

Neutral Citation Number: [2014] EWHC 866 (Ch)

Case No: HC10C04595

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 25/03/2014

Before :

MR JUSTICE NORRIS

Between :

First Subsea Ltd

Claimant

- and -

(1) Balltec Ltd

Defendants

(2) Robert Emmett

(3) [Discontinued]

(4) Russell Benson

(5) Roger Bacon

Philip Marshall QC, Michael Edenborough QC & Andrew Moran (instructed
by Boodle Hatfield LLP) for the Claimant

David Cavender QC, James St.Ville & Tamara Kagan (instructed by
Oglethorpe Sturton & Gillibrand) for the Defendants

Hearing dates: 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 25, 26, 27 March, 10,
11, 12, 15, 16, 22, 23, 24, 25 and 26 April 2013

Judgment

Mr Justice Norris

Introduction

1. This is a trial of liability questions only (pursuant to an Order of Master Bowles of 26 April 2012) in a complex action against a former director and former employees of, and a former sub-contractor to, the Claimant company. The principal case advanced was a diffuse case of conspiracy to injure by unlawful means: and that case entails a detailed examination of the actions of the present Defendants (and others who were never defendants and another who has ceased to be a defendant but who were involved in the alleged conspiracy) in 2003 and 2004. The alleged unlawful means themselves were also the subject of separate claims against individual defendants. So it is necessary to examine multiple causes of action against sundry individuals, and then to ask whether some (and if so which) are secondarily liable as conspirators.
2. In order to present a coherent account of the issues I will establish the basic narrative, and then return to particular parts of it to address the issues for determination.

Basic narrative

3. In 1983 Mr Emmett and Mr Walmsley started a trading partnership as “BSW Design and Engineering” dealing with the design and development of underwater tools and machinery. They had recognised that the technology for moving underwater pipes at depth was unreliable and had seen an opportunity to develop and improve on the available systems. They (using the inventiveness of Mr Emmett) developed a self activating locking system which utilised the interaction between a ball and a taper: and having designed it they put it into production. Once the technology had been proven they adapted it to other uses, and began to design and produce pipeline recovery tools.
4. In February 1994 they incorporated this business as BSW Limited (which is the Claimant in this action under its new name) (“BSW”). In September 2001, in order to secure further investment into the company, Mr Emmett and Mr Walmsley sold a 75.1% shareholding in BSW to Arnlea Limited (a company belonging to and controlled by Mr Suttie) (“Arnlea”). Instrumental in bringing about this transaction was Mr Emmett’s acquaintance, Mr Brown, who had been a project manager with major oil companies, was an enthusiast of the “ball and taper technology” and realised its potential. When the majority stake in BSW was sold to Arnlea Mr Brown became the Managing Director of BSW, having (at that time) the confidence of both Mr Emmett and Mr Suttie: and he was given a small shareholding. Mr Emmett was given the formal title of Technical Director.
5. The consideration payable to Mr Emmett for his shares was £650,000 in cash plus £1.254m of interest bearing Loan Notes redeemable in equal tranches of £313,500 on 30 November over 4 years, and guaranteed by the Royal Bank of Scotland (“RBS”). This (together with payments to Mr Walmsley which are not material to these claims) secured control of BSW by Arnlea (and Mr Suttie, as Chairman), and offered BSW access to funding in order further to develop its technologies. But it also meant that what had previously been an innovation-driven small business operating on an informal basis with a small and well-knit team of half a dozen had to be fitted into a formal corporate structure

in which the key drivers were financial and key personnel were recent introductions. This was unsurprisingly productive of tension.

6. Mr Emmett and Mr Brown embarked on the product development programme which naturally enough entailed a “cash burn” phase before the developed product could be sold. But the progress of this programme did not accord with the business plan agreed at the time of Arnlea’s acquisition. A significant factor in this was that Mr Emmett had realised there was a need to build a “test rig”: but this had not been part of the business plan, and Mr Suttie appears not have been informed (or not to have appreciated) the amounts of money involved. From the perspective of an outside investor looking over the short term, Mr Brown and Mr Emmett had turned an operating profit at the time of the sale in September 2001 of about £220,000 into an operating loss (9 months later) of £378,000, and had turned a debt-free company into one burdened with £464,000 worth of debt and requiring further support for its overdraft facility to be continued. This led Mr Suttie to assume greater operational control, to the evident irritation of Mr Emmett and Mr Brown, who sought (with some measure of success) to circumvent the constraints he imposed. This generated an atmosphere of conflict and concealment.
7. This was manifested in two ways. First, the underperformance against the business plan led to an entitlement on the part of Arnlea to claw back part of the purchase price: and the failure by Arnlea to pay an instalment of interest on the Loan Notes in full entitled Mr Emmett to call all the Loan Notes in immediately. These claims on either side were compromised: but their advancement undoubtedly put further distance between the parties.
8. Secondly, Mr Brown (probably through ignorance: see paragraph 5.12 of the decision of the Manchester Employment Tribunal which later considered Mr Brown’s unfair dismissal claim) committed BSW to take a 15-year lease of some larger premises; and he then sought to conceal from Mr Suttie what he had done. Mr Brown was dismissed by Mr Suttie as an employee for gross misconduct in April 2003 (though he remained a director of BSW). Mr Emmett (who had not been consulted by Mr Suttie about Mr Brown’s dismissal, and one of whose character traits is loyalty) thought this dismissal unfair: but he was powerless to prevent it. Mr Emmett represented Mr Brown at the internal inquiry within BSW: but Mr Suttie would not shift. This led Mr Brown to commence the proceedings in the Manchester Employment Tribunal against BSW for unfair dismissal to which I have referred, proceedings which Mr Emmett (out of loyalty to his friend) funded to the tune of £105,000, and in which he gave a statement supporting Mr Brown. In September 2004 the Tribunal found that Mr Brown’s dismissal was indeed unfair, and that Mr Suttie had decided to engineer Mr Brown’s departure even before he had discovered the lease commitment and its concealment.
9. As soon as Mr Brown was dismissed Mr Suttie appointed Mr Hatfield as managing director to work alongside Mr Emmett (though again without consulting Mr Emmett). Mr Emmett was simply informed of Mr Suttie’s decision by email on the 23 April 2003. This inevitably produced yet more tension and conflict. Mr Emmett had a low opinion of Mr Hatfield and of his abilities and compared him very unfavourably with Mr Brown. Mr Hatfield appears to have been insensitive to Mr Emmett’s position as creator and former owner of the business and to Mr Emmett’s current status as a director, simply reporting to Mr Suttie and ignoring Mr Emmett.
10. Notwithstanding this degree of operational conflict within the office, BSW continued to operate in a formally correct way. In particular on the 25 November 2003 there was a

board meeting of BSW (held at Mr Suttie's offices in Aberdeen) attended by Mr Emmett (though not by Mr Brown). At that meeting BSW's future business was reviewed. Amongst the prospects seen as maybe coming through were (a) a contract from a French company ("Technip") in relation to its Dalia Project: and (b) work in connection with the Kizomba oilfield. It is apparent from the minutes that Mr Suttie remained concerned to control capital expenditure on the development and testing of products, that business was slack (with the position of the company still deteriorating) and that the assistance that Mr Emmett was providing to Mr Brown in the Manchester Employment Tribunal proceedings was an irritation to Mr Suttie.

11. To this tension at board level must be added tension at the operational level well encapsulated in an email that Mr Hatfield sent to Mr Suttie on the 15 December 2003:-

"I like ball grab it's a challenge but I am not obsessive or as passionate about it as Bob [Emmett] says I should be. Personally I don't mind what we make as long as we make it profitable. Bob [Emmett] uses this as an excuse for non-compliance with simple changes I have introduced".

12. One way of resolving these tensions was for Mr Emmett (perhaps also with Mr Brown) to buy back BSW from Arnlea. In August 2003 Mr Emmett had retained Craig Corporate as advisors in relation to that process, and had sought the assistance of a Mr Harlow in the attempt to raise funds. Mr Suttie wanted (in effect) a clear return of £1m from his investment with BSW Limited irrespective of its current value, but no one could make the figures stack up at that level of purchase price (particularly in view of the company's deteriorating financial performance).
13. In the absence of a conventional purchase structure, on the 18 December 2003 Mr Emmett offered a pure "earn out" repurchase but deferred for 3 years. That proposal was brusquely rejected by Mr Suttie. It is an issue in the action whether Mr Emmett thereafter entertained a genuine belief that a repurchase of Arnlea's 75.1% shareholding was a possibility.
14. In January 2004 there arose two further sources of tension. First, Mr Emmett held the view that Mr Hatfield was hopeless and he began openly to voice that opinion and, as Mr Emmett himself put it, to "blow his top". He was not alone in the office in holding that view of Mr Hatfield's abilities: but senior staff felt that Mr Emmett's conduct was disruptive, as was his general disregard of the procedures that Mr Suttie and Mr Hatfield had introduced. It got to the point where Mr Suttie gave Mr Emmett a specific order not to go to BSW's offices: and he wrote to the staff supporting Mr Hatfield (but notably not mentioning any support for Mr Emmett). This led Mr Emmett to consult his lawyers.
15. Second, there was another dispute over the payment of interest on Mr Emmett's Loan Notes, and a cross claim from Arnlea in respect of an alleged premature redemption of some of the Loan Notes. (In November 2003 Mr Emmett had by mistake sent Arnlea the certificates for the 2004/5 tranche of Loan Notes instead of the certificates for the 2003/4 tranche). Because all of the interest had not been paid Mr Emmett called in the outstanding £627,700 worth of Loan Notes (plus interest): and when his demand was not met he called on the RBS guarantee. These disputes drove Mr Emmett and Mr Suttie yet further apart (and, indeed led to the commencement in March 2004 of proceedings in Scotland by Arnlea against Mr Emmett to prevent RBS paying on the guarantee).

16. These tensions led Mr Suttie to call Mr Emmett to Aberdeen for a meeting scheduled for the 3 February 2004. But on the morning of the meeting Mr Emmett indicated he would not be attending; and he signed off work on the 5 February 2004 until the 16 February 2004 on the grounds of stress.
17. On the 6 February 2004 Mr Emmett then sent a long letter of complaint (written with legal assistance) to Mr Suttie. He identified 13 items which he said constituted breaches of one or more terms of his contract of employment, the share sale agreement and the Articles. These were:-
 - a) The dismissal of Mr Brown;
 - b) The appointment of a Mr Forbes as an additional director;
 - c) The appointment of Mr Hatfield as managing director;
 - d) Restructuring of the management of the company and alteration of terms of employment;
 - e) Implementation of new financial procedures;
 - f) Filing accounts without formal agreement of the board;
 - g) Failure to agree on a reporting structure;
 - h) Alteration of the accounting reference date;
 - i) Failure to hold an AGM;
 - j) Establishing a head office in Aberdeen where all executive decisions were made;
 - k) Failure to involve Mr Emmett in the 2003/2004 budget and business plan;
 - l) Failure to discuss a sublease;
 - m) “The undermining of my position represented by your circular letter to employees”.
18. Mr Emmett then went on holiday to America where he met up with Mr Brown. On this holiday, Mr Emmett and Mr Brown:-
 - a) Met with potential co-venturers (and there is an issue which I must resolve about whether “the venture” was the acquisition of Arnlea’s shares in BSW or the establishment of a company to compete with BSW); and
 - b) Discussed what advances might be made in the technology employed in BSW’s then current products.

19. When he returned Mr Emmett received on the 28 February 2004 a letter from Mr Suttie which accused him of deliberately avoiding a meeting with Mr Suttie and continued in these terms:-

“I was attempting to deal with this matter on an urgent basis so that we could attempt to move forward with the business. Instead, you have refused to cooperate with me and to comply with a reasonable request made by the Chairman of the Board and the majority shareholder. In all of these circumstances, I now believe that I have no option but to suspend you from your employment with immediate effect. You should remain away from the office and you are expressly prohibited, during this period of suspension, from communicating with staff or conducting any business on behalf of BSW Limited. In the meantime, I will simply advise staff that you are absent from the office on leave. ... In order for us to attempt to resolve matters, I am again formally requesting that you attend a meeting with me to discuss... the matters raised in your letter of the 6 February.. This is not a disciplinary meeting which I am asking you attend and you therefore do not have any right to be accompanied...”.

20. A meeting between Mr Suttie and Mr Emmett at Lancaster was immediately arranged for the 3 March 2004. Mr Emmett said that if it was an informal and unrecorded free and frank exchange of views, then that was one thing: but if it was a formal meeting he wanted it tape-recorded or an independent written record made. Mr Suttie refused both requests.
21. At this meeting Mr Emmett raised:-
- a) The reinstatement of Mr Brown as Managing Director:
 - b) The behaviour of Mr Hatfield (whom he accused of downloading pornography onto the receptionist’s computer at BSW’s offices and of other behaviour towards female staff members which Mr Emmett regarded as inappropriate): and
 - c) His continued wish to repurchase BSW.

At the conclusion of the meeting Mr Emmett made a reference to “constructive dismissal” which Mr Suttie recorded in these terms:-

“[Mr Emmett] stated that he had hoped that it would not come to this but on that basis that [Mr Brown] was not to return he had no other alternative but to terminate his employment claiming that he was constructively dismissed”.

(On the 5 March 2004 Mr Emmett was to write that this record, then contained in a letter in advance of the preparation of the minutes, was “twisted” and that at no time had he said that his continued employment was contingent on the reinstatement of Mr Brown, that he was still considering his employment position and that he had not resigned).

22. The meeting between Mr Suttie and Mr Emmett was immediately followed by a Board Meeting between Mr Suttie, Mr Emmett and Mr Brown. There was no agenda for the meeting, although Mr Emmett had requested such on the 2 March 2004. Mr Suttie prepared the minutes. Those minutes record an attempt by Mr Emmett and Mr Brown to raise at board level what they regarded as inappropriate conduct by Mr Hatfield. Mr Suttie would not countenance this until he had personally investigated the matter. There was a discussion on the accounts (change of year end, treatment of work in progress, apportionment of costs, treatment of various cost heads, rate of depreciation on certain assets): and when the audited accounts were put to the board for approval, Mr Emmett abstained, Mr Brown voted against the accounts, and Mr Suttie (whose casting vote carried the day) voted in favour. Mr Suttie's minutes conclude:-

“It was also noted at the meeting that [Mr Emmett] had stated earlier that morning that he was terminating his employment effective immediately on the basis of alleged constructive dismissal”.

23. Mr Emmett and Mr Brown feared that because of Mr Suttie's support for Mr Hatfield the latter's conduct in downloading pornography onto the receptionist's computer and his possible harassment of female staff members would not be properly examined. So they went to BSW's offices and removed the relevant computer. This resulted in a letter from Mr Suttie on the 4 March 2004 in the following terms:-

“I... understand that you entered the company's premises... with [Mr Brown] and removed significant items of company property. As you have terminated your employment, I require you to return all company assets, documents and keys in your possession to me, immediately. I am equally disappointed that you feel it necessary to terminate your employment in this way, but I hope that you understand my position. Notwithstanding this, I would like to discuss with you the possibility of offering you a technical advisory role on the basis of a Consultancy Arrangement if you would be interested in that as an alternative to being employed. I would be happy to discuss this with you at anytime”.

The letter did not address Mr Emmett's status or entitlements as a director. It was followed by a letter from BSW's solicitors to Mr Emmett's solicitors saying that they were examining “the criminal implications” of Mr Emmett's removal of a computer and that they would be:-

“obliged if you would also advise your clients that they have no authority or any other legal interest in being on the company's premises, given that Mr Emmett would now appear to have resigned from the company”.

Mr Emmett had not “resigned from the company”. At most he had considered himself constructively dismissed as an employee: but he remained a director and shareholder.

24. At the same time an instruction was given to Mr Elliott (the senior local finance staff member) not to permit Mr Emmett to speak to any staff members by phone, and Mr

Emmett's home phone and mobile phone were both disconnected. When Mr Emmett complained, BSW's solicitors wrote (on 12 March 2004):-

“... Your client terminated his employment. Please advise your client of this position and confirm he will not be attending the premises of BSW or purport to conduct business on their behalf. He should also return immediately all company property which is in his possession...”

The terms of these letters addressed to a director of the company have given rise to a debate as to the extent of which Mr Emmett and Mr Brown were in reality directors after these events, and to what extent they owed the obligations to be expected of directors. Some time the same week Mr Suttie commissioned a report into BSW's business from R Manson. The terms of the resulting report delivered on 22 March 2004 identified as “the main disruption to the current set up” what was termed “the Emmett/Brown interference” which the report said “needs to be closed out”. The “remove[al] [of] Emmett/Brown from equation” was regarded as an advantage: and the report concluded that:-

“The threat, perceived or real, from ex-executive directors (*sic*) must be neutralised absolute soonest”.

Mr Emmett and Mr Brown were not consulted prior to the instruction of Mr Manson, nor were the terms of the report or its conclusions disclosed to or discussed with them. This circumstance also fed into the debate at trial as to whether Mr Emmett and Mr Brown were really directors.

25. Mr Emmett and Mr Brown had taken the computer they had removed from BSW's offices for examination by an IT specialist (and a report had been prepared showing just how extensive Mr Hatfield's downloading of pornography at work had been, he having visited 1764 websites on 1103 occasions). Notwithstanding the terms in which BSW's solicitors had written to them, Mr Emmett and Mr Brown attended at BSW's offices on the 9 March 2004 to return that computer. Mr Elliott's record of what happened is in an email which he sent that afternoon to his line manager. He records receiving instructions from Mr Suttie to ask Mr Emmett and Mr Brown to leave the premises. He continued:-

“[Mr Emmett] informed me that I had no right to ask him to leave as “he was still a director and owner of the company”. I again asked [Mr Brown] and [Mr Emmett] to leave as I didn't want to get involved. [Mr Brown] asked [Mr Hatfield] to sign a form stating that they have returned the computer. Neither I nor [Mr Hatfield] were willing to sign this form... [Mr Emmett] became heated and stated that he was a director and that the only way we could get him to leave was “to call the police, and then you would be in so much more trouble”... [Mr Emmett] left reception, escorted by myself. On leaving reception and at numerous occasions on the corridor/stairs out of the building [Mr Emmett] stated that I was foolish, that I had better be careful and that I was wrong to get involved. He stated that he was a director, he had the right to be there and no one could ask him to leave...”

26. After carrying out such investigation as he thought appropriate Mr Suttie confirmed Mr Hatfield in his appointment, and gave him only a written warning. Shortly thereafter Mr Hatfield ceased to be managing director and Mr Green was appointed general manager (but not managing director) on 1 May 2004. Neither Mr Emmett nor Mr Brown was consulted over this senior appointment. Mr Suttie's case is that as a matter of strict law they did not need to be consulted because Mr Green's notice period was less than 3 months and under clause 2.20 of the Shareholder Agreement only if the notice period exceeded 3 months did they have to be consulted. (This did not address their right as board members to be consulted about a senior appointment and assumed, contrary to the Articles, that the power of management in the company was vested in Mr Suttie).
27. In May 2004 Mr Emmett held his 60th birthday party. It was suggested on behalf of BSW at trial that by this time Mr Emmett and Mr Brown had formed a firm plan to establish new and competing business. One of the people attending the party was Mr Benson (who was Mr Emmett's stepson and held the title of "Project Manager" at BSW). On the 11 May 2004 Mr Benson had signed off work for 1 month because of "stress". Another attendee was Mr Bacon. He was not an employee of BSW but was a freelance designer/draftsman who held a few shares in BSW because of his association with it. It is said by BSW that Mr Benson and Mr Bacon became party to the plan which BSW says Mr Emmett and Mr Brown had by this time hatched to form a competing company.
28. In mid May 2004 the Scottish proceedings which Arnlea had commenced against Mr Emmett relating to the demand on RBS came to a conclusion with the discharge of the injunction which had hitherto prevented RBS from honouring its guarantee of BSW's obligation to pay £627,000 plus interest to Mr Emmett in respect of his Loan Notes: so that money (it is common ground) became available to Mr Emmett to fund whatever plans he had for his future. On the 17 May 2004 Mr Emmett and Mr Brown sought advice from Maclay Murray Spens ("MMS"), Scottish solicitors. For present purposes it is sufficient:-
- a) To take MMS's internal description of the subject matter of that advice which was:-

"Advice concerning a new business and the impact of the new business upon agreement with Arnlea Plc"
 - b) To note that MMS subsequently described their initial instructions in these terms in a letter to Mr Brown:-

"As we discussed at our meeting, Robert and you are considering setting up a business in the USA (with funding from an interested US company). Business will be in direct competition with BSW... you may also wish to entice employees away from BSW".
 - c) To note that on the 9 June 2004 Mr Brown informed MMS that he and Mr Emmett "[were] thinking of setting up in the UK".
 - d) To record that on the 11 June 2004 Mr Brown informed MMS that he and Mr Emmett had "received a request for quotation":

- e) That on 17 June 2004 Mr Brown informed MMS that he was interested in the idea of a “hostile takeover” of BSW.

I regard that as an accurate record of what was then being discussed.

29. On the 10 June 2004 Mr Emmett met with Mr Halstead at “The Phantom Winger” public house. Mr Halstead’s company, HB Halstead & Sons Limited (“HBH”) carried out the engineering of BSW’s products. There is a dispute on the evidence as to what Mr Emmett and Mr Brown’s precise plans were at this stage. BSW’s case is that Mr Emmett and Mr Brown had decided to set up a competing business and were preparing a quotation to supply subsea connectors to Technip for the Dalia Project. Mr Emmett says that at this time there were no such firm plans, though he was considering making such a move, and that he was “sounding out” Mr Halstead.
30. On the 15 June 2004 Mr Emmett went to France and shortly thereafter obtained the “Invitation to Tender” documentation from Technip. The tender period for the Dalia Project was due to close on the 17 June 2004: but Mr Emmett obtained an extension.
31. By the 23 June 2004 Mr Suttie was aware of rumours about Mr Emmett and Mr Brown. As directors of BSW they had asked him for copies of the management accounts of BSW for March and April 2004 and a copy of the business plan for 2004/5. Mr Suttie caused BSW’s solicitors to fire a warning shot in these terms:-

“With respect to the [BSW] business plan for 2004/5, this document has not yet been completed. However, our clients are aware that your clients have approached investors in the Aberdeen area with a view to setting up a competing business to BSW Limited. In those circumstances, our clients believe that there are commercial sensitivities in releasing this documentation to your clients. It also raises sharply the whole issue of your client’s obligations as existing shareholders and directors of BSW Limited”.

There was no evidence that Mr Emmett and Mr Brown had approached any investors in the Aberdeen area: so the rumour was probably false. But Mr Suttie was on the alert, let that fact be known and used it to insulate Mr Emmett and Mr Brown from the affairs and plans of BSW.

32. In late June 2004 Mr Emmett and Mr Brown returned to the USA to discuss with Edison Chouest Offshore Inc (“Chouest”) whether a joint venture would be feasible. The outcome of those discussions was that it was unlikely that the parties could proceed on a joint basis, but the possibility remained.
33. Meanwhile on 28 June 2004 Mr Benson resigned from BSW with effect from 12 July 2004, saying that he had not been happy for 12 months and felt that he had been “edged out”. Another employee (Mr Taylor) gave notice on 29 June 2004 of his resignation from BSW to take effect on 31 July 2004: he explained to Mr Green that since September 2003 he had lost his motivation, that dealings with Mr Hatfield had been damaging and that he was not being left to get on with “design” but was being drawn into “marketing” (which he did not want). Mr Green welcomed Mr Taylor’s departure, saying that the notice came

after a protracted period of poor attendance, shabby appearance and a laissez faire attitude to deadlines.

34. On the 2 July 2004 Mr Emmett and Mr Brown submitted a tender to Technip for the Dalia Project under cover of a letter which said:-

“... We have been in advanced discussions with our American joint venture partner and have only just returned. We are in the process of setting up a new joint venture company but as yet it is not formally in place. We anticipate it will be a further 4 weeks before we will be formally trading... we are naturally anxious to maintain a bidding position with Technip and will do our utmost to expedite all formalities...”.

35. Of course Mr Emmett knew that BSW was also bidding for this contract, both because BSW had already supplied products to Technip, and because the prospect of BSW obtaining work for the Dalia Project had been discussed at the November board meeting.

36. Mr Emmett’s quotation referred to “the BREM mooring connector”. The acronym stood (according to a note of discussions between Mr Emmett, Mr Halstead and Mr Brown) for “ball related engagement mechanism”. But it was also the first two letters of Mr Brown’s and Mr Emmett’s surnames. The “BREM mooring connector” had to be something different from BSW’s product, because otherwise it would simply infringe BSW’s patent (and the entire exercise would be pointless). But no clear rival to BSW’s patented concept had emerged. So one of the issues to be addressed immediately was (according to a contemporaneous note):-

“Basic review of connector design, specific areas to be addressed, single spring and secondary locking mechanism, use of non-pocket slot, ball cage and ball retention, and specific idea of retractable receptacle cone. In general all ideas thrown into melting pot!”

37. Mr Bacon was retained by Mr Emmett for a period in July. Mr Emmett visited him in France from the 7-9 July 2004. In respect of that retainer Mr Bacon rendered an invoice supported by timesheets. The timesheets were headed “BREM Design” and were for the 15-16th and the 19th-22nd July 2004. BSW’s case is that Mr Bacon was working for Mr Emmett’s competing business, and in so doing was using design modules that he had prepared for BSW. Mr Emmett and Mr Bacon’s case is that Mr Bacon had been put on a monthly retainer (so that he would be available in the event but Mr Emmett and Mr Brown formed a competing company) and the invoices simply amount to the agreed monthly fee but do not represent real work. I consider this issue below.

38. On 14 July 2004 Chouest informed Mr Brown that it did not wish to proceed with any joint venture: and Mr Brown responded by saying that he and Mr Emmett intended to “progress in our own right” and “to establish ourselves (once again) as the preferred supplier for mooring connectors generally and ball grip systems in particular”. He and Mr Emmett took the view that a commercial settlement with Mr Suttie was not an option because any offer they could make would be unacceptable, and they immediately took further legal advice.

39. That same day Mr Halstead (the engineering subcontractor) attended a meeting with Mr Green and other managers of BSW to consider the concerns that he had about the trading position of BSW and about securing payment for his work. In the course of that meeting Mr Halstead says that there was an implicit threat to remove BSW's engineering work from his company. Mr Halstead had requested an irrevocable letter of credit: and when that was not forthcoming he told BSW that he would continue to progress all work in connection with current projects but would not release the goods from his premises until he had received payment in full. He wrote:
- “After many years of continuous service to BSW I am greatly saddened by this turn of events, but I have no confidence in the current management of BSW or its ownership”.
40. On 19 July 2004 Mr Bacon gave notice that he was terminating his relationship with BSW with effect from 25 July 2004. The following day Mr Emmett resigned as a director of BSW.
41. On 23 July 2004 Balltec Limited (“Balltec”) was incorporated. Its initial directors were Mr Emmett and Mr Halstead. Mr Emmett described it as “a partnership with H B Halsteads”. Mr Emmett immediately informed Technip that the formal bid vehicle for the Dalia Project work would be Balltec. Even before incorporation Balltec had also (on 19 July 2004) bid for work on the Kizomba oilfield and (on 22 July 2004) for work on Technip's Simian/Sapphire field (in respect of which an order was signed on 1 September 2004 for equipment priced at £98,160).
42. Mr Brown was not recorded as a director of Balltec. He continued to be a director of BSW and attended a board meeting as such on 10 August 2004, voting against the adoption of the accounts. That meeting noted that further support for BSW was being sought from its directors, though it was acknowledged that Mr Brown would not be providing any and that “in the present circumstances the company had no value”.
43. In September 2004 BSW became aware that it had a rival in the shape of Balltec. BSW had bid for the Dalia Project at a price greater than Mr Emmett had offered on behalf of his nascent new venture. On 27 July 2004 Technip had asked BSW to review its quotation. On 8 September 2004 Mr Green and other BSW employees met with Technip's representatives in Paris for that purpose. They were informed that there was a competing bid from Balltec, that Balltec employed ex-BSW employees, and that HBH no longer undertook BSW's engineering (but now supplied Balltec). Mr Green subsequently asked Technip for minutes of this meeting of 8 September: but he was sent (by accident or design) minutes of a meeting held on 7 September 2004 between Technip and Balltec which showed that Mr Emmett, Mr Brown and Mr Halstead had attended the meeting on behalf of Balltec. Mr Green says that in order to secure the contract from Technip he had to lower BSW's price from €1,345,000 to €1,066,000.
44. On 15 October 2004 Mr Brown resigned as a director of BSW (although he continued to be a shareholder until 12 January 2006). From then on it is clear that the battle lines were drawn, though Mr Suttie made no move. His case is that Mr Emmett simply told him a string of lies, and in the absence of admitted wrongdoing he could not pursue a claim.
45. In December 2005 he decided to make an application for pre-action disclosure. I will call this “the disclosure proceedings”. BSW's claim was that Balltec had infringed

unregistered design rights of BSW (by selling products which incorporated identical design features); had infringed BSW's copyright in the design drawings for its products (by copying them and using them in order to obtain certification of its products); and that it had infringed two patents. The premise upon which BSW based these allegations was that it would have been impossible for Mr Emmett and Balltec between 23 July 2004 and the end of September 2004 to have designed and produced a range of products incorporating "ball and taper" technology without copying BSW's existing designs.

46. This application was heard in March 2006 and ruled upon by Mr Justice Patten on 11 April 2006. The judge dismissed the application, saying that it was "really impossible to describe the application as anything but speculative" adding:-

"..I do regard this as a speculative claim in which BSW has based its apparent concerns on uncorroborated statements of impression and a theory about the time taken to design the tools which is unsubstantiated by reference to the evidence of any experienced designers in this field. To this lack of substance is to be added a lack of focus at least in relation to the design rights for which protection is sought..... [T]o allow CPR 31.16 to become a means of examining a competitor's otherwise secret designs on the basis that some kind of infringement might have occurred cannot in my view be permissible unless there is at least a clear and convincing evidential basis that the belief that acts of infringement may have taken place and the court can be satisfied that the pre-action disclosure sought is highly focused"

47. Patten J ordered BSW to pay Balltec's costs. Those costs were subsequently agreed at about £81,300.
48. In July 2008 Mr Emmett and Mr Halstead fell out and each instructed solicitors. In September 2008 Balltec commenced proceedings against HBH (in respect of a claim that some tools had been badly manufactured) and against Mr Halstead personally (in respect of a claim that, in breach of his duty as a director of Balltec, he charged inflated prices for engineering products supplied to Balltec; and for wrongfully procuring that he had a 50% shareholding in Balltec). At trial these were called "the Manchester Proceedings": and I will adopt the term.
49. In the Manchester Proceedings Mr Halstead counterclaimed that an agreement had been reached whereby he was entitled to be an equal shareholder with Mr Emmett. He pleaded:-

"14.1 On 10 June 2004 Mr Halstead met with Mr Emmett and Mr Brown at The Phantom Winger public house in Preston.....At this meeting, Mr Emmett and Mr Brown asked Mr Halstead whether he would be interested in joining them to form a new company to act in competition with BSW using tools and equipment manufactured by HBH...

14.3 On a date early in July and not later than 7 July 2004 Mr Halstead met with Mr Emmett and Mr Brown at the Station Inn [Oxenholme].....The main purpose of the meeting was to discuss potential design and patent issues in relation to the products to be manufactured by the proposed new company....

14.4 On 19 July 2004 Mr Halstead met with Mr Emmett and Mr Brown at HBH's premises..... In the course of this meeting it was agreed that the new company would be incorporated as Balltec and that the product trade name would be BREM..... A formal agreement was to be drawn up between them but it was agreed that they would each become directors and equal shareholders of the new company.....”

50. Mr Emmett's case was that he had never intended to give 50% of Balltec to Mr Halstead, given that he alone was putting up money and that the venture depended on his innovative skills alone: what was intended was that Mr Halstead was to inject HBH into Balltec to create a vertically integrated design and production company, and when that happened *then* he was to be given 50% of Balltec's shares. But since the businesses never merged he never became entitled to participate in Balltec. In relation to the meeting at “The Phantom Winger” Mr Emmett's pleading specifically denied Mr Halstead's version and asserted that he and Mr Brown had told Mr Halstead only that they were considering setting up a new venture and enquired if he would be interested in manufacturing goods for them. They positively asserted in the original Reply that there was no question of the formation of a new company, and in the Amended Reply (in March 2009) that at that stage they had not decided that they would set up a new company and that no such decision was made until after 14 July 2004.
51. Evidence was given in the Manchester Proceedings by Mr Emmett, Mr Brown, Mr Taylor, Mr Benson and Mr Bacon. BSW's solicitors attended to take a note of that evidence. HHJ Waksman QC gave judgment on 12 November 2009, holding that an agreement had been made on 23 July 2004 under which Mr Halstead became entitled to 50% of the shares in Balltec. Mr Halstead was subsequently “bought out”.

This action

52. The present proceedings were only commenced on 22 December 2010 with a focus (on the case as opened at trial) upon a claim for damages for conspiracy to injure by unlawful means. Although Mr Halstead was one of the initial directors of Balltec and (as found by HHJ Waksman QC) intended to be a 50% shareholder in Balltec he was not named amongst the Defendant conspirators. The reason for this is that Mr Suttie and Mr Halstead had decided to make common cause against Mr Emmett. Mr Suttie had (through another of his companies) funded Mr Halstead's Defence and Counterclaim in the Manchester Proceedings by making Mr Halstead a loan of £80,000 on 31 July 2009 (immediately before the start of the hearing), and he provided BSW's documents to assist Mr Halstead's case. In return Mr Halstead assisted BSW with the provision of documents and a witness statement in the present case, obtaining from Mr Suttie an agreement (also in August 2009) that BSW would not pursue him if he assisted them.
53. Nor was Mr Brown a Defendant (although, on the case advanced against Mr Emmett, a principal co-conspirator). On 9 November 2004 BSW had commenced proceedings in Scotland against Mr Brown for an injunction to restrain Mr Brown from acting in alleged breach of the restrictive covenants in his employment contract or in breach of his fiduciary duties as a former director of BSW, and for damages in the sum of £192,510. These proceedings were compromised in November 2005. Mr Brown submitted to an injunction and agreed not to enforce the award that had been made in his favour in the Manchester Employment Tribunal, and did so

“in full and final settlement..... all claims.... of whatsoever nature..... howsoever arising competent to [BSW] and..... arising out of or in connection with [Mr Brown’s] employment with or shareholding in [BSW], excluding for the avoidance of doubt, any claims that [BSW] or [Mr Suttie] may have against any party other than [Mr Brown]...”

54. Originally the Third Defendant was Mr Taylor: but the case against him was settled on 25 May 2012 and he made no appearance at the trial. The Settlement Agreement required Mr Taylor to provide assistance to BSW by providing all the documents which he had or which subsequently became available to him, to provide all reasonable assistance (including signing a witness statement “on behalf of the Claimant (*sc.* BSW)”, and “to give no further assistance or evidence on behalf of any of the remaining Defendants”. If Mr Taylor acted in material breach of that agreement then he had to pay BSW £150,000 plus costs. The Defendants say that the terms of this agreement have the effect of releasing them from all claims in relation to which they are alleged to be joint-tortfeasors with Mr Taylor.

