



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 74

P503/25

OPINION OF LORD LAKE

In Petition of

PE LIMITED AND ANOTHER

Petitioner

for

orders under Section 1 of the Administration Justice (Scotland) Act 1972

Petitioner: Higgins KC; Eversheds Sutherland (International) LLP

Respondent: Manson; Burness Paull LLP

8 August 2025

[1] On 20 May 2025, the petitioners sought and obtained an order under section 1 of the Administration of Justice (Scotland) Act 1972. The respondents to the petition were two individuals, Alan Tominey and Peter Mann. The order was granted in the terms usual for orders sought under that provision, appointing commissioners with broad specified powers. Put generally, they were able to attend to residential addresses, to enter the premises and then to search for and take possession of material identified in a schedule to the petition. The order placed obligations on the respondents to permit the commissioners to enter and remain in the premises specified to carry out their tasks, to provide information to the commissioners and not to interfere with the material that was to be recovered. The order authorised specified persons to accompany each of the commissioners to provide “such

assistance in the carrying out of this order as the commissioner may deem necessary". It also authorised specified solicitors from the firm instructed by the petitioner to attend the commission "as a representative of the petitioner and assist the commissioner in such manner as the commissioner considers appropriate". The orders were executed with materials being recovered and thereafter full copies being made of computer materials. The two respondents have enrolled a motion seeking recall of the order of 20 May 2025, and a direction that any materials recovered in the exercise of the order should be returned to them and that any copies of materials recovered should be destroyed. They also seek to have the petition dismissed with a finding of expenses in their favour. The petitioners oppose this motion. Both parties prepared very helpful notes setting out the framework of their submissions and adopted them at the hearing on 25 and 26 June 2025.

The petition

[2] Put broadly, the petitioners contend that the respondents have infringed their copyright and breached contractual duties of confidentiality. The copyright in question is in computer code used in the petitioners' business. The respondents are said to have uploaded code which is a copy of the petitioners' code to a website called GitHub. This code is referred to as the "GitHub code" and the code used in the petitioners' business is referred to as "the petitioners' code". GitHub is a website on which people write and share software. In addition to this, the petitioners are concerned that the respondents are setting up a competing business and will infringe copyright and use information which is confidential to them in the course of the new business.

[3] The respondents claim that the petitioner has failed in their obligations to the court to disclose material factors. In order to assess what is material, it is necessary to summarise

the averments in the petition setting out the basis on which the orders were sought. The averments include the following matters:

- The petitioners have developed software products which have been commercially successful and in which they own the copyright.
- The software was developed by the second petitioner and the entire business and assets of the second petitioner, including the intellectual property in the software, had been transferred to the first petitioner with effect from 1 October 2023 in terms of a business and asset purchase agreement dated 28 September 2023.
- The source code for the software packages is a core asset of the first petitioner's business. In addition to being subject to copyright protection, it is valuable proprietary confidential information and a trade secret.
- All employees of the first petitioner are made aware that the source code is confidential and not to be used outside of their business. This is made plain in the first petitioner's employee handbook and their contracts of employment.
- The first petitioner endeavours to build a culture of confidentiality ensuring that the importance of confidentiality is covered with all incoming staff as part of the induction process.
- No employees outwith the development team have access to the source code.
- The source code is held behind a firewall with technical restrictions on exporting it.
- The first respondent was an employee of the second petitioner in the role of software development engineer and, in that role, he had access to the source code.

- The employee handbook which formed part of his terms and conditions contained provisions as to confidentiality.
- Before termination of his employment with the second petitioner, the first respondent entered into a settlement agreement. This required him to return property belonging to the business to the second petitioner. In that agreement, the first respondent warranted that he had not retained any software or computer programmes which belonged to the petitioners. He also acknowledged that his duties relating to confidential information continued after the termination of his employment.
- The second respondent was also employed by the second petitioner as a software development engineer. He was quite a junior member of the team but still had access to the source code for all the petitioners' products. He resigned from the second petitioner in 2022. In terms of a restrictive covenant agreement, he was subject to express confidentiality obligations and an obligation to return any copyright material to the second petitioner when he ceased employment.
- In May 2025, the petitioners became aware that source code had been posted on the GitHub website. It is not disputed that this source code extract was posted by the first respondent.
- The petitioners aver that the "source code extract uploaded to GitHub is functionally identical to the corresponding source code of the petitioner but has been translated from Fortran into C++".
- It is averred that "the comments that appear on the GitHub repository are identical to the comments that appear within the petitioners' own source code."

