour, in short at paragraph 14 - sorry, page 14 of  
the transcript after arguments - at lines 4 to 9.

20 HIS HONOUR: This is of the transcript?

MR CATTERNS: Yes, your Honour, of the transcript.

HIS HONOUR: Page?

25

MR CATTERNS: 14. Sorry, your Honour.

HIS HONOUR: 14?

30 MR CATTERNS: Yes, page 14, lines 4 to 9, the first paragraph, where  
his Honour says, "I'm not giving you an Anton Piller order. I'll give you a  
more limited order which requires them to hand over the books."

35 HIS HONOUR: Yes, that was my understanding of what his Honour told me  
earlier.

MR CATTERNS: Thank you, your Honour. I don't need to take your Honour  
to any more of that at the moment. May I just make these submissions about it,  
your Honour: as to the - - -

40

HIS HONOUR: I hasten to say that nothing which I've said should be taken as  
critical of counsel or as any suggestion of material non-disclosure.

MR CATTERNS: No, thank you your Honour. Again I'm grateful to my

friend for that. But, your Honour, that is relevant we respectfully submit to the tentative view your Honour expressed about setting aside his Honour's order which I seek to persuade your Honour against briefly. First, your Honour, the evidence before his Honour showed that this was a flagrant copyright  
5 infringement subject to the question of title about which we gave full disclosure, a flagrant copyright infringement. The book was anonymously published. The evidence shows that it was anonymously published by these people in Australia with their eyes wide open to our claims and the American case.

10 Your Honour, the respondents still have not explained what happened to the 5000 copies. We know about nine copies, plus five that Mr Brereton saw through the window. So, your Honour, I do submit it wasn't an Anton Piller order so we didn't have to make good the three categorisations, but it was a  
15 form of interlocutory relief which had to be justified. Your Honour, crucially, if as our learned friends have done, they very properly abandon the argument of material non-disclosure, they are merely asking your Honour to revisit the question of discretion exercised by his Honour Gray J on the day and, your Honour, there is a question of title very fully raised to his Honour, about  
20 which your Honour has said there is a serious question.

HIS HONOUR: What you really seem to be saying is, by making the order in paragraph - Gray J's order in paragraph 1 was limited about the injunction until further order, which I'm making today.

25 MR CATTERNS: Yes, your Honour.

HIS HONOUR: Order number 2 that his Honour dealt with, about the delivery up of the texts, is covered by the amendment to order number 2 in  
30 your proposed minute.

MR CATTERNS: Yes.

HIS HONOUR: And it's not appropriate to discharge, indeed quite to the  
35 contrary, paragraph 3. Paragraph 4 is historical and paragraph 5 is historical.

MR CATTERNS: Paragraph 6 is historical, your Honour. I think everything else is historical, your Honour.

40 MR CROWE: I should have been more precise. We only press the setting aside of paragraph 2 of his Honour's order, your Honour.

MR CATTERNS: Your Honour, that's where with respect we do submit what is the point? We were the people who spent the costs at that stage of the case.

If we are ultimately successful or unsuccessful that can be a matter dealt with by your Honour at trial, as I submit. Your Honour, this order was moulded by his Honour. When your Honour looks at the order 15A rule 6, the notes in the book - without taking your Honour to it - that's an order for preliminary  
5 discovery well short of a case for knowing you've got a case. I apologise, the inventor of this "turn up at the door with a cardboard box" form of order in a case called Paxus v People Bank, which was an order 15A rule 6 - so the solicitors do not, as your Honour says, search through somebody's premises or worse home, but come to the door and say, "Please hand them to me," giving  
10 them all the protections of reading the form of the order out and so on.

So, your Honour, I do respectfully submit that the form of order made was appropriately limited. The case showed a serious question to be tried and given the flagrancy of the infringement there was enough material to infer that  
15 preservation of the type handing up to us in the cardboard box was appropriate. Your Honour, even in the worst Anton Piller case, or I beg your pardon, the most Draconian Anton Piller case where solicitors go to somebody's home at 6.30 in the morning, the likelihood of destroying material is only ever going to be an inference. We submit that given the apparent flagrancy here, given our  
20 title, and really our learned friends don't put that in issue in their defence, that they've - or their evidence - that they've caused to be made 5000 copies knowing our claim to copyright, with arguments about its veracity. I do submit that his Honour appropriately made order 2, which is really what we're arguing about.

25  
HIS HONOUR: My understanding of the procedure in which we're involved in the moment is, because the order was made ex parte on 20 February it's open to Mr Crowe to say today that the order should not have been made.

30 MR CATTERNS: It is, your Honour. But I would respectfully submit that a better approach for the court to take today is to say, "Given your evidence now, Mr Crowe, as to the balance of convenience" as your Honour has done, in effect, "you can have the books back." But it's not appropriate to revisit  
35 his Honour's exercise of discretion back in February given the limited nature of the order, given the evidence before his Honour and given our friends' proper abandonment of the argument that we failed to disclose anything material to his Honour. In effect, with respect, for a single judge to revisit that exercise of discretion in the absence of material non-disclosure, when there is no practical benefit in doing so, I respectfully submit is not appropriate.

