



Neutral Citation Number: [2024] EWHC 1691 (Ch)

Case No: HP-2023-000003

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**PATENTS COURT**

Rolls Building  
Fetter Lane  
London, EC4A 1NL

27 June 2024

**Before :**

**MRS JUSTICE BACON**

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**Between :**

**(1) LEIGH MAXWELL REMFRY**  
**(2) PGRC DESIGN SYSTEMS LIMITED**  
**- and -**

**Claimants**

**(1) GKN AEROSPACE SERVICES LIMITED**  
**(2) BELCAN TEST SYSTEMS UK LIMITED**

**Defendants**

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**Douglas Campbell KC and Tim Austen** (instructed by **McCarthy Denning**) for the  
**Claimants**

**Miles Copeland** (instructed by **Gowling WLG (UK) LLP**) for the **First Defendant**  
**Christopher Hall** (instructed by **Shakespeare Martineau**) for the **Second Defendant**

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**APPROVED JUDGMENT**  
**ON STRIKE-OUT APPLICATION**

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,  
2<sup>nd</sup> Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.  
Telephone No: 020 7067 2900. DX 410 LDE  
Email: [info@martenwalshcherer.com](mailto:info@martenwalshcherer.com)  
Web: [www.martenwalshcherer.com](http://www.martenwalshcherer.com)

## MRS JUSTICE BACON:

### Introduction

1. This is the hearing of the defendants' applications for strike out or summary judgment in relation to certain aspects of the claim. The application by the first defendant, GKN, was filed on 26 February 2024. The application by the second defendant, Belcan, was filed on 10 May 2024.
2. The applications relate to two aspects of the claimants' claim:
  - i) The first is the claim that the defendants have infringed the claimants' patent, EP (UK) 2 822 794 B1 entitled "Refuelling Coupling" (**the Patent**) by supplying means, relating to an essential element of the invention of claim 1 of the Patent, for putting the invention into effect, knowing or it being obvious to a reasonable person in the circumstances that those means are suitable for putting and are intended to put the invention into effect in the UK. I will refer to this as the **FORC modification issue**.
  - ii) The second is the entirety of the claim brought by the second claimant in respect of acts between 20 May 2021 and 13 February 2023. I will refer to this as the **licensing issue**.
3. The defendants' applications are supported by a witness statement from Huw Evans, a partner in Gowling WLG, the first defendant's solicitors. The claimants rely on a third witness statement of Leigh Remfry, the first claimant, and an expert report from Scott Glancy, for which permission is sought. The defendants oppose permission on the basis that Mr Glancy's evidence is a mixture of inadmissible and irrelevant material.
4. I consider it appropriate to give permission for Mr Glancy's report on the basis that it provides the technical context for the claimants' submission on the FORC modification issue. For the reasons which I will set out shortly, however, I do not consider that the report ultimately supports the claimants' case on this issue.
5. Shortly before 2pm during today's hearing I received from the claimants a draft re-amended particulars of infringement, which addressed the FORC modification issue but not the licensing issue. Mr Campbell KC, for the claimants, said that if I was otherwise minded to accede to the defendants' applications, I should instead give directions for the amendment of the particulars of infringement along the lines of the draft. I do not accept that submission for the reasons that I will explain.

### Background

6. The claims of the Patent concern an element of the refuelling system used for armoured combat vehicles known as a pressure-gravity refuelling coupling (**PGRC**). This enables refuelling of a vehicle both by pressure refuelling and by gravity refuelling. Claim 1 is to a vehicle-side device incorporating a "dry-break member" (also known as a dry-break connector) for pressure refuelling, an aperture in that member, and a displaceable member in the aperture which may be displaced by the introduction of a gravity refuelling nozzle.