- Another averment states,

“albeit that some of these calculations are likely in the public domain and could be written independently, the structure of the functions and the parameters that are passed into the functions, as well as how the functions are laid out, make it highly unlikely that the posted code have been written independently.”
- On the basis of the above averments, it is said that the petitioners believe the source code belongs to the first petitioner and was retained by the first respondent following cessation of his engagement with the second petitioner.
- The first respondent has set up in business with the second respondent and they are selling products that compete with those the petitioners sell.
- The first petitioner has a reasonable belief that the products being offered for sale by the respondents contain many of the features of their own proprietary software. In this regard there is reference to a web page containing a video presentation given by the second respondent in which he demonstrates a piece of software, “which is a facsimile of the petitioner’s GAP software, including the common features of network solver and pipeline modelling.”
- It would not be possible for the first respondent to have built the products shown in the video clips in the 2 year period since he left employment with the second petitioners without access to the first petitioners’ source code.
- On the basis of the foregoing, the petitioners reasonably believe that the respondents have copied or adapted their source code. The first respondent has thereby breached the obligations in the employee handbook and his settlement agreement and the second respondent has thereby breached the obligations including those contained in his restrictive covenant agreement and the employee handbook.

- Further, the first petitioner has a reasonable belief that respondents have infringed their copyright in the petitioners' code by copying it and issuing copies to the public and writing an adaptation of it.
- Copies of the petitioners' code and adapted copies of it, together with records and information relative to the averred breaches and infringements, will be contained on the respondents' computers, tablets, smartphones and other equipment.
- If the respondents were forewarned of the proceedings which it is intended will be raised against them, they would conceal or part with material showing the use made by them over the sort code.

Submissions for the respondent

[4] As I noted above, the crux of the respondents' submissions is that, when seeking the order, the petitioners did not disclose a number of material matters and that the consequence of this is that the order should be recalled. The secondary position was that if the non-disclosure was not sufficient simply to lead to orders being recalled but meant that they should be considered *de novo*, the test for an order under Section 1 was not met so the petition should be refused.

[5] There were 8 different aspects of non-disclosure which were outlined to me in submission. These can be summarised as follows:

- (1) No mention was made of the fact that, prior to leaving the petitioners, the first respondent had been in dispute with them and had instigated a formal grievance procedure. It was contended that this was background information which would have been relevant to viewing the remainder of the averments

and, in particular, those relating to the concern that, if the respondents were to made aware in advance of the motion to recover documents, they might destroy them.

- (2) No mention was made of the fact that the first respondent had been candid with the petitioners that there might be material belonging to them on his own computers. This too was said to be relevant to the apprehension that the respondents would seek to conceal or destroy evidence against them.
- (3) There was not, as the pursuers claimed, “functional identity” between the petitioners’ source code and GitHub code. It was contended that there were differences, that the petitioners were aware of them and that they did not make them clear to the court. It was said that the use of the term “functional identity”, in the context where it was accepted that the coding language was different, indicated that it was *only* the language that differed between the two sets of code. It would have been clear to the petitioners that other differences existed and that they would have provided a reasonable basis to undermine the alleged identity. It was noted that the term “functional identity” was used in the first affidavit from David Hopkinson, the Product Development Director of the first petitioners, which was before the Lord Ordinary at hearing the petitioners’ motion for a section 1 order. The term was repeated in the second affidavit which was provided after answers had been lodged but before the respondents had lodged any affidavits of their own. After the respondents lodged affidavits, Mr Hopkinson provided a third affidavit. In paragraph 37 of that affidavit, it was made plain for the first time that it was only parts of the sets of code that were “functionally identical”. It was contended that this

position should have been made clear right from the outset. Counsel for the respondents explained that while the petitioners' code seeks to implement fourteen equations, the GitHub code seeks only to implement two. This means that it may give different results when used in similar situations and the presence of different equations leading to different outcomes means that there is not functional identity. At the very least, this is something that ought to have been brought to the attention of the court when the order was sought.

- (4) The comments in the two sets of code were not, as claimed in the petition, identical. In some instances, there is no comment in the GitHub code corresponding to a comment in the petitioners' code and in others the comment is materially different. It was said that this was something of which the petitioners must have been aware. It was noted in this regard that again the position taken by Mr Hopkinson in his affidavits had changed over time. In the third affidavit it was expressly accepted that the comments were worded differently albeit he said that the meaning of them was the same. In relation to others, he accepted that comments were not present in the GitHub code albeit he said this was on the basis that the different coding language did not require them. This could be contrasted with the position in his second affidavit in which, having seen the answers suggesting the comments were different, he stated at paragraph 17 that "the comments are in fact identical." It was submitted that there had been a material change of position and the full picture should have been disclosed at the initial hearing of the motion.
- (5) The petitioners did not disclose that an academic paper existed from which both bodies of code were, or may have been, derived. The paper was authored

by Spivey and MacLean. It was also relevant that a paper by Moody published in 1944 contains several of the key numbers used in the petitioners' code and, in particular, the same Reynolds number. The Spivey and McCain paper is referred to within the comments contained in the petitioners' code and must therefore have been known to them but is not mentioned anywhere in the petition. It was said that, once again, there was a material change in position in this regard from Mr Hopkinson's first affidavit to the second and then onto the third. In the second affidavit, when responding to the averments in the answers that the GitHub code is derived from the same publicly available research and technical literature that the petitioners' code is derived from, he said he could not comment without information about what materials were being referred to. However, it is clear from his third affidavit that he was aware of the Spivey and MacLean paper.