Essential background material

55. Before summarising the terms of the pleaded cases and then identifying the issues for decision it is convenient to deal with two further discrete topics: the nature of the product with which the action is concerned, and the documents which embody the relationship between BSW, Mr Emmett and the other defendants.
56. First, the product and the technology. BSW designed and produced (using HBH as its main engineering subcontractor) mooring connectors and pipeline recovery tools which used “ball and taper” or “ball-grab” technology to make the relevant connection. The fundamental technology is engagingly simple and shown in the drawing below:-



BSW Ballgrab Mooring Connector

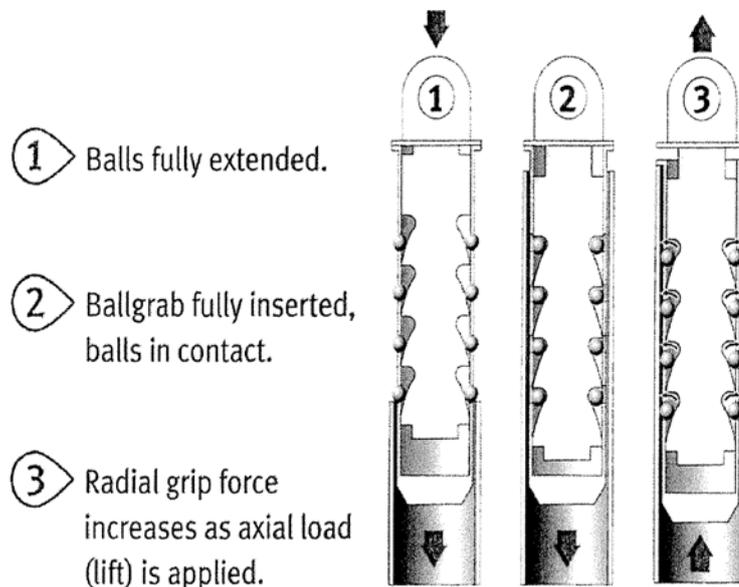


Figure 1 – The Ballgrab Principle

The basic unit is “a mandrel”, a cylindrical probe around which are arranged a series of several hundred balls in pockets, all held in place by a sprung ball-cage. (The ballcage is shown on the drawing as the moving part with a right angled lip). The balls can protrude from or retract within the pockets. The mandrel would be inserted into a pipe or other receptacle. (This is the darker coloured part at the base of the drawing and extending up the sides as shown by the thicker double line). At the external end of the mandrel (the top of the drawing) would be a substantial clevis head or mooring eye to which a shackle and chain (or some other load-bearing line) could be attached. The ball pockets themselves are tapered, with the taper being widest at the end pointing towards the mooring eye and narrowest at the end pointing towards the receptacle. As the mandrel is inserted into the receptacle the balls roll up into the wide part of the taper, but remain in contact with the sides of the receptacle and also with the surface of the taper. If an attempt is now made to withdraw the mandrel from the receptacle the friction between the side of the receptacle and the surface of the ball causes the ball to rotate: but the direction of rotation rolls it down the taper, jamming into a narrowing gap. The basic premise of the technology is that the rolling friction of the ball is always significantly less than the sliding (or shearing) friction, so that if the two load elements are pulled in opposite directions the relative movement of the two contact points (the receptacle on one side of the ball and the taper on the other) rolls the ball ever deeper into the taper and amplifies the radial force, rather than permitting the ball to slide. The greater the pull in opposite directions the greater the radial force. The fact that every ball is independent and capable of minute movement means that there is a continuous dynamic load distribution, making a very secure lock. To undo the lock a clamp is applied to the sprung ball-cage which forces the balls back into the pockets and towards the wide part of the taper, so releasing the pressure and permitting the mandrel to be withdrawn.

57. The fundamental “ball and taper” technology is very old, and there are patents using it dating from the 1890s: but its particular application to mooring connectors was the subject of several patents held by BSW. In early 2004 some of these patents had either expired or were due shortly to expire.
58. In December 2003 BSW applied for a further patent (containing one independent claim and 8 dependent claims) relating to a secondary locking mechanism. This consisted of a second sleeve surrounding the mandrel and attached to the primary ball cage, containing another ball or roller and taper, but this time with the taper facing the opposite way from the tapers in the primary lock. This lock assembly was compressed whilst the mandrel was inserted into the receptacle, and then released. Once released it prevented movement between the mandrel and the primary ballcage. It was the application for this patent that Mr Emmett and Mr Brown were particularly anxious not to infringe in the creation of their own “backward locking mechanism”. It is the genesis of Balltec’s backward locking mechanism that is a central feature of this case.
59. I should note at this point that in due course Balltec also developed a tertiary lock (called a “fall-out lock”) the object of which was to maintain the integrity of the connection if (for example) there was zero load or the whole joint became inverted. That happened later than the matters in dispute in this action: but provides part of the commercial context in which this action is pursued by BSW against Balltec, partly with the objective of acquiring Balltec’s technology for itself.
60. Secondly, the documents. Arnlea acquired its shares under a Share Sale Agreement dated 10 September 2001. In the action no reliance is placed on the contractual duties arising under this document: but in Clause 9 of it Mr Emmett gave certain warranties not to interfere with or endeavour to entice away clients, customers or employees or enter into competition with BSW.
61. Clause 9.5 contained a proviso to those obligations in these terms:-

“The provisions of this Clause 9 shall cease to apply to a Warrantor in the event that the Purchaser has failed to make a payment of capital or interest due under the Emmett Loan Notes..... and shall not have remedied such default within a period of three calendar months from the due date for such payment”.
62. The Emmett Loan Notes were constituted under an Instrument dated 10 September 2001. It contained the customary commercial terms. Although repayable in tranches the whole of the Loan Notes became repayable if Payment Default was made by BSW. The term “Payment Default” was defined to mean

“...the failure by BSW to make payment of any principal monies or interest as accrued thereon on the due date for repayment thereof (excluding any sums which BSW is entitled to withhold or deduct.....) where no remedy is agreed between BSW and Mr Emmett within a period of one month from the due date for payment”

Mr Emmett was also entitled to require BSW to make immediate redemption of all Loan Notes upon:-

“the termination of employment of Mr Emmett by [BSW] arising from a breach by [BSW] of the contract of employment of Mr Emmett provided always that a tribunal of competent jurisdiction has found that such breach of the contract of employment of Mr Emmett constituted unfair or constructive dismissal in which case the date of redemption shall be the date that such finding of a tribunal of competent jurisdiction is intimated to the Company.....”

63. Mr Emmett’s employment by BSW was governed by his Terms and Conditions of Employment also dated 10 September 2001 (which were themselves governed by Scots law). Under these he was engaged for the fixed term of 4 years as an executive director of BSW with the duty actively to support its growth and development and with responsibility for technical support, the promotion of ball and taper technology and the protection, development and evolution of new patents. If he terminated his employment voluntarily or was dismissed in defined circumstances then he was deemed to have served a transfer notice in respect of his shareholding in BSW.
64. The agreement was by reference to Standard Conditions of Service. Clause 3(2) required faithful service, required the employee to use his utmost endeavours to promote BSW’s interests and to devote the whole of his working time and attention to its affairs, and forbade him to be directly or indirectly engaged or interested in any other business.
65. Clause 7 of these Conditions contained obligations of confidentiality. It required the employee not during his employment or at any time afterwards to disclose or to use for his own purposes any “private confidential or secret information of the company”, including details of customers or BSW’s intellectual property. It required the employee to deliver to BSW on termination of his employment all notes, memoranda, records and writing made by the employee in the course of his employment relating to the business of BSW.
66. Clause 12 contained an obligation upon termination of employment to deliver up to BSW all books, documents, papers and other property relating to the business of BSW then in his possession or under his control, and not at any time following termination to endeavour to entice away from BSW any other employee.
67. Clause 13 contained extensive non-compete provisions. These were declared to apply

“ ...for so long as he is an employee or director of the Company and/or retains an interest in the share capital of the Company..... and upon the termination of the employment of the Employee for any reason or by any means whatsoever..... and in the event of termination by the Company, provided that such termination was lawful and/or did not constitute unfair dismissal[and] for the period of two years from the date of termination of the employment of the Employee or until a finding of wrongful or unfair dismissal has been made by a competent tribunal, if shorter.....”

68. The obligations were
- a) not directly or indirectly to solicit or endeavour to entice away from BSW anyone who was to his knowledge then or within the preceding two years a client, customer, employee or person in the habit of dealing with BSW;
 - b) not directly or indirectly to carry on or be engaged or concerned or interested in any other business similar to the business carried on by BSW or competing with the business carried on by BSW immediately prior to the termination of employment;
 - c) not to use or develop any of the intellectual property owned or used by BSW including all patents or patent applications or other ball and taper technology, or product developments in respect of such patents, in furtherance of his own commercial objectives or any other business or for personal gain;
 - d) not to interfere with the continuance of supplies to BSW from any supplier who had been supplying goods or materials during the last year of employment;
 - e) not to induce or encourage any individual who has been in the employment of the Company during the preceding 12 months to join the employment of any third party by which the Employee might be involved or associated if such employment would require that individual to exercise any special skill or knowledge acquired as a result of his employment with BSW.
69. The obligations set out in the preceding paragraph (but not the obligations as to confidentiality) would cease to apply in the event that Arnlea failed to make any payment of capital or interest due under the Emmett Loan and had not remedied such a default within a period of three calendar months from the due date for such payment.
70. Mr Brown was also engaged under very similar Terms and Conditions of employment. In his case the non-compete provisions applied:-

“ ..for so long as he is an employee or director of the Company and/or retains an interest in the share capital of the Company and upon the termination of the employment of the Employee for any reason..... and in the event of termination by the Company, provided that such termination was lawful and or did not constitute unfair dismissal..[and] for the period of two years from the date of the termination of the employment of the Employee or until a finding of wrongful or unfair dismissal has been made by a competent tribunal, if shorter,...”

But in this case there was no proviso rendering these obligations non-operable in the event of default upon Loan Notes, for Mr Brown held none.

71. These Terms and Conditions had been negotiated in relation to incoming directors at the time of Arnlea's acquisition of control. In December 2001 Mr Brown decided to prepare contracts for ordinary members of staff. With Mr Suttie's agreement he used the directors' Terms and Conditions. These were put in place in the course of 2003 for the employees with whom this action is concerned. Each agreement contained the term (in clause 13(2)) that the employee considered the restrictions imposed to be fair, reasonable and necessary to protect the goodwill and interest of BSW.
72. In the case of the Defendant Mr Benson, he had become an employee in February 2002 and his Conditions of Service and Particulars of Employment were signed in the autumn of 2003. His job title was "Project Coordinator", in which capacity he was required to perform such duties as BSW might from time to time assign to him. Clause 7 of the Conditions contained a confidentiality provision, and clause 13 a non-compete provision in the same terms as those I have summarised above. These restrictions were to apply in this way:-

"for so long as he is an employee and upon the termination of the employment of the Employee for any reason or by any means whatsoeverand, in the event of termination by the Company, provided that such termination was lawful ... the employee shall not the period of two years from the date of termination of the employment of the Employee or until a finding of unfair dismissal has been made by a competent tribunal, if shorter..[do any of the prohibited acts].."

The Conditions contained a record that the parties considered those restrictions to be fair, reasonable and necessary to protect the goodwill and interest of the Company: but if a Court of competent jurisdiction found any of them to be unenforceable then the parties agreed to accept any modification as to the area, extent or duration of the restrictions which the court thought fit to impose or which were reasonably necessary to render the restrictions enforceable.

73. Although given the job title "Project Co-ordinator" an insight into what Mr Benson actually did may be gleaned from an appraisal undertaken in March 2003. He was responsible for getting products manufactured after obtaining quotes, and expediting the items once the contract had been awarded. He had acquired sufficient knowledge of the processes to be confident of seeing a job through at every stage, and wished to evolve his job into project management (assuming that his engineering skills could be enhanced). He occasionally did some assembly work. He was on one month's notice.
74. In the case of the former defendant Mr Taylor the Conditions of Service relating to his employment as "Design/Engineering Manager" at a salary of £36,000 were also signed in the autumn of 2003. They contained the same "confidentiality" and "non-compete" conditions as Mr Benson's contract; and likewise recorded that the parties considered the terms of the "non-compete" clause to be fair reasonable and necessary.
75. Of those who have never been defendants, Mr Lang (who was given the title "Senior Project Engineer") and Mr Huddleston (who was given the title "Workshop Technician") signed their Conditions of Service in the autumn of 2003; and Mr Staveley (who was given the title "Production Manager") signed his in February 2004. These Conditions were all in the standard form containing the "confidentiality" and "non-compete" provisions to which

I have already referred. The salary levels of Messrs Lang, Huddleston and Staveley are not apparent from the contract documents available.

The pleaded case

76. Having established the main narrative and referred to the key transactional documents I can turn to the essential pleaded case. The Re-amended Particulars of Claim is a somewhat discursive document from which it is not always easy to see precisely what facts are relied upon in relation to what cause of action against whom. This was the subject of vigorous complaint by Mr Cavender QC for the Defendants. He described the central conspiracy claim as “formulated in extraordinarily broad terms that border on the incomprehensible”: a view with which I have a degree of sympathy (even if it is itself expressed in extravagant terms). He pointed out that “unlawful means conspiracy” is a way of making people liable for things that they did not do: they are directly liable for the wrongs they themselves did, and their liability for the wrongs done by others stems from the part they played in the combination which utilised those wrongdoings. One would think that the starting point would be to establish the wrongdoing (the “unlawful means”) and then enquire whether it was brought about or utilised by a conspiracy. But that course would have highlighted that some of the principal apparent wrongdoers (Mr Brown, Mr Halstead and Mr Taylor for example) were not before the Court, that BSW was going to allege (in relation to some of them) their wrongdoing in their absence, and that BSW would seek to throw onto Mr Emmett, Mr Benson and Mr Bacon the task of showing that there was no wrongdoing. Given the multiple options in the pleadings this threw a heavy burden on the remaining defendants.
77. In opening Mr Marshall QC for BSW identified certain claims. The trial was conducted on this basis. They were:-
- a) A claim for damages against Mr Emmett, Mr Benson and Mr Bacon on the grounds that they conspired together and with Mr Taylor and Mr Brown to injure BSW by unlawful means. The unlawful means relied on are (i) breaches of fiduciary duty by Mr Taylor (in June and July 2004) (para 20), by Mr Emmett (in November 2003 or alternatively from early 2004) (paras 11, 13, 14, 15, 16, 20A, 21, 22) by Mr Brown (from February 2004) (paras 13, 14, 15, 16, 20B, 21, 22) (ii) breaches of contract by Mr Emmett, Mr Brown, Mr Taylor and Mr Benson (paras 20 following) (iii) inducement by Mr Emmett and Mr Brown to Mr Taylor, Mr Benson, Mr Bacon Mr Lang, Mr Huddleston and Mr Staveley to break their contracts with BSW (para 9): (iv) fraud (particularly fraud on the Court) (v) infringement of copyright.
 - b) A claim for damages against Mr Emmett for breach of fiduciary duty, breach of contract and deceit and for inducing others to act in breach of contract (paragraphs 9, 11, 13 – 19, 20A and 21 – 22).
 - c) A claim for damages against Mr Benson for breach of contract (paragraphs 18 and 21(5)).

- d) A claim for damages for breach of contract and breach of confidence against Mr Bacon for preparing certain designs by 19 June 2004 or shortly thereafter.
- e) Claims that property received by Balltec as a result of breaches of fiduciary duty by Mr Emmett and Mr Brown was held on constructive trust for BSW.
- f) Claims of infringement of copyright.
- g) A claim that the order for costs made against BSW in the disclosure proceedings should be set aside and that Balltec should pay BSW's costs of the disclosure application.

78. These topics were explored in great detail and with constant additions to the trial bundle: and by the time of BSW's closing submissions (543 paragraphs and 243 pages in length) 19 main issues (with sundry sub-issues) were identified for decision, and were addressed in the Defendants' closing (572 paragraphs and 154 pages in length).

Witnesses of fact

79. Mr Suttie was a "prickly" witness who came across as a calculating and manipulative man. It seemed to me that he had carefully prepared for the eventuality of litigation with Mr Emmett, with BSW employees reporting to him upon Mr Emmett on a regular basis. Mr Emmett was not given the chance to comment on this contemporaneous "record" as it was prepared. Mr Suttie maintained control of the record, for example, refusing Mr Emmett's request for an independent record of the key meeting in March 2004 and then producing his own record (which Mr Emmett did not agree was accurate). Mr Suttie's written evidence had been meticulously prepared on the basis of this informal documentary record. In oral evidence he understandably put the most favourable gloss upon what he had said and written: and on occasion (for example, in relation to his attempt to get Mr Emmett to amend his evidence supporting Mr Brown in the Employment Tribunal proceedings, or the circumstances of his suspending Mr Emmett, or his knowledge of Mr Halstead's involvement with Mr Emmett's plans) he would not acknowledge the obvious when it reflected less than well upon him. When he was taken to an event that he himself had not caused to be recorded (his continued willingness to sell Arnlea's shareholding) he admitted that he had forgotten it and then told a straight lie to minimise the significance of the event. But overall I am bound to accept the reliability of Mr Suttie's narrative of events, whilst approaching his characterisation or interpretation of those events with considerable caution.
80. Mr Green (the General Manager of BSW who replaced Mr Hatfield) acknowledged that he was "assertive", but declined to accept that he was "abrasive". The latter term more accurately describes his performance as a witness. Even Mr Halstead (who gave evidence for BSW) described him as having "an unusual management style" that was "a little over-enthusiastic in some respects": I think that is an understatement. I did not find Mr Green's accounts of his treatment of employees or events concerning their departure from BSW or of the circumstances in which BSW reduced its price on the Dalia Project to be secure: and in each case I prefer to rely on the documents. In general, I formed the impression that Mr Green came to Court to convey a particular message and did not engage with the process of giving evidence to any greater extent than was required to achieve that end.

81. Mr Halstead's written evidence in this action was essentially his written evidence in the Manchester Proceedings, although it had been "trimmed" to strengthen it for the purposes of these proceedings (in particular by omitting important evidence about the genesis of Balltec's secondary locking design). It was partisan and although expressed as direct evidence was more than occasionally (when read carefully) Mr Halstead's interpretation of an event about which he had learned or been told. But I thought his oral evidence in general to be much fairer. He acknowledged that he had agreed with Mr Suttie to help BSW provided that BSW did not go after him, and that he was giving evidence under that agreement. But notwithstanding that, he gave evidence supportive of Mr Emmett's case as to the genesis of the secondary locking device and acknowledged that insofar as his written evidence in this action tended to suggest a creation date in June 2004 it was not accurate (and possibly tainted by Mr Emmett's refusal to accept his claim to a share in Balltec's business). The acknowledgment was worthy of note because those preparing the trial bundle on behalf of BSW for this action had not included in it Mr Halstead's witness statement in the Manchester Proceedings which touched on the genesis of the secondary lock. Mr Halstead was also much less dogmatic in his oral evidence about the options that were open in June 2004 than he had been in his written evidence. Although Mr Halstead's evidence was largely accepted by HHJ Waksman QC I consider that it requires review in these proceedings in the light of material that was not available in the Manchester Proceedings (in particular the MMS file and the fuller evidence about the genesis of Balltec's secondary locking mechanism).
82. A theme of BSW's closing was that since (it was said) large parts of Mr Halstead's evidence were not challenged I am bound to accept it. I have not regarded myself as so mechanically bound. In diffusely pleaded and complex action such as this I do not think it right to approach the fact-finding exercise on the basis that if a passage in a witness statement has not been directly challenged in cross-examination then its truth must be accepted without more. Trials would become interminably long if every point of difference had to be the subject of challenge at trial. I have considered it right to consider the nature of the evidence given in any particular passage (distinguishing direct evidence from hearsay), to assess what weight to give to it in the light of other evidence that falls for consideration, and then to decide whether I can place reliance on it, always bearing in mind that Mr Halstead has not in fact had the opportunity to comment upon any potential criticism.
83. Two examples will suffice. In paragraph 36 of his witness statement Mr Halstead gave evidence that on 22 June 2004 Mr Emmett paid £3000 to the Lancaster University race car project by way of sponsorship. He commented that this clearly showed that Mr Emmett had decided to establish a new business well before he had received confirmation that Chouest would not enter of joint-venture. He did not say that he was a witness to the transaction. He is evidently recounting something that he learnt. He then expresses an opinion about it. In his evidence in cross-examination Mr Emmett explained that he had paid £3000 to Lancaster University out of his own pocket as he had done before. After Balltec was formed he asked if its name could be put on the Lancaster University car. I do not regard myself as compelled to accept Mr Halstead's "evidence": I think I must weigh its inherence substance with the other evidence I received.
84. In paragraph 37 of his witness statement Mr Halstead gives evidence that around the 19-28 June 2004 Mr Emmett made a telephone call to Mr Halstead to advise that he had found some suitable offices for the new company. He goes on to assert that "on or around 26 June 2004 Mr Emmett made a payment of £1250 to [estate agents] to secure the premises he had

found”. Mr Halstead does not explain how at a distance of 8 years he is able to date a telephone call or what is his means of knowledge about the payment. He is giving the evidence because he wants to demonstrate that Mr Emmett had settled upon a separate competing business by at least 26 June 2004 and had set it up. BSW itself adduced hearsay evidence from Mr Brown that conflicted with Mr Halstead’s account. For Balltec Mr Emmett gave evidence that the relevant payment was actually made on 26 July 2004 (he having found the premises in July not in June), although an expense sheet was incorrectly completed as showing the payment made a month earlier and was later corrected. In my view all this evidence (and the inherent probability) has to be looked at in the round. I cannot simply accept Mr Halstead’s evidence because it was not challenged in cross-examination.

85. BSW also relied on evidence from Mr Brown (given by him in the Manchester Proceedings and in the Scottish proceedings) which was adduced as hearsay because “he is outside of the jurisdiction, namely in Scotland”; and hearsay evidence from Ms Shuttleworth and from Mr Saluja. BSW also relied upon the written evidence of Mr Fitzpatrick of Boodle Hatfield (who was not cross-examined).
86. BSW sought to portray Mr Emmett as an unsatisfactory witness, deliberately selective in his recollection, willing to fabricate evidence and dishonestly to say whatever was necessary to avoid rendering a just account to his former company: a man whose evidence should not be accepted unless independently corroborated. In my view this was a reiteration of Mr Suttie’s misjudgement of the man. Mr Emmett was a passionate engineer with unbounded enthusiasm for the technology he created and a deep loyalty towards those who had helped him develop it and market its products. This passion and loyalty, and a character-trait of straight talking, made him hot-headed and susceptible of saying the first thing that came into his head, at times abusive to colleagues and intolerant of what he viewed as obstruction of his plans. When reviewing matters in retrospect, he was equally capable of saying the first thing that came into his head and of succumbing to self-justification in response to perceived wrongs. There is no doubt that his response to the content of some of the contemporaneous record put to him suffered from this tendency: but to call it (as Counsel for BSW did) “dishonest invention” is to misdescribe it. Mr Emmett very frankly acknowledged that he had little recollection of the actual events and that much of his evidence was based upon a review of the documents coupled with his “patchy and incomplete recollection”: and it was plain that at times his recollection was confused and inaccurate. Overall I thought him honest but erratic.
87. Mr Benson was a balanced witness, volunteering that he could now separate out what he knew at the time from what he had subsequently pieced together, ready to concede that whilst he had no present recollection of an event, what he had said earlier about it was likely to be accurate. I noted him as an impressive witness. It is unlikely that his recollection is accurate in every particular; but I regard it as generally reliable.
88. Mr Bacon is now the technical director of Balltec (though he was in 2004 – 2005 an independent contracting designer/draughtsman). Although he had the benefit of an unconditional indemnity from Mr Emmett in relation to the claims made against him in this action, he was somewhat defensive in giving evidence. That may be because he had to admit that he had given false information to BSW when he terminated his contract, that a key part of his evidence depended upon his having fabricated timesheets, and that his evidence in the Manchester Proceedings (closer to the events that are all in question) had been wrong. Of course these matters give grounds for caution in approaching his evidence

in this action. But I concluded that his evidence in this action was more likely to be correct than the evidence he had given in the Manchester Proceedings (albeit that the latter evidence was closer to the events in question) because he had fuller information in this action as to the metadata on his computer files which made his chronology more secure.

89. I should note that at trial and in closing BSW made a wholesale attack on Mr Bacon's honesty accusing him of fraudulently charging BSW for work when the time had really been spent on matters for Balltec. Although he was a Defendant no such case of fraud had been pleaded against him. I consider that he dealt with the ambush well: I find that he was not dishonest or fraudulent.
90. This must be said about all of the witnesses. They were trying to recall events and, more particularly, states of mind and extent of knowledge, motives and understanding from almost a decade ago. Whilst account must be taken of all this material, it is only by a detailed review of the surviving documents (subject to the caveat that at the time of their creation they may not necessarily have constituted an entirely accurate record) and a willingness to draw appropriate inferences which take account of the inherent probabilities that one can hope to come close to what, according to proof to the civil standard, happened.
91. Much was made by BSW of Balltec's failure to call Mr Brown as a witness, (the same Mr Brown from whom they adduced hearsay evidence but did not call because he was outside the jurisdiction "in Scotland"). I was predictably pressed with the proposition that in civil proceedings the court may draw adverse inferences from a party's decision not to call witnesses whom it is reasonable to conclude would have given evidence if asked to do so: see McKillen v Barclay [2012] EWHC 2343 for a recent statement. But whether it is appropriate to draw the inference, and what weight is to be attached to any such inference, is always dependent on the particular circumstances of the case. In the instant case (a) BSW accept the difficulty of calling Mr Brown because he is not in the jurisdiction; (b) in November 2005 BSW dropped all claims against Mr Brown himself, but they now complain that Mr Emmett has not called Mr Brown to deal with BSW's complaints against Mr Brown for which they seek to make Mr Emmett liable; (c) Mr Emmett quite plainly did not want to involve Mr Brown (who had managed to secure his exit from the proceedings); (d) Mr Emmett offered himself for cross-examination on all the key issues (and was very extensively cross examined).
92. BSW also asked that I draw adverse inferences from Balltec's failure to call Mr Huddleston, Mr Staveley and Mr Lang. These were all alleged wrongdoers for whose wrongdoing BSW sought to make Mr Emmett, Mr Benson and Mr Bacon liable. The oddity in this approach is that BSW in effect is unwilling to seek to prove that Mr Huddleston, Mr Staveley and Mr Lang are wrongdoers (by suing them), but says that the court should infer that they are wrongdoers because Balltec did not call them as witnesses to meet the case against Mr Emmett, Mr Benson and Mr Bacon.
93. Mr Taylor had been a defendant: but as I have noted BSW settled with him on terms on 25 May 2012. Clause 8.4 of the compromise provided:-

"Richard Taylor agrees and undertakes to provide all reasonable assistance to [BSW] going forward in the Proceedings including ... at [BSW's] option attending meetings in order to finalise, settle and sign Richard Taylor's witness statement on behalf of [BSW]".

94. Despite having the benefit of this promise BSW did not call Mr Taylor. Balltec suggested that an adverse inference should be drawn from this: and in response BSW said they should not be expected to call someone whom they accused of deceit and dishonesty (though that sits uneasily with the terms of the compromise with him and with the fact that the evidence they would have sought to lead from Mr Taylor would have been admissions, that being the way they deployed the evidence given in the Manchester Proceedings). BSW also said that an adverse inference should be drawn from Balltec's failure to produce a witness statement from Mr Taylor (although in the compromise they had extracted a promise from Mr Taylor not to help Mr Emmett). Nor did BSW call the makers of the various contemporaneous records of events and conversations on which they relied.
95. In truth adverse general inferences from failure to call witnesses, those I have listed and others, which are said to weaken one side's case and/or strengthen the other's, have had no real part to play in the fact-finding exercise given the quantity of oral evidence which I heard and the volume of documents to which I have been referred. I have been able to reach my conclusions on the basis of what I heard and saw, the absence of a particular witness to address a particular point being only one factor amongst many going to the weight of the evidence actually adduced.
96. This case was opened, examined and argued as one of conspiracy to injure by unlawful means. So I will begin the analysis by focusing on the conspiracy elements (and for that purpose assume that the means employed were unlawful). Then I will examine each of the allegedly unlawful means that are said to have been utilised in the conspiracy.

Did Mr Emmett and Mr Brown conspire to injure BSW?

97. I will begin this section by setting out the principles of law I intend to apply when considering the evidence relating to "conspiracy", focusing upon the characteristics of "combination": then I will make relevant findings of fact, focusing upon Mr Emmett and Mr Brown. I will then examine the requisite mental element. In all of this I will assume the unlawfulness of the intended acts (which I address subsequently).
98. The tort of conspiracy to injure by unlawful means requires an agreement, combination, understanding or concert to injure, generally referred to as "concerted action taken pursuant to an agreement" (though the "agreement" must be taken as referring not to a contract but to a combination with a common intention): see generally Clerk & Lindsell on Tort (20th Edition) paragraph 24-92.
99. I would add some short comment upon this settled law:-
- a) Coincident events are not by themselves sufficient to establish a combination. There must be a connection between the events through the participants in the events.
 - b) To establish that connection it is not necessary to show anything in the nature of an express agreement (formal or informal). Deliberate (if tacit) combination to achieve a common end is sufficient, and that fact will almost invariably have to be inferred from overt acts: Kuwait Oil Tankers v Al Bader [2002] 2 All ER 271.

- c) Inferring the fact of a combination to achieve a common end requires scrutiny of the acts relied on to see what inferences might properly be drawn from them.
- d) The expression “concerted action” is a useful reminder that conspiracy is distinct from conversation. Talking and speculating and planning which do not result in a settled and agreed course or which do not result in concerted action do not in my judgment amount to the tort of “conspiracy”. The tort of conspiracy does not inhibit freedom of expression: it prohibits action taken in combination.

100. These are the facts I find in relation to the allegation of a conspiracy.
101. I can commence the examination of this particular strand in February 2004. Mr Brown had been dismissed, he felt (and it is subsequently established) unfairly. Mr Emmett and Mr Brown had been unable to raise funds in a conventional way to repurchase BSW from Arnlea. Their approach to Mr Suttie to consider a pure “earn out” deferred for a period to enable them to re-establish themselves had been rebuffed. Mr Emmett had made no secret of his assessment of Mr Hatfield as incompetent: and in response Mr Suttie had suspended Mr Emmett as an employee and had written to BSW’s staff a letter of support for Mr Hatfield. Mr Suttie had summoned Mr Emmett to Aberdeen for a meeting: but Mr Emmett had declined to attend and had been signed off work as suffering from stress. There were suggestions that this “stress” was a sham: but I consider it likely that it was entirely genuine. Mr Suttie’s approach was cold and calculating. He had disposed of Mr Brown by seizing upon events to achieve a pre-determined aim: Mr Emmett could justifiably be apprehensive about receiving the same treatment.
102. During the latter part of his sickness period Mr Emmett left for America: and his sickness period merged into a holiday. He met with Mr Brown. They visited various possible partners in pursuit of what Mr Emmett said in evidence he supposed was “a long shot”: Mr Marshall QC pressed Mr Emmett with the proposition that what was in view in February 2004 was the establishment of a competing business using a US joint partner. This was largely founded upon two answers that Mr Emmett had given in the course of his cross-examination in the Manchester Proceedings.
103. At that trial in the course of a passage of cross-examination about whether Mr Brown had got some dates right or wrong Ms Anderson QC put the following question and received the following answer:-

“Q: [Mr Brown] was a director at the time you were going off to investigate possibly setting up some competing firm in America in the early part of 2004 was he not?”

A: Possibly, yes”.

Then in a second passage, which tested Mr Emmett’s written evidence in the Manchester Proceedings that because he won his case on the RBS guarantee he had the funds to start “a new venture” in June 2004, he had said:-

“Yes it is correct that in February I was starting a new venture. This date here, June is incorrect. It is a mistake. It was only getting the money in June stemmed from my ability, if you like, to be able to form a new company”.

This latter passage was not put to Mr Emmett in cross-examination in this action but was commented upon in closing. But in his evidence before me Mr Emmett was clear that the primary purpose of the February 2004 visit to the USA was “absolutely not to set up a joint venture”. He insisted that in February 2004 what he and Mr Brown were trying to achieve was a buyout. They approached various US companies (Hydrotech, Cameron, CalDive, Canrig Haven Oil and Edison Chouest) to see if they would assist in a buyout of the Arnlea interest, not least because if there was a buyout of the Arnlea interest that would establish a value for their own 25% shareholding. They made no secret of it. Mr Taylor said in the Manchester Proceedings that it was spoken of in April 2004: one of the possible funders whom Mr Emmett approached (Cameron) later asked Mr Green if BSW was still for sale. Chouest showed interest: but the price Mr Suttie had demanded of Mr Emmett presented a problem.

104. According to Mr Emmett’s evidence it was not until the end of May that one of Chouest’s consultants said “Why buy him out? Why not set up again?” Mr Emmett said that this took him by surprise, because he had not thought of that course of action.
105. Save as to the date of the change in strategy (as to which I have doubts) I regard this general account, given in an open and frank manner and with real conviction, as entirely credible. I consider that in February 2004 Mr Emmett did cling to the belief that he could buy his company back again. I do not believe Mr Suttie when he says he was simply not interested in selling (for a reason that will become apparent later in the narrative). I consider that Mr Emmett’s evidence that some change in strategy occurred in May to be supported by subsequent events (as I shall record later in the narrative). I do not consider that this account is seriously undermined either by Mr Emmett’s answers in the Manchester Proceedings (which fail to specify which particular “venture” – joint venture buyout/joint venture competing company/independent competing company - is being talked about) or by the fact that when Balltec was subsequently incorporated Mr Emmett apparently claimed some of his February expenses as proper “pre-incorporation expenses” of Balltec.
106. Mr Emmett returned from the USA at the end of February 2004. Then followed his meeting with Mr Suttie on the 3 March 2004, the board meeting when Mr Suttie exercised his voting power to approve the accounts, Mr Suttie’s letter of the 4 March 2004 which treated Mr Emmett as having “terminated” his employment and the two letters from BSW’s solicitors telling Mr Emmett that he had no authority to be or any other legal interest in being on the company’s premises, and banning him from purporting to conduct business on BSW’s behalf.
107. In March and again in May Mr Emmett and Mr Brown visited the US again. I consider it likely that the initial visits were again concerned with an attempt to buy back BSW. BSW was, after all, Mr Emmett’s company, and he felt that he was being excluded from it by Mr Suttie. He still held shares in it (as did Mr Brown). His natural reaction would have been to try and get back that which had been his and in which he still had a minority interest, rather than to abandon it and seek to start again. I think it likely (as Mr Emmett asserted) that he believed his own shareholding in BSW had real value (in the light of Mr Suttie’s demand for £6 million for Arnlea’s 75.1%).

108. Mr Emmett says that it was towards the end of May that Chouest suggested that an alternative to a “buy back” would be the establishment of a new competing business. I have accepted this general account of events. But I consider that it was in mid May that the proposal to establish a competing business emerged. That was why Mr Emmett and Mr Brown took advice from MMS on about 14 May 2004 “concerning a new business and the impact of the new business upon the agreement with Arnlea Plc”, and why MMS recorded as their instructions that Mr Emmett and Mr Brown were “considering setting up a business in the USA (with funding from an interested US company)” which business would be “in direct competition with BSW”. Mr Emmett was reluctant in cross-examination to accept that the proposal had emerged that early. But he is simply wrong about that. Having an idea and seeking advice as to how far that idea might be lawfully pursued does not amount to a conspiracy to injure by unlawful means. As Mr Emmett put it in cross-examination, “thinking is not doing”. He and Mr Brown were “looking at all the boundaries before we [took] the decision”.

109. At the end of May Mr Emmett held his birthday party. In the Manchester Proceedings it was submitted *on Mr Emmett’s behalf*:-

“The suggestion that [Mr Emmett] and [Mr Brown] might compete with BSW and the fact that [they] had identified the Technip Dalia project as one they wanted to pursue explains why the possibility of a new venture was discussed at [Mr Emmett’s] birthday party in late May”.

BSW argued that this submission must have been made on instructions given closer to the events in question than the present trial and is likely to be accurate. I agree. The possibility of a new venture was discussed.

110. The party was attended by (amongst others) Mr Benson and Mr Bacon. When he was cross-examined in Manchester Proceedings Mr Emmett accepted that he had some discussions with “key employees” before the 10 June: and he accepted that, “whether through a nod a wink or words used”, he understood that Mr Taylor and Mr Benson had given indications that they were prepared “to jump ship”. But in my judgment all this still lay in the realms of “What if...”. Taking the evidence of the Manchester Proceedings as a whole, it seems clear that a competing business was an alternative under consideration and was not a settled plan.

111. Mr Benson’s evidence before me (when asked to comment on some evidence that had been given by Mr Taylor in the Manchester Proceedings) was that until Mr Benson left BSW’s office in June 2004 there were discussions about how to buy back BSW from Arnlea, so as to get the company back to where it had been but with Mr Suttie and Arnlea out of the picture. I form the same view on the evidence I received.