7. The defendants' products which are the subject of the infringement claim are PGRCs manufactured and supplied for a particular vehicle known as AJAX, which is currently in development with the British Army.
8. The claims that remain live concern two different PGRCs: the General Assembly, GKN Fuel Filler, also known as the **Red Plug Product**, which was first ordered in 2019; and the float-operated refuelling coupling, or **FORC**, which was first ordered in February 2022.
9. Both the Red Plug Product and the FORC were produced by Belcan for GKN's fuel tanks. GKN supplies those fuel tanks to its customer, General Dynamics European Land System Santa Barbara Sistemas (**GDELS**) a company within the General Dynamics Group. GDELS then supplies parts of the vehicles, including the GKN fuel tanks to a further General Dynamics Group Company, General Dynamics United Kingdom Limited (**GDUK**) which supplies the vehicles to the ultimate customer, the Ministry of Defence (**MOD**).
10. Following various undertakings given by the defendants, the claims that are still pursued against GKN relate only to claimed acts of historic infringement, in relation to both the Red Plug Product and the FORC. Against Belcan, the claimants pursue claims of historic infringement in relation to the Red Plug Product, and both historic and current/future infringement in relation to the FORC.
11. The basis for the claimed infringements in relation to the Red Plug Product is not in issue under the defendants' application. What is disputed, however, is the claimants' case in relation to the FORC. That product is said to infringe the Patent, not on the basis that it falls itself within the claims of the Patent, but on the basis of contributory infringement pursuant to section 60(2) of the Patents Act 1977.
12. The claimants' case, in that regard, is that the FORC was and is the means relating to an essential element of the invention and was (and will in respect of Belcan) be supplied knowing or it being obvious to a reasonable person in the circumstances that the FORC was/is suitable for putting and was/is intended to put the invention into effect in the UK. The central foundation for that claim is an allegation that the FORC does not comply with the MOD's Technical Requirement Specifications (**TRS**) for the AJAX vehicles because the FORC does not have a dry-break connector, and will therefore have to be modified or adapted to include a dry-break connector if used on the AJAX. If it is so modified, the claimants say that the modified product will fall within the claims of the Patent. Alternatively, if not modified, the claimants say that the FORC will have to be replaced with a different PGRC which includes a dry-break connector, such as the Red Plug Product.
13. The defendants deny all elements of this case. For the purposes of their strike out or summary judgment applications, however, they focus on a short point, which is that the claimants have not pleaded the requisite intention to put the invention into effect by modifying the FORC, and that in any event there is no realistic prospect of the case as to intention succeeding on the evidence even if an application were made to re-plead the point.

### Tests for strike-out, summary judgment and amendment

14. The tests for strike out and summary judgment significantly overlap. In relation to strike out, CPR 3.4(2) provides that the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim.
15. The court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success. In essence, this requires the court to determine whether or not the claim is “bound to fail”. While the court should not automatically accept the claimants’ factual contentions at face value, it will normally do so unless those factual assertions are demonstrably unsupportable: *Begum v Maran* [2021] EWCA Civ 326, §22.
16. Regarding summary judgment, CPR 24.3 provides that the court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if it considers that the party has no real prospect of succeeding on the claim, defence or issue, and there is no other compelling reason why the case or issue should be disposed of at trial.
17. The classic summary of the principles to be applied in a summary judgment application is set out in the judgment of Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch), §15. Again, the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success and may reject factual assertions made if it determines them to have no real substance, particularly if contradicted by contemporaneous documents. The court should, however, take into account not only the evidence before it, but also the evidence that can reasonably be expected to be available at trial. In that regard, the court should consider whether there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case.
18. As for the potential amendment of the particulars of infringement, the relevant principles were set out by Popplewell LJ in *Kawasaki Kisen Kaisha v Kemplall* [2021] EWCA Civ 33, §§16–18 as follows:

“16. It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to applications for summary judgment: *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2102] 1 WLR 1804 per Lord Collins JSC.

17. The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.

18. In both these contexts:

- (1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc c Aabar Block SARL* [2017] 4 WLR 164 at paragraph 27(1).
- (2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at paragraph 42.
- (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph 41.”

### **Contributory infringement under s. 60(2)**

19. Section 60(2) of the Patents Act 1977 provides:

“Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if, while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.”

20. The defendants’ application in the present case focuses on the question of whether the defendants knew, or it was obvious to a reasonable person, that the FORC was intended to put the invention into effect in the United Kingdom. In *Grimme Maschinenfabrik v Scott* [2019] EWCA Civ 1110, [2011] FSR 7, Jacob LJ concluded that it was not necessary to identify any specific person as having the requisite intention, rather it is enough that some ultimate users will intend to use or adapt the “means” so as to infringe:

“107. ... (i) Whose intention is referred to? The possible candidates are the supplier himself, his direct customer or the ultimate user. Or perhaps no specific person at all – the inquiry being whether the ‘means’ and the circumstances surrounding it being offered or supplied are such that some ultimate users will intend to use or adapt the ‘means’ so as to infringe. We call this the ‘inherently probable’ view. ...

114. ... we conclude that the “inherently probable” view is indeed the correct construction of the provision. ...