- (6) The court was not told of the existence of publicly available resources as to North Sea data. This mattered because in Mr Hopkinson's first affidavit, after reference to a statement on the first respondent's LinkedIn profile that the software offered by the new company has been run against a real asset in the North Sea, he says it was unclear where Dr Tominey could have obtained such North Sea data unless it was taken from the petitioners. The respondents said that there were any number of publicly available government sources for the data including those provided by Norway and the US. This is something of which the petitioners would be aware as they are part of the industry.
- (7) The petition was misleading as to the culture of confidentiality said to have been maintained by the petitioners. It was contended that the culture of

confidentiality had been used to support the petitioners' position. It was clear now from Mr Hopkinson's third affidavit that there was in fact no such culture. It was noted that in that affidavit Mr Hopkinson had in fact accepted that in this regard things could have been done a lot better and that the petitioners' employees would use "work arounds" to avoid restrictions imposed on use of information.

- (8) Contrary to the petitioners' claims, software demonstrated by the second respondent in a video posted by him online is not a "facsimile" of the petitioners' software. It was submitted that this term indicated that the software was a carbon copy of the petitioners' software. It was qualitatively different from saying that there was similarity. The term was found in Mr Hopkinson's first affidavit. It was pointed out that in the petitioners' note of arguments for the recall hearing, it was conceded that a better term could have been used.

[6] In addition, submissions were made regarding the involvement and conduct of personnel from Kroll who had attended with the commissioners at the homes of the respondents. It was noted that in an affidavit provided by the second respondent, he overheard a call from the Kroll employee at this house to the employee at Dr Tominey's house in which he said, "we don't have the MacBook, that's the payload". It was submitted that, as in terms of the court's interlocutor they were supposed to be acting on behalf of the commissioners, the personnel from Kroll should have had no knowledge of what is significant and what was the most favourable outcome. The instructions to the experts had not been revealed but it was said that an adverse inference could be made from the comment.

[7] If it was the case that the court was minded to consider the matter *de novo*, it was submitted that there were five bases on which it was contended the order should not have been pronounced:

- (1) When all the matters that were not previously disclosed are taken into account it is apparent that there is no justification for the order.
- (2) The second petitioner did not have title and interest to bring the petition.
- (3) The case concerned with the second respondent is exceptionally weak as it rests only on the assertion that the software he is seen demonstrating in the video clip is a “facsimile” of the petitioners’ software and it is now accepted that that term is not apposite.
- (4) Insofar as it relates to the first respondent, the case is directed at conduct of his on his own personal platforms and was not linked to a rival business.
- (5) The court has been provided with an explanation as to how the GitHub code came into being which is inconsistent with it having been copied from the petitioners’ code.
- (6) If considering the matter *de novo*, the court should start with a presumption that the respondents’ actings are regular and that they are acting honestly and in good faith. It is only when materials put before the court to satisfy them that this presumption should be rebutted that a different conclusion could be drawn. References in this regard was made to decision of Hoffman J (as he then was) in *Lock International plc v Beswick* [1989] 1 WLR 1268.

Petitioners' submissions

[8] Counsel for the petitioners explained that, at the hearing of the motion for the orders under section 1, the first inventory of productions for the petitioners and the first affidavit by Mr Hopkinson were available in addition to the petition. It was submitted that it was clear that the Lord Ordinary would have had an opportunity to read the petition and the affidavit and that in the course of the hearing of the motion for the order counsel referred to productions 6 and 9 in the petitioners' first inventory. Production 6 was a comparison of the comments contained in the two sets of code and production 9 was a comparison between the products themselves.

[9] It was submitted that in considering what had been said for the respondents, it was important not to be distracted by detail and it was necessary instead to consider the real substance raised in the petition. In essence, this was that code said to have been written for the petitioners and in respect of which they owned the copyright had been copied. It was submitted that this was implicitly accepted in the affidavit of the first respondent. In that affidavit, he said that the code had originated in an experiment he had carried out while completing his PhD before being employed by the petitioners. Later, he had translated this code into C++ in his own time. Between 2016 and 2018, during his employment with the second petitioners, there had been a need for a similar code and he had translated his previous work into another coding language, FORTRAN. In 2018, he combined the original code in C++ with additional functions to make an application for a friend who sought his assistance. It was this modified C++ code that was uploaded to GitHub.

[10] Although the affidavit said that this code was not created in the course of the first respondent's employment with the second petitioners and did not include any of their proprietary information or protected works, having regard to the terms of his contract and

the fact he was employed by and wrote a version of the code for a client of the second petitioners, the copyright would belong to them or would be held by him in trust for them. Reference was made to the Copyright Designs and Patents Act 1988, section 91. The terms of the respondents' contract of employment were sufficient to function as an assignment of future property but, even if they were not, the property would be held in trust for the second petitioners. Even if the position as to ownership of the copyright was disputed by the respondents, it was said that the claim set out for the petitioners provided a sound basis on which ownership could be claimed and it was accepted that there were similarities between the petitioner's case and code posted by the first respondent on GitHub. This was sufficient to amount to an intelligible case and that was all that was required for the section 1 order (*Pearson v Educational Institute for Scotland* 1997 SC 245 and *Mex Group Worldwide Limited v Ford* [2024] SLT 901).