112. Mr Bacon’s evidence before me was also that at the birthday party there was general discussion about a possible buyout or a new business; and whilst he accepted that a new business in competition with BSW was discussed, that was but one of several ideas and had “not been decided upon in any way shape or form”. This differed slightly from the written evidence which he had given in the Manchester Proceedings, which was to the effect that in May 2004 he had been told by Mr Emmett that he and Mr Brown were going to start up a new business, and that the discussion had started at the time of Mr Emmett’s 60th birthday.

It differed more significantly from an answer given in cross-examination in the Manchester Proceedings:-

“Q: In any event we know that you were told in May 2004 when Mr Emmett and Mr Brown was setting up a new company?”

A: That’s correct; I was at Mr Emmett’s birthday party”

Mr Marshall QC argued that this written evidence and answer in cross-examination was significantly different and was closer to the events in question so that I should reject Mr Bacon’s evidence given before me and treat his evidence in the Manchester Proceedings as an admission that a firm decision to establish a competing company had already been taken by the time of Mr Emmett’s birthday.

113. The evidence given before me was entirely credible and was consistent with other evidence, and with the tenor of Mr Bacon’s written evidence in the Manchester Proceedings. These are more weighty considerations than a single answer given in the Manchester Proceedings assenting to a proposition that did not capture the nuances of Mr Bacon’s written evidence and proceeded on the assumption of a skewed chronology. I accept Mr Bacon’s evidence before me. At Mr Emmett’s birthday party the establishment of a competing company (if it was lawful so to do) was a possibility under discussion but in respect of which no firm decision had then been taken.
114. This finding accords with the probabilities. First, although Mr Emmett and Mr Brown had first sought legal advice from MMS in mid May, they had yet to receive it. It is unlikely that they would decide to establish a competing company or make any agreement or undertake any concerted action until they had received the advice they had sought. Second, the “new venture” cannot have had a coherent shape at that stage, since it had only recently been proposed, and in its tentative form contemplated that any joint venture between Chouest and Mr Emmett/Mr Brown would be based in Louisiana (with Mr Emmett’s and Mr Brown’s interest in the joint venture being held by an English company): that had implications for Mr Emmett personally and for those to whom he might want to offer the opportunity of employment. No firm decision could be taken until those matters had been addressed.
115. After the Chouest joint venture proposal in May Mr Emmett and Mr Brown began seriously to consider this as a possibility. Mr Emmett was not keen upon participating in any joint venture based in the United States. Further, he immediately realised that if a competing business were to be established then it would have to avoid infringing any of BSW’s patented features. To that end preliminary advice was sought from a patent lawyer based in Baton Rouge. The advice was not received for months. Both Mr Brown and Mr Emmett arranged to attend an Offshore Technology Conference in Houston (that was also being attended by BSW). They were plainly not attending as directors of BSW, but for some purposes of their own. In the course of a 9 hour drive to Houston they discussed how they might “reinvent” the ball engagement tools. They took as their objective the creation of a new and unique configuration for a range of products that would render those then on offer from BSW obsolete. They tossed ideas around and identified some design improvements that would make the connectors easier to manufacture utilising fewer raw materials. They thought they had created the basis for a new design (in that they identified techniques or concepts which might be capable of development): but they did not achieve anything like a “design” that was capable of implementation.

116. By early June Mr Brown had established that there were potential customers who might be interested in dealing with them if a new venture was established. Who they were and how they were approached is not addressed in the evidence. Mr Brown sought the advice of MMS as to whether any restrictive covenants that still bound him might prevent him from talking to those potential customers, because he needed to advance discussions with those people in order to take things forward (by which I understand him to mean taking forward the idea of establishing a new venture). The very seeking of this advice demonstrates, in my view, that Mr Brown and Mr Emmett did not want to do anything that was unlawful.
117. Before that advice had been received Mr Emmett met with Mr Halstead at “The Phantom Winger” on 10 June 2004. It was Mr Halstead’s evidence that during this meeting Mr Emmett and Mr Brown “declared that they intended to form a new company in competition with BSW” and enquired whether he would like to join them. Mr Halstead’s evidence was that although there would be significant risks involved, he decided to accept their offer to form a new company and informed Mr Emmett and Mr Brown of this decision during the week commencing 14 June 2004. Mr Marshall QC submitted that this account was “largely unchallenged...at least in terms of substance”. But Mr Cavender QC did put to Mr Halstead a passage in his own evidence to this effect:-

“Mr Emmett and Mr Brown also advised me that they had for some months been investigating various options which included trying to acquire investment to either buy back BSW or fund other options, but in any event they had not been successful”.

He suggested to Mr Halstead that this was a fairer summary of Mr Emmett’s attitude at the meeting at “The Phantom Winger”. Mr Halstead did not agree, though he did concede that the possibility of a joint venture of Chouest was still there, and that matters “were not set in stone”. It is noteworthy that in the Manchester Proceedings in a statement of case signed by Mr Benson on 17 March 2009 Balltec’s case on 10 June 2004 meeting was put in these terms:-

“At that stage Mr Emmett and Mr Brown wanted to bid for the Technip Dalia project and were looking for a manufacturer. They knew that [Mr Halstead] had fallen out with BSW and that [his company] needed to find a new customer. They also knew that [his company] had the equipment and experience to manufacture the goods that they wished to supply....The purpose of the meeting was for Mr Emmett and Mr Brown to discuss with Mr Halstead.....whether [they] could secure [his company’s services] as a manufacturer and supplier....Mr Emmett and Mr Brown told Mr Halstead that they were considering setting up a new venture and asked Mr Halstead if he would be interested in manufacturing goods for them. There was no question of Mr Halstead joining in the formation of the new company or being involved as a shareholder (at that stage Mr Brown and Mr Emmett had not decided that they would set up a new company and no such decision was made until on or after 14th July 2004)”

In his evidence in these proceedings Mr Emmett accepted that in early July 2004 he was in discussions with Mr Halstead about cooperating in a joint venture; and, in particular, whether he would be manufacturer for that venture. It is clear from the documents that by

the 2 July 2004 Mr Emmett was able to assure Technip that the manufacturing would be undertaken by Mr Halstead's company. So any discussion must have preceded that date.

118. I regard the case pleaded by Balltec in the Manchester Proceedings as broadly correct, and Mr Halstead's oral evidence in the present proceedings more accurate than his written evidence in the Manchester Proceedings. I regard it as unlikely that on the 10 June 2004 Mr Emmett told Mr Halstead that he and Mr Brown intended to form a new company and asked if Mr Halstead would like to join them. First, the joint venture with Chouest (either as a buy-out or as a competing venture) was still a possibility: an independent company was not certain and Mr Emmett had no power to offer to Mr Halstead participation in any joint venture. Second, they had, on the 10 June 2004, not yet received the advice from MMS as to what they could lawfully do. I do not doubt that there were exploratory discussions on a "what if" basis. Nor do I have any real doubt that what impelled these exploratory talks was the fact that Mr Emmett and Mr Brown had picked up the fact that the Dalia contract was now on offer and that they would need to move quickly if they were told that it was lawful for them to pursue it (or if they decided to pursue it in the teeth of legal advice). Moreover, it seems to me highly likely that one possibility being canvassed with Mr Halstead was the joint venture with Chouest to form a competing company, and that this would have prompted the enquiry whether Mr Halstead would manufacture for such a venture (for without his participation there would be no point in pursuing the Technip order or any other potential customer immediately, for Mr Emmett had no available alternative manufacturing capability).
119. I regard this analysis as confirmed by what happened when MMS gave their advice on 16 June 2004. Although directed to Mr Brown it was copied to Mr Emmett. MMS noted that Mr Emmett and Mr Brown were "considering setting up a business in the USA (with funding from an interested US company)". The business would be in direct competition with BSW: and might involve enticing employees away from BSW. The advice sought related to the likely consequences in the light of the employment contracts and the Shareholder Agreement. The letter of advice concluded with the following analysis:-
- a) Setting up a business in competition with BSW was likely to contravene the restrictive covenants contained in the employment contracts and the Shareholder Agreement:
 - b) The employment restrictive covenants were dubious:
 - c) Mr Emmett could avoid the application of both the employment and the shareholder covenants because of the default in relation to the Loan Notes:
 - d) If Mr Brown could establish that he was unfairly dismissed he could avoid the application of the restrictive covenants in his employment contract, but not in the shareholder agreement:
 - e) There was nothing to prevent Mr Emmett from setting up in business in competition with BSW provided that he did not infringe any intellectual property rights belonging to BSW.

When this advice was received neither Mr Brown nor Mr Emmett contacted MMS to say that things had moved on, that they had decided to establish their own company and to

abandon the joint venture with Chouest and that, in fact, less than a week earlier they had offered Mr Halstead an interest in the new business and he had within the last couple of days indicated that he wished to take it. What *did* happen was that Mr Brown picked up a reference in the letter of advice to the possibility of “a hostile takeover” i.e. himself and Mr Emmett buying out Arnlea and he expressed interest in pursuing that and arranging a meeting to that end. Mr Emmett and Mr Brown paid MMS to consider (on 18 June 2004) how they might acquire Arnlea’s shares. In my judgment it is improbable that they would have done that if they had already decided to set up a new company and had already offered Mr Halstead a share in it and he had already accepted the offer.

120. Mr Marshall QC sought to press the point that since Mr Suttie’s brusque rejection of Mr Emmett’s “earn out” proposal there was simply no prospect that Arnlea would be willing to dispose of its shareholding; and that Mr Emmett knew this. But on the evidence this will not do.
121. There is compelling material to suggest that in June 2004 Mr Suttie was in contact with corporate finance advisors in relation to a disposal by Arnlea of its shareholding in BSW. Mr Suttie enquired how this had got into the trial bundle, and was plainly discomfited by its presence. He said that he had forgotten about the incident and that it was really just “a discussion over coffee”. But the relevant documents record “recent meetings” in connection with BSW, the provision of information by BSW to Simmons & Company International Ltd, (including the 2004/2005 financial projections), note that there were issues to be resolved with the former managers who remained stakeholders, record awareness of the employment tribunal proceedings involving Mr Brown, and anticipate the delivery by BSW of a consultancy report (I think probably that by Mr Manson) and a draft business plan. There had also plainly been discussions about a fee structure in relation to an anticipated sale at up to £6m. When Mr Suttie said that this was simply Simmons & Company International Ltd trying to create an interest in a sale over a cup of coffee whereas he was “nowhere near selling” he is not telling the truth. In my judgment the evidence was a lie and not a misrecollection. It is true that the share sale proposal was not carried through. But the likelihood is that Mr Suttie would have sold *even in June 2004* if Mr Emmett and Mr Brown could (with the aid of joint venture funding) have come up with the money, and Mr Suttie could have achieved his exit without incurring fees to Simmons & Company International Ltd.
122. On the 17 June 2004 Mr Brown was in France, together with Mr Emmett and Mr Halstead. I find that they went there to collect the bid documents for the Dalia contract in order to be in a position to move quickly if the “hostile takeover” in which Mr Brown was interested failed and the “competing business” (be that a joint venture with Chouest or an independent venture) came into being. They obtained an extension of the bid closing date until 2 July.
123. At the end of June both Mr Brown and Mr Emmett visited Chouest in the United States. Although they were still exploring the possibility of a “hostile takeover” I consider it likely that the focus of their visit was not to solicit support from Chouest for a takeover of BSW, but rather to explore further a joint venture to undertake a competing business. There is no evidence that Chouest was prepared to reconsider its provisional view that a buyout was an expensive way to acquire a business like BSW, and that it would be cheaper and cleaner (subject to not infringing BSW’s intellectual property rights) to establish fresh business.

124. On the 1 July 2004 Mr Brown and Mr Emmett received further advice from MMS as to how they might acquire Arnlea's shareholding in BSW. The nature of the advice to Mr Brown (copied to Mr Emmett) need not be recorded. But the writer took the opportunity:-

"..simply [to] remind you that it is likely that Robert Emmett would be able to conduct business in competition with BSW (subject to the comments made below concerning infringement of intellectual property rights). However you [Mr Brown] would be unable to be associated with such a business for a period of two years from the date of termination of your employment, resignation of your directorship or sale of your shares..."

MMS went on to advise Mr Brown:-

"To limit your exposure to litigation, it would be advisable to resign as a director of BSW (indeed, you will be in breach of your fiduciary duties to BSW if you continue to hold a directorship, whilst operating in competition with BSW) and to dispose of your shareholding as soon as possible".

The letter concluded:-

"I should remind you that your current activities in connection with seeking to secure business in competition with BSW are likely to amount to a breach of your fiduciary duties as a director of BSW, a breach of your restrictive covenants and possibly also an infringement of BSW's intellectual property rights".

125. Also on about 1 July Mr Emmett and Mr Halstead met at The Station Inn Oxenholme. Mr Halstead pleaded in the Manchester Proceedings (and supported by his evidence in those proceedings, and repeated in these) that this meeting was to discuss potential design and patent issues in relation to products to be manufactured by the proposed new company. I accept the general tenor of this evidence, though not its fine detail. First, if by the use of the term "the proposed new company" Mr Halstead is suggesting that that was a settled course, I do not accept that. In cross-examination in these proceedings Mr Halstead accepted that a separate new company was "an option", but was not "cast in stone": though he did insist that (from his perspective) a competing company was all that was on the table. That is understandable since, if there was a buyout, the question of his having to choose between BSW and the new competitor would not arise: and he was only being sounded out as to what he would do if that choice had to be made. Second, the inherent probabilities suggest that it is much more likely that the focus of the conversation was how to deal with the imminent Dalia project bid (which required a production schedule) rather than the general product range of any intended new company.
126. On the 2 July 2004 Mr Emmett completed and returned to Technip some of its bid documents (in particular a schedule of prices and a production schedule). He told Technip:-

"We are in the process of setting up the new joint venture company but as yet it is not formally in place. We anticipate it will be a further 4 weeks before we will be formally trading..."

we are naturally anxious to maintain a bidding position with Technip and will do our utmost to expedite all formalities”.

127. In my judgment it is clear that there is at this point a combination between Mr Emmett and Mr Brown aimed at competing directly with BSW. (I say “at this point”: but that conveys a specious accuracy. The submission of the bid is the event that I can confidently view as action taken in concert or from which I can confidently infer agreement or understanding upon a planned course of action. The understanding or agreement may have been reached a short while earlier since the bid would have required some preparation). The establishment of “a bidding position” can only have taken place pursuant to an agreement between Mr Emmett and Mr Brown, or alternatively it is itself an act done in concert: and realistically this can only have arisen out of discussions with Mr Halstead. (I should note in passing that in my judgment neither Mr Emmett nor Mr Brown had an exact design for the subsea connector that they were proposing to supply to Technip for the Dalia project).
128. Mr Marshall QC urged that it was “incredible” to suggest that a conspiracy to embark upon competitive activity was only concluded on or shortly before 2 July 2004. He urged the following:-
- a) Mr Emmett had had contact with Technip about the Dalia bid in June and had persuaded Technip to extend the deadline for the submission of tenders. This did occur. But like the discussions with Chouest and the discussions with Mr Halstead I think it is equally consistent with exploring and preserving options (where that exploration did not of itself damage BSW’s interests) as with pursuing a settled, agreed and concerted course of action to achieve a common end.
 - b) On 22 June 2004 Mr Emmett had signed a confidentiality agreement with Chouest under which he had expressed himself willing to disclose “certain technology, information and devices owned by Robert Emmett”. This (together with the fact that something was to be considered by US patent lawyers) demonstrates, according to this submission, that there were already patentable designs in existence. The inference that there were already patentable designs in existence is contradicted by other material: whilst I am satisfied that there were some “bright ideas” which might or might not turn out to be workable, there was nothing approaching a coherent concept or a design.
 - c) Mr Halstead gave evidence that “on or around the 1 July” he met with Mr Emmett and Mr Brown at The Station Inn at Oxenholme, and that the purpose of the meeting was to discuss the design and patent issues in relation to the new products to be manufactured by the proposed new company. Mr Marshall QC submitted that this evidence was not challenged. I have accepted that such a meeting probably occurred, but found that it was more probable that the subject of the discussion was the specifics of the Dalia project bid than a general discussion about the

design features of a new product range. There was acceptance that the prospect of a “buyout” had almost gone, and that a competing company (either a joint venture or independent) was the likely way forward and for that reason the Dalia project bid had to be put together. There was agreement to make that bid.

129. On 5 July 2004 Mr Brown and Mr Emmett took further advice from MMS. They understood that they could not infringe any of BSW’s patents: and they understood that they could not use BSW’s drawings, though it might be possible to undertake reverse engineering. Mr Brown disclosed that they had already put in a price for the Dalia bid against BSW. Mr Brown and Mr Emmett asked if they needed to resign as directors and shareholders. MMS advised that the covenants probably caused no problem for Mr Emmett, and that he could continue to be a director and shareholder “but there may be problems concerning his fiduciary duties as a director”, and that further research would be undertaken. Mr Brown and Mr Emmett asked if the manner in which the company was being handled (and the fact that they could not resign without offering their shares for sale) had any impact upon their fiduciary duties. The solicitor said that he would investigate this issue as well (and did so on 8 July 2004). Mr Emmett then stated that if his shares were worthless, there was no real benefit gained by keeping them, and that he might as well resign and sell his shares rather than run the risk of being in breach of fiduciary duty. Mr Brown and Mr Emmett then asked whether there was any problem over the solicitation of employees. The solicitor advised that the relevant covenants were broadly worded but that there might be a question over whether the covenants would be enforceable (on the grounds that they were not necessary to preserve the legitimate business interests of BSW). At trial, Mr Emmett’s comment on this advice was that it was a bit late to warn him of breach of fiduciary duty on the 5 July when he understood that he had been given the “all clear” on 16 June. It is notable that even at this stage Mr Brown still wanted to discuss how to make an offer to Mr Suttie.
130. On 7 July 2004 Mr Brown informed Chouest that he and Mr Emmett had submitted a price and delivery schedule for the Dalia project “strictly in our own right (i.e. Bob and I) simply to keep the door open”.
131. On the 8 July 2004 MMS:-
- a) Advised Mr Brown that in relation to the issue of fiduciary duties it would seem that if Mr Emmett were to seek to enter into business in competition with BSW then he would be in clear breach of his fiduciary duties (and it is probable that this advice was conveyed to Mr Emmett):
 - b) Were instructed by Mr Brown to examine “if he [did] not get involved with the new company [whether there was] any reason for him not to be a shareholder”: and
 - c) Were asked by Mr Brown whether “if they are going to set up the new company” MMS would be able to help with this.

From this it is clear that no final decision had been taken that Mr Emmett was to establish a British company, or what form it would take.

132. Between 7 and 9 July Mr Emmett visited Mr Bacon in France. I shall have to examine what then occurred. But Mr Bacon produced timesheets which included a heading “Dalia Bid” and recorded 34 hour’s work between 6 and 9 July 2004.
133. On 13 July 2004 Mr Brown sent an email to Chouest containing an outline development proposal for the joint venture. This provoked the response on the following day:-

“Edison Chouest Offshore has elected not to go forward with this project”.

I find that it was upon receipt of that email that Mr Emmett and Mr Brown finally decided that they intended to form a new company themselves. This was the evidence of Mr Emmett, which I accept. It was supported by the evidence of Mr Benson.

134. Mr Emmett placed great emphasis upon the 14 July 2004 as the watershed. But for me the significant date is 2 July 2004 being the date upon which he commenced competitive activity against BSW. The precise means by which he intended to conduct that competitive activity (whether through a joint venture with Chouest, or through a newly formed independent company) is not material.
135. Shortly thereafter there was a meeting between Mr Emmett, Mr Brown and Mr Halstead to discuss (amongst other things) the preparation for the full Dalia bid. Mr Halstead says that he prepared some notes on the evening of the 13 July 2004 and “subsequently” took those notes to this meeting. In the Manchester Proceedings it was accepted by Mr Halstead’s Counsel that Mr Halstead had not produced the document itself at the meeting, that it did not constitute an agenda for the meeting and that it served as an aide memoire for Mr Halstead. I accept that the document was created on 13 July 2004: but I do not think that it is safe to draw any firm conclusion as to its then terms. It was obviously subsequently modified: for example the note records:-

“Willis enlightened Bob of contact by BSW with regards to Constitution 16/7/04”.

Further, I think it plainly records what happened at the subsequent meeting on 19 July 2004.

136. It is this document that includes as one of the “issues to be addressed asap”:-

“Basic review of connector design, specific areas to be addressed, single spring and secondary locking mechanism, use of non pocket slot, ball cage and ball retention, and specific idea of retractable receptacle (*sic*) cone. In general all ideas thrown into melting pot!”

It is clear that there was no settled design (patentable or otherwise): and that the Dalia bid had been put in on the footing that by the time that detailed drawings had to be submitted the new company would have produced something that did not infringe BSW’s intellectual property rights. It also records as one of the matters under discussion whether Mr Emmett was to resign with immediate effect to allow the formation of a new company. This was one of the matters that would have needed consideration in the context of establishing the new company. But in fact the decision to establish Balltec was taken before the relevant

advice was received from MMS on the 16 July 2004. That advice was in these terms (given to Mr Brown and copied to Mr Emmett):-

“Every directorship carries with its certain fiduciary duties. These duties effectively mean that you must act in the best interests of the company at all times. You must not place yourself in a position which would create a conflict between these duties and your own personal interest. Setting up, or assisting in any way, a company in competition with BSW would therefore be a flagrant breach of those duties. The ramifications for a breach could be an action for interdict, damages and/or your removal from the board”.

The letter went on to note that resignation as a director would trigger an offering of that director’s shareholding at a discounted rate. (Incidentally this letter of advice also dealt with the question of solicitation of other employees of BSW by Mr Emmett and Mr Brown. The letter said that there was nothing to stop Mr Emmett from soliciting employees after his resignation as a director, though Mr Brown would remain bound by the terms of his shareholder agreement and his own fiduciary duties): however the letter went on to refer to the restrictive covenants in the employment contracts of each employee likely to be solicited (though it suggested there was a doubt over enforceability)). This letter was the first occasion on which it was clearly explained to Mr Emmett what his duties were.

137. On the 19 July 2004 Mr Emmett submitted drawings for work in connection with the Kizomba Oilfield. These bore the legend “Balltec” and said that the copyright in the drawing was the property of Balltec. The accompanying quotations said that all Balltec components would be fully compatible and interchangeable with BSW supplied equipment. In fact the delivery proposal stated:-

“BSW (*sic*) can deliver all units listed above in 6 weeks ex-works.”

I do not think that it can be inferred simply from that error that the author of the proposal was modifying some underlying BSW document that contained BSW’s quotation and had forgotten to change “BSW” to “Balltec” in that instance. But if (as I think likely) the document was prepared by Mr Brown, then it would replicate an error he had made elsewhere.

138. That same day Mr Emmett sent a further quotation for different equipment to be supplied to the Kizomba Oilfield.
139. On the 20 July 2004 Mr Emmett resigned as a director of BSW.
140. On the 22 July 2004 Mr Emmett sent Technip a quotation for some pipeline insertion tools and a multipurpose lifting tool for use on the Simian/Sapphire development. He solicited the order within the next 7 days. Although the quotation (like those for Kizomba) was in the name of “Balltec” the company itself was not incorporated until the following day (23 July). This quotation resulted from contact made by Mr Vincent of Technip, who knew of Mr Emmett’s connection with BSW but not of his departure from that company or of the proposed establishment of Balltec.

141. On 27 July 2004 Mr Emmett sent to Technip further documentation in relation to the Dalia bid. The information included 2 drawings (515650 and 515651). I am satisfied these drawings were commenced by Mr Bacon on about 8 July 2004 and probably completed on 9 July 2004. These drawings did not display any new concept in relation to the “ball and taper” mechanism. They were simply “layout” drawings which gave an idea of what a mooring connector would look like if it did not have pockets. Where the secondary lock might be was simply a shaded box. How the “ballgrab” technology actually worked was not depicted. As is absolutely clear from a technical meeting held on 7 September they did not even depict the correct dimensions of the product (“Size of connector on drawing is considered as maximum size. The new design of connector should be more compact”).
142. On 30 July 2004 there was a meeting between Mr Emmett, Mr Brown, Mr Bacon, Mr Halstead, Mr Taylor and others. BSW had put in a patent application for a secondary lock: the detail does not matter, but the key point is that the secondary lock was effected by means of the ballcage. Balltec had to produce something for Technip’s Dalia Project that did not infringe BSW’s continuing valid patents or that for which it had applied. Mr Emmett says the 30 July meeting was to discuss the production of a better, more practical mooring connector. Mr Halstead says that the 30 July meeting was to discuss work for a client called Geoprober Ltd (who incidentally were also exploring a variation of the BSW design by using a split ball-cage). I think there is truth in both partial recollections. But it is common ground that at that meeting Mr Halstead made the passing comment (“at a high level”) that it should be possible to achieve a secondary lock by connecting the mandrel to the receptacle directly (just like the primary lock), and that he drew a few lines on a piece of paper to illustrate a very basic concept. The idea itself was very simple. The clever bit would be incorporating the idea in a design that worked.
143. On 4 August 2004 Mr Bacon produced a layout drawing (“515668”) which encapsulated Mr Halstead’s idea in that it showed a secondary lock that locked the mandrel to the receptacle directly, using a taper on the mandrel and springing the ball upwards. This document shows a file creation date of 19 June 2004; and in his evidence in the Manchester Proceedings Mr Bacon said that the *drawing* had been created on that date. Mr Emmett insisted, in the Manchester Proceedings, that Mr Bacon was wrong and was confused with the dates and that the idea for the new secondary locking mechanism did not occur until after Mr Emmett had ceased to be a director of BSW. Typical passages from Mr Emmett’s cross-examination are these:-

“Q: So Mr Bacon’s evidence certainly is that the first design that is drawn up to show the backwards locking mechanism...was 19 June at 9:48 and he says the file actually has a stamp on it. Now, on what basis do you say he is incorrect about that?”

A: He is wrong with that date definitely.

Q: But how can he be wrong? He has gone and looked at the actual file.

A: I know he is wrong because we did not design that backwards lock until we were well into forming the new company. Roger has got his dates wrong or he has got something wrong there, that is it.

Q: He is the author of the document and he has gone and checked, and he is able to tell us exactly what the date of it is and the time.

A: I am sorry, but it did not get designed until we had formed the new company... We started work in July not June... I stick to what I said. We did not do any design until July..."

144. Mr Emmett said the same in the present proceedings: and he is right. Mr Bacon cannot have drawn a layout plan encapsulating Mr Halstead's concept until after Mr Halstead had articulated his idea. It is common ground that the idea was first voiced on 30 July 2004, after Mr Emmett's resignation and after the incorporation of Balltec. I shall leave this part of the narrative now: but noting that Mr Bacon's layout drawing could not work in engineering terms since the secondary lock required a "T-bar" to hold the secondary locking ball against its spring, which prevented the mandrel from being guided into the receptacle. As I said above: the idea was simple – the clever bit was incorporating it into a design that worked. This was something that Balltec never worked out for the Dalia Project bid. In early August 2004 Technip sent to Balltec a request that Balltec explain how their technology differed from the existing BSW technology: Balltec could never (and never did) answer Technip's question because they could not turn their novel idea in its then state into a workable model.
145. With Balltec formed and (according to the judgment in the Manchester Proceedings) agreement having been reached on 23 July 2004 that Mr Hallstead should be entitled to 50% of the equity, and with a competing quotation out in the Dalia Project bid, and quotations issued in respect of other work for which BSW was anticipating quoting, it is appropriate to pause at this point in the narrative and to record that on the foregoing material I find and hold that from the end of June there was between Mr Emmett and Mr Brown (and also for completeness, Mr Halstead) an agreement or plan to undertake concerted action namely to form a business to enter the subsea moorings and recovery tool market as a competitor to BSW. This was of itself not wrongful.
146. I now focus upon the mental element of the tort: the conspiracy to injure.
147. A conspiracy to compete is not necessarily a conspiracy to injure. Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. Far from prohibiting such conduct the common law seeks to encourage and protect it, recognising the economic advantages of competition. A conspiracy to injure must involve an intention to bring about what the law will regard as "an injury" by doing something that the civil or (in some cases) the criminal law does not allow.
148. As regards the necessity for "intention", it is important to underline that the requisite intention does not (in this branch of the tort) have to be a *predominant* intention: but *an* intention to harm must be proved. I accept as my guiding principle what was said by Lord Nicholls in OBG Ltd v Allan [2008] 1 AC 1 at paragraphs [164]-[167] about the "unlawful interference" tort:-

"A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a

defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests ... Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way ... Lesser states of mind do not suffice. A high degree of blameworthiness is called for because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant.Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort”.

149. As regards the necessity for an intention *to harm* i.e. to cause injury by doing something that the civil or criminal law does not allow there was an issue between the parties. Counsel for BSW submitted that a party to the conspiracy need not understand the legal effect of it: but he or she must know the facts on the basis of which the agreed or concerted act is unlawful. They relied on two cases.
150. Belmont Finance v Williams Furniture [1980] 1All ER 393 was a case that concerned an agreement to buy and sell shares which was carried into effect in an unlawful way, the defendants knowing the manner in which it was to be carried into effect, but not appreciating that that manner adopted an unlawful means. Buckley LJ held at p404:-

“In my judgment the alleged conspiracy is established in respect of these three defendants, and they are not exempt from liability on account of counsel's opinion or because they may have believed in good faith that the transaction did not transgress section 54. If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them.... Nor in my opinion can the fact that their ignorance of, or failure to appreciate, the unlawful nature of the transaction was due to the unfortunate fact that they were, as I think, erroneously advised, excuse them ...”

The other members of the Court agreed with this formulation.

151. In British Midland Tool v Midland International Tooling [2003] 2 BCLC 523 at 556 Hart J held:-

“I am satisfied that the Tamworth 4 did not, when deciding upon the elements of the plan so far outlined, agree to use unlawful means in its implementation in the sense that I am satisfied that the means which they decided upon were not known by them to be unlawful. On the contrary they took legal advice in order to be able to understand where the borderline lay between lawful and unlawful conduct, and my conclusion is that they were collectively determined to follow that advice. My findings as to the solicitation of key personnel ... mean that they lapsed from the standard which they set themselves. Whether such lapses suffice to change a lawful combination into an actionable conspiracy may be arguable. The real question is as to the causative potency of the particular unlawful acts in the context of the implementation of the overall plan. If the implementation of the plan necessarily involved the commission of unlawful acts then the damage suffered as a result of the implementation of the plan is recoverable as damages for unlawful means conspiracy. If it did not necessarily involve those acts, but such acts were in fact carried out in the course of implementing what would otherwise have been a lawful (albeit damage causing) plan the question arises whether the whole of the damage suffered is properly attributable to what may have been purely incidental unlawful acts; and there may also be an issue as to the extent to which all parties to the otherwise lawful plan are to be treated as parties to such incidental unlawful acts.”

152. Counsel for Mr Emmett submit that the observations in Belmont are directed to a case of conspiracy to injure (not a case of conspiracy to injure by unlawful means) and that the observations of Hart J in the Midlands Tool Case can no longer be taken as an accurate statement of the law having regard to the decision of the Court of Appeal in Meretz Investments v ACP [2007] EWCA Civ 1303.
153. That case concerned a complicated development agreement which included a right for one of the claimants (Britel) to require a leaseback of part of the development site if it had not been developed by ACP in accordance with an agreed timetable. ACP's parent company funded the development. The parent company sold the development site as mortgagee. The parties took the view that that prevented ACP from granting a leaseback. ACP, its parent company and others were accused of conspiracy to cause harm to the claimants by unlawful means. The defendants established that they had a firm belief, based on legal advice that they had received, that the rights of Britel under the leaseback option would be overreached by an exercise of the power of sale by the mortgagee. The claimants cited Belmont to the Court. The Court of Appeal held that the tort of conspiracy by unlawful means required an intention to cause loss by unlawful means, and it followed from the judge's findings of fact that there was no such intention, because all the defendants intended to do was to produce a result which they believed they were entitled to produce.
154. At paragraph [146] Arden LJ held:-
- “The OBG Case did not concern liability for conspiracy but no counsel suggested that any distinction could be drawn between what was held in the OBG Case about intention to cause loss by

unlawful means and conspiracy. It follows therefore that it is not enough that there is an intention to do an act which in fact causes loss. That act must be done with the intention that it will cause loss. In the present case Mr Hawkins gave advice that the leaseback option would be overreached. That advice was inconsistent with an intention to cause harm to Britel.”

155. Toulson LJ decided the case on the footing that unlawful means were not employed (an alternative ground also relied upon by Arden LJ). But at paragraph [174] he said:-

“Although my conclusion on the issue of unlawful means makes it unnecessary to decide the point, I would support Arden LJ’s view ... that it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did. Just as the tort of conspiracy to induce breach of contract is not committed if the defendant believes that the outcome sought by him will not involve a breach of contract ... so a defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing.”

156. Pill LJ (the third member of the Court) regarded the discussion of the point as “illuminating” but did not decide it.

157. On this state of the authorities I am bound to accept that the law is correctly stated in Belmont. The case is binding on me and is directly in point. Although it is suggested in Meretz that in the light of the decision in OBG the law now stands on a different footing (a conclusion to which I am attracted) those suggestions were clearly *obiter*. Further, Belmont was cited to the House of Lords in OBG (see [2001] 1 AC 1 at 7) but it was not overruled or even commented upon adversely.

158. My findings of fact on this part of the case (bearing in mind that I am at this stage assuming that the competitive means employed were unlawful) are:-

- a) Mr Brown and Mr Emmett did not from the outset have a positive intention to harm BSW because they entertained the hope that they could buy Arnlea out and restore BSW to their ownership;
- b) But in submitting the bids for the Dalia Project, the Kizomba oilfield and the Simian/Sapphire oilfield both Mr Emmett and Mr Brown knew and understood that by seeking to advance their own business in relation to those contracts they would by the very nature of things be “injuring” BSW (the loss to BSW being the obverse side of the coin from the gain to Balltec);
- c) By July 2004 it was “a key plank” in Mr Emmett’s and Mr Brown’s strategy to “take out” BSW (as Mr Emmett acknowledged in the Manchester Proceedings and accepted in these), so that they knew and intended that their success should

be at the direct cost of BSW. As Mr Emmett put it in an e-mail on 29 July 2004 to Technip in connection with the Dalia bid:-

“After 20 years of building BSW and earning an enviable reputation for delivering on promises I am greatly saddened to see the huge changes happening and to receive a rising tide of complaints from staff, suppliers and latterly customers ... Experienced staff continue to depart BSW. They no longer have any design staff. A proud engineering company cannot exist without experienced and talented engineers.”

- d) Whilst they took extensive legal advice as to what it was lawful for them to do Mr Emmett and Mr Brown knew (i) from no later than 23 June 2004 that there was an issue about their obligations as shareholders and directors of BSW; (ii) from 1 July 2004 that they would be in breach of fiduciary duties as directors of BSW if they continued to hold a directorship whilst actually operating in competition with BSW; (iii) from 1 July 2004 that Mr Brown’s then current activities in connection with seeking to secure business in competition with BSW were likely to amount to a breach of fiduciary duty as a director of BSW; (iv) from 5 July 2004 that being a director of BSW whilst competing in business presented potential problems; (v) from 8 July 2004 that entering into a competitive business whilst still a director of BSW would represent a clear breach of fiduciary duty; and having received that advice they did not inform their legal advisers of what in fact they had done or intended to do (submit bids to hold the position against the day when the new business actually started) so as to ensure that their conduct fell the right side of the line.

159. On this material (and on the assumption I am making about the relevant means) I hold that the requisite mental element of the tort of conspiracy to injure by unlawful means is established.

160. I therefore find and hold that from the end of June 2004 Mr Emmett and Mr Brown agreed and acted in concert (“combined”) to establish a competing business by bidding for the Dalia Project, work on the Kizomba oilfield and work on the Simian/Sapphire oilfield intending that their new business should obtain that work and that BSW would be deprived of that work. If the means they used to establish that business and to procure that work were unlawful, and Mr Emmett and Mr Brown knew all the facts which made those acts unlawful, then the tort of conspiracy to injure by unlawful means would be made out.

Did Mr Emmett and Mr Brown conspire with Mr Benson, Mr Bacon, Mr Taylor and others?