116. ... it was essentially the reasoning of Jacob J in *Chapman*. He said:

‘It is sufficient if it is shown that the invention will be put into effect by some users. One would only disregard maverick or unlikely uses of the thing.’

117. That must, of course, be established in the usual way on a balance of probabilities. It is more accurate, therefore, to state the test in terms of what probably will be intended and what probably will be the use to which the means will be put.”

21. Jacob LJ summarised his conclusions in *Grimme* in the subsequent case of *KCI Licensing v Smith & Nephew* [2010] EWCA Civ 1260, [2011] FSR 8, §§53–54:

“53. ... i) The required intention is to put the invention into effect. The question is what the supplier knows or ought to know about the intention of the person who is in a position to put the invention into effect – the person at the end of the supply chain ...

(ii) It is enough if the supplier knows (or it is obvious to a reasonable person in the circumstances) that some ultimate users will intend to use or adapt the “means” so as to infringe ...

(iii) There is no requirement that the intention of the individual ultimate user must be known to the defendant at the moment of the alleged infringement ...

(iv) Whilst it is the intention of the ultimate user which matters, a future intention of a future ultimate user is enough if that is what one would expect in all the circumstances ...

(v) The knowledge and intention requirements are satisfied if, at the time of supply or offer to supply, the supplier knows, or it [would be] obvious to a reasonable person in the circumstances, that ultimate users will intend to put the invention into effect. This has to be proved on the usual standard of the balance of probabilities. It is not enough merely that the means are suitable for putting the invention into effect (for that is a separate requirement), but it is likely to be the case where the supplier proposes or recommends or even indicates the possibility of such use in his promotional material ...

54. It follows the judge misdirected himself on the law. There is no requirement that the ultimate users must have decided to use the means to put the invention into effect at the time they first take possession of the means. The relevant intention may be formed at a later time. But the supplier must know (or it must be obvious to him in all the circumstances) that some ultimate users will indeed form that intention.”

22. It bears emphasis that the person who must form the relevant intention is not simply any third party but must be an ultimate or end user of the relevant product. Moreover, the intention of the end user to put the invention into effect must be either known or obvious “in all the circumstances”. That brings into play the circumstances in which the product is sold. In the case of a product sold on the open market, such as the machines at issue in *Grimme*, the circumstances may well not allow the identification of particular end users who are likely to use the product to put the invention into effect. But where the disputed product is a bespoke device for supply to a single identified end customer, the only person who can form the requisite intention under s. 60(2) is that customer. The claimant will therefore have to show that that identified customer has or will form the requisite intention.

### **The FORC modification issue**

#### *The claimants’ case*

23. The claimants’ case as articulated by Mr Campbell at this hearing is that any reasonable engineer would have known that the FORC would be modified for use in the final AJAX vehicles up to battlefield standard so as to add a dry-break connector, which would put the invention of the Patent into effect.
24. At the first CMC, Meade J ordered the claimants to amend their particulars of claim (including the particulars of infringement) by 16 August 2023, so as to set out all facts and matters relied upon by them in their allegation of infringement. Those particulars were expressly ordered to include all facts and matters relied upon to support the contention that the FORC will be modified.
25. Pursuant to that order, the claimants served, among other things, the amended particulars of infringement (APOI) §4(b) of which states that:
- “Even if certain AJAX vehicles have recently been fitted with the FORC ... for the purposes of refuelling during testing and verification of the vehicles, GDELS has recognised that the FORC would not be suitable for pressure refuelling in standard service or combat due to the reasons given below, and has asked the First Defendant to replace the FORC with the General Assembly, GKN Fuel Filler PGRC or a variant thereof.”
26. The explanation given for this is that the FORC is not compliant with the relevant TRS, since the TRS requires a NATO dry-break connector (§5(b)). §5 of the APOI continues:
- “(d) The Defendants have not suggested that the TRS has been modified in any way so as to permit this omission of a dry break member from the FORC, nor has the TRS been so modified. For this reason, the FORC is an interim product, and is not the fuel coupling to be used in the final battle-ready and TRS-compliant versions of the AJAX vehicles.

(e) The FORC does not have a NATO stock number, which implies that it is not the final product to be installed in the final version of the AJAX vehicle. ...

(g) Alternatively, if and insofar as the sample of the FORC shown to the Claimants is indeed part of the final PGRC to be used in the fuel containment system to be supplied by the First Defendant to General Dynamics, it necessarily follows that a dry break member must be added at a later date in the final assembly of the coupling so that such final assembly (including a dry break member) will be in compliance with the relevant specifications of the TRS in the final battle-ready and TRS-compliant AJAX vehicles. ...