[11] The various non-disclosures referred to by the respondents were then considered in turn. It was submitted that while they raised issues which it might be necessary to consider in an action following on from the petition, they were not such as to mean that the order should be recalled. In relation to the fact that the first respondent had raised a grievance against the second petitioner while he was employed, it was accepted that this was not mentioned in the petition. It was contended, however, that it was not necessary to refer to every single fact in the petition regardless of its relevance. The grievance could have counted for or against the petitioners and was not a necessary part of their case. There was no obligation to put it before the Lord Ordinary. In relation the contention that the first respondent had told the petitioners that he had material on his computers and they had said they were content with this, the petitioners' position was that he had been told only that he need not delete what was on his LinkedIn and Facebook accounts. The respondents' version

of events was not agreed and as this was a dispute of fact, there was no onus on the petitioners to disclose what they did not accept.

[12] It was submitted that the respondents were wrong to claim that the impression created by the averments is that the software was the same but for the language in which it was expressed. It was said that it was wrong to assume that “functionally identical” meant that the only difference lay in the language in which the code was expressed. I was referred to the third affidavit from Mr Hopkinson which had been prepared after he had seen the draft answers and the affidavits for the respondents. In this, he said that the expression “functionally identical” had been used by them to draw a conclusion that he did not intend. He elaborated this to say that while the languages used for each piece of software are different so that the respective lines of code are not identical, the function of each line is identical. It was submitted that the third affidavit was not rowing back on what Mr Hopkinson had said in his earlier affidavits. It was a clarification and an explanation for the avoidance of doubt. It was submitted that even if “functionally identical” was thought to mean that every line of the code is the same and now it's understood only that it is large parts of the code that are the same, the submission that would have been made by the petitioners in support of the motion would have been the same – that such similarities as there were was sufficient to establish breach of copyright and misuse of confidential information.

[13] In relation to the choice of words, I was asked to bear in mind the circumstances in which petitions for section 1 orders are drafted and affidavits in support of them are obtained and sworn. There is often considerable urgency. While it might be fair to say that this expression could be improved and made clearer, that was not sufficient to mean that there had been a non-disclosure.

[14] In relation to the comments in the code, it was explained that the ones to which the Lord Ordinary had been taken are those described in productions 6 and 8 for the petitioners. These comments are not part of the operational parts of the code in that they do not lead to any function being performed. They are notes put there by the person writing the software as an *aide memoire*. The similarity between them cannot therefore be said to arise from functionality and would not exist unless one code was copied from the other.

[15] It was accepted that the petition represented that every comment was identical. The comments that were put before the Lord Ordinary hearing the motion were, however, identical and it was said that this on its own would be enough to make the point that the GitHub code had been copied from the petitioners' code.

[16] In relation to the respondents' contention that both sets of code were derived from the Spivey and McCain paper or the Moody paper and that this might explain the similarities, this critical issue was not the formulae or data in the papers but the manner in which the ideas in the papers have been expressed and given effect in the code. It would not be expected that there would be the degree of similarity which the petitioners said existed in relation to the structure of the code and the way in which concepts in the paper were used merely because they were based on the same academic paper. The inference that there was copying comes from the way that the code is set out rather than the paper on which it was based.

[17] While it was accepted that Mr Hopkinson's second affidavit stated that there were several aspects to the GitHub code that would not be found outside the petitioners' code, it was submitted that this was a reference to them not existing online. It was not intended to give the impression that they did not exist in any academic papers. It was not accepted that in Mr Hopkinson's third affidavit he had changed his position in this regard. He still

maintained that it was possible to identify one part of the code which had been written by one person – Abdelhamid Guedroudj, the founder of the petitioners. It was not just a snippet that was the same, however. It was noted that there was nothing in Dr Tominey's affidavit to explain how he wrote it or to provide any other explanation as to why it was identical.

[18] In relation to the graphs in the Moody paper, it was not accepted that they disclosed key parameters used in the petitioners' code. Reference was made to the affidavit from Mr Guedroudj in which he set out the circumstances in which he had written the code in question. He stated that he had selected certain of the parameters which were specified in the code including ones referred to by the respondents. Certain values for these parameters were not often taken into account but he had considered they should be included. The decision to take them into account during the development of the petitioners' code had been his and the fact that the GitHub code also took them into account was another similarity which supported the view that there has been copying. He said that the choice as to which values to use was important to the operation of the code. Further, his affidavit noted that while he had selected certain values on the basis of published work, in doing so he had inadvertently changed a figure of 2.51 to 2.52. It was significant that the GitHub code contained that same value and this raised a clear inference that it was a copy of the code he had written. It was noted that the respondents had provided no explanation to counter that argument.