40  
HIS HONOUR: The only problem is there's a matter of consistency between the two orders. Don't I need to actually set aside paragraph 2 of his order?

MR CATTERNS: If your Honour is doing so, with respect, as a matter of

consistency and without - in a neutral way, without it being, as it were, a penalty against us, we wouldn't object to that, just as a matter of consistency. We would consent to its vacation if your Honour feels there is any conflict between the order your Honour proposes to make today.

5

HIS HONOUR: I don't propose to give any formal reasons in this matter other than to work out the form of order which I'm proposing to make.

MR CATTERNS: Your Honour, we would consent to it being vacated and it being replaced by the appropriate undertakings today.

HIS HONOUR: Yes, thank you.

MR CROWE: Just very briefly in reply, your Honour, your Honour is quite right when you said that we on behalf of our client are quite entitled to say today in the context of an ex parte order that an order that should not have been made should be set aside. It is not an appeal. It is not an interference with the discretion of another judge. If your Honour needs authority for that, that is that an order wrongly obtained must be set aside, subject to discretionary matters today, I can refer your Honour to Thermax, T-h-e-r-m-a-x.

20

HIS HONOUR: I don't know that you need to refer to authority for that proposition.

MR CROWE: Very well, your Honour.

25

HIS HONOUR: The difficulty one gets into from time to time or the issue with which one is confronted when you say "wrongly made", that covers up an issue where a judge has exercised a particular discretion in a matter and then it comes before a judge on further or more full argument in this context and the second judge has to exercise the discretion.

30

MR CROWE: There is no criticism of the judge at first instance at all. He had the benefit of only one set of arguments, obviously dealt with with some urgency. We say that the indication your Honour has already given in terms of balance of convenience, that the books seized should be returned to my clients, for your Honour not to set aside paragraph 2 of the orders made ex parte would be totally inconsistent with that. They should never have been seized in the first place.

35

40

Our learned friend referred obliquely to the Paxus decision under order 15A rule 6, that is this type of watered down Anton Piller if I can put it that way, or as he put it I think, turning up with a cardboard box and asking for the documents. If I could hand up a decision of Prosnow, P-r-o-s-n-o-w,

International v Polar Technologies 36 IPR 369, where the decision in Paxus was distinguished and to take your Honour to page 373, about line 26.

HIS HONOUR: "If said Dr Baxter"?

5

MR CROWE: Yes, your Honour. Simply to make the point, your Honour, that here as in Prosnow and unlike Paxus it wasn't a case of pre-action discovery or early discovery trying to find a cause of action. This isn't a case of reasonable cause to believe. They knew they had a cause of action from the books they had already seized. With respect to our learned friends, the order 10 15A cardboard box argument is not to the point. That's our reply, your Honour.

HIS HONOUR: Really on one view it's a matter of terminology, whether I - 15 it's not so much that I discharge the order, it's that I vacate it, don't I, and give you the books back? I mean, at the end of the day you achieve the result subject to any issue of costs that might arise. That's another issue but the costs before Gray J have been reserved and they'll stay reserved until the final disposition of the matter. The costs today will be dealt with on the merits of 20 what's happened and what orders are made today. Other than getting perhaps a perception advantage which may be more apparent than real vacation of the order gives you what you seek, does it not?

MR CROWE: I suppose that's right.

25

HIS HONOUR: Perhaps I shouldn't put that to you directly. It's just an observation.

MR CROWE: Yes, so long as whatever word is being used the order is set 30 aside on the basis it should never have been made which is the basis of our application. Whatever word your Honour uses, we won't cavil with that.

HIS HONOUR: Yes, I understand.

MR CROWE: Thank you, your Honour.

35

HIS HONOUR: What I propose to do subject to anything Mr Catterns says, the application for the vacation or the discharge of the order is not opposed on the basis that it be vacated and in those circumstances I don't need to say 40 anything further at this stage.

MR CATTERNS: May it please the court, your Honour, I think that would allow us to have short minutes of order ready by 2.15 unless your Honour wants to do it now.

HIS HONOUR: If you just give me two or three minutes I may be able to save the parties the necessity to come back. Just bear with me for one moment and I'll put something to you.

5

MR CATTERNS: May it please your Honour.

HIS HONOUR: Can we work through this - my suggestion is the following, and tell me what you think - I'm working off the minute. Page 2, the undertaking of the applicants by their counsel the fourth line, the words "order or" should be deleted so it should read, "Interlocutory undertakings hereinafter given or any continuation."

10

MR CATTERNS: Yes, your Honour.

15

HIS HONOUR: I would then propose - and (b), "to pay the compensation" stays. There would then be before the words "the court orders that", "the respondents by their counsel undertake to the court" and what is paragraph 1 of the order in fact becomes A of this undertaking and it will read in this form, "A, until the hearing and determination of this proceeding or further order the respondents and each of them, whether by themselves or servants or agents or howsoever otherwise, and in the case of the first respondent also its directors and officers," the words "be restrained from" be deleted and the words "will not" be inserted, "destroying" becomes "destroy or", "parting" becomes "part with possession, custody, power or control of any copy of" insert a new (a), "the books returned to them pursuant to paragraph 1 of this order." We will come to that shortly. What's printed as (a) and (b) becomes (b) and (c).