161. I can now focus on whether Mr Taylor, Mr Benson and Mr Bacon were co-conspirators. At trial this was glossed over.

162. In approaching this issue I am guided by the following principles:-

- a) I am not confined to looking for positive evidence of meetings between co-conspirators nor am I concerned to find evidence of an express agreement: but I am concerned to look for actions on the part of the alleged conspirator which I can properly infer were, on the balance of probabilities, actions taken pursuant to an express or tacit agreement or as part of a concerted action plan.
 - b) The conspirators need not all join in at the same time nor, indeed, need they have exactly the same aim in mind. The question is always how far a particular defendant was aware of the plan and then “joined in the execution of it”. Put another way, the question is whether a particular Defendant, having regard to his knowledge, utterances and actions, was sufficiently a party to the combination and the common design: see Clerk & Lindsell (*op cit.* at paragraph 24-94).
 - c) It is essential that the alleged co-conspirator should have joined in the implementation of the plan; the mere fact that the alleged co-conspirator may have acted unlawfully is not of itself enough, because the unlawful act may have been a purely incidental one of no causative potency in the context of the implementation of the overall plan.
 - d) Each of the alleged conspirators must have been sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the act complained of.
163. I begin with Mr Taylor. Did he share the objectives of Mr Emmett and Mr Brown and act in tacit agreement with them so as to be a party to the common design? BSW simply submit that “he... was party to the conspiracy”. These are my findings of fact.
164. Mr Taylor was contracted to give evidence for BSW. If he had wanted to admit in this action to participation in a conspiracy with Mr Emmett and Mr Brown, BSW could therefore have procured that he do so. He did not. I am therefore left to make my findings upon such evidence as is available.
165. Mr Taylor was a designer (and an important one) for BSW filling the post of Design and Engineering Manager. He resigned on 29 June 2004 (effective 31 July 2004) i.e. at the very time Mr Emmett and Mr Brown combined to compete with BSW. Mr Emmett acknowledged in evidence (both in the Manchester Proceedings and in the present proceedings) that in and from May 2004 he had held discussions with Mr Taylor and knew from those discussions (by a nod, or a wink, or by words used) that Mr Taylor would be prepared to leave BSW and to work for Mr Emmett. The context of the actual resignation (as spoken of by Mr Green in his contemporaneous report to Mr Suttie) was of Mr Taylor’s disaffection, dissatisfaction and plain disenchantment with the regime at BSW.
166. Mr Taylor told an apparent lie to Mr Green when he resigned. He said that he wanted a complete change and intended to work from home as a contractor on behalf of a Welsh pump company: he denied that he would be working for the competition, saying that he

wanted to get away from mooring connectors. Telling lies is sometimes the badge of consciousness of wrongdoing: but not always. Indeed, Mr Taylor may have been telling the truth: Mr Emmett's evidence was that he thought Mr Taylor had another job lined up. Following notice of this resignation (but whilst still an employee of BSW) Mr Taylor met with Mr Emmett several times. In particular, although his notice period ended on 31 July 2004 Mr Taylor attended the meeting of Mr Emmett, Mr Halstead and Mr Bacon on 30 July 2004.

167. From 11 August 2004 (and possibly from 2 August 2004) he worked through a service company called "Brolly IT.com Ltd" doing drawings for Balltec (in the course of which he accessed Mr Emmett's PC). Sometimes working through a service company can be motivated by a desire to conceal; and sometimes a desire to conceal can show a guilty conscience. But sometimes a service company is used for its well known tax advantages: and sometimes the desire to conceal can be motivated by a desire to avoid trouble even if the actor is convinced they are in the right. Mr Taylor designed the test rig on which Balltec's products were eventually tested: that (not product design) was his speciality.
168. In my judgment the mere fact that Mr Taylor gave notice at the end of June 2004 to leave BSW, and immediately and surreptitiously undertook contract work for Balltec (even of something as important as the test rig) does not make him a co-conspirator so as to be liable for the wrongdoing (if any) of others. I cannot on the available material fairly conclude that Mr Taylor was participating in concerted action as party to a combination, joining in breaches of duty or obligation by Mr Emmett or Mr Brown/Mr Emmett in connection with their plan to obtain the Dalia, Kizomba and Simian/Sapphire contracts. He undoubtedly undertook contract work. But his role was entirely different from the roles undertaken by Mr Brown, Mr Emmett and Mr Halstead.
169. I turn to Mr Benson. BSW submit that Mr Benson was willing to and did assist Mr Brown and Mr Emmett in setting up a competing business from least of May 2004, whilst still an employee of BSW, and after his employment terminated. No particular acts are relied upon.
170. Mr Benson was from March 2003 called "a project co-ordinator"; in effect he was an office administrator (having previously been what he described as "a potwasher") with aspirations to become a project manager (as detailed in the appraisal which I have cited above and regard as accurate). He undertook purchasing of services and materials (getting quotes and raising purchase orders). He resigned on 28 June 2004 with effect from 12 July 2004. The circumstances of his resignation were these. In early 2004 Mr Benson was really miserable at work because what had been happy relationships were disintegrating. He was signed off work in February 2004, but returned. He says that in May 2004 he was offered by Mrs Shuttleworth a redundancy package, but that this offer was withdrawn. In an unchallenged witness statement Mrs Shuttleworth says she has no recollection of the offer. I accept Mr Benson's evidence: particularly because he goes on to say that in retaliation for the withdrawal of the redundancy offer he signed off work again and took his sick pay as a form of compensation for the withdrawn redundancy package (something that does not reflect particularly well on him, but which he openly disclosed). He then resigned when the "sick pay" was about to stop, never having had any intention to return to BSW unless Mr Emmett's buy-back plan (which he was sure was still on the agenda in May 2004) succeeded.
171. He is Mr Emmett's stepson. I have no doubt that at Mr Emmett's birthday party (and on other family occasions) the possibilities for the future were discussed (including the

possibility of a competing joint venture with Chouest and the possibility of a competing independent company). But there is no direct evidence that he participated in the formulation of any strategy or prepared any documents to carry forward the plan, there is nothing in the nature of his qualifications or experience or abilities to suggest that it is inherently probable that he was drawn into the planning process, there is no conduct that properly founds the inference that he was acting pursuant to a concerted action plan or joined in the execution of a conspiracy. He was an observer rather than a participant. His own evidence is that he was not “in the loop” and came on the scene sometime in mid to late July 2004. I accept that evidence. He simply left his old job and then he joined his stepfather’s new business. None of his pre-resignation conduct warrants the inference that he shared the objectives of Mr Emmett and Mr Brown and acted in tacit agreement with them so as to be a party to the common design.

172. It is submitted by Mr Marshall QC that Mr Emmett accepted in cross-examination that he used Mr Benson to assist him whilst Mr Benson was still an employee of BSW. I reject this submission. Mr Marshall directed Mr Emmett’s attention to part of Mr Benson’s witness statement in the Manchester Proceedings: and there followed this exchange:-

“Q: I suggest to you the work he is referring to in paragraph 16 chronologically occurred before his departure from BSW, when he was at home.....

A: No, no, no

Q: Away from work?

A: You will have to ask Mr Benson this. There is no date on this. I’m sure Russell did some work on Dalia after we formed Balltec, but I don’t remember anything being done beforehand.”

Then Mr Emmett was referred to Mr Benson’s cross-examination in the Manchester Proceedings, where the subject is the timing of meeting at Mr Emmett’s house attended by Mr Benson at which the Dalia bid is discussed:-

“Q: Assuming that your [witness] statement follows a broadly chronological stance, that appears to be close to the time when you were told by Mr Emmett that he is intending to set up some sort of new business?

A: Yes, my specific recollection of events around that time is a bit hazy. I was, as I said before, in a bit of a fragile state, having left BSW.....”

Then Mr Emmett was referred to some Manchester answers concerning Mr Benson helping with some kind of QA documentation, after which Mr Emmett’s evidence to me was:-

“If that’s what Mr Benson says in here, and it is true, then I hold my hand up”

This is not in my judgment an acceptance by Mr Emmett that he used Mr Benson whilst Mr Benson was still an employee of BSW. It is an acceptance that Mr Benson worked on the

Dalia bid after the formation of Balltec and after he left BSW. Mr Benson was not a conspirator before he resigned.

173. Following his resignation the first thing that he did was to prepare the quotation for the Simian Sapphire bid on 22 July 2004 from material supplied by Mr Emmett and Mr Brown. The next was to assist on 29 July 2004 in the preparation of a list of quality assurance documents (which documents he had not himself prepared) in connection with the Dalia Project bid. The next was to attend the meeting on 30 July 2004. By that time the Dalia, Kizomba and Simian/Sapphire bids had all gone in and Balltec had been incorporated.
174. In his stepfather's new business he dealt with documentation, undertook purchasing and ran the book-keeping, and undertook haphazard data storage. He admitted to feeling that he had "an axe to grind" and anticipated that the new company could take the fight to BSW: but he felt that Mr Green's aggression towards employees and suppliers and clients would soon lead to the self-destruction of BSW. He knew that Mr Brown could not take a direct role in Balltec's business pending the outcome of the employment tribunal hearing. He (along with others) used concealment and subterfuge in his new position. Mr Benson explained why. He and others knew that there were restrictive covenants: they believed them to be unenforceable. They generally concealed what was going on, not from fear of enforcement, but for fear of the process that they would have to go through if BSW (with its considerable resources) sought to enforce the covenants and before a court eventually held that they were unenforceable. None of them could afford to face that. He said he thought that "deceit" was a strong word: but none of them wanted to be targets.
175. In my judgment it is not right to infer from any of this post-resignation conduct that Mr Benson became a co-conspirator after he resigned. His role was quite different from that of Mr Emmett, Mr Brown or Mr Halstead.
176. I turn to Mr Bacon. Mr Bacon was a freelance draughtsman and designer. His principal client was undoubtedly BSW (in which he held a few shares). But he certainly did not work exclusively for them. He says that in July 2004 he was also working on a sub-sea shut-off system for Geoprober (on the instructions of Mr Bamford), involving their own version of "ball and taper" technology and exploring modifications to the ball-cage on the mandrel for which Mr Halstead was doing the production engineering. BSW submitted that I should reject this evidence because Mr Bamford was not called as a witness, no documents relating to Geoprober were disclosed by Mr Bacon, and no payments from Geoprober can be seen on his bank statements. But I accept Mr Bacon's evidence. There is clear evidence he was working for someone other than BSW and Balltec. On 7 July 2004 Mr Halstead e-mailed Mr Bacon to comment on two drawings which have no apparent connection (and which no-one submitted were connected to) any of the drawings in this action and to discuss methods of ball retention. Mr Bacon said that all this related to the Geoprober project. I see no reason to doubt this. Further it is the evidence of BSW's own witness (Mr Halstead) that Mr Bamford attended the meeting on 30 July 2004 to discuss the Geoprober project with Mr Halstead.
177. In 2004 Mr Bacon's relationship with BSW was becoming strained. I find that he felt that he was being given the unattractive work to do ("ancillaries and minor design tasks") and felt that the "frontline" work was being taken "in-house": and that Mr Green held him in low regard. He heard a rumour that he was to be dispensed with. I have no doubt that these matters were discussed when Mr Emmett and Mr Bacon met, as they did at Mr Emmett's birthday party. Mr Bacon says (and I accept) that at that party Mr Emmett made clear that

although he had parted from BSW he was not ready to retire and was looking at other options, but that there was no discussion as to what those options were, and no invitation to Mr Bacon to be part of them.

178. Mr Halstead gave evidence (that was not challenged) that in the week following 1 July 2004 “around 6 July” he had spoken to Mr Bacon who told him that he had already commenced some design work for the new company. I accept that such an incident may well have occurred; but I do not regard the evidence placing the conversation as “around 6 July” as really secure. Once one abandons fixation upon the date of 19 June as the date of key drawings there is nothing that was actually produced before the drawings begun on 8 July: but I think it probable that Mr Emmett contacted Mr Bacon as soon as the decision was taken to submit the Dalia Project bid (on about 1 July) to warn him his help may be required (since that is the first entry made on the timesheets, albeit not in connection with the Dalia bid or BREM development).
179. Mr Emmett visited Mr Bacon in France between 7 and 9 July 2004. Part of the time was spent socialising: part of the time was spent discussing work. Mr Bacon says that this work discussion did not include any comment that there were outstanding elements of the Dalia Project bid which had to be completed urgently. This strikes me as very improbable; and I think Mr Bacon is wrong. Balltec had submitted the Dalia Project bid without a product to satisfy it. They had to produce a drawing of something to stay in the race. I consider Mr Emmett must have told Mr Bacon what was needed for the Dalia bid and when it was needed.
180. Both Mr Emmett and Mr Bacon say that Mr Bacon was on a general retainer during this month (i.e. Mr Emmett had reserved his time): and at the month end Mr Bacon presented an invoice for £4400, supported by three timesheets. I accept that the actual number of hours charged for on the timesheets may well not be accurate because of the existence of some background retainer. But I find that the titles given to the time sheets may be taken as a reliable indicator of the nature of the work that Mr Bacon was undertaking and the dates as a fairly reliable indicator of when work was done (though I would pay greater attention to metadata attached to the computer files where available). The timesheets cover the period from the time of Mr Emmett’s visit until the end of the month.
181. During that period Mr Bacon severed his relationship with BSW. He did so in two stages. First on 13 July 2004 he told Mr Green that he would be taking “a little time off work” for a short break from the 15 to 22 July 2004. In fact he spent that time working for Balltec and Geoprober. Then on 19 July 2004 he gave seven days’ notice of termination of his subcontract work, his last working day being 23 July 2004. The monthly retainer he had from Mr Emmett enabled him to do so. This was at the time of the establishment of Balltec.
182. I find that Mr Bacon did work in relation to the Dalia bid. He used a template he had created on 19 June 2004. He probably began creating layout drawings on 8 July 2004 and he completed them on 9 July. He did a drawing of part of a test rig on 9 July 2004 (“515652”) which Balltec needed to submit on the Dalia Project bid as part of its Load Test Procedure and Function Test. Mr Bacon did work on other Balltec projects and in relation to the development of the new technology: he put this under the heading “BREM design”. He did a general arrangement (i.e. an outline sketch not a design drawing) of a pipeline recovery tool (“515656”) on 27 July 2004. He then created a drawing embodying the idea Mr Halstead had had on 30 July in the period between 2 and 4 August 2004. All of this he did as subcontract draughtsman and designer retained by Balltec.

183. How far was Mr Bacon aware of Mr Emmett's plan to establish a competing business by unlawful means and joined in the execution of it? Having regard to Mr Bacon's knowledge, utterances and actions, was he sufficiently a party to the combination and the common design to make him liable for any wrongdoing of Mr Emmett or Mr Brown? He was no part of the plan. He became caught up in its execution because he was retained to provide some services and to come up with some ideas (rather as MMS were retained to provide legal advice and to come up with ideas as to how Mr Emmett could get his business back or set up another one). He had no part in the formation of the business, the employees it engaged, the customers it attracted, or the strategy it adopted. Once again, in my judgment his role was entirely different from that of Mr Brown, Mr Emmett and Mr Halstead. I would hold that he is not a co-conspirator.
184. As to the others (Mr Huddleston, Mr Staveley, Mr Lang and others unknown) no evidence was led or elicited in cross-examination from which I can satisfactorily infer that any of these individuals in any real sense joined in the execution of Mr Emmett and Mr Brown's plan so as to make them co-conspirators. They simply made their own choices and when they joined the new venture they did what they were told.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namelybreach of fiduciary duty?

185. This section is concerned with the first thread of the "conspiracy by unlawful means" claim: namely that there was a conspiracy to injure by breach of fiduciary duty. The fiduciary duties relied on are those of Mr Emmett and Mr Brown as directors of BSW: and of Mr Taylor as employee.

Did Mr Emmett and Mr Brown owe BSW fiduciary duties? If so, what were they?

186. It is unnecessary to set out at length the fiduciary obligations of a director. I will draw upon the summary made by Mr Livesey QC sitting as a Deputy Judge of the High Court in Hunter Kane Ltd v Watkins [2002] EWHC 186 (Ch) which was endorsed by the Court of Appeal in Foster Bryant Surveying Ltd v Bryant [2007] EWCA Civ 200. In short:-
- a) A director, whilst acting as such, has an obligation to deal with the company with loyalty, good faith and the avoidance of the conflict of duty and self-interest;
 - b) A fiduciary relationship does not continue after the determination of the underlying relationship;
 - c) Acts done by directors whilst a contract of employment subsists but which are preparatory to competition after it terminates are not necessarily in themselves a breach of any term (express or implied) as to fidelity;
 - d) Unless restrained by the terms of his contract a director is not prohibited from using his general fund of skill and knowledge or the "stock in trade" of the knowledge he has acquired whilst a director;

- e) A director cannot obtain for himself (without the informed approval of the company) any business advantage belonging to the company, and that restriction will continue to apply after his resignation if the resignation may fairly be said to have been prompted or influenced by a wish to acquire any maturing business advantage.
- f) In considering whether the act of a director after resignation breaches that principle the court must consider the nature of the office which the director held, the nature of the opportunity and the directors relation to it, the amount of knowledge which the director possessed and the circumstances in which he obtained that knowledge, the passage of time, and the circumstances in which the directors relationship with the company terminated.

187. I accept that the principles which I have summarised (and my summary is not intended to modify the full statement of the principles in Hunter) apply to the case before me. I also regard myself as bound to accept the principle that in the ordinary course a director is obliged to alert the company to any nascent threats to its business, even if he himself is part of that threat. This appears from a passage in the judgment of British Midland Tool Ltd v British Midland Tooling Ltd [2003] EWHC 466 where at paragraph [89] Hart J:-

“A director’s duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests.... Where the activity involves both himself and others, there is nothing in the authorities which excuses him from [the duty]. ... it does not... seem to me that the public policy of favouring competitive business activity should lead to a different conclusion. A director is free to resign his directorship at any time notwithstanding the damage that the resignation may itself cause the company... By resigning his directorship he will put an end to his fiduciary obligations to the company so far as concerns any future activity by himself (provided that it does not involve the exploitation of confidential information or business opportunities available to him by virtue of his directorship). A director who wishes to engage in a competing business and not disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself into the actual taking of preparatory steps”.

188. This reasoning was regarded as correct by Etherton J in Shepherds Investments Ltd v Walters [2006] EWHC 836 (at paragraph [105]) and by Mr John Martin QC (sitting as a Deputy Judge of the High Court) in G Attwood Holdings Ltd v Woodward [2009] EWHC 1089 (Ch) (at paragraph [24]).

189. Whilst I accept the principle (subject to one emphasis), it is important to observe that the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case. As Etherton J observed in Shepherds case (at paragraph [108]):-

“Hart J may have been too prescriptive in saying... that the director must resign once he has irrevocably formed the intention to engage in the future in a competing business and, without disclosing his intentions to the company, takes any preparatory steps...”

As he had pointed out earlier in that paragraph:-

“It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with the director’s fiduciary duties and the employee’s obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case”.

190. These observations of Etherton J are in my judgment entirely consistent with the principles stated in Balston Ltd v Headline Filters Ltd [1990] FSR 385 at page 412 and Framlington Group Plc v Anderson [1995] 1 BCLC 475 at 497-498. As Rix LJ explained in Foster Bryant (supra) at paragraph [77]:-

“Where, however, directors retire, the circumstances in which they do so are so various, as the cases above illustrate, but the courts have developed merits-based solutions. At the one extreme... the defendant is a director in name only. At the other extreme, the director has planned his resignation having in mind the destruction of the company or at least the exploitation of its property in the form of business opportunities in which he is currently involved... in the middle are more nuanced cases which go both ways: in Shepherds Investments... the combination of disloyalty, active promotion of the planned business, and exploitation of a business opportunity, all while the directors remained in office, brought liability; in Ireland Export Finance Ltd v Umana [1986] BCLC 460 [Balston] and [Framlington], however, where the resignations were unaccompanied by disloyalty, there was no liability”.

191. The particular emphasis I would wish to make is that this duty to “self-report” is not a discrete and free-standing duty. It is one aspect of a bundle of interrelated obligations which together constitute “good faith” and “loyalty”. Hart J introduced his discussion of the subject in Midland with the words

“A director’s duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company...”

192. As Arden LJ put it in Item Software (UK) Ltd [2004] EWCA Civ 1244 in a passage at paragraph [41] with which both Mummery LJ and Holman J agreed:-

“I do not consider that it is correct to infer from the cases ... that a fiduciary owes a separate and independent duty to disclose his own misconduct to his principal or more generally information of relevance and concern to it. So to hold would lead to a proliferation of duties and arguments about their breadth. I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be in the best interests of his company..... On the facts of this case there is no basis on which Mr Fassihi could reasonably have come to the conclusion that it was not in the interests of Item to know of his breach of duty. In my judgment, he could not fulfil his duty of loyalty in this case except by telling Item about his setting up of RAMS and his plan to acquire the Isograph contract for himself.”

193. Mr Cavender QC for the Defendants was at pains to establish where one end of the spectrum lay. He submitted that it was meaningless to say that a director owed fiduciary duties to the company in the abstract; that a director could only owe a duty to act faithfully in relation to his acts as director, and that if he was excluded from discharging any directorial functions then there was nothing in respect of which he was bound to act faithfully; and the acts in furtherance of his own interests could not conflict with the acts he was not being required to undertake and the duties he was not being called upon the discharge.
194. In support of this argument he referred first to the decision of the Court of Appeal in In Plus Group Limited v Pyke [2002] EWCA Civ 370. In that case the trial judge had found as a fact that the director “had been excluded effectively from the company of which he [was] a director”. The Court of Appeal decided (at paragraph [90]) that:-

“Every decision of this kind... is fact specific. The judge’s...proposition is critical because it is factually correct and it eliminates the duality of interest or duty which the law seeks to guard against... the Defendant’s role as a director of the Claimants was throughout the relevant period entirely nominal... in the concrete sense that he was entirely excluded from all decision making and all participation in the Claimant company’s affairs. For all the influence he had, he might as well have resigned”.

195. The same approach is demonstrated in the decision of Lewison J in Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638. Having referred to the “no conflict” rule as stated in Aberdeen Railway v Blaikie Brothers (1854) 1 Macq. 461 the judge continued (at paragraph [1308]):-

“As Deane J stated in Chan v Zacharia (1984) 154 CLR 178, the object of the “no conflict” rule is to prevent the fiduciary from being swayed by considerations of his personal interest. Swayed in what? The answer must be: swayed in the exercise of those

powers which are his to exercise in a fiduciary capacity. If he has no powers to exercise, then the foundation for the rule has been undermined and the rule will not apply”.

196. These are the principles which guide my consideration of the facts.

Did Mr Emmett and Mr Brown cease to owe fiduciary duties to BSW?

197. Mr Cavender QC submits that as from March 2004 Mr Emmett had no power or discretion to exercise in relation to BSW and was excluded from playing any role in the management of it, and that in these circumstances his fiduciary duties had reduced to vanishing point.

198. The key matters relied on in support of this submission were these:-

- a) On 1 April 2003 Mr Suttie had (as he admitted) appointed Mr Forbes to be a director of Balltec without obtaining the consent of Mr Emmett;
- b) Mr Suttie appointed Mr Hatfield to be managing director in May 2003 by the exercise of individual executive power and not through the board;
- c) In February 2004 Mr Suttie suspended Mr Emmett and imposed a general prohibition that during the suspension Mr Emmett was not communicate with staff or to conduct business on behalf of BSW;
- d) Mr Suttie refused to provide an agenda for the board meeting held on 3 March 2004 which board meeting did not undertake any discussion of the present or future business of BSW or any matters of strategy;
- e) Mr Suttie refused to allow discussion of Mr Hatfield’s behaviour in relation to pornography at the board meeting on 3 March 2004 and reserved this for private executive action by himself alone;
- f) In March 2004 BSW’s solicitors told Mr Emmett that he had no authority or other legal interest in being on the company’s premises, ejected him from the premises when Mr Emmett returned Mr Hatfield’s computer, and required him to confirm that he would not attend the premises or purport to conduct business on the behalf of BSW;
- g) Between March 2004 and 20 July 2004 Mr Suttie ran BSW as if he was in sole control of it, taking individual executive action (and ignoring the board) in relation to the disciplining of Mr Hatfield and the appointment of Mr Green and the general conduct of BSW’s business (as is demonstrated by the reference in Mr Manson’s report to the “ex-executive directors” whose threat had to be neutralised, and by Mr Green’s slip in evidence when he referred to Mr Suttie as “the sole director in the business”).

199. Mr Marshall QC submitted that there was no effective exclusion of Mr Emmett and that in so far as he ceased to be involved in the affairs of BSW this was because (as he acknowledged in cross-examination) he himself was not really interested in the affairs of BSW once he had been told not to purport to do any business.
200. The key matters relied on in support of this submission were these:-
- a) Notwithstanding his dismissal as an employee Mr Emmett was able to attend and participate in board meetings as he did on 3 March 2004;
 - b) Mr Emmett admitted in cross-examination that he could have called a board meeting at any time;
 - c) No restrictions were ever put on Mr Emmett's ability to communicate with Mr Suttie;
 - d) Mr Emmett requested management accounts and was provided with them on 23 June 2004 (though I note that this was the letter in which BSW's solicitors declined to provide the business plan for 2004/5 on the footing that it contained commercial sensitivities which it was not appropriate for Mr Emmett as a potential competitor to see);
 - e) The evidence of Mr Halstead was that he had been told by Mr Brown that Mr Emmett had access to BSW's financial information by virtue of still being a director;
 - f) Mr Emmett asserted his authority as a director of BSW (for example in the collection and return of Mr Hatfield's computer, and in his dealings with Mr Green over whether Mr Benson should undergo a medical examination - an issue I have found it unnecessary to deal with in detail);
 - g) Mr Emmett deliberately retained his status as a director in order not to trigger the compulsory transfer provisions under BSW's Articles and cannot deny the duties attached to that status.
201. Mr Emmett chose to remain a director for as long as it suited his purpose to retain a shareholding as a lever to assist a buyout and to avoid a compulsory transfer. A consequence of that choice was that in my judgment Mr Emmett's fiduciary duties had not been reduced to vanishing point. But they fell to be discharged (a) so far as positive (i.e. requiring action) only in relation to what BSW was, to Mr Emmett's knowledge, actually requiring or expecting him to do; and (b) so far as negative (i.e. requiring Mr Emmett not to act in a particular way) only in relation to what BSW was, according to what Mr Emmett knew or must be taken to have known, doing or intending to do. If Mr Emmett was to do something for BSW then he had to do it in a loyal and faithful way: if BSW was doing something, then Mr Emmett had to conduct himself in a loyal and faithful way as regards his own actions in the light of what BSW was doing.

202. So far as Mr Brown was concerned Mr Cavender QC and Mr Marshall QC made essentially the same points. But the following additional points were made:-
- a) At the March 2004 board meeting Mr Brown acted as a director and voted against the accounts;
 - b) Mr Brown attended a further board meeting on 10 August 2004;
 - c) Mr Brown remained a director until 15 October 2004.
203. In Mr Brown's case too I consider that his duties had not been reduced to vanishing point: but they fell to be performed in the context of what he was required to do by BSW and what he knew or must be taken to have known BSW were doing or intending to do.

Were Mr Emmett and Mr Brown in breach of those fiduciary duties?

204. Mr Emmett and Mr Brown had ceased to be employees of BSW. They were without jobs or income. They had ceased to have any direct contact with BSW's sales or design teams. They were non-executive directors. In operational terms they were instructed not to act or to purport to act in relation to BSW's business. In so far as any strategic planning was being undertaken, it was not being undertaken by BSW's board, but by Mr Suttie and his consultants, and they were no part of it. They were viewed with suspicion by BSW and its business plans were not shared with them.
205. The breaches of fiduciary duty alleged against Mr Emmett are scattered throughout the Particulars of Claim. It is said that in breach of fiduciary duty Mr Emmett sought to establish (and to induce Mr Brown to join him in) a competing business; he paid Mr Brown's legal fees in the employment tribunal proceedings; he travelled to the United States to entice a third party to enter into a joint-venture; he contacted Mr Fulton of Technip and sought to secure Technip as a customer of the new company; he sought to develop the technology for the benefit of the new business in a way that would make BSW's products obsolete (by removing the ball pockets, reducing the length of the mandrel and developing a new backwards locking mechanism) and produce drawings embodying it on 19 June 2004; he failed to inform BSW of this new technology; he held discussions with Mr Taylor, Mr Bacon and Mr Benson; he failed to inform the BSW board of unspecified activities of Mr Bacon, Mr Taylor, Mr Benson, Mr Lang, Mr Huddleston and Mr Staveley which posed an actual or potential threat to the interests of BSW; he removed a computer containing BSW's confidential drawings and took it home and made unauthorised use of the drawings; in June 2004 he contacted Technip concerning the Dalia bid and actually made a bid on 2 July; he bid for the Simian Sapphire contract; he took legal advice about what he was doing.
206. Other cases do not help. The decision is fact-sensitive, nuanced and merits-based. An overarching principle is that there is nothing wrong with (and everything to commend) lawful competition.
207. I find and hold that (save in two respects) Mr Emmett was not in breach of fiduciary duty in seeking to establish a competing business. There is no doubt that prior to his resignation he was discussing setting up a competing business at some point in the future, and was taking legal advice as to where the boundaries of lawful conduct lay. But setting up a

competing business was difficult and expensive and effectively involved writing off the business Mr Emmett had created and his current investment in it: and he made no firm decision to do so until 16 July 2004. I am satisfied that his real preference was to buy out Mr Suttie and obtain back for himself the business he had created over the years. It was only at the very end that there was a reluctant acceptance of the diminishing likelihood of his ever recovering his business; though even at that time he and Mr Brown would have pursued a “hostile takeover” if they could. Indeed, the clear impression I have is that if Mr Suttie had said to Mr Emmett

“Come back into the business, not as a technical consultant, but in your old operational and management role, and I’ll support you with a managing director of a different calibre from the incompetent Mr Hatfield or the bruising Mr Green”

Mr Emmett would have been back like a shot. His attempts to bring that about, and his hopes of a “buyback” meant that he did nothing actually contrary to the interests of the BSW, even whilst he looked at other options.

208. But in the middle of this process Mr Emmett acted disloyally in one respect. Mr Halstead recalls being told during the course of their meeting on 10 June 2004 by Mr Brown that BSW had incurred fairly substantial losses and was effectively insolvent: and that Mr Emmett added his opinion that BSW could soon be out of business because the management was not competent. Since Mr Brown did not receive the management accounts for March and April 2004 until 23 June 2004 Mr Halstead’s recollection of the date on which this conversation took place is dubious: but I accept his recollection of the event itself. It seems to me to be inherently probable that Mr Emmett would, to bolster Mr Halstead in his decision to throw in his lot with Mr Emmett and Mr Brown in making the Dalia Project bid, have expressed such a view in support of Mr Brown’s view on the finances. It was disloyal to give tacit support to suggestions of BSW’s insolvency and expressly to cast doubt on BSW’s continued existence in order to assist in achieving the commercial object of obtaining Mr Halstead’s support.
209. Again, at the very end (by which I mean the beginning of July) Mr Emmett was forced to make a choice. He chose to promote his personal interests over loyalty to BSW. He chose to put in a competing bid for the Dalia Project even though he knew or must be taken to have known that BSW would be bidding for it. In the same circumstances he chose to prepare and submit bids for the Kizomba oilfield (of which there is in fact no specific complaint in the pleadings) and for the Simian/Sapphire project. In each case he knew or must be taken to have known of BSW’s intended actions and his duty of loyalty to BSW required him to refrain from interfering. Those were in this case breaches of fiduciary duty.
210. I find and hold that Mr Emmett was not in breach of fiduciary duty in paying Mr Brown’s legal fees in the employment tribunal proceedings. The very pursuit of this complaint shows the true character of those in charge at BSW. Mr Suttie unfairly dismissed Mr Brown and engineered his departure. BSW’s true best interests lay in acting fairly and paying its legal dues. It is an impossible submission to say that Mr Emmett’s duties in equity required him to facilitate BSW acting unfairly and avoiding the legal consequences.
211. I find and hold that Mr Emmett was not in breach of fiduciary duty by travelling to the United States to “entice” a third party to enter into a joint venture. It is quite clear that the initial approaches were to secure funding to enable a buyout of Arnlea’s interest. Only in

May 2004 did the idea of a joint-venture competing business emerge. When it emerged its viability as an option was explored and legal advice was taken as to where the boundaries of lawful conduct lay. Exploring the establishment of a competing business and taking legal advice about it was not in this case a breach of fiduciary duty. Mr Emmett was not otherwise engaged in the performance of any duties for BSW.

212. As to the allegation that Mr Emmett was in breach of fiduciary duty in contacting Mr Fulton of Technip, if this is a reference to contact made on 19 July 2004 in relation to receptacles for the Kizomba oilfield then I find and hold that this was a breach of fiduciary duty. Mr Emmett knew that BSW was supplying Technip in relation to the Kizomba oilfield because that had been discussed at the November 2003 board meeting and had arisen more recently in connection with Mr Brown's queries on the 2003 financial statements. It is true that the precise work then discussed was not identical to the receptacles that Balltec was offering to supply in July 2004: but in my judgment that is immaterial. What is important is that BSW was supplying subsea equipment to Technip for the Kizomba oilfield, was the existing supplier and (as Mr Emmett must have known) was almost certain to bid for further supply. His obligation of loyalty required him not to advance Balltec's interest whilst still a director of BSW. He was a day early.
213. I find and hold that Mr Emmett was not in breach of fiduciary duty in thinking about how to advance the "ball and taper" technology. From February 2004 Mr Emmett was no longer engaged by BSW to think about technical advances and no longer in contact with the design team. He was first suspended and then dismissed. If BSW had summoned him as a non-executive director to a meeting to consider research and development or strategic planning Mr Emmett would have had to discharge his duties to give advice loyally and faithfully. But whilst BSW ignored him he was free to think his own thoughts in his own time, to indulge in "blue sky thinking" and to have ideas which belonged to him and which he did not have to share with BSW. The unworked and unworkable concepts for removing the ball pockets, reducing the length of the mandrel, and developing a new backwards locking mechanism belonged to Mr Emmett. It is true that if these ideas could be made to work then from them could be developed a competing product. But the clever bit was making the ideas work. So I would reject any suggestion that these ideas themselves represented a nascent threat which Mr Emmett was under a freestanding duty to report the BSW.
214. As to the suggestion that these ideas were embodied in a drawing on 19 June 2004, I find that this is simply wrong. The first sketch was not produced until 30 July 2004. The first drawing was not produced 4 August 2004. As drawn the idea did not work. It was abandoned. There were two attempts to make the "backward lock" work in October 2004, each using entirely different means from the original (abandoned) idea. The real answer emerged on 17 January 2005. All this happened after Mr Emmett had ceased to be a director and ceased to owe fiduciary duties.
215. I find and hold that Mr Emmett was not in breach of fiduciary duty in holding discussions with Mr Taylor, Mr Benson or (subject to one matter) Mr Bacon. At the heart of this charge lies the allegation that Mr Emmett solicited these people to leave BSW and to join Balltec. BSW assert that Mr Emmett did solicit its employees and rely on the facts
- a) That MMS on 16 June 2004 noted "you may ... wish to entice employees away from BSW":

- b) That on 5 July 2004 Mr Emmett sought advice because he was concerned about solicitation of employees in the context of former BSW employees working for a Balltec subcontractor:
 - c) That Mr Emmett recognised that a key plank of the strategy to take out BSW was to get employees of sufficient quality, skill and experience to be able to produce a competing product;
 - d) That Mr Emmett was later to say that all key members of staff recruited by him had left BSW
 - e) That Mr Emmett used subterfuge to disguise the connection of these recruits to Balltec.
216. The first two matters seem to me rather to indicate that Mr Emmett had not, at the point of taking advice, “enticed” anyone and was anxious not to do so. The latter three matters seem to me neutral. The staff Balltec needed did not have to come from BSW (and it was not established that they all did). The truly key member of staff recruited by Mr Emmett who had left BSW was Mr Brown, and Mr Emmett had certainly not solicited him to leave. Nor did all of those who left BSW go to work for Balltec. I find that all Mr Emmett did was to ascertain that if a competing business were to be established then Mr Taylor and Mr Benson would work in it and Mr Bacon would supply services to it. When they did come to work for Balltec he sought to protect them from pursuit by Mr Suttie.
217. “Enticement” or “solicitation” requires both encouragement to leave BSW and encouragement to join Balltec. I find that Mr Taylor and Mr Benson had their own very good reasons for wanting to escape the regime imposed by Mr Green.
218. Mr Taylor wrote to Mr Suttie in March 2004 to express concern at what was happening at BSW and had discussions with him about those concerns: and when Mr Green became manager Mr Taylor (according to his evidence in the Manchester Proceedings) thought him the most abrasive individual he had ever had the misfortune to work with. Mr Emmett’s evidence was that he asked Mr Taylor to “hang in” whilst he tried to buy the business back: and that has the ring of truth. That prospect diminished and other opportunities came to the fore: and Mr Emmett ascertained Mr Taylor’s intentions if they came about. Eventually Mr Taylor gave notice. At the time when he did so Mr Emmett’s plans were not firm. Mr Green’s commentary upon Mr Taylor’s resignation tells its own story.
219. When Balltec (as a new company) secured the services of Mr Taylor it did so by means of Mr Emmett promising that Mr Taylor would be paid whether Balltec obtained orders or not. But it was not established that this promise was made whilst Mr Emmett was still a director of BSW or before Mr Taylor had given notice. Mr Emmett acknowledged in cross-examination that in July 2004 he had offered Mr Taylor the prospect of a shareholding in Balltec and an attractive salary package. The occasion on which he did so is alleged to be 23 July 2004. This would have been after Mr Taylor had given notice to BSW on 29 June 2004. It was not established in the evidence that any such offer had been made before Mr Taylor resigned. Offering a job to someone who had already resigned is not in my judgment solicitation of an employee.
220. In my judgment Mr Emmett’s behaviour in relation to Mr Taylor was not disloyal.