[19] In relation to the use of North Sea data, it was accepted that information could be obtained from the sources highlighted in Dr Tominey's affidavit. It was noted that in Mr Hopkinson's first affidavit that was before Lord Ordinary, that the petitioners' data had been used by the respondents was expressed as a somewhat tentative hypothesis. This was

not a key part of the petitioners' case and was not an attempt to mislead. The petitioners did not rely on the use of this information but relied on the similarity in the code.

[20] The position in relation to a culture of confidentiality was another area in which there was a dispute of fact and, as before, was not incumbent on the petitioners to set out in a petition a version of events which they did not accept. It was noted that this is not a situation in which the petitioners had to rely only on a culture of confidentiality to argue that the information should be protected.

[21] It was accepted that "facsimile" was not the ideal word to have used in relation to the software demonstrated by the second respondent in a video clip but it was submitted that it was necessary to have in mind again the circumstances in which petitions and affidavits of this nature were prepared. The submission was that, at the hearing, the Lord Ordinary had been taken to production 9 in the petitioners' first inventory in which similarities in the code were highlighted. The submission had been that they were sufficiently similar to give rise to the petitioners' concern. The petitioners did not, in fact, rely on the code being a "facsimile".

[22] In relation to the experts, it was accepted that misbehaviour on the part of the experts appointed to assist the commissioners would be a serious issue. It was submitted however that there was no basis on which such a conclusion could be reached on the basis of the single overheard comment from the IT professionals in attendance. The persons appointed in the interlocutor work with the commissioners and should be relying on what they are directed to do by them. In this instance, both commissioners had said that the parties were not to deal directly with the representatives from Kroll and that all communication should take place via the commissioners themselves. As there had not been any communication,

the petitioners were unable to offer any suggestion as to why the statement alleged would have been made by the IT professional.

[23] If the matter required to be considered *de novo*, it was necessary to consider the following points:

- (1) Having regard to the submissions made, there had not been a failure to disclose material facts or, to the extent there had been, it was inadvertent. In addition, the petitioners had set out an intelligible case.
- (2) The second petitioners did have title to sue. They had title as licensee of the first petitioners. A note had been entered into between the first and second petitioners on 17 June 2025 (after the order was granted in this matter) which gave the second petitioners the right to raise proceedings. Reference was made to section 101A of the 1988 Act.
- (3) It was denied that the case against the second respondent, Dr Mann, was a weak one. He had posted the video showing the software being used. It was significant also that he was the only other director with the first respondent of the trading company and that the two individuals were represented by the same agents and had one set of answers.
- (4) The point that the respondent sought to make in relation to the first respondent's conduct being on his own personal platform had no merit. He has uploaded the petitioners' code onto GitHub where it would be accessible to many people.
- (5) The court should reject the explanation advanced by the respondents.

- (6) The petitioners had already raised proceedings against the respondents in relation to copyright infringement and breach of confidentiality. This is a further factor which favours the granting of the orders.

Applicable law

[24] To a significant extent the parties were in agreement as to the applicable law. There is a duty on a party seeking an order of the court on an *ex parte* basis to make a candid disclosure of any relevant circumstances – whether legal, factual or procedural – irrespective of whether they are favourable or unfavourable to that party's position (*Bell v Inkersall* [2006] SC 507, *Archer, Petitioner* [2019] SLT 267, *Mex Group Worldwide v Ford* [2024] SLT 901). The rationale for this is easily stated. It is a general rule of a fair adversarial procedure that both parties should be able fully to participate in the process by which the decision is made. There are circumstances, however, in which exceptions may be made. Sometimes there may not be time to permit this to happen if a harm is to be avoided. In other situations, giving a party notice of an order being sought might lead to them taking the very action it is sought to prevent. Sometimes, the action that is sought to be prevented is such that it cannot readily be undone. In these and other situations, it is permissible to override the requirement that both parties be heard and for the court to grant an order having heard only the applicant. However, the court must be satisfied that the circumstances are such as to justify that course of action before proceeding (*Bell*). It leads to a situation in which the respondent is not in a position to argue that the order is not necessary or not appropriate and is not be able to furnish any material for the court to take into account. While a petitioner may consider the matter to be urgent if their rights are to be protected, a court must have regard to the rights of the respondent and take them into account when striking

the appropriate balance between competing interests. In order for the court to ensure that proper account is taken of a respondent's rights and that a proper balance is struck, it is necessary that it be furnished with all relevant information. Where, as here, the order granted will involve access into a person's home with the infringement of their privacy that this entails, the need for the circumstances to be adequately justified and for the Court to be aware of all relevant circumstances is particularly acute (*Thermax v Schott Industrial Glass* [1981] FSR 289, *Mex* para [43]).

[25] The duty of disclosure imposed in these circumstances is the corollary of the loss of the other party's right to be heard. That rationale for the rule is relevant not only for determining when the duty comes into existence, but also as a guide to the content of the duty when a dispute about its fulfilment arises. The requirements as to what must be divulged has been stated to be that a matter must be disclosed if it is reasonably capable of affecting the decision to be made (*Mex*). This is consistent with the idea that the court should be fully informed even when taking its decision in the absence of one of the parties.