20

25

There is then a second undertaking by the respondents which will be B, which will be in the form of the paragraph numbered 5 in your minute with the following alterations: "until further order the respondents and each of them whether by themselves or servants," that should be "their" probably; "their servants" which I'll change in the first one as well - "by their servants or agents or howsoever otherwise and in the case of the first respondent also its directors and officers" the words "be restrained from" be deleted and be substituted by the words "will not". "Importing" becomes "import", "exporting" becomes "export", "publishing" becomes "publish", "printing" becomes "print", "reproducing" becomes "reproduce or", "producing" becomes "or produce any copies of the alleged infringing works and will not authorise any other person to do so." I think that's the content of the undertakings and it's then necessary to go to the form of the order.

30

35

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MR CATTERNS: Yes, your Honour, and may I say my friend and I agree with your Honour so far.

MR CROWE: Those undertakings are proffered, your Honour.

MR CATTERNS: And by us too, your Honour.

5

HIS HONOUR: Thank you. Paragraph 1 will be what was printed in 2 but with the initial words as follows, "Paragraph 2 of the order of Gray J made on 20 February 2003 be vacated and all copies of the alleged infringing works obtained by the applicants' solicitors pursuant to such paragraph be returned to the respondents until further order." Paragraph 3 will be deleted. Paragraph 4 will be deleted. Now, do the parties require orders for security for costs or is there agreement as to the provision of them?

10

MR CATTERNS: There is agreement, your Honour.

15

MR CROWE: We would ask for an order because it also deals with security of \$30,000 already given pursuant to an undertaking.

MR CATTERNS: Yes, we're happy for these to be in the form of orders if your Honour is.

20

HIS HONOUR: Yes. What was order number 6 will become order number 2 but I'm not sure if there's to be - I take it if I make the order that was numbered 8, that just solves the problem because then the 75,000 has to be provided in a form that - - -

25

MR CATTERNS: Yes, your Honour.

HIS HONOUR: So if I make paragraph 8 number 3, 7 number 4.

30

MR CROWE: Your Honour, perhaps paragraph 2 the words could be added, "Failing which these proceedings be stayed."

MR CATTERNS: We'll get there, your Honour.

35

HIS HONOUR: Well, I would propose that the end of paragraph 2, consistently with orders I've made in the past, is in this form, "And in default of such security being provided this proceeding be stayed until further order." That mechanism means that if the security is not provided you don't have to come with a further application for a stay. The stay operates until lifted by the provision for security.

40

MR CATTERNS: Thank you, your Honour. We don't oppose that, your Honour.

HIS HONOUR: Paragraph 7 becomes 4; that's the motion for change of venue, is it not?

5 MR CATTERNS: Yes, your Honour.

HIS HONOUR: Paragraph 9 becomes 5, 10 becomes 6, 11 becomes 7, 12 becomes 8, 13 becomes 9 and 14 becomes 10 and that date is 4 June.

10 MR CATTERNS: Thank you your Honour.

HIS HONOUR: The only question arises whether at this stage it might be desirable to provide for the parties to exchange lists of categories of discovery.

15 MR CATTERNS: We considered that, your Honour. May I respectfully suggest not because really this case does look as if it's going to turn on whether we come good with a chain of title.

HIS HONOUR: Yes, I take your point.

20

MR CATTERNS: If we've got a good chain of title we'll talk to our friends about it, if we haven't we'll have to - - -

HIS HONOUR: Consider other situations.

25

MR CATTERNS: I think it's going to be an all or nothing trip to America, your Honour.

HIS HONOUR: Yes. What is paragraph 15 becomes 11. It seems to be in the circumstances, having regard to the cross-undertakings that have been given and the way the matter has been worked out in the face of the court this morning, it's appropriate that the costs of this day be reserved.

30

MR CATTERNS: Thank you, your Honour, may it please the court. And I think our learned friend and I are agreed with that, your Honour.

35

HIS HONOUR: Upon those undertakings being given I'll make those orders in the terms I've just enunciated.

MR CATTERNS: May it please the court. Your Honour, we will type that up perhaps borrowing a photocopy from your Honour's associate and give it to our friends. We might not be able to file it and give it - - -

40

HIS HONOUR: There's no problem. The orders have been made. They're

effective as from now and my associate can make a copy available to you if you wish.

5 MR CATTERNS: Thank you, your Honour. We will send them to our friends for checking and then file them.

10 HIS HONOUR: Yes. What I might do in the circumstances, because what's happened to date is an interlocutory application, I think all the original exhibits should probably be returned to the parties for the moment and kept in their custody unless anyone has got a view to the contrary.

MR CATTERNS: No, your Honour.

15 HIS HONOUR: It's just there's a lot of books there and it's best that they be retained by the parties who are familiar with them at the moment. Adjourn the court.

**MATTER ADJOURNED AT 12.54 PM ACCORDINGLY**

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