221. Mr Benson had been dissatisfied since at least February 2004. The treatment of his stepfather and his own treatment in relation to the redundancy package persuaded him to sign off again, take the “sick pay” in lieu of redundancy, and leave when it ran out: his own treatment by the aggressive Mr Green gave him no encouragement to return. What Mr Emmett was doing afforded Mr Benson the opportunity to leave: but Mr Emmett did not act disloyally by inducing him to leave when otherwise he would have stayed.
222. Mr Bacon was an independent contractor who could choose what work to do. I find that Mr Green held him in disdain, calling him a “loud-mouthed critic from France”. I find that Mr Bacon believed his work from BSW would dry up because (as was the case) Mr Green wanted to build up an in-house drawing capability. Mr Bacon had his own reasons for throwing in his lot with Mr Emmett: Mr Emmett did not disloyally encourage Mr Bacon to cease working for BSW when otherwise he would have continued to do so. At the beginning of July 2004 Mr Emmett agreed to pay Mr Bacon a monthly retainer: but there was nothing wrong with that provided that the retainer was not exclusive (which has not been suggested).
223. Mr Emmett used that retainer when he visited Mr Bacon in early July 2004 following the Dalia Project bid. Mr Bacon’s timesheets do not accurately record the actual hours he worked (because he had the benefit of the general retainer from Mr Emmett). But he specifically attributed time to the Dalia Project bid. I find that Mr Emmett asked Mr Bacon to prepare the layout drawings to support the Dalia Project bid (515650 and 515651). These discussions must have involved a breach of fiduciary duty by Mr Emmett: he ought not to have been strengthening Balltec’s bid (which, as submitted on 2 July stood no chance of being accepted because it was so incomplete) whilst he was a director of BSW. Further, by 19 July 2004 Mr Emmett had instructed Mr Bacon to prepare (and Mr Bacon had prepared) drawings in connection with the Kizomba bid (the two drawings numbered 515654). These were run-of-the-mill drawings for a receptacle and for a trunnion assembly embodying no new technology. But they again strengthened a Balltec bid which ought not at that point to have been made.
224. But subject to that I do not consider that any of the general discussions Mr Emmett had with Mr Bacon about eliminating some of the pockets and lightening the mandrel, or his leaving Mr Bacon with the job of thinking about the problem and seeing if he could come up with anything that could eventually be used in any new competing company, constitute breaches of fiduciary duty. The elimination of pockets was not itself a novel idea: there were already other forms of tool manufactured by HBH which were assembled without pockets. The advance would lie in applying the technique to a much larger piece such as a mandrel: and that was what Mr Emmett and Mr Bacon were discussing. Asking Mr Bacon to think about a product that could be manufactured if and when a new company was established, but without infringing BSW’s intellectual property rights, was not acting disloyally. BSW was not employing or otherwise engaging Mr Emmett to think these thoughts on its behalf, and it never sought his advice as non-executive director on any fresh ideas for product development.
225. I take the same overall view about the alleged breaches of fiduciary duty on the part of Mr Brown, and the same view of specific breaches of duty alleged against both Mr Emmett and Mr Brown (see paragraphs 13, 14, 15, 16, 21 and 22 of the Particulars of Claim).
226. There are three particular points to make. First, Mr Brown’s fiduciary duties lasted until 15 October 2004, when he resigned. The precise consequences of this were not examined at

trial. What one can say is that when BSW discovered on 22 September 2004 (from the mistakenly provided minutes of the meeting between Technip and Balltec) that their new rival was backed by Mr Emmett, Mr Brown and Mr Halstead and was marketing a redesigned and more compact product, they did not call a board meeting to discuss the matter (which would have put Mr Brown in a difficult position).

227. Second, Mr Brown attended a board meeting on 10 August 2004. But it addressed management accounts (which were so brief as to cause Mr Brown to complain), an attempt to reclaim £8870 expenses from Mr Brown, and further support for the company (in relation to which it was noted that no support would be coming from Mr Brown and that BSW was valueless). So none of those issues called for the discharge of particular fiduciary duties.
228. Third, it is alleged as against Mr Brown that whilst he was a BSW director he downloaded onto his own laptop confidential drawings and documents (including budget templates and a Tender Cost Estimating Summary for the BP Atlantis project) and permitted that to be used for the purposes of Balltec's business. This laptop was destroyed: but some of its files were copied. The evidence did not establish exactly what Mr Brown downloaded or when: but I am satisfied that he must have downloaded and did use the budget template, the costs summary, the operating manual for the Pipeline Insertion Tool and the Quality Assurance manual. I regard it as inherently probable (though not the subject of specific proof in the action) that these are merely specific examples of a wider activity. Having regard to the way that Mr Brown and Mr Emmett worked together (the former sometimes working at the latter's home and on the computer there) I do not doubt that Mr Emmett was aware of this.
229. I therefore find and hold that Mr Brown was in breach of his fiduciary duties to the same extent as Mr Emmett was in breach of his. I cannot identify any additional breaches peculiar to Mr Brown in respect of the period down to 15 October 2004, or in respect of his attendance at the board meeting in August 2004, or in respect of the material on his laptop (save insofar as in the last case the relevant files have been identified in one of the new schedules to the Particulars of Claim and are admitted by the Defendants to constitute infringing copies).
230. Competing in breach of fiduciary duty was unlawful. Mr Emmett is liable for his own wrongs. Because I am satisfied that he and Mr Brown (together with Mr Halstead) formed a combination with the requisite intent to injure BSW he is liable in damages for conspiracy in relation to Mr Brown's (identical) wrongdoing in relation to the premature bids for the Dalia Project, the Kizomba oilfield and the Simian/Sapphire oilfield, and for Mr Brown's misuse of confidential material on Mr Emmett's computers.
231. I have considered whether (notwithstanding my general views as to whether Mr Taylor, Mr Benson and Mr Bacon were co-conspirators) their acts and the utterances in relation to these particular breaches of fiduciary duty mean that I should draw the inference that they were co-conspirators (so as to make them liable for the wrongdoing of Mr Emmett and Mr Brown). I have concluded that the quality of the evidence does not warrant drawing the inference that these individuals agreed or acted in concert.

Did Mr Taylor owe fiduciary duties? Did he break them?

232. In paragraph 20 of the Particulars of Claim it is alleged that in June or July 2004 (and in breach of fiduciary duty) Mr Taylor met with Mr Emmett and divulged to him information

belonging to BSW concerning its bid for the Dalia contract and then assisted Mr Emmett in the design of products and tools so as to give Balltec a competitive advantage over BSW. It is said that Mr Taylor informed Mr Emmett that the Balltec bid price for the Dalia project was lower than the BSW bid price: and of the size and form of the BSW connector to meet the Technip brief.

233. No direct evidence was led at trial to support this. Instead some evidence which Mr Taylor had given in the Manchester Proceedings formed the basis of a question to Mr Emmett in the present proceedings. In the Manchester Proceedings Mr Taylor gave evidence that he did not actually work on the Dalia bid for Balltec. Counsel at Manchester then put to Mr Taylor that he must have been assisting Mr Emmett before he had left BSW, in particular during his notice period and by telling Mr Emmett what the BSW bid had been about. Mr Taylor had said:-

“Yes, and helping to ensure they produced a design that was different ... I told them the approximate size of the connector, yes ... We did have conversations about designs of tools. I don't recall ever seeing the final general arrangement drawings that was submitted to Dalia [until 30 July]....but we did have discussions about general design features.... How we might make the tools different and give ourselves a market advantage..... From the middle of June onwards I would say.”

234. Mr Emmett said that Mr Taylor was wrong in what he stated, and that he was not involved with Dalia whatsoever until after he had left BSW. He was less sure about whether he and Taylor had met during July (though clear that it was not a dozen times). He firmly denied the accuracy of Mr Taylor's evidence and asserted that the information that was relevant came from Mr Halstead.
235. BSW say that they have not called Mr Taylor (although he is contracted to give evidence for them if asked) because they do not think that he is honest. They nonetheless invite me to accept Mr Taylor's evidence in the Manchester proceedings on this issue. Mr Emmett chose to be cross examined. He is honest (if on occasion inaccurate and erratic). (Subject to one matter which I will address when considering breach of contract) I accept his evidence on this issue.
236. Mr Emmett's evidence in this case did not address Mr Taylor's evidence given in the Manchester Proceedings about having had discussions about general design issues. If (as is common ground) Mr Emmett and Mr Taylor met in the course of July 2004 I think it is inherently probable that they discussed design issues – particularly the design of a test rig (which any new company would need to validate its products and which was a particular area of expertise for Mr Taylor). But it is to my mind clear that these discussions were not productive of any concrete concept or workable design because of the clearly recorded position that (a) even on 19 July Balltec was still having to call on everyone to put ideas into the melting pot and (b) on 30 of July was still discussing the principles of the design of the secondary locking mechanism. The evidence does not establish that anything productive emerged from the discussion between Mr Emmett and Mr Taylor.
237. If I had taken a different view of the facts I would in any event have held that Mr Taylor, as an employee, did not, on the case pleaded and proved, owe a fiduciary duty: Nottingham University v Fischel [2000] ICR 1462. His obligations were contractual.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely... breach of contract?

238. It is necessary to unravel this compendious way of putting the case by identifying the relevant contracts, identifying the relevant obligations, identifying the relevant breaches, and then considering whether each of the named persons was a conspirator who had combined to bring about those breaches.
239. I will confine attention in this section to breaches of contract by the named persons. I will consider breaches of contract by others in the section concerned with the tort of inducing breach of contract.
240. First, Mr Emmett. Reliance is placed upon his contract of employment, and in particular clauses 3(2) (faithful service), 7 (confidential information), 12(4) (upon termination to deliver up books documents and papers and not to endeavour to entice away any of BSW's employees) and 13 (non-competition). Mr Emmett was engaged as an executive director and as such an executive director was required actively to support the growth and development of the company, being responsible for technical support and promotion of ball and taper technology.
241. The breaches alleged against Mr Emmett are (a) soliciting or suborning Mr Brown, Mr Bacon, Mr Taylor, Mr Benson, Mr Lang, Mr Huddleston and Mr Staveley; (b) seeking to establish Balltec; (c) attempting to negotiate a joint-venture; (d) soliciting Technip Offshore and Technip France; (e) developing new technology for Balltec (in particular a backwards locking mechanism, the removal of ball pockets and a reduction in the size of the mandrel); (f) producing drawings of this on 19 June 2004; (g) failing to inform the board of BSW of the BREM technology; (h) removing a personal computer and making unauthorised use of it; (i) trying to secure the bid for the Dalia project; (j) concealing, rather than disclosing and handing over to BSW, the BREM technology, or drawings and all business opportunities arising therefrom.
242. Mr Cavender QC takes a preliminary point. He submits that the behaviour of BSW and Mr Suttie modified Mr Emmett's obligations.
243. First, Clause 13(3) of the Terms and Conditions of Mr Emmett's contract said that the "non-compete" provisions set out in that clause should cease to apply if Arnlea

"shall have failed to make a payment of capital and or interest due under the Emmett Loan Notes..... and shall not have remedied such default within a period of three calendar months from the due date for such payment".
244. On 23 January 2004 Mr Emmett claimed that BSW had underpaid a total of £4981 in respect of various defaults under the Loan Notes in the period December 2001-September 2003. In the Scottish proceedings which BSW commenced to prevent payment-out on the RBS guarantee it was agreed that between December 2001 and December 2003 there were a number of occasions on which BSW made interest payments which were too small or were paid late. The Scottish judgment does not identify the occasions, but refers to the case being made by Mr Emmett. The case then being made appears from the correspondence to be that there were late underpayments in June, September and December 2002 (amongst other occasions). BSW paid the arrears on 5 March 2004.

245. Mr Suttie acknowledges that there were underpayments of interest, but seeks to set off an alleged overpayment of capital in November 2003. What actually occurred in November 2003 was not pleaded or established in evidence at trial before me (though there were assertions in correspondence in the trial bundle). The arguments for overpayment seem to depend on Mr Emmett having mistakenly submitted the 2004/5 Loan Notes instead of the 2002/3 Loan Notes at the November 2003 redemption, and nobody noticing at the time. Whether this argument was right or not was not examined in the Scottish proceedings or before me. In any event an overpayment in November 2003 could have no bearing on defaults in June, September or December 2002. It was not suggested that these defaults had been compromised.
246. Mr Marshall QC then took a construction point. He submitted that the expression “failed to make a payment of... interest due” should be read as meaning “if a Payment Default has occurred under the terms of the Emmett Loan Notes”. The Emmett Loan Notes define a “Payment Default” as:-

“the failure by the Company to make payment of any ... interest accrued ... on the due date for repayment thereof (excluding any sums which the Company is entitled to withhold or deduct in accordance with ... any applicable law in any jurisdiction) where no remedy is agreed between the Company and the Holders within a period of one month from the due date of payment....”

So if under the applicable law there was a right to make a deduction then there was no “failure” to make a payment of interest. He acknowledged that it was right that there was “default” of such a nature that under the RBS guarantee Mr Emmett was entitled to immediate payment: but he argued that that was not the same as saying that there was “Payment Default” under the Loan Notes. At the time of the demand under the guarantee there were sums which Arnlea was entitled to withhold or deduct which exceeded the sums claimed by Mr Emmett.

247. I accept that documents executed at the same time and in relation to the same transaction must (so far as the language permits) be read consistently. In fact it is the formula contained in Mr Emmett’s employment contract that appears elsewhere: see clause 5.5 of the Share Sale Agreement dated 10 September 2001. But I do not accept that the expression “shall have failed to make a payment of ... interest due” means the same as “ a Payment Default shall have occurred”, particularly having regard to the difficulties of interrelating the different time periods. One simply has to enquire whether there is a “failure” to pay interest: and that question can only be answered by reference to the obligation (which is to be found in the Loan Notes). It is admitted by Arnlea in the Scottish proceedings that the obligation in Loan Notes was not discharged on occasions predating any conceivable set-off claim.
248. On the arguments advanced and the evidence led I find and hold that by 5 March 2004 clause 13(3) of Mr Emmett’s employment contract had operated to discharge him from the other provisions of clause 13. But that did not affect his obligations under clauses 3, 7 or 12.
249. In that connection Mr Cavender QC advanced a second argument (which also constitutes a fallback position relating to clause 13). He submitted that BSW had repudiated Mr

Emmett's employment contract thereby discharging him from future performance of its continuing obligations. The repudiatory breaches are identified in paragraph 52B of Mr Emmett's Defence as being "exclusion from [BSW] its management and operations from February 2004 including ... [the] suspension": though Mr Cavender QC put to Mr Suttie a broader case that each of the items identified in the letter of 6 February 2004 constituted a repudiatory breach.

250. Mr Cavender QC submits (and I accept) that Mr Emmett's contract of employment contained an implied term that BSW would not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between itself and Mr Emmett. He submits that Mr Suttie and Mr Hatfield engaged in a systematic campaign to sideline, undermine and humiliate Mr Emmett. He draws attention to the fact (according to evidence given by Mr Taylor in the Manchester Proceedings) that Mr Hatfield had said his job was to get rid of Mr Emmett. He relies upon BSW's failure to respond to any of the matters of complaint (acknowledged by Mr Suttie in evidence to be serious) set out in Mr Emmett's letter of 6 February 2004 save by suspending him: and upon Mr Suttie's failure to provide an agenda for the important meeting on the 3 March 2004.
251. Mr Marshall QC cross-examined Mr Emmett at some length on the basis that there was nothing in the complaints raised in the letter of 6 February 2004. I found this exercise of no assistance (given Mr Suttie's acknowledgement that the issues raised were "serious", and given the obvious difficulty facing Mr Emmett in trying to recall the detail that lay behind headline complaints made nine years earlier). But he established in cross-examination that Mr Emmett knew that the reason for his suspension was his behaviour (which Mr Suttie and Mr Hatfield regarded as disruptive) and his failure to attend the meeting summoned by Mr Suttie on 3 March 2004.
252. In my judgment it is necessary to focus on the contract of employment and not to be distracted by rights arising under the share sale agreement or the articles (although their provisions will obviously inform the true meaning of the express and implied obligations in the contract of employment). The letter of 6 February 2004 did not distinguish between them.
253. If the employment contract alone is considered, only one (possibly two) of the items of complaint in the letter of 6 February relate to it: taking executive decisions in Aberdeen and undermining Mr Emmett before the BSW workforce. Mr Emmett's job as executive director was to be responsible for technical matters. His job was not the day-to-day management of BSW. The fact that day-to-day executive decisions were taken in Aberdeen was doubtless an unwelcome change from the old order: but it was not a breach of Mr Emmett's contract of employment as technical director. His contractually designated responsibility for technical development and application development required adherence to any business plan determined by the board, and the observance of any financial limitations imposed by those charged with responsibility for BSW's finances. Responsibility for technical development and application development would sometimes have necessitated Mr Emmett's involvement at some stage in major sales to customers (since he would have to oversee the application of the technology to the customer's specific needs): but it would not involve his participation in every sale. If he complains about that his complaints go too far. The restraints put on Mr Emmett's freedom of action were no doubt irksome: but in my judgment they did not constitute repudiatory breaches. The simple truth is that Mr Emmett found it difficult to act within the confines of his new job.

He continued to act as if he was the proprietor of the business. He regarded restraint as “sidelining”. Mr Suttie could see this and had the skill to manipulate Mr Emmett and the foresight to record his explosive reactions.

254. I find and hold that Mr Emmett’s employment contract was not repudiated. But I hold that on its termination clause 13 did not bind Mr Emmett because of the breaches by Arnlea of the conditions attaching to the Emmett Loan Notes.
255. There was an issue over the date of dismissal. BSW gave Mr Emmett a P45 that said that the leaving date was 28 February 2004. But that cannot be right. The P45 was itself dated 18 March 2004: but Mr Emmett was not paid up to then and it is plain that his employment contract was treated as determined before then. I find his contract terminated on 6 March 2004, by which time the disputed events of 3 March 2004 seem to have resolved themselves into an acceptance that the employment relationship had ended.
256. The relevant obligations are accordingly clauses 7 and 12. Clause 3(2) need not be considered because it applied only during employment. I hold that Mr Emmett had done nothing prior to 6 March 2004 to break that term. His endeavour to raise funding to buy out Arnlea was not an act unfaithful to BSW: nor was his indulging in “blue sky” thinking whilst on holiday.
257. As to the breaches of clause 7 of the employment contract (confidentiality), I hold that Mr Emmett did breach clause 7 of his contract in one respect.
258. BSW made no serious attempt to identify precisely what “private, confidential or secret information of BSW” Mr Emmett had obtained by virtue of his employment and used for his own purposes. Indeed, it deleted its allegations of breach of confidence, recasting them as breaches of fiduciary duty. Mr Green’s evidence was this effect:-

“As our products are very specialised, the workforce and in particular our designers/engineers, are crucial to the business as over time they gain extremely specialised and detailed knowledge of products which is key in this line of work.”

He did not seek to identify “confidential information” any further. In his evidence Mr Suttie referred to patents, product designs and customer lists. In the course of their closing submissions Counsel for BSW referred to “pricing of manufactured goods”, “who BSW’s customers were”, “what projects were being pursued” and “drawings” as examples of confidential information.

259. In my judgment this will not do. In paragraph 54 of the Defence Mr Emmett put BSW to strict proof that the information to which he had access and which it was said he used was indeed confidential. But BSW did not rise to the challenge of identifying it (save to the extent I have indicated). As Laddie J said in Ocular Sciences Limited [1997] RPC 289 at 360, if a claimant wishes to seek relief against a defendant for misuse of confidential information it is his duty to ensure that the defendant knows what information is in issue, not least because a claim based on wide and unsupported claims of confidentiality can be used as an instrument of oppression or harassment against a defendant, by destroying a competitor’s ability to compete.

260. If by “prices of manufactured goods” it is being said that Mr Emmett knew what prices Mr Halstead had charged BSW in the past, I agree that that is capable of being confidential information. But on the evidence this material was not deployed. According to the issues raised and evidence adduced in the Manchester Proceedings the arrangements between Balltec and Mr Halstead were not usual supplier/customer terms, and what BSW paid Mr Halstead was not relevant to the prices quoted to Balltec by Mr Halstead or by Balltec to customers.
261. “Who BSW’s customers were” and “what projects were being pursued” is likewise capable of being confidential information (the former being acknowledged as such in clause 12(4)). But it was not established on the evidence that Mr Emmett used this information (as opposed to contacts made at trade fairs or public knowledge of invitations to tender or general knowledge within the industry as available to, for example, Delmar, as to BSW) in order to procure contracts. Responding to public invitations to tender (even if those invitations were from entities known to be customers of BSW) would not amount to misuse of confidential or secret information. (Whether, having acquired the information about the availability of contracts otherwise than through the misuse of confidential information, Mr Emmett could, consistently with his duty as director, bid for them, is a different question).
262. Trying to develop a technology that did not infringe BSW’s patents cannot have involved such a breach of an obligation not to misuse confidential information since the claims in BSW’s patent or patent application were neither confidential nor secret.
263. In relation to drawings of BSW’s products I can readily see that these were confidential: many would have been so marked, and of the unmarked ones some computer files of model are admitted to be the subject of copyright, and others could by their nature be confidential. It is established to my satisfaction that Mr Emmett retained copies of drawings (albeit not the latest versions of the latest products) on the old personal computer which he kept at home (and on a second computer which he kept at home but the precise origins of which were not clear), which computer files he did not delete or return to BSW on the termination of his employment, and which he thereafter accessed (not necessarily in a disloyal way such as to amount to a breach of fiduciary duty) but for purposes other than BSW’s purposes, and to which he allowed Mr Brown access when Mr Brown worked at Mr Emmett’s home. This was a breach of clause 7 of his contract.
264. As to clause 12 I hold that the reference in clause 12(4) of the contract to “documents” includes documents held in digital (as well as printed) form. I hold that the obligation to return all books, documents, papers and other property relating to the business of BSW is subject to the qualification that Mr Emmett was entitled to retain such as were required for him to discharge his duties as a non-executive director. I find that on the termination of his employment Mr Emmett did not return all other documents relating to the business of BSW: it seems to me that he retained a full suite of the documents which were then in his possession or under his control, and in particular he retained on his old computer the drawings which are now the subject of the admitted infringements.
265. As to the second part of clause 12(4), the complaint is that Mr Emmett solicited (the contractual term is “endeavour to entice away”) Mr Brown, Mr Bacon, Mr Taylor, Mr Benson, Mr Lang, Mr Huddleston and Mr Staveley to assist him in setting up and thereafter promoting Balltec. There is no direct evidence of solicitation or suborning of employees e.g. from those who were approached but declined to go or those who watched it happen. The case made is that solicitation is to be inferred (a) from the fact that the named persons

did join Balltec (b) that Mr Emmett had indicated to his solicitors that he may want to entice employees away from BSW and (c) that after the named persons joined Balltec they employed subterfuge to throw BSW off the scent. But I am not prepared to draw that inference.

266. Regarding Mr Benson, Mr Taylor and Mr Bacon, I have dealt with the substance of the issues raised under this head when dealing with the characterisation of the same facts as a breach of fiduciary duty. As regards Mr Lang, Mr Huddleston and Mr Staveley, I have no more reason to draw the inference. The clear impression I have is that (for some) working under Mr Green's unusual and in some respects over enthusiastic management style was truly awful and its aggression would destroy the business. It would be no surprise if some left and found refuge with Balltec and (fearful of reprisals from Mr Suttie and Mr Green) took to subterfuge to disguise their involvement. That is as consistent with the few known facts as the inference that they were "enticed away".
267. It was submitted that Mr Lang had in the Manchester Proceedings admitted that he had been solicited by Mr Emmett. But both in the Manchester Proceedings and these it was the evidence of Mr Halstead (on behalf of BSW) that the enticement was by Mr Taylor. I regard that as more probable.
268. Was there a conspiracy to injure by means of these breaches of contract by Mr Emmett? In my judgment plainly not. There was no agreement or concerted action to that end, save only with Mr Brown. I am satisfied that he and Mr Emmett planned everything together.
269. Next, Mr Brown. He is not a party: but BSW is trying to make Mr Emmett, Mr Benson and Mr Bacon liable for what are said to be breaches of contract by Mr Brown. I must therefore address the case against him in full. The contract relied on is Mr Brown's contract of employment. This terminated in April 2003. Reliance is placed on clause 3(2), clause 7, clause 12 (4) and clause 13.
270. The breaches alleged are (a) attempting to negotiate a joint-venture; (b) soliciting Technip Offshore and Technip France; (c) developing new technology for Balltec (in particular a backwards locking mechanism, the removal of ball pockets and a reduction in the size of the mandrel); (d) producing drawings of this on 19 June 2004; (e) failing to inform the board of BSW of the BREM technology; (f) trying to secure the bid for the Dalia project; (g) concealing, rather than disclosing and handing over to BSW, the BREM technology, all drawings and all business opportunities arising therefrom; (h) suborning Mr Taylor, Mr Bacon, Mr Benson and Mr Lang; (j) copying confidential drawings and a budget template onto his laptop; (k) copying BSW drawings onto Mr Bacon's computer.
271. These acts all post-date April 2003 so there is no question of a breach of clause 3(2). The only relevant clauses are 7, 12 and 13.
272. As to clause 13 Mr Cavender QC took a preliminary point. The non compete provisions of clause 13 were imposed on Mr Brown

"...in the event of termination by the Company, provided that such termination was lawful and or did not constitute unfair dismissal...[and] for the period of two years from the date of the termination of the employment of the Employee or until a

finding of wrongful or unfair dismissal has been made by a competent tribunal, if shorter,..."

Mr Cavender QC submits that as a matter of construction the intention of that paragraph was that the covenants were to run for two years from the date of termination unless such termination was found to be wrongful or unfair, in which event the covenants were not to be enforceable *at all*. (Since the Employment Tribunal held in September 2004 that Mr Brown had been unfairly dismissed, on this argument clause 13 did not apply to Mr Brown as from April 2003). He submits that it would be both counterintuitive and commercially unreasonable for the parties to have agreed that a restrictive covenant would remain extant until the decision of the court on wrongful or unfair dismissal and not thereafter, and runs contrary to the usual position of a declaration as having retrospective effect.

273. I do not accept this argument. Although the wording is not happy I think its true effect is that the covenants (if valid) were to remain in place until a court decided that Mr Brown's dismissal had been unfair. The words have the same effect as the rather more happily worded redemption provision in the Emmett Loan Notes covering a similar eventuality. In their written closing Counsel for BSW submitted that clause 13 should be interpreted as operating up to the point of the decision of the tribunal in September 2004 but no further. Only in their very final closing reply submission did BSW take the point that clause 13 continued to apply after September 2004 by virtue of Mr Brown's continuing to be a shareholder or director. As a matter of construction in my judgment they are right: but the trial having been conducted on the basis that attention was focussed on Mr Brown's breaches of clause 13 down to the determination of the employment tribunal it would be unfair to allow them to expand their case in this way in closing submissions.
274. The relevant covenants are therefore those in clauses 7, 12 and 13 (if valid). Clause 7 deals with confidential information. Clause 12 deals with soliciting employees. Clause 13 deals with non-competition.
275. As to clause 7, the same criticisms can be made about the case advanced against Mr Brown as are made about that against Mr Emmett. They are compounded by the fact that BSW's case against him was not put to Mr Emmett. But whatever the deficiencies of the pleaded case I am satisfied that Mr Brown did use (for purposes other than those of BSW) material which he held on his laptop or that was on a computer belonging to Mr Emmett and which is properly regarded as confidential. I find that Mr Brown copied and used for the purposes of Balltec BSW's Maintenance and Operating Manual for the 100 tonne SWL Pipeline Insertion Tool: it was created in 2002. Although it was provided to customers I consider that its contents remained confidential, the customers understanding that they could not freely disseminate those contents. I find that Mr Brown copied (and prepared for use by Balltec) BSW's Quality Assurance Manual (although in the event it was not actually used). I find that Mr Brown probably used an underlying BSW quotation document (which I have no reason to think was created after April 2003) when preparing the Balltec bid for the Kizomba work. This was as far as the evidence went on this head of claim. There were general allegations that Mr Brown had a lot of BSW material on his (now destroyed) laptop and that he used material to be found on Mr Emmett's computer and that he downloaded lots of material from BSW's server: but it is not possible to make any specific findings of breach of contract because BSW did not adduce evidence from anybody (or from its server) as to what this material was or how Mr Brown had used it.

276. It was alleged that Mr Brown copied and used for the purposes of Balltec a template called “Tender (Cost Estimating) Summary”: on its face this appears to be an internal document of BSW’s and there was no evidence that customers saw it. It is properly regarded as confidential in that it sets out in systematic form the factors leading to a quotation. But it was not created until after Mr Brown had been dismissed as an employee. Mr Brown did not have access to this document during his employment nor did he owe contractual obligations in relation to it when his employment terminated. It was said that Mr Brown copied BSW’s Technical Proposal Q4076 for the Dalia Project bid and modified it (leaving certain passages *verbatim*) to support Balltec’s bid: I find that having regard to the inherent probabilities it is likely that Mr Brown did work on this. But from internal evidence this document was created after October 2003: so Mr Brown did not acquire knowledge of it during his employment nor did he owe contractual obligations in relation to it on termination. (Whether these dealings were a breach of fiduciary duty, even though not breaches of contract, is a separate question).
277. Clause 12(4) covers failure to deliver up books etc on termination of employment. In this regard I have nothing to add to the preceding section. It also covers endeavouring to entice away employees. There is no sufficient evidence upon which I can make a properly grounded finding that Mr Brown enticed any employee away.
278. Clause 13 deals with non-solicitation and non-competition. The reasonableness or otherwise of a restraint upon competition is to be assessed at the time when the contract containing the provision is entered into: Norbrook Laboratories v Adair [2008] EWHC 978. In approaching this assessment I shall follow the guidance of Cox J in TFS Derivatives v Morgan [2005] IRLR 246 at [37]ff: namely (a) to construe the covenant so as to determine its scope; (b) to assess the evidence advanced by the party seeking to enforce the covenant as to its legitimate commercial interests; and (c) to assess whether that party has shown that the covenant is no wider than is reasonably necessary to protect those identified interests in the circumstances as at the date of the contract (having regard to the contract as a whole and to the circumstances in which it was then realistically envisaged the contract would apply).
279. Mr Marshall QC takes a preliminary point. Clause 13(2) records that the parties consider clause 13(1) (which contains the restrictions) to be “fair, reasonable and necessary to protect the goodwill and interests of BSW”. He submits that, since there is no reason in principle why parties should not agree that a certain state of affairs should form the basis of a transaction (whether it be the case or not), clause 13(2) creates a contractual estoppel. He relies on *Chitty on Contracts* 31st ed. para 14-135 as authority for the principle: and upon an answer given by Mr Emmett in cross-examination (that Mr Brown understood what clause 13(2) meant and could have stipulated for different terms if he chose) for the evidential foundation.
280. I do not accept this argument (which would apply equally to Mr Benson, Mr Taylor, Mr Staveley and Mr Huddleston whose contracts also contained this term). Covenants in restraint of trade are not enforceable on public policy grounds (save in particular circumstances). Employers cannot avoid the legal necessity of establishing those circumstances by incorporating a standard term requiring every employee to state that in his or her opinion the terms are fair. What matters is not whether *the parties think* the terms are fair but whether *the law accepts* the terms as fair. So I will embark on that enquiry.

281. I begin with the construction of the obligations. The non-solicitation covenant in clause 13(1)(a) is broad. Its application is worldwide. It purports to prevent the employee soliciting or endeavouring to entice away anyone in the world known to be (or in the preceding two years to have been) a client, or customer or in the habit of dealing with BSW, whether or not the employee had any actual contact with the client, customer or habitual dealer: and for the period of two years. So if in 2004 Mr Benson knew that in 2002 Technip Houston had hired a pipeline recovery tool from BSW then he was barred until 2006 from soliciting its custom for the purchase of a mooring connector.
282. The non-compete covenant is of extreme breadth. It purports to prevent the covenantee from being (a) an employee of or (b) directly carrying on or (c) indirectly carrying on or (d) directly being engaged in or (e) indirectly being engaged in or (f) directly concerned in or (g) indirectly concerned in or (h) directly interested in or (i) indirectly interested in any other business *similar* to that carried on by BSW prior to the termination of employment: and all this for the duration of employment or directorship and for the period of two years thereafter. The business of BSW was the manufacture and sale of subsea mooring connectors and the manufacture and sale or rental of subsea pipeline tools for the offshore oil and gas industries. So the employee cannot be involved in any of the specified ways with any “similar” business.
283. I turn to legitimate commercial interests. Mr Suttie referred to the highly specialised nature of BSW’s business, its global marketplace and the niche sector in which it operated, and to the fact that its economic value lay in its intellectual property and its workforce. But it has to be borne in mind that the key members of that workforce (Mr Emmett and Mr Brown) brought to BSW many years’ experience and the capacity for inventiveness and creativity that was part of their personal capital and could not be appropriated by BSW. BSW did not produce any evidence directly addressing this. It did not, for example, establish the size of the market or how many competing businesses there were. It was submitted that there was only one competing business (a company called Delmar). But from the scraps of incidental evidence there was at least another company (Nemo, a Norwegian company) that provided mooring connectors, and a further three that provided subsea pipeline tools. BSW demonstrated that in one instance (the Dalia Project) the timescale from initial quotation to bid acceptance was of the order of 10 months: but it was not established that this was typical. Taking into account the times scales of the Kizomba and Simian/Sapphire bids I find that the sales process might typically last for six months (because the main contractor may need “sighting bids” from intending sub-contractors before submitting its own bid, and only after having secured the main contract would it seek firm bids for the work).
284. The failure directly to address the issue means that it is barely possible to form a view as to BSW’s legitimate business interests. I am really left with what BSW elicited from Mr Emmett viz. that about 85% of BSW’s work was international, and that in his opinion BSW needed *some* protection in respect of its personnel, confidential information, intellectual property and customers. In my judgment BSW’s legitimate business interests were to preserve its intellectual property and to protect its employee, supplier and customer connection. These would be primarily protected by the confidentiality, non-enticement non-solicitation provisions for a reasonable period: but they could properly be supported by a non-competition covenant for the minimum period sufficient to ensure that there was no unwitting transfer of relevant confidential information or know-how.
285. As to whether the covenants went no further than was necessary to protect such legitimate business interests, BSW led no direct evidence that really addressed this issue. Mr Suttie

referred to the highly specialised nature of BSW's business, its global marketplace and the niche sector in which it operated, and to the fact that its economic value lay in its intellectual property and its workforce. But again it has to be borne in mind that the key members of that workforce (Mr Emmett and Mr Brown) brought to BSW many years' experience and the capacity for inventiveness and creativity that was part of their personal capital and could not be appropriated by BSW. It would never be possible for BSW to stipulate that Mr Emmett and Mr Brown (or for that matter Mr Taylor or Mr Lang) should not have original thoughts about ball and taper technology after they had left BSW. In cross-examination Mr Emmett acknowledged that he and other employees could get some sort of engineering job elsewhere, but the evidence did not establish that they could get such jobs within the highly paid off-shore oil industry and yet comply with the broad covenants. The question is not, however, whether Mr Brown and the other employees bound by clause 13 could get other jobs, but whether in restricting the jobs that were open to them BSW went no further than was necessary to protect its legitimate business interests having regard to the public interest in innovation and its implementation.