[26] The rationale for the duty of full disclosure also indicates that it cannot be overridden by any urgency from the standpoint of the petitioner to obtain the order. I accept that there can be a substantial amount of work that has to be undertaken before a petition for a section 1 order or any other interim order is presented, but this cannot displace the requirement that the court be given the relevant information before taking a decision which will have an impact on a respondent's rights. That time is short will not justify a failure to disclose.

[27] Where there has been non-disclosure the court has a discretion as to whether an order should be recalled (*Archer* para [43], *Mex* para [44]). It is not mandatory. If the order is recalled, the court may consider whether it would be appropriate to consider the matter *de*

novus to decide whether the order could still be granted with the benefit of the additional information (*Mex* para [44]). In exercising the discretion, the court will have regard to whether the non-disclosure was deliberate or reckless or was merely careless or inadvertent. The court will also have in mind that a party ought not to benefit from their wrongdoing (*Archer* para [42], *Mex* para [44]) and that the court may have regard to the need to underline the importance of full disclosure.

[28] One area in which the parties were not aligned concerned the dicta of Carr J in *Tugushev v Orlov and Others* [2019] EWHC 2031 at paragraph 7. There, she seeks to distil propositions concerning the duty of disclosure and consequences where it is not observed which may be derived from English cases in this area. The respondents considered that there was no reason why the court should not adopt what is said there and, in particular, what is said regarding the rationale for the rule, the need for fair presentation, the need to make proper inquiries, the test for what facts are material, the requirement to maintain a sense of proportion and the relevance of the fact that that a non-disclosure was innocent. The petitioners preferred the approach of Lord Sandison in *Mex* in which regard is had to the general principle of what is required in the interests of justice rather than attempting to formulate detailed rules. It was submitted for the petitioners that the exercise carried out by Carr J is a summary of the position in the law of England rather than that of Scotland.

[29] The difference of view between the parties in relation to this does not make much practical difference. The principles set out by Carr J are all derived from the need to achieve justice between competing interests. While the approach of identifying discrete rules or principles is a common feature of English law, there was no suggestion that any of the identified principles did not or should not apply in Scotland. The second of her points concerns the fact that the duty to make disclosure is the corollary of the court being

prepared to depart from the requirement to hear both sides before making a decision and many of the others flow from that. As I set out above, I too am of the view that the duty of disclosure is a requirement to avoid injustice arising from a departure from the principle that all parties should be heard. I consider that the matters which the respondents said could be taken from the judgments are also examples of application of the general principle referred to by Lord Sandison.

[30] The need for the court to be fully informed to avoid injustice also justifies the comment by Carr J that an applicant for *ex parte* orders must make proper inquiries. A party cannot be obliged to disclose matters of which they are not aware, but they should make themselves aware of key facts before the petition is presented. They must be confident that any fact they assert can be proved by them. Where there is a dispute on a minor or peripheral matter, it may not be necessary to disclose that to the court. If, however, it is known that in relation to one of the key facts, the respondents take a different view, that ought properly to be brought to the attention of the court. Without that, the court could not properly conduct the balancing exercise required of it. No doubt, the petitioner will wish to justify their position and explain why the position of the respondent is 'wrong'. That is entirely permissible. What is important is that the court should be aware that there is a dispute and should direct its mind to the issue of whether or not it is appropriate nonetheless to grant the order sought.

[31] Before turning to consider the submissions for the parties as to the merits of the respondents' motion, it is necessary to be clear about the issue before me. Many of the submissions made by the petitioners do not relate to the question of non-disclosure but are concerned instead with why it is or was appropriate to grant the Order. That matter is not directly relevant to the issue of whether the court's attention should have been brought to a

matter but was not. It is also important to emphasise that I am not required to reach any view - even a preliminary one - on the merits in the underlying dispute between the parties. The requirement for disclosure is not in any sense dependent on the strength or otherwise of the case being advanced by a petitioner although the issue may arise in relation to the matter of whether the order should be made anew.

[32] Turning firstly to the issues as to whether the first respondent was candid with the petitioners that it was likely that there would still be material belonging to them in his possession and the culture of confidentiality. In relation to both there is a dispute as to the facts and it is not clear that the petitioners knew or had cause to suspect that the respondents took a view that differed from theirs. There was no breach of the duty of disclosure in relation to these matters. In relation to the issue concerning the commencement by the first respondent of a grievance procedure against the second respondent, the petitioners would have known of this but it is collateral to the issue which the court had to decide in relation to the order sought. At best, it might be used to suggest that there was rancour or ill feeling between the parties and that could potentially have been the basis for submission as to credibility and reliability after proof. I do not consider that in isolation it meets the test of materiality and the fact it was not disclosed did not breach the duty. Nor do I consider that the position in relation to the North Sea data amounted to a breach of the duty. Although the petition alleges that the respondents would not have been able to develop their products in the absence of copying of the petitioners' software, it does not make any averments in relation to misuse of business data such as mentioned in paragraph 41 of Mr Hopkinson's first affidavit. This was therefore not material.

[33] The position in relation to the Moody and Spivey and McCain papers is more finely balanced. I was concerned that in Mr Hopkinson's third affidavit at paragraph 13, having referred to the paper, he says

"We did not draw the distinction at the time between public domain and proprietary research as it seemed unnecessary given that all code of this type contains public domain calculations, **the code was clearly copied anyway**, and it was simpler to remark on the similarities in the 'enhancedwater' file due to the existence of identical comments: however, given the arguments made by Dr Tominey it seems that this is now more relevant. This is discussed in more detail below." (emphasis added)

This appears to indicate a deliberate decision not to reveal a matter on the basis that the code was "clearly copied". That is the issue at the heart of the dispute and which ultimately a court will decide. It is entirely inappropriate for an applicant for a section 1 order to make an assumption of this nature when deciding whether a matter should be disclosed.

However, overall, I consider that there was not a failure to observe the duty in relation to the papers. In the petition there is an averment that some of the calculations may be in the public domain and that what is relied on is the structure of the functions and how they are laid out. Although it could be clearer, I accept that in light of this statement of the basis of the case, that disclosure was sufficient.

[34] The position is different in relation to the remaining three matters; the allegations that the petitioners' code and the GitHub code are "functionally identical", that the comments the GitHub code are identical to those in the petitioner's code, and that the software demonstrated by the second respondent in a video clip online was a "facsimile" of the petitioners' product. In relation to each of these, I consider that there was not adequate disclosure.

[35] The starting point is to consider what meaning should be attached to the term "functionally identical" used by the petitioners in the petition. While submissions were

made to me as to what the petitioners intended it should convey, the meaning that should be considered is that which would be taken by the intended reader – for present purposes the judge hearing the application – and not what Mr Hopkinson may have intended. The choice to use the terms in the petition was the petitioners’ and, if it has created a misleading impression, that too is their responsibility. The context in which and purpose for which the term was used is relevant. The term is used in the context of a statement that the code has been translated from FORTRAN into C++ and, I agree with the submission for the respondents that the averment gives the impression that the GitHub code and the petitioners’ code are the same except as regards the language in which they are expressed. That is part of the basis for the contention that the GitHub code is a copy of the petitioners’ code. That contention lies at the heart of the petition and is highly material. At the hearing on the motion for recall, the petitioners sought to explain and qualify what was meant by the term and the need for that of itself indicates that there should have been disclosure. In my view there is a significant difference between software which is expressed in different terms but in which each line achieves the same purpose or result on the one hand and software which is expressed in terms that are the same on the other. The latter is significantly more indicative of copying.

[36] In Appendix 4 to his affidavit, Dr Tominey identifies differences that exist in the two sets of code. In response, in his third affidavit, Mr Hopkinson expressly accepts that these differences exist and goes on to say,

“Although there are additions and subtractions that Dr Tominey points out in his affidavit that mean that the bulk code would indeed behave differently, there are numerous mappings that can be drawn from the GitHub code to the Petex [petitioners’] code where the code is functionally identical, and where these mappings would absolutely not be expected to exist in independently written code.”

He addresses these differences by saying that it is “something of a moot point” as Dr Tomney’s affidavit accepts that the code was added to the petitioners’ repository while working for the petitioners. On that basis he says, “This makes the discussion of Appendix 4 [of Dr Tominey’s affidavit] somewhat irrelevant.” Two concerns arise from his approach. The first is that the issue of disclosure arose when the motion for a section 1 order was made. At that time, there was no affidavit from Dr Tominey so there was no alleged acceptance by Dr Tominey of copying and no basis on which he could decide the issue of differences was a “moot point”. The second and more fundamental one is that it is not appropriate for a party to decide that something need not be disclosed on the basis that *they* consider that they have an answer to it. In that situation, the matter should be disclosed along with the answer, and it will be for the court to decide whether it is or is not material.

[37] The purported identity of the comments is clearly intended to have the same result of leading to a conclusion that the petitioners’ code had been copied. That is, of course, necessary if the copyright claim is to succeed. That comments which are not functional and are therefore not necessary appear in both sets of code is a means of establishing that the original code has been copied is common in cases of infringement of copyright in computer programs. This is clearly the purpose for the statement in the petition and affidavit that they are identical. Despite this, in Mr Hopkinson’s third affidavit, prepared after the answers and respondents’ affidavits were lodged, he accepts that in many of the comments different words had been used. He goes on to say that the content and meaning of the comments was the same and the differences did not affect the inference of copying. This latter comment is very much a matter of judgment – particularly where it is the fact that comments are “identical” which is said to give rise to the inference. When he refers to differences identified by Dr Tominey, he says, “these examples do nothing to indicate that the two code

snippets are not derived from the same source". Once again, that is a matter of judgment. It is not appropriate that Mr Hopkinson makes the decision as to the effect of evidence and, on the basis of that, decides it does not affect the petitioners' case and does not have to be disclosed.