286. In my judgment the non-solicitation covenant in Mr Brown's contract is not sustainable. It purports to prevent him dealing with people with whom he has had no previous contact. The two year period is more than is needed to protect any legitimate interest of BSW.
287. In my judgment the non-competition covenant in Mr Brown's contract is not sustainable either. The attempt to bar him from involvement in similar (but non-competing) businesses cannot protect any legitimate interest of BSW: and the two year period goes beyond anything that is reasonably required for that protection. Provided that personal connection is interrupted and projects current at the time of termination of employment are insulated from Mr Brown and his new employers or associates (for which purpose a 12 month restriction is in my view perfectly adequate) it is not in the public interest for experienced and creative people to be kept out of their specialist field. Mr Emmett accepted in evidence that what was contemplated in 2001 was a two-year period of expansion for BSW, and that in that context it was right that if Mr Brown was dismissed a two-year period of restriction upon his employment elsewhere was reasonable. But the non-competition clause did not apply only during the first two years following the date of the contract of employment. Its reasonableness has to be judged as at the date of the contract but according to its terms (which endure throughout the period of the contract): and that judgment has to be made by the Court not by Mr Emmett. The fact that a well established company is going through a growth spurt does not justify a period of restraint that is not otherwise justified.
288. Mr Marshall QC submitted that a two-year restraint must be regarded as reasonable because when Mr Emmett and Mr Brown were contemplating purchasing Arnlea's holding they had proposed a *three* year non-competition period. I do not accept this submission. The reasonableness of a restraint imposed on the seller of a business or of an interest in a business is judged by different standards than are applied to employer/employee relationships. BSW rely on the employment contracts.
289. Had clause 13 been valid I would have found Mr Brown to be in breach of it in relation to his participation in the Dalia Project, the contact with Mr Fulton which lead to the Kizomba work, and in the Simian/Sapphire project. He would also have been in breach in respect of his assistance to Mr Emmett in the establishment of Balltec from the beginning of July 2004 (notwithstanding that he did not become a director of Balltec).

290. I find and hold that there was no conspiracy (to which Mr Benson and Mr Taylor were party) to injure BSW by Mr Brown's breaches of contract.
291. Third, Mr Taylor. He is no longer a defendant. But it is said that Mr Emmett, Mr Benson and Mr Bacon conspired together with him to injure BSW by the unlawful means of Mr Taylor breaking his contract. I therefore need to see whether Mr Taylor did break his contract.
292. The only relevant contract is his contract of employment. The relevant terms are clauses 3(2), 7, 12 and 13.
293. The breaches alleged are that in June or July 2004 (a) Mr Taylor met with Mr Emmett and divulged information concerning BSW's bid for the Dalia Project; (b) assisted Mr Emmett in the design of products and tools for Balltec. The allegation was not further particularised.
294. This seems to me to be the same case as was advanced in relation to the allegation that Mr Taylor acted in breach of fiduciary duty. It was not proved. I accept the evidence of Mr Emmett that Mr Taylor's work began after he left BSW.
295. BSW relied on one piece of evidence as establishing a particular breach of contract by Mr Taylor. Mr Brown was cross-examined in the Manchester Proceedings. In a confusing passage (in which his answers were constantly interrupted by Counsel) this exchange occurred:-

“Q: Right, okay. Alright. So Richard Taylor was passing information out about this time about BSW's relationship with HBH?

A: Yes”

BSW argued that this evidence given by Mr Brown proved that Mr Taylor broke his contract in divulging information confidential to BSW about its relationships with its main supplier. It is unsatisfactory enough to seek to establish in this action that (for example) Mr Benson is liable for a breach of contract by Mr Taylor (who is not a party and not called as a witness) on the basis of the evidence of Mr Brown (who is not a party and is not called as a witness) given in other proceedings between different parties.

296. But it even more unsatisfactory when the single selected sentence distorts the evidence actually given. In context the evidence was:-

“Q: Well who were the third parties who are telling you about the relationship with Halstead's? Who were they? Because you do not identify those in your statement. You do not say anything about this.

A: Well just in general chitchat from....

Q: Well who were they?

A: Well I am aware that Richard Taylor met Graham Halstead.....

Q: No. No. You are aware now. We are all aware of a lot now. But who at the time did you think... who was giving you information?

A: Well I'm not sure whether it was Richard to myself, or Richard to Bob, but I....

Q: Alright it is Richard..

A: became aware that there was a meeting...No, no, not Richard necessarily to me...but Richard was the source of the information....”

“Q: Right, okay. All right. So Richard Taylor was passing information out about this time about BSW's relationship with HBH?

A: Yes.

Q: Right.

A: He had....

Q: Okay.

A: Met in passing with Graham....

Q: No, no. I....

A: ...in the car park.

Q: I understand that.”

297. In my judgment a fair reading of this evidence is that Mr Brown was saying that Richard Taylor's information about the difficulties between BSW and HBH (which he conveyed to Mr Brown) derived not from information that Mr Taylor acquired whilst at BSW and (in breach of his contractual obligation of confidence) disseminated, but rather derived from Mr Halstead himself. I do not regard this evidence as proving Mr Taylor broke his contract.
298. There is one qualification to my general view. I am satisfied on the evidence that on 30 July 2004 (the day before his notice period expired) Mr Taylor attended the meeting with Mr Emmett, Mr Brown, Mr Halstead and Mr Bamford of Geoprober. At that meeting some general design issues were discussed concerning the secondary locking mechanism (albeit that they were later abandoned). On that one day (whilst still bound by clause 3(2)) Mr Taylor became involved with Balltec. That was a breach of contract.
299. The circumstances of his attendance were not explored: and from the mere fact of his attendance I am not prepared to infer that there was a conspiracy to cause him to breach his contract in that regard, so as to make (for example) Mr Benson liable in damages for the loss caused to BSW (if any) by reason of Mr Taylor's breach of contract through attending that meeting.

300. There was no conspiracy to injure BSW by the unlawful means of Mr Taylor attending a meeting the day before his contract of employment terminated.
301. I should note one further detail. If one examines the lengthy Schedules to the Particulars of Claim it appears to be alleged that on 27 July 2004 Mr Taylor prepared a calculation sheet for Balltec. Had he done so that would have been a breach of his contractual duty to serve BSW faithfully. But examination of the document shows that the calculation was done by “AB”. BSW’s pleaded case is that “AB” is Mr Bacon (see paragraph 17(3) of the Amended Particulars of Claim). So I do not find this breach proved.
302. Finally, Mr Benson. The relevant contract is his contract of employment: the relevant clauses are again clauses 3(2), 7, 12 and 13.
303. The breaches of those obligations alleged against him are not easy to pin down in the Particulars of Claim. There is a general allegation (in paragraph 9) of assisting in the establishment of a competing business “in the manner pleaded below”. But the only allegation to which that clearly relates is an allegation in paragraph 18(2) that Mr Benson attended the meeting on 30 July 2004. Since Mr Benson’s notice had taken effect on 12 July 2004 that can only have been a breach of clause 13 of the contract of employment. In the closing Mr Marshall QC simply submitted that
- “[Mr Benson] was willing to and did assist Mr Brown and Mr Emmett in setting up a competing business from at least May 2004, whilst still an employee of BSW...”
304. Mr Benson was an administrator and book-keeper: he dealt with purchase orders and helped the technicians with assembly in the workshop (but without having any engineering skill). At the time of his contract of employment he earned £11,154 per annum. He knew who clients were, because their names appeared on the files he used in connection with processing purchase orders. He had access to BSW’s server: but it was not put clearly to Mr Benson that he had misused this access to download specific material which he then made available to Balltec. Mr Benson’s appraisal (with which I have dealt above) gives a fair picture of what he was actually engaged in shortly before the events in issue in this action.
305. I turn to look at the breaches of his contractual obligations which were argued but not pleaded. In cross-examination Mr Benson was taxed with helping Balltec prepare some Quality Assurance material. He acknowledged preparing a list of quality assurance documents: and it is evident he did so in July 2004. It was suggested that Balltec had plagiarised BSW Quality Assurance Manual. I find that at some stage someone did “reprocess” BSW’s QA Manual in an endeavour to adapt it for Balltec’s use. (Mr Benson said that it was not “BSW’s Manual” but a template published by Hern European Management Systems which each user simply populated with its individual information: but BSW’s copyright in the document was admitted and I proceed on the footing that it is BSW’s document). Mr Benson denied that he had adapted the document for Balltec’s use. I accept his evidence: I find that it was Mr Brown (under the alias “FF”) who did the work. He also said that the work was never used, but instead a new QA Manual was produced. I also accept that evidence.
306. It was established in cross-examination that Mr Benson helped Balltec with the preparation of the Kizomba bid (submitted on 19 July 2004). It was suggested in that context that BSW

needed to have some protection in terms of how Mr Benson used confidential information he had obtained (that information not being specified) and in particular how he dealt with BSW's clients after his departure from the company. Mr Benson's response is that none of the material was confidential information, and that all he did was to obtain prices from subcontractors. Some of the drawings that were submitted in support of the Kizomba bid are now admitted to have been copied from BSW's drawings. There is no evidence to suggest that this was done by Mr Benson or, indeed, that at the time he knew it had been done. It is not established that Mr Benson used BSW's confidential information in the Kizomba bid.

307. I also consider that it is probable that Mr Benson assisted in the preparation of the quotation for the Simian Sapphire contract that was submitted on the 22 July 2004. But it was not established that this involved any breach of contract by him (save for the argument that it was in breach of clause 13 of his employment contract).
308. I find and hold that clause 13 of the employment contract is most clearly not enforceable against Mr Benson. It far exceeds in scope and duration what was reasonably required for the proper protection of such legitimate business interests as BSW has established. I find that there were no breaches of contract established in relation to clause 3(2) during Mr Benson's employment or of clauses 7 and 12 during and upon termination of his employment.
309. In any event there was no conspiracy between Mr Bacon and Mr Benson and Mr Taylor (or between them and Mr Emmett and Mr Brown) to cause injury to BSW by the unlawful means of Mr Benson's breach of contract (if any could be proved). This was not part of any agreed plan or concerted action. Mr Benson simply joined his stepfather's new company because he wanted to.
310. BSW's pleaded case also referred to breaches of contract by Mr Bacon. He was a freelance draughtsman who had been providing drawing and design services to BSW since 1999. The terms of the contract under which he provided those services were not recorded in writing. BSW relied on (a) oral agreement; (b) express terms contained in the written acknowledgements that Mr Bacon used on the drawings he prepared for BSW; (c) implied terms.
311. The terms orally agreed were said to have been made by unspecified BSW personnel from time to time in the period from 1999 to 2004 in the course of requests to Mr Bacon to undertake work, which work Mr Bacon undertook to do. The terms were that Mr Bacon would not use confidential information relating to the business of BSW other than in the best interests of BSW and for the promotion of its business: and that copyright and design right in the "drawings and inventions prepared by Mr Bacon" should vest in BSW.
312. In my judgment the evidence did not establish an oral agreement in these terms. This may explain why the burden of Mr Marshall QC's argument was that these terms were to be implied.
313. The acknowledgement that Mr Bacon placed on his drawings was in these terms:-

"CONFIDENTIAL DRAWING BSW LTD © [2004] this drawing and the copyright in it are property of BSW limited. It must not be parted from or copied in whole or in part or used as

the basis of any other drawing or reproduced 3 dimensionally without consent in writing of BSW Limited and must be returned to them on request.”

In my judgment this does not constitute an express term of any agreement between BSW and Mr Bacon: but it is capable of evidencing an implicit agreement between these parties.

314. In his evidence Mr Bacon acknowledged that he would not use the designs or drawings that he prepared for BSW for any other purpose or purposes than those of BSW itself. In my judgment such behaviour was not a gratuitous act by Mr Bacon, but reflected his understanding of an over-arching obligation which he owed to BSW, which was implicit in every separate contract for services that he undertook, and which found expression in the acknowledgement which he put on every drawing. The terms of the obligation, if spelt out, were (a) that copyright in the drawing so marked vested in BSW; (b) that the design disclosed by the drawing so marked was confidential to BSW; and (c) the drawing so marked belonged to BSW and could only be used for the purposes of BSW. Such an implicit term is consistent with the principles identified by Lightman J in Robin Ray v Classic FM [1998] FSR 622 at 641-643. (I would in passing observe that whilst the questions of copyright and confidence are normally distinct the terms of the endorsement upon the drawings in the present case means that the two can be taken as going hand in hand).
315. The process of producing a 2D drawing involved the deployment as a working tool of various 3D models of component parts whose interrelationship the final drawing was to depict. These models are created in a programme called “Autodesk Inventor”, and may be models of component parts (“.ipt files”) or of assemblies (“.iam files”). Some of these were very simple and were standard features of the Inventor software, such as screws, bolts, bearings, balls and springs. Others would be more complex and might have been created by the CAD operator in the course of one task, but would then be manipulated by the CAD operator (e.g re-dimensioned) in the course of a subsequent task. Into this category would fall both simple models (such as “O” rings and circlip grooves) and also much more complex shapes. In his expert evidence Prof MacFarlane explained how draughtsmen kept a palette of object shapes on which they would draw to produce the models which would ultimately lead to the preparation of a drawing (“.dwg files”). In his evidence Mr Bacon referred to the process of modelling something into a different profile using a base shape created in a previous model. These computer files were not provided to the client and bore no such endorsement as the final drawing: they were kept by the draughtsman, were only viewable on the generic software belonging to the draughtsman and contained attributes that were only readable by the CAD operator.
316. An issue arose as to whether the contractual term that I have identified applied to these models as well as to the final drawing. Was a computer file containing the model of an “O” ring later represented on a BSW drawing (or a print of the file) something in which BSW owned the copyright and was confidential to BSW? And if not in relation to an “O” ring, did a different rule apply to more complex shapes?
317. Counsel for BSW submitted that because *some* modelling files and prints of files were to be found amongst the 1387 items in respect of which an admission of copyright infringement had been made it must follow that copyright (and confidentiality) had been admitted in *all similar* modelling files. I do not accept this submission. I accept that where copyright in a model file is admitted then (unless permission is granted to withdraw the admission

because it relates to some obviously simple shape derived from the Inventor software itself) it is implicitly acknowledged that the model is confidential to BSW. But as to the rest of the files of this type which may be found on Mr Bacon's CDs the answer to the question must be ascertained by applying the principles identified by Lightman J in Robin Ray v Classic FM (*supra*) to which I have already referred.

318. It was not suggested that BSW acquired copyright or confidentiality in any model prepared from the standard Inventor package. Nor was it seriously argued that BSW acquired copyright or confidentiality in what could be called the standard palette of every engineer, such as an "O" ring or a seal or a cone. If the draughtsman needs a 10cm "O" ring for drawing B on behalf of client X there is nothing to stop him simply copying (and altering the dimensions of) 12cm "O" ring from drawing A that he did for client Y: he does not have to start from scratch. The debate is about more complex shapes. Here the default position is that Mr Bacon retained copyright in what he created. There is no express term dealing with copyright in the models. The mere fact that BSW may have paid Mr Bacon to create the shape for the purposes of a 2D drawing does not suffice. The issue is whether there is some other ground for implying into the contract (on the basis of obviousness and necessity) some restriction on the right of Mr Bacon to deal with what he retained: and if there is, then what is the minimum restraint that meets the necessity?
319. It is not possible to answer this question without identifying (in relation to each model or file) whether there is something significant about it (uniqueness of profile or shape or dimension, or perhaps derivation from some pre-existing design of BSW's) which is integral to the design on the copyright 2D drawing and which any reasonable observer would recognise obviously could not be copied or amended to produce a slightly different model because of its confidential character. This Mr Bacon recognised. Having established that there were basic off-the-shelf models his cross-examination proceeded:
- "Q: Then there are also other models which you have to work on, and in particular there can be quite complex 3D Inventor models of products?"
- A: There can.
- Q: .. often they will contain quite confidential information about the product concerned, won't they? They might show details of dimensions, they might show details of tolerances, constituent parts that sort of thing?
- A: It's possible.
- Q: Which could be confidential?
- A: It depends."
320. I am addressing models in relation to which no admission of copyright has been made. I hold that in relation to any such model integral to the design on the copyright drawing where by reason of some substantial distinguishing feature (such as uniqueness of profile or shape or dimension, or derivation) any reasonable observer would recognise that (by reason of its readily apparent character of confidentiality) it could not be copied or amended to produce a slightly different model, then Mr Bacon was under an implicit contractual

restraint only to use it for the purposes of BSW. I regard this as a high threshold. So, for example, a basic model of a receptacle and trunnion could be manipulated (e.g. by shortening the receptacle and lengthening the trunnion): but if the receptacle contained a specially profiled seal created by BSW then that could not be manipulated by Mr Bacon to create a larger or smaller version of the special seal.

321. I find that Mr Bacon broke his contractual obligations in the preparation of the Kizomba bid drawings. They were straight copies of drawings in which BSW held the copyright.
322. I find that save in relation to the admitted infringements of copyright (for example in relation to file 515660.ipt where the admission of infringement in relation to a model I think must implicitly recognise that this was a model which was subject to contractual restraint) BSW has not established that Mr Bacon broke his contractual obligations in the way he utilised any models. BSW proceeded on the footing that *all* models (save perhaps for those that came as part of the suite of CAD software) used to create the drawings in which BSW held copyright also “belonged” to BSW. Accordingly it did not seek to establish any substantial confidential distinguishing features which would lead any reasonable observer to the view that Mr Bacon was subject to some restraint in relation to any particular models.
323. BSW relied on what were said to be breaches admitted by Mr Bacon in his witness statement. In paragraph 4 of it Mr Bacon acknowledged that he had electronically stored some drawings with BSW drawing series numbers which he “had used..... as components for a mooring link tender by Balltec in late July 2004” , but he asserted that BSW did not have any intellectual property rights over them. It is unclear to what material this evidence relates. If it relates to the Kizomba bid, then I have already addressed it. If it relates to models where there has been an admission of infringement of copyright (and so subject to an implicit contractual restraint), then I have already addressed it. If it relates to non-confidential models used to create Balltec drawings (“the standard palette”), then again I have already addressed it. If it relates to some allegedly “confidential” model, then I am unable to identify it or to make any finding in relation to it.
324. In its pleaded case BSW also alleged that Mr Bacon “in breach of contract” copied a number of BSW’s confidential drawings onto his own computer using remote access to BSW’s computer which had been granted to him around the 9 or 12 July 2004. This (if established) seems to me not to be “a breach of contract” but rather an infringement of copyright. But I will briefly address it now. The allegation depends on an entry in a notebook of Mr Lang. The entry says:-

“Remote access software for Roger: to give Roger access to network and therefore ability to update drawings engineering change notices and drawing numbers etc.”

Beside the entry is a ticked box. Mr Bacon had five CDs of BSW drawings. He denied using remote access software. It was not established that any of the drawings on these five CDs had been downloaded using this remote access, as opposed to having been created by Mr Bacon in the course of his work for BSW or provided to him by BSW by e-mail or by using a standard file transfer protocol in the ordinary course of his work.

325. I find that there was no conspiracy between Mr Emmett, Mr Brown and Mr Bacon to injure BSW by the unlawful means of Mr Bacon’s breach of contract. The breaches occurred, but

not as part of any plan or concerted action. Indeed Mr Emmett did not know they had. I find that it is probable that Mr Brown knew that Mr Bacon was to produce drawing 515667 from an Inventor assembly file originally created for BSW (because he seems to have commissioned that work): but otherwise there is no real evidence that demonstrates he knew how Mr Bacon was producing his drawings. Mr Benson and Mr Taylor were not party to any conspiracy that Mr Bacon should break his contract with BSW.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely inducing breach of contract?

326. This is another portmanteau claim. It is necessary to unpack it and to identify the contracting parties, to identify the terms of the relevant contracts, to identify the breaches, to identify the acts said to constitute inducement of those breaches, and then to enquire whether the tort of inducement to breach that contract came about because of a conspiracy between the named parties. Fortunately some of this work has already been done.
327. In paragraph 9 of the Particulars of Claim BSW allege that Mr Emmett induced Mr Brown, Mr Bacon, Mr Taylor, Mr Benson, Mr Lang, Mr Huddleston and Mr Staveley to break their contracts of employment or other contractual obligations. Paragraph 10 pleads that Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon, and Mr Benson together combined to injure BSW by Mr Emmett's unlawful inducing of breach of contract. The contractual terms relied on (and said to have been broken) are clauses 3(2), 7(4), 12 and 13 of the employment contracts.
328. In considering this aspect of the case I apply the following principles (drawn from the speech of Lord Nicholls in OBG at paragraphs [191]ff:-
- a) The essential prerequisite for a successful claim against the defendant is that a third party has broken his contract:
 - b) The defendant is made responsible for that breach of contract by a third party because of the defendant's intentional causative participation in the breach i.e. the defendant must have intended to persuade the contracting party to break his contract :
 - c) Intentional interference by persuading the third party to break his contract presupposes knowledge of the contract;
 - d) What is necessary is sufficient knowledge for the court to find that the defendant proceeded to induce the third party to act in a way which the defendant knew was a breach of that party's obligations under the contract (or deliberately turned a blind eye to the third parties contractual obligations and proceeded regardless).
329. It may be taken as read that Mr Emmett knew the contractual arrangements of all those whom it is alleged he induced to break their contracts.
330. I have found above that Mr Brown broke his contract in that in breach of clauses 7 and 12(4) he accessed and used BSW's confidential documents for the purposes of Balltec. In my judgment there was intentional causative participation by Mr Emmett in that breach.

The most probable means of access to this material was via a computer that Mr Emmett kept at home: and Mr Emmett acknowledged that he permitted Mr Brown to use it.

331. I have found that there was no breach by Mr Brown of clause 12(4) (as regards enticement of employees) or 13 (as regards solicitation and competition). If I am wrong in law about that I would find and hold that Mr Emmett did not induce any such breach. One has to look at the reality of the position. Mr Emmett and Mr Brown were people who had both suffered at the hands of Mr Suttie and his appointees: and they both saw themselves as victims. They together put into effect a plan to compete with BSW knowing (having regard to the way they began the business) that it would injure BSW and knowing the facts that made their actions a breach of fiduciary duty. Neither induced the other. Mr Brown knew exactly what he was doing and chose to do it in the teeth of advice from MMS.
332. Counsel for BSW submitted in closing (though this inducement had not been pleaded) that Mr Emmett induced Mr Brown to breach his employment contract by (a) paying a salary of £5000 per month irrespective of Balltec's performance and (b) offering the hope of shares. These "facts" derived from Balltec's pleaded case in the Manchester Proceedings: Counsel's submission does not fairly reflect that pleaded case. The pleaded case was that before Balltec ever engaged Mr Brown, Mr Emmett personally paid Mr Brown £5000 per month to tide him over until Mr Brown's case against BSW was sorted out: and Mr Emmett explained that he did so out of loyalty to a friend whom he considered had been very badly treated by Mr Suttie. Mr Marshall QC submitted that if Mr Emmett had not done so then Mr Brown would have gone off and got another job and so would not have become involved in Balltec. But this assertion cannot be tested: and on such evidence as is available from Mr Brown it seems wrong. Mr Brown explained in the Manchester Proceedings that, having been dismissed by Mr Suttie for "gross misconduct", he could not get another job until the tribunal had determined whether such a dismissal was fair. Mr Emmett's generosity tided him over until then.
333. I have found that Mr Bacon broke his contract in relation to the preparation of the Kizomba bid drawings. I find that Mr Emmett did not induce that breach of contract. He asked Mr Bacon to produce the drawings but he did not invite or induce him to produce them in a particular way. On the evidence produced it is not possible to find that on the balance of probabilities Mr Emmett facilitated the provision to Mr Bacon of the drawings and models that Mr Bacon actually used.
334. I have found that Mr Bacon broke his contract in relation to any case in which in the preparation of a Balltec drawing he used (a) a BSW drawing or (b) a model in respect of which an admission has been made that BSW owned the copyright. I find that Mr Emmett did not induce such breaches. He left Mr Bacon to get on with his work.
335. I have found that Mr Taylor broke his contract. There was a technical breach of clause 3(2) in that in July Mr Taylor discussed with Mr Emmett in general possible improvements to the "ball and taper" technology which I think was not consistent with an obligation to use utmost endeavours to promote BSW's interests: but "technical" because the evidence does not establish that whatever it was that was discussed resulted in any idea adopted by Balltec. As the other party to the conversation Mr Emmett may be said to have induced that breach.
336. I have found that Mr Taylor broke his contract in attending the meeting on 30 July 2004. There is no evidence that this breach caused any loss to BSW because the ideas discussed

at the meeting were abandoned. There is no direct evidence that Mr Emmett “induced” this breach: how Mr Taylor came to attend the meeting was not explained. The question is whether there is sufficient other material to infer intentional causative participation on the part of Mr Emmett. I consider that there is. It is common ground that Mr Emmett and Mr Taylor met during July. It is clear that Mr Emmett offered Mr Taylor attractive terms to join Balltec (though I have found that he probably did so after Mr Taylor had given notice of resignation). Plainly Mr Taylor accepted those terms before 2 August. It is very probable that Mr Emmett would have invited Mr Taylor to the first meeting of Balltec on 30 July knowing that he was due to start work on 2 August.

337. I have found that Mr Benson did not break his contract. So the “inducement” claims falls at the first hurdle.
338. I have not yet addressed the contracts of Messrs Lang, Huddleston and Staveley. The principal claim is that they broke the restrictions on competition. I hold that clause 13 is not enforceable against any of them as being in unreasonable restraint of trade. Their cases are *a fortiori*.
339. One particular breach of contract by Mr Lang was addressed in closing (though not pleaded). Mr Lang’s employment with BSW ceased on 30 September 2004. Until then he was subject to obligation well and faithfully to serve BSW and to use his utmost endeavours to promote its interests. In their written closing Counsel for BSW identified an e-mail sent from “sales@Balltec.com” to Mr Halstead by “AB” on 3 September 2004. The writer is thinking about a method of assembling the balls on the mandrel, and proposes to overcome a particular problem by machining “a finishing cut”. BSW ask me to make a finding that the writer of the e-mail was Mr Lang, and to hold that since on 3 September 2004 he was an employee of BSW anything he “devised” automatically belonged to BSW. As I understand it BSW will then claim ownership of part of Balltec’s technology.
340. The basis of which the finding of fact is sought is a single answer on the fifth day of Mr Emmett’s cross-examination:
- “Q: We have an example..... it’s just an e-mail sent on 3 September to do with pocket details. It has “Regards: AB”. So that would seem to be the abbreviation for Mr Lang: is that right?
- A: Well I’m presuming so. I can’t remember now. Was it... yeah, I would think so. Yeah.”
341. I decline the invitation to make the finding of fact sought. I do not consider it is warranted.
342. First, this alleged breach of contract by Mr Lang is not pleaded. The only breach pleaded against Mr Lang is that he went to work for Balltec: see paragraph 19(1) of the Re-Amended Particulars of Claim. It is not fair to make findings of fact and holdings of law with potentially serious consequences when the issue has not been pleaded.
343. Second, the authorship of this e-mail and the significance of the idea it communicates is not addressed in the evidence, save (a) by Mr Bacon, whose unchallenged evidence was that the e-mail was sent by Mr Taylor and (b) by BSW’s own witness Mr Halstead who says

that it was Mr Taylor who went under the guise of “AB”. Mr Emmett’s one answer has to be weighed alongside that material.

344. Third, there was no hint in BSW’s opening (either written or oral) that the taper profile on the mandrel or the authorship of the e-mail commenting upon it was a matter in issue. The emergence of the issue is an ambush.
345. Fourth, the basis on which the question was put contradicted BSW’s pleaded case. Paragraphs 17(3) of the Re-amended Particulars of Claim pleads that Mr Bacon was given the abbreviation “AB”.
346. Fifth, the selected answer does not fairly reflect Mr Emmett’s evidence as a whole. It is preceded by a passage in which Mr Emmett clearly indicates that he does not remember who “AB” was and that he was not really concerned about those matters at the time: and it is immediately followed by the remainder of Mr Emmett’s answer: “ I wouldn’t ... It’s a long while ago”. Mr Emmett’s affirmative answer in the middle (about an e-mail sent to somebody else and which it was not suggested he had seen previously) had very insecure foundations.
347. For those reasons I do not make the finding sought.
348. I find that there was no conspiracy between Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson (or between any of them) to injure BSW by means of Mr Emmett inducing Mr Brown, or Mr Bacon, or Mr Taylor to break his contract. They may each be liable for their own breaches of contract (if any). But they are not secondarily liable for Mr Emmett’s secondary liability for such breaches.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely...inducing breach of fiduciary duty?

349. What this head of claim adds to BSW’s battery of other pleaded causes of action is obscure: and in litigation pursued with “the overriding objective” more in the foreground, perhaps it would not have been pursued. But it has been, so I must address it.
350. I have held that Mr Emmett and Mr Brown owed fiduciary duties. The outcome apparently desired is that BSW may recover from the small fry what is due from the big fish.
351. The fundamental question here is whether there is such a thing as the tort of “inducing breach of fiduciary duty”. Counsel for BSW assert that there is. They go back to the judgment of Erle J in Lumley v Gye (1853) 2 E&B 216 at 232 which is in these terms:-

“It is clear that the procurement of the violation of right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security, he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.”

In OBG [2007] UKHL 21 Lord Nicholls said in the course of his analysis of the Lumley v Gye tort (at paragraph [189]) that he would leave open the question as to how far the principle of that case applied to inducing a breach of equitable or fiduciary obligations.

352. In my judgment it does not generally apply. When Erle J sitting in the Queen's Bench spoke of "causes of action" and "actionable wrongs" I think he had in mind matters actionable at law and did not have in mind duties that could be enforced in the Court of Chancery. The original statement of principle does not in my view cover the present case. Whether as a matter of policy it should be extended to cover breaches of a fiduciary duty is a much larger question.
353. The matter was not extensively argued before me and I shall therefore say only what is sufficient to dispose of this case. I accept that there are cases where there is a contractual obligation and an identical fiduciary obligation (e.g. to account) in which the inducement tort has been held to apply to both obligations: but in my judgment these do not provide a sufficient foundation for the proposition that there is a general tort of inducing breach of fiduciary duty. There are well-developed principles within equity itself covering accessory liability (based on knowing receipt and dishonest assistance): in my judgment these address secondary claims of the type advanced here. The existence of these principles led the Court of Appeal in *Metall und Rohstoff AG* [1990] 1QB 391 to say (admittedly in the context of a plea of inducement to commit a breach of trust) that there was no reasonably arguable case for the introduction of the tort:-

"The principles of the law of trusts,... are quite sufficient to deal with those persons who incite a breach of trust or wrongfully... interfere with the relationship of trustee and beneficiary. We know of no authority supporting the existence of the alleged tort and can see no sufficient justification for the introduction of a new tort of this nature."

I share this caution. I also note that the view is expressed in Clerk & Lindsell on Torts (20th edition) paragraph 24-31 that as yet there appears to be no general tort of procuring a breach of fiduciary duty.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely lending assistance to a breach of fiduciary duty?

354. I have held that each of Mr Emmett and Mr Brown were in breach of fiduciary duty from the end of June 2004 in respect of three identified bids (the Dalia Project, the Kizomba work procured through Mr Fulton, and the Simian/Sapphire work). Paragraph 10 of the Re-amended Particulars of Claim pleads that Mr Taylor, Mr Bacon and Mr Benson combined to injure BSW by the unlawful means of lending assistance to those breaches of fiduciary duty.
355. Secondary liability for breach of fiduciary duty depends on dishonest assistance. The only plea of dishonest assistance is to be found in paragraph 30 of the Re-amended Particulars Claim (elaborated in paragraphs 31-33). The case made is:-
- a) Mr Bacon was an almost permanently engaged consultant to BSW;
 - b) In June and July 2004 he charged both BSW and Mr Emmett for work done;

- c) He made no attempt to contact BSW to ensure that working for Mr Emmett was acceptable to BSW;
 - d) On 13 July 2004 he told BSW that he was going to take a short break but in fact he worked for Mr Emmett and for Geoprober;
 - e) Mr Bacon knew or strongly suspected or turned a blind eye to the facts (i) that Mr Emmett and Mr Brown were directors of BSW and owed it fiduciary duties and (ii) they were planning a competing venture;
 - f) An honest and reasonable person would have realised that preparing drawings for Balltec was dishonest.
356. Misuse of BSW's copyright or confidential material forms no part of this case. For the purposes of analysis it may be assumed that Mr Bacon sat down with a clean sheet of paper and a pencil. It is in my judgment also irrelevant to the claim advanced that Mr Bacon did sub-contract work for BSW. Whatever the commercial good sense of doing so, Mr Bacon was under no legal duty to enquire of BSW whether he might accept work elsewhere: and his failure to do so is not a badge of dishonesty. The heart of the case under this head lies in subparagraphs (e) and (f).
357. I approach the evidence guided by the summary of the law in Barlow Clowes International v Eurotrust [2005] UKPC 37. Liability for dishonest assistance requires either (a) knowledge that the transaction is one in which the actor cannot honestly participate; or (b) solid grounds for suspicion which are consciously ignored e.g. by making a conscious decision not to make enquiries which might result in knowledge that the transaction is one which cannot be undertaken honestly. Since there is no window into another mind the court is required to draw inferences from what the actor knew, said and did at the time and later (including what is said in evidence).
358. Mr Bacon was free to take business from any source: BSW did not own him. Being asked to do work by an intending competitor of BSW did not itself raise suspicion of wrongdoing and did not involve the turning of a "blind eye". Mr Bacon knew that Mr Brown had been dismissed in April 2003 but was taking BSW to court. He did not know that Mr Brown continued formally to be a director of BSW. He knew that Mr Brown had difficulties in working for Balltec, both because Mr Brown used an alias in communications, and because Mr Brown was not formally part of Balltec: but that was explicable by reference to the existence of restrictive covenants. He knew that Mr Emmett had split from BSW in circumstances of acrimony, but he did not actually know what impact that had on Mr Emmett's general freedom: his belief was that Mr Emmett no longer had any position within BSW. Mr Bacon did not actually know that Mr Emmett and Mr Brown remained statutory directors of BSW. Mr Emmett himself thought himself free of restraint if he could establish that the restrictive covenants no longer bound him. Whilst Mr Emmett had probably seen advice to Mr Brown about the duties Mr Brown owed as a director his own duties as fiduciary were not clearly brought home to him until the issue was raised with MMS on 5 July and answered by MMS on 8 July 2004. It is therefore extremely unlikely that Mr Emmett himself would have given any hint to Mr Bacon that fiduciary duties were a material consideration at any time before (say) 9 July 2004. It was not suggested to Mr Bacon in cross examination that Mr Emmett raised the issue of fiduciary duties after

receiving the advice about them. Actual knowledge on the part of Mr Bacon that Mr Emmett or Mr Brown was acting in breach of fiduciary duty is not made out.

359. It would be slightly odd to find that a freelance draughtsman should have suspected breach of fiduciary duty on the part of Mr Emmett when such was not clear to the solicitors actually advising Mr Emmett. But I have been troubled by the possibility that as from 30 July 2004 it may be inferred from the facts (a) that Mr Brown was not formally part of Balltec and (b) that all communications with him used a pseudonym, that Mr Bacon had solid grounds for suspecting a breach of fiduciary duty by Mr Brown but turned a blind eye to such because of the excitement of “getting one over BSW”. But there is an alternative: and it was that alternative that was put in cross-examination. Adopting the case that had been put to Mr Bacon in the Manchester Proceedings, what was suggested by Counsel for BSW to Mr Bacon before me was that the topic of discussion at the meeting on the 30 July 2004 was “the restrictive covenants affecting Mr Brown” and that “not only Mr Brown’s restrictive covenants would have been considered at that meeting, but also the restrictive covenants affecting other employees”. Given that the way the case was put to Mr Bacon focused on restrictive covenants I do not think it right to find that Mr Bacon suspected that Mr Brown was also in breach of fiduciary duty and deliberately did not enquire further.
360. I therefore find and hold that Mr Bacon is not liable for dishonest assistance in the breaches of fiduciary duty by Mr Emmett or Mr Brown.
361. There is no basis upon which I can properly find and hold that there was a combination between Mr Emmett, Mr Brown, Mr Benson and Mr Bacon to injure BSW by the unlawful means of Mr Bacon dishonestly assisting in breaches of fiduciary duty by Mr Emmett and Mr Brown.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namelycarrying out frauds?

362. CPR 16 PD 8.2(1) requires a claimant specifically to set out any allegation of fraud. Paragraph 10 of the Re-amended Particulars of Claim alleges that on unknown dates prior to December 2004 Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon, Mr Benson and unidentified others combined to injure BSW “by carrying out the frauds ... set out below”. No “frauds” are set out.
363. Save in the context of the judgment of Patten J, the allegation of “fraud” or dishonesty crops up only in the context of the use by former employees of BSW of service companies in connection with work which they undertook for Balltec.
364. When Mr Benson left BSW he became an employee of Balltec.
365. When Mr Taylor left BSW he used Brolly IT as a service company to employ himself (under an arrangement facilitated by Mr Benson). He contracted his services to HBH (or to Gilmat Engineering Ltd, a company belonging to Mr Halstead), but worked for the benefit of Balltec (who reimbursed HBH). The use of the service company conferred tax advantages.
366. When Mr Lang left BSW he used Vector Ltd as a service company to employ himself: he also contracted his services to HBH or Gilmat Engineering Ltd but worked for the benefit of Balltec (who reimbursed HBH).

367. When Mr Huddleston and Mr Staveley left BSW they worked for Duxbury Construction Ltd. (a building company belonging to Mr Emmett's wife). It was the evidence both of Mr Emmett and of Mr Halstead that Mr Huddleston and Mr Staveley genuinely did do building work for Mr Emmett and for others. But it is also the case that they did workshop assembly work for Balltec. As Mr Emmett's solicitors asserted in the Manchester Proceedings:-
- “[Mr Huddleston and Mr Staveley] worked as subcontractors for Balltec's clients which Balltec charged for and made a large profit.”
368. When Mr Brown, Mr Benson, Mr Taylor and Mr Lang communicated with one another by e-mail they used pseudonyms. Mr Brown was “Fearless Fred”, or “FF” or “REPA” (which stood for Robert Emmett's Personal Assistant). Mr Taylor was “AB” or “Eng01”. Mr Lang was “Albert Black”. This manifests a desire to conceal but does not in itself constitute a legal wrong. The question is: what state of mind does it evidence?
369. Mr Benson gave evidence as to what lay behind these arrangements. The participants did not believe the restrictive covenants to be valid. (They may have been advised that this was so: but there was no waiver of privilege in relation to the advice given.) Mr Marshall QC objected to reference to legal advice in those circumstances. I have therefore approached the issue simply on the basis of whether Mr Benson's evidence about his belief and that of others was credible, having regard to the material that is available. That material includes assertions by solicitors instructed by Mr Benson and others in open correspondence that the restrictive covenants were too wide and unenforceable). What Mr Benson and the others feared was not enforcement of the restrictive covenants. It was fear of the process that each of them would have to go through before a court held that the restrictive covenant was unenforceable, a process that could be funded from the deep pocket of BSW and Mr Suttie, but which would exhaust their own resources.
370. In my judgment it is not “fraudulent” for a former employee who has doubts about the enforceability of the non-competition covenants in his contract so to arrange his affairs as to minimise his exposure to attack by his former employer and to maximise the tax advantages available to him by the interposition of a service company. (Such a device might be wholly ineffective: but the issue is whether someone who employs it is dishonest).
371. BSW were suspicious. BSW knew (from the minutes with which they had been provided by Technip on 22 September 2004) what Balltec was doing, that Mr Emmett, Mr Brown and Mr Halstead were behind it, and that they employed former BSW employees. BSW knew which employees had left its own business in the period leading up to 7 September 2004. BSW employed private detectives to take photographs of Balltec's premises and to record who went in and who came out. BSW wrote to its former employees.
372. On 14 March 2005 Mr Emmett telephoned BSW's solicitors and spoke with Mr Fitzpatrick to request him to desist from writing to Mr Benson and others. Mr Fitzpatrick's file note records Mr Emmett saying that “those individuals were not working for Balltec and had nothing to do with Balltec” and that “Mr Brown was nothing to do with Balltec”. In answer to an enquiry who did work for Balltec Mr Emmett is recorded as saying “me and me only”. Mr Emmett disputed the accuracy of this file note: but I see no grounds for treating it as other than accurate.

373. After some equivocation Mr Emmett also accepted in cross-examination (as he was bound to do) that it was untrue to say that Mr Benson (and by implication Mr Taylor and Mr Lang) had nothing to do with Balltec: and it was equally untrue to say that Mr Brown had nothing to do with Balltec.
374. In the Scottish proceedings which BSW commenced against Mr Brown, Mr Brown also denied in evidence given on 21 February 2005 any involvement with Balltec. When he was referred to the minuted meeting with Technip in September 2004 he said that he had attended those meetings as “a courtesy” and as “a favour” to Mr Emmett and to assist him with his hearing deficiency in conversation with French people. That was not a true account of why he was there.
375. I find that both Mr Emmett and Mr Brown concealed his participation in Balltec and did so pursuant to strategy agreed between them. As Mr Benson observed in his evidence “deceit” is a strong word: but in my judgment it is properly applied to the conduct of Mr Emmett and Mr Brown. It is not said that the deceit, as such, caused compensatable loss to BSW.
376. I should note (because some reliance was placed upon it by BSW) (a) that on 31 March 2005 solicitors instructed by Mr Lang and Mr Taylor wrote to say that although they had been seen at a building occupied by Balltec they were carrying out project work preparing a workshop with specialised test facilities to be owned and operated by Gilmat Engineering Ltd; (b) that on 15 April 2005 the solicitor confirmed the connection with Gilmat but also accepted that Mr Lang and Mr Taylor also did work for Balltec: (c) that on 15 April 2005 the solicitor confirmed that Gilmat did test products produced by Balltec as part of its business but that Gilmat did not trade in the same business as BSW. It was said by BSW that this was deceitful concealment of Mr Lang and Mr Taylor’s connection with Balltec. If it was (and the true position in March 2005 was not explored in evidence) it does not seem to me to lead to any actionable claim in deceit.
377. I find and hold that no “fraud” has been proved. Some deceitful untruths were told: but they did not cause compensatable loss to BSW. Mr Benson, Mr Taylor, Mr Lang, Mr Huddleston and Mr Stavely were doing what they were lawfully entitled to do viz. to work directly or in directly for Balltec.
378. Nor do I find that there was between Mr Benson, Mr Taylor and Mr Bacon a conspiracy to injure BSW by means of the commission of “frauds” upon BSW.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely carrying out a fraud on the Court? Did Mr Emmett and Balltec procure the judgment in the disclosure application by the deployment of false and fraudulent evidence? Ought the judgment to be set aside?

379. This claim relates to the disclosure proceedings brought in 2005. The first head of relief sought in the Claim Form in the present proceedings (as amended on 5 March 2013) is that Patten J’s order of 11 April 2006 should be set aside and that Balltec should repay the costs it has recovered. The third head of relief sought in that Claim Form is that Mr Emmett, Mr Benson and Mr Bacon should pay damages for a conspiracy to injure BSW “by fraud (including fraud upon the court)”.
380. The following principles govern my approach to the underlying claim:-

- a) It must be clearly proved that a judgment (in the present case, dismissal of the pre-action disclosure application and a favourable order for costs) has been obtained which, but for the fraud of one parties, would not have been obtained (Flower v Lloyd (1877) 10 ChD 327 at 334):
- b) BSW must establish that Mr Emmett gave his evidence in the disclosure proceedings without honest belief in the truth of his statement at the time when he made it (RBS v Highland Financial Partners [2013] EWCA Civ 328 at [106]):
- c) The relevant conscious and deliberate dishonesty must be causative of the judgment given and order made by Patten J. (*ibid*):
- d) What has to be assessed is the impact of the material now available on the evidence supporting the original decision (*ibid*);
- e) The allegation of fraud has to be pleaded with the particularity required by CPR16.4 and established by evidence of the quality appropriate to the seriousness of the charge.

381. The section of the Particulars of Claim (as amended on 27 February 2013) which deals with “Judgment obtained by Fraud” begins with a group of paragraphs which plead that BSW was induced to take no action by reason of some allegedly deceitful statements. I need not consider those in this part of the judgment. The case then pleaded is that in the disclosure proceedings Mr Emmett made a witness statement in which he said

- a) That he had not undertaken any design work for Balltec whilst still a director of BSW;
- b) That all design work had been undertaken by him after 20 July 2004 and had been undertaken from a clean sheet of paper;
- c) That he and Balltec did not have any of BSW’s plans;
- d) That Balltec did not use BSW’s drawings or “piggyback” upon BSW’s approvals.

It was alleged that this evidence was false and that Mr Emmett knew that it was false “for the reasons set out above” (which are not clearly identified, but would appear to relate back to allegations in paragraph 15 of the statement of case that certain drawings had been prepared on 19 June 2004). Key amongst the further particulars are allegations that Mr Emmett admitted in the course of his evidence in the Manchester Proceedings that his evidence in the disclosure proceedings was false and that he had in fact undertaken design work in July; and that Mr Bacon had admitted in the Manchester Proceedings then he had undertaken design work in May or June 2004 and had produced a drawing reflecting design work on 19 June 2004. The latest amendment added an allegation that Mr Emmett or Balltec had in his or its possession or control a BSW computer containing 1387 confidential drawings, and had also got confidential drawings copied by Mr Bacon onto his computer and used by him in his design work for Balltec.

382. It is necessary to consider what case BSW advanced in the disclosure proceedings; to look at what Mr Emmett said in response to that case; to see what the facts were; to consider (in the light of what Mr Emmett said and how things actually were) whether he was dishonest and fraudulent in the ways alleged by BSW; to see whether he and Mr Benson and Mr Bacon conspired together to commit any such fraud; and then finally (if necessary) to see whether any such fraud in fact brought about the judgment of the Court.
383. BSW had identified some external visual similarities between its mooring connectors and those actually being supplied by Balltec, but it had been entirely unable to inspect the internal aspects of the design of those actual products. It suspected that the internal design copied BSW's products or infringed its patents. BSW sought disclosure of Balltec's design drawings, accreditation correspondence and the mooring connector or subsea tool supplied or intended to be supplied in relation to five specific Balltec bids or contracts. They were the Dalia Project bid (which BSW won, so that Balltec made no actual supply); a pipeline recovery tool design tested on 29 September 2009; a pipe follower tool supplied in October 2004; and a mooring connector supplied to Inter Moor at the end of December 2004. Information was also sought in relation to a test rig photographs of which were displayed at an exhibition in May 2005.
384. Patten J identified BSW's case in these terms:-

“[BSW says that] Balltec has infringed the unregistered design rights of BSW in its products by selling products which incorporate identical design features; that it has infringed BSW's copyright in the design drawings for its products by copying these drawings and using them in order to obtain the certification of its own products; and that it has infringed two of BSW's patents”

He noted that the infringement claims in relation to “design right” and “copyright” were based largely on the shortness of the interval between Mr Emmett ceasing to be a director of BSW and the subsequent certification and manufacture of a pipeline recovery tool in September 2004. So far as the patents were concerned, BSW adduced no evidence to show how Balltec's products could infringe one of them; and the other related to a sub-seal mechanism which Balltec's evidence demonstrated was not used in the tool for which BSW sought disclosure of the design drawings.

385. It is important to make three observations about this case. First, to emphasise that BSW's case was that the products *intended to be supplied or actually supplied* copied BSW's products or infringed its intellectual property rights (the patents being identified and the claimed design rights being intentionally left unformulated). Mr Emmett was not being called upon to answer a case directed to every supply of the every product across the whole of the product range. Second, the word “design” has a variable meaning; it might mean an idea or concept, or a drawing embodying an idea or concept, or drawing embodying a workable idea, or a general layout drawing showing the interrelationship between components which are not themselves drawn in detail, or a detailed production drawing from which a sub-contract manufacturer could prepare a piece of work; and no doubt sundry other shades of meaning. The term “design” was not used with a single consistent meaning in the Manchester Proceedings, the disclosure proceedings or in this action. Third, since the disclosure proceedings BSW has not pursued any case of patent infringement, has completely abandoned any claim based on breach of “design right”, has abandoned very

significant parts of its infringement of copyright claim and has succeeded on a part of its copyright claim which concerns a body of drawings largely unrelated to the products supplied or intended to be supplied by Balltec of which complaint was made in the disclosure proceedings. The case it now pursued is not that for which BSW sought disclosure.

386. What Mr Emmett said in paragraph 11 of his witness statement dated 21 March 2006 in the disclosure proceedings was:-

“From February to July 2004 I was involved in the upheaval of being forced to leave BSW ... I was not working on designs for Balltec or any business intended to compete with BSW. ... We only started working on designing mooring connectors and pipeline recovery tools for Balltec or any business intended to compete with BSW after Balltec was incorporated on 23 July 2004. We worked from first principles. That is what ‘working from a clean sheet of paper’ meant.....”

This evidence is quite clearly directed at and confined to working on “designs” for Balltec (or for any other business intended to compete); and (in the context of the disclosure proceedings and the evidence to which Mr Emmett was replying) related to designs for mooring connectors and pipeline recovery tools. It cannot fairly be read as evidence that Mr Emmett “was not working on...any business intended to compete with BSW”. The disclosure proceedings were about misuse of intellectual property rights not breach of anti-competition restrictions: and that was what Mr Emmett was addressing.

387. Insofar as BSW allege that Mr Emmett has admitted that this evidence was wrong (and so may be taken to have admitted that it was given in a consciously and deliberately dishonest way) I reject that case.

388. In the Manchester Proceedings Mr Bacon gave written evidence to this effect:-

“I created together with Mr Emmett a new backwards locking mechanism which locked the receptacle to the ball grab. It was created from a blank sheet of paper and recreated a completely new design of mooring connector. We had to ensure that the design did not infringe BSW’s designs.....the locking mechanism was conceived and created by myself before Graeme Halstead was involved at all and I have the drawings to prove it. After initial conversation with Robert Emmett, I was tasked with developing the new mooring connector. I worked solely on my own in my French office developing the system... I have a copy of the first iteration of the design: this does not include the fallout mechanism, but clearly shows the backward locking mechanism... the initial drawings created on 19 June 2004 at 9:48 AM.”

389. Mr Emmett was pressed with the proposition that Mr Bacon’s first drawing showing a ‘design’ was produced on 19 June 2004: and although he wanted to stick to his answer that there was no design work until July he was brought back to the date on the drawing and to the evidence Mr Bacon based upon it. He was then taken to Mr Taylor’s resignation from

BSW, and then to the meeting with Mr Halstead at the beginning of July, but the line of questioning diverted to Mr Emmett's visit to Mr Bacon in France in July:-

“Q: Now when you went to France you say that was when you had a discussion with... that was to see Roger Bacon was it not?

A: Correct

Q: And whatever else you say about Mr Bacon's evidence, that was a meeting at which you were discussing the design?

A: Correct.....

Q: So in the first week in July you were discussing designs that are very detailed lengthy meeting with Mr Bacon in France?

A: Yes

Q: Why then did you tell Mr Justice Patten that no work was done until after you had resigned as a director of BSW?

A: Maybe I just got the wrong dates.

Q: Pardon?

A: I got the wrong date.

Q: Forgive me, that was your evidence on oath before the court in proceedings back in 2006.

A: Yes. I honestly thought I had not done any designing....

Q: So it follows that your evidence to Mr Justice Patten is false or what you are saying today is false.

A: About the patent, yes, I must have been, yes.

Q: Well which is it?

A: The evidence I gave to Mr Justice Patten must have been wrong..... All I can say is I had design work before the 23rd July.”

390. The most that can be said about that passage is that Mr Emmett was acknowledging that he had made an honest mistake. But now the facts are known it does not seem to me clear that he *was* making a mistake. The products which were actually supplied by Balltec and referred to in the disclosure proceedings were *not* designed during the July visit in France. The key differentiating feature (the backwards locking mechanism) derived from an idea that came into being on 30 July 2004 (but was not workable) and was developed into workable form in January 2005 (as I explain further below). What had happened in July 2004 was that there was discussion between Mr Bacon and Mr Emmett as to the desirability of eliminating some of the pockets in the mandrel. This would enable the

mandrel to be as short as possible, and would result in a saving on material costs and weight, which are obvious design targets. But the target could only be achieved if an assembly procedure could be developed adapted to that configuration: and Mr Bacon was left to explore possibilities, doing a “General Arrangement” drawing showing what the mandrel would look like *if* the target could be achieved. I do not think that must necessarily be viewed as Mr Emmett “undertaking design work for Balltec” relevant to the infringing products of which BSW complained, such that Mr Emmett’s evidence that he was not prior to 23 July 2004 working on designs for Balltec and only started working on “designing” mooring connectors and pipeline recovery tools for Balltec after 23 July 2004 must be regarded as consciously and deliberately dishonest.

391. In reaching this view I have not overlooked the fact Mr Bacon actually did some drawings on about 8 July 2004 in connection with the Dalia bid (which “bid” did not, in my judgment, result in an offer to supply Dalia with any mooring connector that existed or had actually been designed). Mr Emmett knew of these drawings because they were sent to Technip on 27 July 2004: but there is no evidence that he knew upon what date they had been commenced or how they had been prepared. Moreover, in his view these were “layouts, not designs...[d]esigns are a different thing from a layout”. This is not sophistry. The drawings are described as showing the “general arrangement” of the mooring connector and the female docking receptacle: they lack any design detail i.e. they do not describe any of the components comprising the “general arrangement” or give any clue how they work. They are correctly described by Mr Emmett as “conceptual or illustrative”. Prof McFarlane said of drawings of this type that they were “the most basic kind of sketch which uses blocks of material to represent where a secondary lock and other components would go”.
392. Insofar as BSW still seek to advance their case that Mr Emmett’s evidence was consciously and deliberately dishonest because there were drawings dating from 19 June 2004 showing the products which Balltec produced (as pleaded), I reject that case as unsustainable.
393. The drawing (numbered 515668, and called “The BREM 3 Concept Layout”) prepared on a prototype template created on 19 June 2004, and which shows the (unworkable) secondary lock, was produced on or about 4 August 2004 following the production by Mr Halstead of rough concept sketch on 30 July 2004. Far from being consciously and deliberately dishonest, Mr Emmett’s evidence (if addressed to designing mooring connectors containing a novel differentiating feature) was true.
394. BSW then ran an unpleaded alternative. The experts (Mr Dearsley and Mr Bartle) agreed that drawing 515668 was itself created from a file called “NEW_BBF.dwg” which itself incorporated part of a file called “Brem_3_section.dwg”, which in turn was created directly from a modelling file called “515661.iam” (which itself incorporated a number of sub-assembly CAD drawings). BSW sought to argue (i) that it would be possible to cut and paste material from one file to another: (ii) that if you use Mr Bacon’s timesheets and assume that the relevant computer files were open for all of the claimed working hours then work on the files must have been done before 22 July 2004; (iii) that if you look at Mr Bacon’s bank statements somebody bought petrol at Gateshead resulting in a debit entry being made on 2 August 2004 and someone made a payment into a bank at Accrington which resulted in a credit entry on 3 August 2004, and if that person was Mr Bacon then he could not have been working in France to produce a drawing on 4 August 2004.

395. I do not accept this speculative reconstruction. First, it ignores BSW's own witness's evidence that the first novel concept only occurred to him on 30 July 2004. Second, BSW's own CAD expert Mr Dearsley acknowledged that he had found no files which could provide a source for such a "cut and paste" operation. Third, it overlooks the fact that the experts were agreed that the modelling file "515661.iam" was created using Inventor 9, that the metadata showed that no previous version of Inventor had been used in relation to that modelling file or any of its constituent parts, and that Inventor 9 was first used on the system on 23 July 2004. Fourth, the balance of the evidence was that file "515665" had been created on 28 July 2004 (BSW's expert Mr Dearsley ultimately accepting that the view contained in his report that it must have been created before 22 July 2004 was wrong).
396. Further it is right to record that the Balltec products that BSW was saying in the disclosure proceedings were copied from it (in order to sustain the disclosure application) were not designs derived from drawing 515668 at all. I am clear (having examined the drawings and considered the expert evidence of Mrs Wasserman for BSW and of Professor MacFarlane for Balltec) that 515668 led to a dead-end. The secondary locking mechanism which featured on the mooring connectors actually supplied by Balltec to Intermoor was, I find, the result of several unsuccessful iterations of the basic idea, each of which strove not to copy BSW's designs. I will give a short account of the key development process. There was Mr Halstead's original suggestion (made at the meeting on 30 July 2004). This led to drawing 515668. This concept was abandoned. There was then a proposal by Mr Emmett on 6 October 2004 for the secondary lock to use a wedge system using a split collet acting in one direction (instead of balls in a taper). This was overtaken by a proposal (again originating with Mr Halstead) on about 10 October 2004 to revert to locking the mandrel to the ballcage but this time using ratchets in the secondary locking system. This in turn was abandoned in the light of a proposal by Mr Emmett on 21 October 2004 to use a split taper collet acting as a wedge, but this time acting in the opposite direction and now locking the mandrel to the receptacle again. There is no doubt that this was a real technical departure and operated on different mechanical principles. But the secondary lock that was eventually incorporated into the mooring connectors actually supplied by Balltec and that were referred to in the disclosure proceedings was a development of a yet further idea that Mr Emmett had on 17 January 2005 and recorded on a sketch drawing in relation to the very connector to be supplied to Intermoor (and to another client called Rowan Midland): wedges were abandoned in favour of balls again, but in terms of mechanics the balls operated as non-jamming wedges and not in the same way as in the "ball and taper" technology. His idea was incorporated into a design drawing by Mr Bacon on 19 January 2005. Mr Bacon then further modified this idea by replacing the taper with a groove. From this summary of much detail a clear picture emerges. Any suggestion that Mr Emmett had his key inventive ideas whilst still a director of BSW and recorded them on a drawing dated 19 June 2004 which was then the foundation of Balltec's successful technology could hardly be further from the truth. His denial of this case in the Manchester Proceedings was plainly justified.
397. I have so far dealt with the secondary locking mechanism. Complaint was also made in the disclosure proceedings about pipeline recovery tools. So far as concerns the designs for them, they date from 27 July 2004 as regards layout: and as regards detail they date from 23 August 2004 (for the 26 inch version) 19 September 2004 (for the 20 inch) and 12 October 2004 (for the 4 inch). All these dates are after Mr Emmett ceased to be a director of BSW.

398. In BSW's expert evidence there emerged an issue of which there was no hint in BSW's pleadings. Mr Dearsley expressed the opinion that if one examined the file path of file 515667.iam (a Balltec assembly drawing for a standard tool section which is admitted to be an infringement of BSW's copyright) it disclosed dependencies on BSW references and was "virtually identical" to a BSW file. He expressed the same opinion about file 515654.iam and 515655.iam. Counsel for BSW submit that this is a "shocking finding" which "completely undermines any protestations that the Defendants started with "a clean sheet of paper".....".
399. I do not accept that submission. I will assume that Mr Dearsley's opinion is correct. No attempt was made to relate the files upon which he expresses an opinion to any of the products upon which BSW based its assertion of copying in the disclosure proceedings or to demonstrate what part the BSW files could have played in the actual design process. The allegations were not put to Mr Emmett in cross-examination. No attempt was made to demonstrate that when he gave his evidence in the disclosure proceedings he actually knew how Mr Bacon had created files 515667.iam, 515654.iam and 515655.iam but consciously, deliberately and dishonestly made the statement that he and Mr Bacon had "worked from first principles".
400. Insofar as BSW seek to say that Mr Emmett's evidence was deliberately and consciously dishonest because he asserted that the Balltec team "worked from a clean sheet" and did not have BSW's plans, I reject that case.
401. I find on the evidence that Mr Emmett did work from a clean sheet of paper in relation to the Dalia Project connector and in relation to the connector supplied to Interroom. There is no satisfactory evidence to establish that in relation to the pipeline connectors Mr Emmett used BSW's plans. In order fairly to address BSW's case it is necessary to comment on three further matters.
402. First, Mr Emmett now admits that during the relevant period (2004-2006) he had at his home an old computer (dating from the earliest days of BSW) operating on MS-DOS which held very early AutoCAD drawings which could not be transferred to other IT media. So these were BSW drawings or models. He also had in his personal possession another computer on which Mr Brown worked. These computers were used in August 2004 to create some drawings for Balltec. Mr Emmett acknowledges that he accessed this material on various occasions from September 2004, included in particular November 2005 and December 2005 (a few months before his evidence in the disclosure proceedings). He says that he did so in order to check for "prior art" in connection with patent issues both for Balltec and to assist others: and he denies that he accessed these old drawings for the purpose of developing the new technology. It is clear that screen shots were taken and some "jpeg files" were copied to Balltec's server: but I find that this was done by Mr Taylor (not Mr Emmett). This accessed material related principally to a product that was never produced by Balltec and was not in issue in the disclosure proceedings: its only relevance might have been that the autoswage and coiled tube handling tools were configured in a way that permitted their assembly without pockets, and someone may have been looking at them for comparison purposes. Some of the drawings have "last modified" dates post-July 23 2004. Files of some of the models were clearly circulating within the Balltec team. BSW submits that in the light of this Mr Emmett's evidence in the disclosure proceedings that he did not have any of BSW's plans is "a palpable lie".

403. The evidence given by Balltec’s solicitor in the disclosure proceedings (and which Mr Emmett confirmed) was that

“They ... came up with different designs. The above designs were created from blank pieces of paper. Mr Emmett and Balltec did not have any of BSW’s plans. Mr Emmett has explained to me that they set out to make a new design which was more effective from blank the sheet of paper”

The statement that Balltec did not have *any* of BSW’s plans was inaccurate. I accept the evidence of Mr Emmett that the files on his computers were not used by him (or by others to his knowledge) to develop the technology explored in the Dalia Project bid and later developed in the Intermoor connector bid. I am not satisfied that the inaccuracy was brought about by any conscious and deliberate dishonesty on the part of Mr Emmett.

404. Second, it is now acknowledged that when he terminated his business relationship with BSW in July 2004 Mr Bacon did not delete from his computer all material used in the course of doing BSW’s work. Mr Bacon admitted that he used some of “the designs” to save time because he was working on his own (though it is not clear to what specific designs he was referring and in connection with what work), but was insistent that he did not tell Mr Emmett that he was doing so. Mr Emmett gave convincing answers that he was unaware how Mr Bacon had produced the drawings he prepared for Balltec. Mr Benson gave convincing evidence that Mr Emmett was appalled to discover in 2012 that Mr Bacon had copies of some BSW drawings on his back-up CD. I accept this evidence of Mr Benson, Mr Bacon and Mr Emmett. If, in his depiction of the ideas which Mr Emmett had developed from first principles and on a clean sheet of paper, Mr Bacon used some of BSW’s material because it was quicker and easier to do so then Mr Emmett was not aware of this. The evidence which Mr Emmett gave in the disclosure proceedings was not deliberately and consciously dishonest.
405. Third, in Re-Amended Particulars of Claim produced in December 2012 BSW alleged that Balltec and the other defendants had infringed its copyright in respect of 1486 works. The alleged infringements were set out in a number of alternatives: the defendants were said to have “reproduced” or “authorised or procured the reproduction” or “issued ...or communicated to the public” or “possessed... in the course of a business...articles that they...had reason to believe were infringing copies”. In response the Defendants said that they had no wish to possess use or in any way deal with specified items of which complaint was made, and were willing to undertake permanently to erase or destroy those items and (whilst maintaining the BSW was not entitled to recover anything in relation to those items) to submit to an enquiry as to damages. They subsequently agreed to admit liability for copyright infringement as alleged in relation to those items. But they denied reproducing or authorising the reproduction of drawings and models of mooring connectors (item 67 of the specified works) or pipeline recovery tools (items and 70 to 74 of the specified works) and that they had any reason to believe that their own drawings were infringing copies. BSW discontinued its claim in relation to those items, but reserved the right to argue that they were copies. BSW argue that the admission fixes the defendants (in particular Mr Emmett) with guilty knowledge in respect of all the admittedly infringing specified works: and since they have admitted guilty knowledge the assertion in the disclosure proceedings that Mr Emmett started with a clean sheet of paper and did not have any of the plans

“..palpably was a lie. The admitted infringements of the copyright attest to that lie.”

406. I do not accept the submission. Mr Emmett has never admitted that his plans of mooring connectors and pipeline tools (the products which featured in the disclosure proceedings) infringed BSW’s copyright. That was what his evidence in the disclosure proceedings was directed towards. I have accepted his evidence that so far as he was concerned he designed them from first principles and a clean sheet: if in the depiction of his ideas others drew upon existing sources to complete the drawing they did so without his knowledge. The admission in the pleading is quite insufficient to demonstrate that Mr Emmett was consciously and deliberately dishonest in his evidence in the disclosure proceedings. Moreover, it is directed to what is the state of knowledge in 2012: not what was the state of knowledge in 2006.
407. In so far as BSW seek to say that Mr Emmett’s evidence was deliberately and consciously dishonest because he did not acknowledge (as he must have known) that the certification of the Balltec tools “piggybacked” onto BSW’s documents, I reject that case. It was not pressed in argument: but nor was it abandoned.
408. So far as concerns certification of the product intended to be supplied to Technip for the Dalia Project is concerned, the facts I find are these. The Dalia Project product itself had not been designed at the date of the bid (either on 2 July or 27 July 2004) although Balltec did not disclose this to Technip, asserting only that “optimization” was still required. That is why Balltec was never in a position fully to describe its product to Technip in answer to Technip’s August 2004 request. No workable secondary locking mechanism had been developed by the time Technip came to discuss the bids in September 2004. The first workable iteration occurred in October 2004 (when Mr Emmett had the idea of using a wedge, in the form of a split taper collet, to replace the ball in the secondary lock). So no certification of “the product” could be obtained at that time. In progressing its bid on 7 September 2004 all Balltec could say to Technip was

“BV classification approval in principle anticipated to be received this week. Baltech to confirm when approval received. Final type approval from BV estimated to be available by end of October.”

409. Statements by Balltec to this effect were based upon its contact with Bureau Veritas. The documents disclose that on 30 August 2004 Mr Emmett had e-mailed BV seeking approval in principle for the specific Dalia Project tools (not type approval for Balltec mooring connectors generally). Such approval would be obtained once a finite element analysis had been undertaken to assess the stresses and fatigue life of part of the connector, the key part being the female receptacle. Mr Emmett informed BV:-

“Please note Balltec has commissioned a full-scale fatigue test program on the Balltec BREM mooring connector with DNV in Oslo. Given the similarity of materials and test parameters it is not expected that the outcome of testing will be different to the report attached.”

The report attached a copy of fatigue testing “on similar grip arrangement and material” which had been undertaken by BSW and which was a public document downloadable from

BSW's website. DNV in Oslo did conduct a fatigue test on the female part of the BREM mooring connector on and it produced its report on 19 October 2004. The male part of the connector (containing the secondary lock that was still being developed) was not tested or certified. The certification of the female part was of no value because Balltec did not win the bid for the Dalia Project. There was no "piggybacking". Mr Emmett's evidence was not false (let alone dishonest).

410. For these reasons (and also having regard to the way these various challenges were put to him in cross-examination) I find and hold that Mr Emmett did not give fraudulent evidence in the proceedings before Patten J. There is no reason to set aside the judgment or to alter the order for costs which the judge made.
411. Had I entertained doubts about Mr Emmett's evidence I would have had to go on to consider what influence it had upon the outcome of the disclosure proceedings. On that matter I would briefly observe that BSW lost its application because of the deficiencies in its own evidence (rather than because of the strength of Balltec's evidence. As Patten J referred to "uncorroborated statements of impression" and to "a theory ... unsubstantiated by reference to the evidence of any experienced designers" and to "a lack of focus at least in relation to the design rights for which protection is sought".
412. Further there was simply no evidence (indeed I consider no justification for even pleading) that the giving of allegedly dishonest statements in the disclosure proceedings came about as the result of a conspiracy between Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon, Mr Benson and others whom BSW could not identify (see paragraph 10 of the Particulars of Claim). Mr Bacon and Mr Brown had both parted company with Mr Emmett by the time of the disclosure proceedings. There was no evidence that Mr Emmett had agreed with any of the named persons the content of his instructions to Balltec's solicitor or the content of his own witness statement, or that there was causative participation by anyone else.
413. Had I found fraud on the Court to be established the Order of Master Bowles of 26 April 2012 required me to assess damages. The assessment process was not addressed at trial. I would have had no difficulty in ordering repayment by Balltec to BSW of the costs which BSW was ordered by Patten J to pay. But I would have had real difficulty in deciding what (if any) sum should be paid as damages in respect of BSW's own costs. BSW included some redacted fee notes from Counsel and some solicitor's bills amongst the 40 odd lever arch files of papers (and added yet more during the hearing): but these were not the subject of reference, exposition or debate, and no evidence was led addressing this head of loss. It was not clear when or if the bills had been paid. Fact-finding is impossible. If the assessment of the loss becomes material it will have to be referred to an enquiry.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely.....concealing breaches of duty?

414. Paragraph 10(4) of the Re-amended Particulars of Claim contains an allegation about concealment of breaches of fiduciary duty and/or contract by deceit. These seem to me but a repetition of the allegations of "fraud" made in paragraph 10(3). With those I have already dealt and I shall not consider this claim further.

Did Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson conspire to injure BSW by unlawful means namely infringing copyright?

415. It is necessary to begin by identifying the alleged infringement of copyright. This in turn involves identifying what was in issue and what is admitted. This process will establish what acts were unlawful. The question can then be addressed (if it remains relevant) whether there was a conspiracy between the named persons to injure BSW by means of those admitted infringements.
416. Schedule 1 to the Re-amended Particulars of Claim lists a number of works in which it is alleged copyright vests in BSW either at law or in equity. They naturally fall into five categories (but are not so divided up in the pleadings). Category 1 consists of operational documents, such as the quality assurance manual and the technical proposal to which I have already referred. It covers items 1, 6, 8, 78 – 79 and 81. Category 2 consists of some drawings found on Mr Emmett’s old computer: those copied for the trial date from 1994 and show the fine machining detail of small component parts of an autoswage (such as the dimensions of an inner taper or of an outer taper or of a spring housing). This case has been about mooring connectors and pipeline tools: not about autoswages. (An autoswage is a pipeline connector. I was told that Balltec did not manufacture them). The category covers items 9 to 23. However, item 9 itself consists of 1387 drawings. Category 3 consists of models and drawings for a receptacle and trunnion (the female part of a mooring connector): they appear to date from 2001. These include the items that were copied for Balltec’s submission on its Kizomba bid (“515654”). The category covers items 24 – 30, 45 – 54, 69 and 75 – 77. Category 4 consists of models for an autoswage assembly, which appear to date from 2003 and to have been prepared by Mr Taylor. The category covers items 55 – 65. Category 5 consists of models and drawings for a nose cone and a standard tool assembly. These date from 2002 and were created by Mr Bacon. The category covers items 66, 68 and 80.
417. Paragraph 42 of the Re-amended Particulars of Claim pleads that each of the Defendants has reproduced, or authorised or procured the reproduction of, the whole or a substantial part of each of those works. Paragraph 43 alleges that each of the Defendants has possessed in the course of a business articles that he knew or had reason to believe were infringing copies.
418. In the third version of their Defence the Defendants indicated that they had no wish to use any of the items in category 1 to category 5 inclusive and offered to submit to an injunction. In the fifth and sixth versions of their Defence the defendants added:-
- “For the avoidance of doubt, the Defendants admit liability for infringement of copyright as alleged in relation to those items”
419. In my judgment this means that each of the Defendants has admitted liability for infringing copyright in each of the specified works in each of the alleged ways. But so far as I can see from the evidence so far adduced it is doubtful whether the items in respect of which admissions of infringement have been made were (save for the Kizomba copying) of any commercial significance.
420. On 21 February 2013 BSW discontinued its claims in relation to all other items on Schedule 1. BSW “reserved the right” to question Balltec’s witnesses on the footing that certain products were copies.
421. In the result the only issue is as to the terms of the Order resulting from the state of the pleadings.