[38] The petitioners accepted in the note prepared for the hearing before me that the use of the word "facsimile" in the petition and Mr Hopkinson's affidavit to describe the relationship between software demonstrated by the second petitioner in the video clip and the petitioners' code was "not the ideal choice of word". I agree. It created an impression which was incorrect. The petitioners submit that at the hearing at which the order was sought, the judge was referred to production 9 and that it identifies both the features that are the same and those that are different. Counsel said that the submission at that hearing had been that the two sets of code were "sufficiently similar". This tends to indicate that at the time there was awareness on the part of the petitioners that "facsimile" was not the correct term to use. That being so, it should have been brought to the attention of the court in a way that was clear. The court is faced with a petition seeking an order under section 1 and accompanying affidavits. It has limited preparation time before the motion is heard. The word "facsimile" creates an immediate and powerful impression. Simply referring to productions which illustrate that it was not correct without expressly drawing it to the judge's attention would not rectify that impression.

[39] In view of the foregoing, I am satisfied that the duty of disclosure was not satisfied and I must consider whether to recall the order made. In my view that is the appropriate consequence. Any one of these three material non-disclosures I have referred to might suffice to mean that the order should be recalled but, when they are taken together, it is clear that a core element of the petitioners' case on which the inferences against the respondents

were based was undermined. The extent to which the two codes were the same is fundamental to the petitioners' case and the non-disclosures are highly material to the inferences which the petitioners invited the court to make. It is also of note that it appears from the passages in Mr Hopkinson's third affidavit that are considered above, that he was aware of the issues but did not disclose them. While I do not go so far as to say there was an intention to mislead the court, there was a deliberate decision to withhold matters and that is a relevant consideration in the decision as to whether to recall the order. Section 1 orders such as this which permit searches to be carried out in a person's home represent a substantial encroachment on a person's rights. In deciding whether to permit that, the court needs to carry out a balancing exercise between competing rights. The effect of the non-disclosure undermines that exercise and undermines the ability of the court to ensure that the right to privacy is only encroached upon when appropriate. When this is considered along with the principle that a party should not benefit from their wrong, I am satisfied that the interests of justice favour recall.

[40] The petitioners moved that if I was to recall the order, I should consider the application *de novo* and grant it afresh. Having regard to the basis on which I have recalled the order, I do not consider that it would be appropriate. As the petitioners submit, the requirements on parties seeking section 1 orders to set out an intelligible case is a low hurdle. However, while that is a precondition of granting the order, it is not the only matter the court considers in exercising its discretion as to whether to grant an order. It is relevant to consider the whole circumstances and what is required in the interests of justice. The scope of recoveries set out in the second schedule of the petition is very wide. They seek recovery of the code used by the respondents' competing business whether or not it infringes the petitioners' copyright. There are no averments to support this in the body of

the petition. Also, it does not appear that there are averments to support recovery of or explain the relevance of the materials referred to in paragraph 1(d) of that Schedule. Having regard to these matters, together with the extent to which the validity of the inferences which the petitioners seek to draw has been called into question and the principles that a party should not benefit from their wrongdoing and that it is important that the court does not undermine the importance of disclosure, even if it was appropriate to consider the matter *de novo*, I would not have granted the order.

[41] Finally, I do not consider that I could form a concluded view as to the conduct of the experts appointed to assist the commissioners on the basis of the material available to me.

Disposal

[42] In view of the foregoing, I recall the order of 20 May 2025 and direct the petitioners and commissioners to (a) secure forthwith the return of the respondents' property and documents to them, (b) destroy permanently any copies made of the same and (c) to write to the clerk of court certifying that these steps have been taken. I will dismiss the petition and award expenses in favour of the respondents on a party/party basis. Having regard to the test identified by Lord Hodge in *McKie v Scottish Ministers* 2006 SC 528, I do not consider the conduct of the action by the petitioners can be characterised as incompetent or unreasonable so as to cause unnecessary expense to the respondents. The test for awarding expenses on an agent / client basis is therefore not met.

Postscript

[43] During the hearing, an issue arose as to precisely what had been said to the judge hearing the original motion. Obviously, the respondents were not represented so did not

know. They requested that the petitioners' solicitors disclose a copy of their file note of the hearing. The petitioners' solicitors declined to do so. Although I was not addressed on this in detail, it seems to me that they were entitled to do so. This raises the difficulty as to how a judge hearing a motion to recall can assess whether or not the duty of disclosure has been satisfied. For the purposes of this hearing, the issue does not crystallise. I have made my decision on the basis of the matters which the petitioners said were before the judge - the petition, the affidavit of Mr Hopkinson and the specified productions – and have therefore taken their case at its highest. In addition, I have taken into account the subsequent affidavits from Mr Hopkinson which were lodged by the petitioners. These were sufficient to indicate that there had been non-disclosure. However, in order to avoid the situation arising in which there is doubt as to what has been disclosed, consideration should be given by petitioners and the court when hearing *ex parte* motions to recording the proceedings.