422. Before leaving the topic of copyright I should deal with one issue raised in the BSW's expert evidence and in closing but not related to any pleaded issue. In the Re-amended Particulars of Claim BSW alleged (and in its final Defence Balltec admitted) that Balltec's model "515660" infringed BSW's model "220478.ipt". This is a model of a component part of the nose-cone on a mandrel. What was raised in the expert evidence on 12 February 2013 (but not reflected in any amendment to the pleadings) was whether Balltec's model "515660" was then itself copied into model "515664.ipt". It was agreed between the experts that there was no electronic link. What was said is that the representations were visually very similar, and that there must have been copying by eye (that "515664.ipt" was "based upon and referenced the earlier work") because if you calculated the volume of model "515664.ipt" it was all but the same as the volume of model "220478" (a difference of 0.78%) and that if you realigned a screw thread then they could be made the same.
423. I decline to make any finding which "hangs in the air" and is unrelated to any pleaded issue or any claim for relief.
424. The final issue arising on BSW's pleaded case is whether the admitted infringements of copyright evidence a conspiracy to injure BSW. I do not understand why this argument is pursued. Seeking to establish secondary liability where each and every one of the defendants has admitted primary liability for the identical loss strikes me as "overkill". I shall therefore not review the facts to determine whether this cause of action is made out.

A summary of the claims which have been made good.

425. I have found that the following causes of action have been made good:-
- a) Mr Emmett and Mr Brown conspired together to injure BSW by the unlawful means of (i) disloyally asserting that BSW was insolvent in order to secure the advantage of getting Mr Halstead "onside"; (ii) bidding for the Dalia, Kizomba and Simian/Sapphire contracts; (c) Mr Brown's downloading and using specified documents in connection with those bids;
 - b) Mr Emmett broke clauses 7 and 12(4) of his contract by keeping after termination of his contract copies of drawings and confidential models that were the property of BSW;
 - c) Mr Brown broke clauses 7 and 12(4) of his contract by using confidential materials belonging to BSW;
 - d) Mr Emmett induced Mr Brown to break his contract in that manner;
 - e) Mr Taylor broke his contract by attending a meeting with Balltec on 30 July 2004 when he was still an employee of BSW;
 - f) Mr Emmett induced that breach of contract;
 - g) Mr Bacon broke his contract by using BSW's copyright and confidential material to prepare the Kizomba drawings;

- h) Balltec, Mr Emmett, Mr Benson and Mr Bacon infringed BSW's copyright in the manner admitted.

Have the Defendants been released in respect of any of these claims?

426. The plea of conspiracy is contained in paragraph 10 of the Re-amended Particulars of Claim. It alleges that prior to December 2004 Mr Emmett, Mr Brown, Mr Taylor, Mr Bacon and Mr Benson (together with unidentified others) combined to injure BSW by unlawful means. The Defendants say (and I have found) that if there was such a combination then one of the "unidentified others" was Mr Halstead. The Defendants argue that by reason of BSW's dealings with Mr Halstead in 2009 and with Mr Taylor in 2012 Mr Emmett, Mr Benson and Mr Bacon have been released.
427. In terms of legal analysis, in cases involving the joint liability of joint tortfeasors there is only a single cause of action: accordingly a release of one of the joint tortfeasors extinguishes that single cause of action (or alternatively "releases" the other joint tortfeasors). The rule is undoubted and is binding on me (although BSW reserves the right to argue in an appellate court that the rule no longer forms part of English law). They are encouraged so to do by the references in the judgment of Steyn LJ in Watts v Aldington [1999] L & TR 578 at 594 to the effect that:-

"These appeals illustrate the absurdity of the rule that the release of one of two joint and several tortfeasors operates as a release of the other. ... the rule has been relaxed by statute... but the old rule apparently still survives... In a less formalistic age it is now clear that the question whether the release of a joint tortfeasor should operate to release the other tortfeasor is a policy issue. Either solution is logically defensible. But good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for contribution against the released tortfeasor must be faced".

428. I am bound by the rule and the only question for me is whether it is engaged by BSW's dealing with Mr Halstead and Mr Taylor.
429. BSW did not disclose any written settlement agreement with Mr Halstead. But in the course of his evidence Mr Halstead disclosed that he had entered into an agreement to assist Mr Suttie in his pursuit of Balltec on the proviso that Mr Suttie did not include Mr Halstead in any proceedings he might bring against Mr Emmett. His further evidence was:-

"Q: If he sued you ... if he tried to join you as a defendant to these proceedings, do I assume that paragraph 1 of your defence would be, notionally, that there is an agreement between you and him that all proceedings in relation to these matters have been settled and discharged by reason of your agreement?

A: Yes"

430. The arrangement disclosed by that evidence might amount either to a release of Mr Halstead or a promise not to sue him. As Steyn LJ observed in Watts v Adlington [1999] L&TR 578:-

“The absurd consequences of applying the rule of logic [that the release of one of two joint and several tortfeasors operates as a release of the other] inevitably leads judges, in the best common law tradition, to devise ways of escaping the rigours of its application. The first was the invention of the distinction between an agreement operating as a release ...and an agreement not pursue one joint tortfeasor which did not involve the discharge of the other. The second technique was the creation of the rule that, even if the agreement operates as a release of one joint tortfeasor, nevertheless the other joint tortfeasor was not released if the agreement contained a reservation of the plaintiff’s rights against the other tortfeasor. In combination these two subsidiary rules, generously interpreted, have ensured that in the majority of cases satisfactory solutions are achieved.”

431. I hold that the arrangement with Mr Halstead is to be viewed as an agreement not to pursue him. This is entirely consistent with the language employed to describe the arrangement to which language Mr Halstead assented. Unconstrained by any written record of the arrangement made between BSW and Mr Halstead I would apply the first of the judicial techniques identified above.
432. The arrangement between BSW and Mr Taylor was reduced to writing, BSW having the benefit of legal advice from Boodle Hatfield. It expressly operates as a release of all actions and claims (and for good measure it also contains an agreement not to sue). It contains no reservation of BSW’s rights against Mr Emmett. However, on my findings of fact and holdings of law Mr Taylor is not a joint tortfeasor with any of Balltec, Mr Emmett, Mr Benson or Mr Bacon. So (subject to one point) it is unnecessary to consider the legal effect of Mr Taylor’s settlement.
433. If I am wrong in such of my findings of fact or holdings of law that Mr Taylor is a joint-tortfeasor with any of the Defendants then the issues which arise are issues of construction and of law which can be addressed by an appeal court without my making further findings of fact. The one finding that may be material is this. Having examined the circumstances in which the Taylor settlement agreement was reached I think there is nothing from within the document itself or the context in which it was signed which leads one to view that Mr Taylor was necessarily and obviously saying

“We agree you cannot sue me: but it is important that we preserve everyone else’s right to sue me (for a contribution in the event that you succeed against them in respect of the claims against them which you are preserving).”

Therefore I would not have implied a term or construed the agreement as including a reservation of the right to sue other Defendants. Nor would I have accepted that BSW had established a right to rectify so as to include such a reservation (so as to defeat the apparently accrued rights of third parties) without at least having called Mr Taylor to address this point.

434. The one issue I must decide about the Taylor settlement agreement concerns its effect on concurrent (as opposed to joint) claims. Mr Taylor was in breach of contract in attending a meeting on 30 July 2004; and Mr Emmett induced that breach. The direct claim against Mr Taylor for breach of contract has been settled: may the concurrent claim against Mr Emmett in respect of the same loss on the ground that he induced that breach still be pursued?
435. Mr Cavender QC argued that it could not. He argues that BSW has been fully compensated for any cognizable loss by the consideration given by Mr Taylor in the compromise. He relies on Jameson v Central Electricity [2000] 1 AC 455 and Heaton v AXA Equity [2002] 2 AC 329.
436. I agree with this submission.
437. The causes of action are separate. So the agreement reached between BSW and Mr Taylor in respect of the contract claim does not as a matter of legal logic extinguish the other cause of action i.e. BSW's concurrent tort claim against Mr Emmett. But if Mr Taylor had paid every penny of the damages claimed against him for breach of contract then BSW could not have sued Mr Emmett for more: *the loss* would have been extinguished. If Mr Taylor paid something less than every penny due for breach of contract, but something which BSW was prepared to accept in full and final settlement of his liability, then the agreement and its satisfaction would equally bring to an end BSW's cause of action against Mr Taylor for the payment of damages. That would also extinguish the loss, unless from the terms of the agreement it is clear that BSW has not treated its settlement with Mr Taylor as satisfaction for the full amount of the claim for damages. This is very close to the question whether the settlement agreement preserved BSW's right to proceed against joint tortfeasors.
438. In my judgment (in contrast to Mr Brown's settlement agreement) this settlement agreement did not preserve the right to seek additional damages from a concurrent wrongdoer. My brief reasons (which allude to but do not set out a series of events) are these:-
- a) It does not expressly or literally do so.
 - b) Notwithstanding the existence of the "entire agreement" clause it would be *possible* to introduce material relating to the context in which the agreement was made which would lead an objective observer to understand the intention of BSW and Mr Taylor to have been that even though the claims against Mr Taylor had been settled all other claims against all other people could be pursued.
 - c) But in relation to those causes of action where there were concurrent claims against Mr Taylor and others it is neither *necessary nor obvious* that Mr Taylor should have agreed that concurrent claims against others could still be pursued (with the inevitable consequence that his settlement with BSW would leave him exposed to contribution claims and that his period of risk was not at an end).

- d) Although he was agreeing to assist BSW (so that the continuation of the action was plainly contemplated) there was scope for performance of that obligation in relation to claims that were not concurrent.
- e) If the effect of the settlement agreement was upon execution to extinguish the inducement claim as against Mr Emmett then Mr Taylor and BSW cannot by subsequent agreement between themselves reinstate it.
- f) The “Deed of Rectification” may purport to set out the subjective intentions of Mr Taylor and of those acting for BSW but those subjective intentions are not determinative of the accord objectively reached.
- g) The settlement agreement ought not to be rectified by order in the way claimed in the absence of disclosure of all the material passing between Mr Taylor and BSW at the time or in the absence of Mr Taylor (since rectification will only be ordered on the basis of what a reasonable objective observer would have understood the parties to have intended by reference to what they said and did and what passed between them) and without third parties affected by the rectification order having the right to cross examine him and to seek disclosure from him.

439. In my judgment Mr Emmett can no longer be pursued for inducing breach of contract by Mr Taylor.

440. The remaining breach of contract, tort and copyright claims have been established.

What is to be determined at trial as regards injury?

441. A dispute arose as to what needed to be established at trial as regards injury. This cannot be determined in the abstract, but only by reference to the order made (which addressed all causes of action pleaded whether or not damage was the gist of the action).

442. Paragraph 11 of the Order of Master Bowles dated the 26 April 2012 provided

“The determination of the quantum of damages and/or profits, if pursuant to the claimant’s claim the defendants or any of them are found liable to pay the same (other than damages [relating to costs in the disclosure proceedings]) be deferred.....”

443. In my judgment this requires BSW to establish that it suffered some injury which was caused by the breaches of obligation which it proves (in order to complete any cause of action dependent upon proving loss): but it is not required to prove at trial the full extent of that loss (i.e. everything that was caused by the breach of duty or obligation that has been established); nor is it required to prove the quantum of that loss (i.e. to establish the value of the damage suffered in money terms). But when the quantum of damages comes to be determined it would not be open to BSW to say there were other breaches of duty or obligation for which the Defendants are also liable and which also gave rise to losses,

because there would not (in relation to those other causes of action) have been a finding that the Defendants were “liable”, the quantification of which has been “deferred”.

444. The enquiry is into the damages suffered by reason of the causes of action which are established: it is not an enquiry into whether there are any other causes of action. If BSW wishes to say that there are other causes of action in respect of which it seeks relief then it must identify them, at the outset of the inquiry raise that as an issue for determination and establish that as a matter of fairness and convenience the Court should undertake the exercise rather than insist that BSW commence fresh proceedings (and thereby be exposed to limitation defences).

Has BSW established injury?

445. To make good its causes of action for breach of fiduciary duty, conspiracy to injure and inducement to breach of contract BSW must establish injury.
446. I deal first with breach of fiduciary duty. The Dalia Project was for 12 of 11,300kN “ballgrab” mooring connectors. I have recounted the submission of Balltec’s bid on 2 July 2004. It was in the sum of €1,055,600 and was initially supported only by a Schedule of Prices and a Production Schedule. BSW had submitted a bid by 16 June 2004 (within the original deadline): that was in the sum of €1,345,542 and was supported by over 40 documents. When it had both quotes Technip said to Mr Green of BSW that it regarded Balltec as a competitor to BSW, but one which was 30% cheaper whilst offering the same technology. BSW had priced its tender using a margin of 31%, so there was a negotiable margin. Mr Green’s evidence (introduced on 11 March 2013, omitted from his original witness statement and not mentioned in the Manchester Proceedings) was that Mr Lemesnager of Technip asked for a discount on BSW’s quoted price as “something to show that the negotiators had done their job”, initially asking for €200,000. Notwithstanding the circumstances of its introduction I accept this evidence. Mr Green gave me further evidence as to how he dealt with this. But Mr Green had recorded what happened in a fax to Mr Suttie on 9 September 2004. Mr Green’s fax told Mr Suttie (a) that BSW had to confirm that the technology employed by Balltec in fact belonged to BSW (b) that BSW had to revert with a new price which reflected the efforts to negotiate (c) that BSW had to re-address its terms and conditions (d) that Technip had given him “a real hard time about whether [BSW’s] subcontractors would be able to support [BSW] on project”, and that it had been implied that Mr Halstead would drop BSW for Balltec and (e) that Technip needed to be reassured that BSW retained competent personnel (in which context Mr Green referred to “nine highly qualified and experienced people who had joined [BSW]”. I accept the terms of the fax as accurately recording the key features of the meeting on 8 September 2004 (in preference to Mr Green’s account given in oral evidence). I also accept (from an aide memoire which Mr Green produced on 9 October 2004) that at that meeting Mr Green was told what Balltec’s price was.
447. On 14 September 2004 BSW submitted a revised quotation in the sum of €1,145,500. This led to further negotiations (including adjustments to the terms as to stage payments and the amount of a performance bond) and a reduction on 24 September to €1,095,000, resulting in an ultimate offer in the sum of €1,050,000, which on the adjusted conditions provided for a 32% margin. I am satisfied (on the basis of the aide memoire) that during this process BSW was told that it had to match Balltec’s price.

448. BSW submits that but for the Balltec bid they would have been the sole bidder and would not have had to allow any discount. The evidence of what other bids had been received by Technip was sparse. But I accept BSW's submission that it and Balltec shared the same technology: and the probability is that they were the real competitors. I do not accept that if BSW had had the field to itself it would not have allowed any discount. It priced in a sufficient margin to allow a discount: and Technip had a team that was expected to negotiate a discount. Taking the ultimate contract price from the original bid price to arrive at the injury suffered is too simplistic. The real question is whether the ultimate discount is larger than it otherwise would have been but for Balltec's bid. Counsel for Balltec submitted that the answer was "No" because it could not be demonstrated that any loss was caused: and the loss claimed involved a breach of the "clean hands" principle.
449. I first address the causation issues. The remedy sought for the breach of fiduciary duty is equitable compensation. BSW must therefore show that the breach of fiduciary duty was causally relevant to the course of action which gives rise to the loss for which compensation is sought. From the available material the process of reducing BSW's bid price began on 14 September and culminated in a revised bid on 24 September which was itself further reduced. Mr Cavender QC submitted that this presented a basic causation difficulty because the reduction in price was not caused by anything Mr Emmett did before 20 July 2004, and it could equally have been caused by anything Mr Emmett was free to do after the 20 July 2004 (had he done it).
450. I do not accept this argument. Balltec had to bid by 2 July because that was the limit of the extended deadline. Balltec could not wait until Mr Emmett freed himself of his fiduciary obligations and it had itself been incorporated: had it done so, Balltec's bid would not have been valid. But for Balltec's bid and place in the bidding process, Technip would not have been able to tell BSW that it was up against a competitor (which it did). Technip would not have taken that step unless it thought that by doing so it could gain some advantage over BSW. Balltec's bid caused Technip's hand to be strengthened and BSW's bargaining position to be weakened. What that weakened position actually cost is part of the assessment process. I find that Mr Emmett's premature bid on behalf of Balltec did cause BSW loss.
451. I now address the "clean hands" argument. Mr Cavender QC submits that Technip's bidding process was confidential. He relies on the form of Invitation to Tender which required the person submitting the tender to

“...agree that this Invitation to Tender, all drawings, specifications and other data relating thereto are confidential and are not to be used to any other purpose than the preparation of the quotation...”

In my judgment this required the tenderer to treat as confidential all material provided by Technip to enable the tenderer to prepare the quotation. But it did not reciprocally bind Technip to treat the tenderer's material as confidential.

452. Mr Cavender QC then submits that the very process, which required the submission of confidential drawings and detailed commercial and accounting information, demonstrates that it was objectively intended by both parties to be subject to an equitable obligation of confidence. In principle I agree: but I do not accept that every item of information submitted as part of the bid process was subject to an obligation of confidentiality. Plainly

Technip could not show Bidder A's confidential drawing to Bidder B. But I am sure that an objective bystander would think that both parties accepted that Technip could say (a) that the lowest bid price had been €1000 and (b) who had made bids. The real issue is whether Technip could put the two together and say that the €1000 bid came from Bidder A.

453. In my judgment it was not a breach of confidence to say that Balltec had offered €1,050,000. The objective bystander would understand that the bid process had been initiated as part of a process of negotiation in which Technip was to be provided with the prices offered by each of the competitors in a narrow field. The bystander would recognise that, whilst Technip would not be free to share one bidder's "know how" or secret knowledge with another, it would be free to deploy the very results of the bid process which it had established for its benefit as it saw fit in the contemplated negotiations. It was as free to say "We have been offered €1,050,000 by Balltec" as it was to say "We have had bid from BSW" so allowing Balltec to attack the quality of BSW's employees and subcontractors.
454. It was accordingly not unconscionable for BSW to take into account what it was told by Technip in revising its own bid price in the course of negotiation. Indeed it is difficult to know what BSW could do once the information had been imparted and it was told that it had to match the price.
455. If I am wrong and the disclosure that it was Balltec that had offered the lowest price amounted to a breach of confidence by Technip then I would accept BSW's argument that Balltec cannot pray in aid the "clean hands" doctrine because its own bid was put in breach of fiduciary duty. What Balltec is in effect saying is:-

"We have committed a breach of fiduciary duty: but you cannot recover equitable compensation in respect of it because (through a third party's breach of confidence) you discovered exactly what we had done and used it to limit the damage you suffered."

The "clean hands" doctrine does not operate in that way. BSW can assert its claim for breach of fiduciary duty without reference to the information imparted to it on 8 and 22 September 2004 by proving that Mr Emmett was a director and by proving what he did as a director.

456. I deal next with injury caused by breaches of fiduciary duty in relation to Kizomba and Simian/Sapphire. I am satisfied that the premature bids probably caused BSW damage in that they reduced the chance of BSW securing that work for itself. Whether that reduction was of such a degree as to be compensatable in damages and if so what are those damages should be is a question for the assessment.
457. I deal next with the conspiracy to injure. BSW submitted that it was sufficient simply to rely upon the costs incurred in investigating the conspiracy: British Motor Trade Association v Salvadori [1949] 1 Ch 556 at 569. This was disputed by Mr Cavender QC who noted that in R+V Versicherung AG [2006] EWHC 42 (Comm) what was common ground (recorded at paragraph [54]) was that there was "no reason in principle why [the claimant] cannot recover *as part of its loss* arising out of the conspiracy losses which consist in the cost of hiring external consultants or experts" (emphasis supplied). This common ground had been reached presumably on the basis of the observation of Dillon LJ (with whom the other members of the court agreed) in Lonrho v Fayed (No5) [1993] 1

WLR 1489 at 1497 that “investigation costs” could be included “at any rate if ... there is also other pecuniary loss”. I do not need to resolve this dispute in the instant case. The conspiracy proceeded utilising the unlawful means of breach of fiduciary duty: that breach of fiduciary duty of itself caused loss. That loss is to be compensated for either by an award of equitable compensation or as damages for conspiracy at common law. The “investigation costs” can be recovered as part of the damages at law.

458. Mr Cavender QC submitted that to be recoverable it had to be demonstrated with sufficient certainty that such “investigation costs” had been incurred in investigating or mitigating the relevant tort, and that in this regard BSW’s evidence was deficient. I do not accept this submission. It is true that the evidence in the witness statements of Mr Suttie and Mr Green does not descend to detail, but it is clear that BSW retained solicitors to pursue its complaints (which costs will not be recoverable as costs in the action): and in this connection I focus upon the costs of investigating Mr Emmett and Mr Brown (and ignore investigation costs relating to the pursuit of Mr Benson, Mr Lang, Mr Staveley and Mr Huddleston who are not shown to have been conspirators).
459. I finally deal with inducement to breach of contract. Mr Brown breached his contract by using confidential materials belonging to BSW. Mr Emmett induced him to do so. Mr Brown did so to enable Mr Emmett and Balltec to pursue the premature bids. The premature bids caused loss to BSW. In my judgment that suffices.
460. BSW has established that it suffered loss and is entitled (subject to the next argument) to an order for an enquiry to assess that loss.

Are any of these claims barred by limitation?

461. The claim form was issued on the 22 December 2010. Prima facie only causes of action accruing after 22 December 2004 would be actionable.
462. The claim was extensively amended on 3 December 2012. The amendments were allowed without prejudice to any arguments which the Defendants may have in relation to accrued limitation defences to some or all of the claims advanced in the amendments (and also without prejudice to any arguments that BSW may have (i) as to the postponement of the limitation period or (ii) that the amendments arose out of substantially the same facts as those already pleaded).
463. Causes of action in contract are ordinarily time-barred six years from the date of the breach. BSW allege that Mr Emmett broke his contract whilst he was “a serving employee and a director of BSW” (paragraph 11 of the Re-amended Particulars of Claim): Mr Emmett ceased to be an employee on 6 March 2004 and ceased to be a director on 20 July 2004. I have held that Mr Emmett broke his contract at termination by keeping after termination of his contract copies of drawings and confidential models that were the property of BSW. The claim is apparently barred.
464. BSW allege that Mr Bacon broke his contract in June and July 2004 (paragraphs 15 and 20C of the Re-amended Particulars of Claim.). I have held that Mr Bacon broke his contract in July 2004 by using BSW’s material to prepare the Kizomba drawings. The claim is apparently barred.

465. BSW do not plead and have not argued that any relevant breach is a continuing breach. (BSW does plead that the breach of the non-compete clause continued after 23 July 2004: see paragraph 21(5) of the Re-amended Particulars of Claim. But it has not made good that a cause of action).
466. Causes of action in tort dependent upon proof of damage are ordinarily barred six years after the date damage first occurred. I have found that Mr Emmett was party to a conspiracy to injure BSW by the unlawful means of (i) breaking his own fiduciary duties (by deploying his knowledge about BSW's financial position to his advantage in his dealings with Mr Halstead, and his bidding for the Dalia, Kizomba and Simian/Sapphire contracts) and (ii) Mr Brown's breaking his fiduciary duties in the same respects and also in downloading and using BSW documents in connection with those bids. I have also found that Mr Emmett induced Mr Brown to break clauses 7 and 12 of his contract by using confidential materials belonging to BSW. The damage was first occasioned to BSW when in July and August 2004 it lost the Kizomba and Simian/Sapphire contracts by reason of the premature bids put in by Balltec. It suffered damage in respect of the Dalia contract when it was forced to agree to a reduced price in September/October 2004.
467. The tort claims which BSW advanced and which I have held to be made out all accrued earlier than 23 December 2004. Without more they are statute barred.
468. In fact, in so far as the tort claims are dependent upon wrongdoing by Mr Brown, these allegations of wrongdoing were only introduced on 3 December 2012 under an Order which preserved Balltec's right to raise any limitation point. Likewise, the claim in relation to the Simian/Sapphire contract was only introduced at that point. Causes of action introduced by amendment after their primary limitation period has expired will be time-barred unless the cause of action arises out of "the same or substantially the same facts as are already in issue": section 35 Limitation Act 1980. I have held that these claims would be statute barred even if they had formed part of the original pleading. If I am wrong about that I would hold that the claims introduced on 3 December 2012 do not arise out of the same facts (or substantially the same facts) as the claims pleaded up to that point. This is substantially a matter of impression: of course that does not mean the impression made by the amount of red (as compared with the amount of black) on the page, though by that test the comparison is striking. I mean a broad assessment of the volume and significance of the additional facts which have to be pleaded to sustain the new relief sought in relation to Mr Brown's fiduciary duties, Mr Bacon's duties, and the additional breach of contract claims.
469. I turn to claims for breach of fiduciary duty. The starting assumption is that a six-year limitation period applies (unless specifically excluded by the 1980 Act or by authority): Gwembe Valley v Koshy [2003] EWCA Civ 1048. According to BSW's pleaded case, the breaches relied upon relate to the time when Mr Emmett was a director of BSW (paragraphs 11,13, 16, 16A, 17,20C and 21 of the Re-amended Particulars of Claim). He ceased to be a director on 20 July 2004. I have held that Mr Emmett was in breach of his fiduciary duties in using his knowledge of BSW's financial position to assert that it was insolvent in order to gain an advantage for himself, and in bidding for the three contracts. These breaches occurred before 22 December 2004. If the presumptive rule applies these claims are statute barred.
470. BSW submits that the presumptive rule does not apply and that its claims are in respect of trust property and in particular are in respect of a fraud or fraudulent breach of trust to which Mr Emmett as trustee was party (and so falling within section 21(1)(a) of the 1980

- Act). In the alternative BSW submit that its claims are to recover from Mr Emmett trust property or the proceeds of trust property in his possession within s.21(1)(b). In either event no time limits apply.
471. At the heart of the argument that BSW's claim is "an action by a beneficiary under a trust" falling within section 21(1) lies the concept that Mr Emmett's thoughts belonged to BSW because he was a director of BSW, that if he failed to report those thoughts to BSW then that was a breach of fiduciary duty, and that if he later developed or incorporated those thoughts into some innovative design then those corporate opportunities and new designs belonged to BSW, and Balltec's receipt of the profits from them amount to misappropriation of trust property. But although this was pleaded the constructive trust argument was not pursued at trial: it was replaced with the conspiracy argument. In my judgment, rightly so. Mr Emmett ceased to owe fiduciary duties on 20 July 2004. The first step on the journey towards the secondary locking mechanism was taken on 30 July 2004 by Mr Halstead (whose thoughts cannot belong to BSW). The second was taken in October 2004 when the innovative idea of wedges came to Mr Emmett. Journey's end approached when Mr Emmett had his "eureka" moment in January 2005. It finished when Mr Bacon developed the idea. Equally, the development of the pocketless mandrel was dependent on somebody's idea in September 2004 for overcoming the assembly difficulties. All this happened well after Mr Emmett had ceased to be a director. None of it could sustain a constructive trust claim of the type addressed in s.21(1).
472. So far as s.21(1)(b) is relied upon, that provision is concerned with wrongful dealing with pre-existing assets that had been entrusted to the fiduciary, as where a director abuses the power of disposition which he has over company property. This, however, (in one alternative) is a claim to an account of profits which came into existence by reason of the breach of fiduciary duty itself and in respect of which Mr Emmett is to be treated as if he were a trustee.
473. So far as s.21 (1)(a) is concerned although judges at first instance have (in the light of comments made by Carnwarth LJ in Halton International [2006] EWCA Civ 801) expressed the view that this provision too should be confined to cases arising from real trusts, they have also held that as a matter of precedent they are bound by the actual decision in Gwembe Valley (*supra*) which assumes that s.21(1)(a) applies also to cases where the fiduciary is liable to account as if he was a trustee because of the presence of fraud (see J D Wetherspoon v Van den Berg [2007] EWHC 1077 (Ch) and Kleanthous v Paphitis [2011] EWHC 2287). I shall not depart from that view (although I doubt that this aspect of the decision in Gwembe Valley can survive the majority reasoning in Williams v Central Bank of Nigeria [2014] UKSC 10, published when this judgment was in draft and not the subject of submissions).
474. On that footing the question is whether Mr Emmett's breach of fiduciary duty was fraudulent i.e. dishonest. That his breaches of fiduciary duty were "dishonest" was not put in terms to Mr Emmett: nor was it the subject of argument in closing. But if in this context "dishonesty" connotes at the minimum an intention on the part of the fiduciary to pursue a particular course of action knowing or being recklessly indifferent to whether that action will injure the interests of those to whom the fiduciary duties are owed (see McGee "Limitation Periods" 6th ed para 14.004) then the logical outcome of my earlier findings and holdings is that Mr Emmett was dishonest. He committed his breaches of duty knowing that they would injure BSW and intending that they should. BSW may therefore rely on

s.21(1)(a) as extending the limitation period in relation to its claims against Mr Emmett for breach of fiduciary duty.

475. BSW also rely on s.32(1)(b) Limitation Act 1980 as postponing the commencement of any limitation period applicable to its claims until after 22 December 2004. This limb of the subsection provides that if any fact relevant to the cause of action has been deliberately concealed then time does not begin to run until BSW discovers the concealment or could with reasonable diligence have done so.

476. The principles I apply are as follows:-

- a) It is necessary to focus upon the particular cause of action.
- b) It is for BSW to establish that they could not have discovered the concealed fact which is relevant to the cause of action without exceptional measures which they could not reasonably have been expected to take (Paragon Finance v Thakerar [1999] 1 All ER 400 at 418).
- c) Reasonable diligence has to be measured against some standard: and that standard is how a person carrying on a business of the type carried on by BSW would act if he had adequate (but not unlimited) staff and resources and was motivated by a reasonable but not excessive sense of urgency and a desire to know and, indeed, investigate.
- d) A fact which is “relevant” to the cause of action is one that it is necessary to plead in order to constitute the cause of action (so that if an unnecessary albeit helpful fact is concealed time still runs).
- e) Deliberate concealment is made out if the defendant has either taken active steps to conceal the wrongdoing having become aware of it, or is guilty of deliberate wrongdoing and conceals it in circumstances where objectively it is unlikely to be discovered for some time.
- f) Whatever the defendant does, it is not possible to “conceal” a relevant fact if the claimant comes to learn of it by other means.

477. BSW submitted that there was a substantial body of evidence supporting the proposition that Mr Emmett concealed facts relevant to BSW’s causes of action and that BSW “only acquired an understanding of the activities of the defendants in 2004 when the Manchester Proceedings were heard in 2009”. BSW relied on the following:-

- a) Mr Emmett accepted that the use of pseudonyms, key personnel working from home and the use of intermediary employers were designed to prevent BSW making claims based on the restrictive covenants.
- b) Mr Emmett accepted that stating in March 2005 that only he worked for Balltec was untrue.

- c) Mr Emmett had accepted in the Manchester Proceedings that in 2004 there had been a general strategy to hide things from BSW.
 - d) Mr Emmett's solicitors had written on 6 August 2008 to explain that Duxbury Construction Ltd had been set up to avoid the consequences of any restrictive covenants affecting Mr Huddleston and Mr Staveley.
 - e) The facts on the basis of which allegations of breach of fiduciary duty by Mr Brown were advanced were concealed from BSW until they were revealed in the course of the Manchester Proceedings.
478. In my judgment the submissions do not really engage with what BSW has to prove. They would have been relevant if the cause of action being addressed was breach of the non-compete clause in Mr Huddleston's contract (for example). But the causes of action here being addressed are the breach of contract claims against Mr Emmett (in keeping copies of drawings and confidential models that were the property of BSW) and Mr Bacon (in using copyright and confidential material to prepare drawings), the conspiracy claim, and the inducement claim: and (if s.21(1) does not apply) the breach of fiduciary duty against Mr Emmett. The use of pseudonyms in internal e-mails and misleading statements about employment arrangements could have no bearing on the facts necessary to plead those causes of action.
479. On the other hand BSW knew in September 2004 that Mr Emmett and Mr Brown were selling in direct competition with BSW (because they were told so by Technip and had the minutes of the meeting between Technip and Balltec). BSW knew the bid timetable had a target date of 17 June 2004 and since there is no evidence that BSW knew of the extension of the timetable it must have been alert to a possible premature bid by Balltec. BSW was able to plead in Scottish proceedings commenced against Mr Brown on 9 November 2004 a detailed case for breach of fiduciary duty referring not only to the Dalia project but to a number of other projects which have not been examined in these proceedings, and to set out Mr Brown's connection with Mr Emmett. Mr Suttie acknowledged in evidence in this action that as from the disclosure of the Technip minutes in September 2004 he knew of Mr Emmett's involvement but was unable to explain why BSW did not take action at that point. In correspondence BSW's solicitors have asserted that BSW was told in August 2004 (i.e. within days of the incorporation of Balltec) that it had lost the Simian Sapphire contract to Balltec: and BSW's internal e-mails confirm that Mr Green certainly knew this by October.
480. Armed with all this information I do not think it would have taken exceptional measures to investigate and uncover the dates on which bids were made. I consider the claims for breach of fiduciary duty would (if s.21(1) does not save the claim) be barred notwithstanding s. 32(1)(b).
481. But all this knowledge acquired by BSW would not enable it to plead a claim based on the retention and use by Balltec of confidential documents. Nor, on the basis of what they knew, could reasonable investigation have lead to it. BSW brought the disclosure proceedings: these focussed on intellectual property and designs (rather than commercial dealings and the use in those dealings of confidential material). The application failed. Of course there is a distinction to be drawn between seeking pre-action disclosure to enable a

case to be pleaded and seeking pre-action disclosure to bolster and particularise a case that you can already plead because you have the bare facts necessary to establish the cause of action. But as regards the confidential documents it would in my judgment be unfair to BSW to find that they knew sufficient facts to plead such causes of action or could with reasonable diligence have uncovered them.

482. Therefore, in my judgment time did not run in relation to the contractual claims against Mr Emmett that he kept copies of drawings and confidential models, and the claim in tort that he induced Mr Brown to break his contractual obligations of confidence: nor did it run in relation to Mr Bacon's breach in relation to the preparation of the Kizomba drawings.
483. There is no limitation point that arises in relation to the copyright claims because of the terms upon which it was agreed in interlocutory proceedings that BSW could plead the claims.

Conclusion

484. In the result BSW succeeds in relation to:-

- a) Its claim that Mr Emmett acted in breach of fiduciary duty in (i) acting disloyally in using financial information to encourage Mr Halstead to "sign up" (ii) relation to the Dalia, Kizomba and Simian/Sapphire bids and (iii) in the retention and the misuse of confidential documents stored on Mr Brown's laptop and Mr Emmett's computer;
- b) Its claim that Mr Emmett is liable for conspiracy to injure by the unlawful means of the misuse of confidential information by himself and Mr Brown
- c) Its claim that Mr Emmett broke his contract by keeping after termination copies of drawings and confidential models that were the property of BSW;
- d) Its claim that Mr Emmett induced Mr Brown to breach his contract by using confidential materials belonging to BSW;
- e) Its claim that Mr Bacon broke his contract by using BSW's confidential material to prepare the Kizomba drawings;
- f) Its claim for infringement of copyright in the terms admitted in the Sixth Amended Defence.

485. When I circulated this judgment in draft Counsel for BSW asked me to make additional findings and holdings in relation to the liability of Balltec for the wrongs I have found to be have been committed by Mr Emmett. Although a foundation was laid in the pleadings, this was not the subject of detailed submissions in closing (although there was brief reference by the Defendants to what they called "the attribution claim"). Since I am delivering judgment out of London and the many files remain in London the fair course is to address this issue in a supplemental judgement after hearing any argument at the proposed Relief Hearing.

486. All other claims of BSW stand dismissed.
487. I will adjourn all matters relating to the form of relief and to the further conduct of this action to a hearing to be fixed through the usual channels. I extend the time for making any application for permission to appeal to that Relief Hearing, and the time for filing any appellant's notice shall be extended until 21 days after judgment following the Relief Hearing.