(j) The First Defendant avers that the FORC is the final version of the coupling. The FORC has also been referred to by the Second Defendant as the 'Final Products'. The reason for the use by the Second Defendant of the term 'Final Products' is unclear.

(k) This averment cannot be correct and is accordingly denied for the reasons set out herein. In particular, the FORC, if assembled in the fuel containment system to be supplied by the First Defendant to General Dynamics for the AJAX vehicle programme, would not be compliant with the relevant provisions of the TRS, in particular STANAG 3756 (Facilities and equipment for receipt and delivery of aviation kerosene and diesel fuels) and STANAG 2947 (Technical Criteria for a Closed-Circuit Refuelling System) since they require a dry break member."

27. The particulars of knowledge for the purposes of s. 60(2) are set out at §29(a)–(l) of the APOI. Those paragraphs plead that the FORC was not fit for battle-field use in the final TRS-compliant version of the AJAX vehicle; that the defendants would have known that; and that it would be straightforward either to adapt the FORC by adding a dry-break connector, or to swap it out of an AJAX vehicle for a replacement PGRC.

28. The claimants' position is then further developed in the amended reply and defence to the counterclaim of the first defendant (**AR&DCCD1**), which maintains at §46(h) that the FORC is an "interim product" and repeats at §46(m)(iii):

"In any event, as stated above, the FORC is an interim version of the fuel coupling for the AJAX vehicles, and the fuel coupling likely to be used in the final AJAX vehicles is that shown in the '*General Assembly GKN Fuel Filler*' drawings".

29. The claimants' pleaded case is therefore the FORC is not the final product which will be installed in the AJAX vehicles, because of the problem of non-compliance of the FORC with the relevant TRS. Rather, the claimants say that it is "likely" that the FORC will be replaced in the final AJAX vehicles by the Red Plug Product. Modification of the FORC to add a dry-break connector is pleaded as an alternative possibility, but is not said to be likely.



*The claimants' evidence*

30. Mr Remfry's witness statement for this application says that:

"I do not believe that the FORC ... will be the refuel coupling in the vehicles accepted into service by the MoD. I believe that the Defendants intend to adapt the FORC to include a dry break in such a way as will infringe the Patent or substitute the FORC with the General Assembly, a device which falls within the claims of the Patent."

31. He goes on to say that the FORC is both simple and cheap to remove and replace, and describes the FORC as "being used as an interim device until such time as it is replaced with an alternative device". He concludes by asserting that it is obvious to any reasonable person that the fuel system as used in trials on armoured vehicle equipment is "unfit for purpose and needs to be modified".

32. Mr Glancy's evidence refers in considerable detail to the TRS in the AJAX, as provided by the MOD, noting that these requirements incorporate the requirements of certain NATO standard agreements referred to as **STANAGs**. In particular FT35 of the TRS SV0212, which is the TRS for the AJAX fuelling coupling, requires:

"The fuel tanks shall be able to be replenished with fuel from all current UK military fuelling sources designed in accordance with STANAG 3105 and STANAG 3756 to include the Male 3 inch NATO dry-break connector to enable tanker refuelling.

May be considered to use a filler with the characteristics of the Male 3 inch NATO dry break connector and the STANAG 3105 and to use [an] adaptor to meet the STANAG 3756."

33. FT35 is designated as a Priority 1 requirement, which Mr Glancy explains means that any deviation from this requirement would require a concession agreement from the MOD. There is no evidence in this case that the MOD has granted any concessions in relation to this requirement.

34. Mr Glancy's evidence is that the FORC does not have the technical functions required by (among other things) FT35, because it does not include a dry-break connector. He therefore concludes:

"... given that the FORC does not have a dry break member, my view is that any reasonable engineer would think that the FORC will not be approved by the Systems Acceptance Panel at the MOD and that either it is intended to be modified to include a dry break, or to be replaced with a device with a dry break, or a concession obtained from the MOD. ...

If the FORC is the final device for the Ajax then it will have to be modified to comply with the Specification."

35. The evidence of Mr Remfry and Mr Glancy is therefore not that the FORC *will* be modified or is *likely* to be modified to add a dry-break connector, but rather that *either* it will be modified to add a dry-break, *or* it will be replaced with a device containing a dry-break member, *or* (a further possibility raised by Mr Glancy) a concession will be obtained from the MOD.

*The Jenner and MOD correspondence*

36. At the first CMC in these proceedings on 12 July 2023, Meade J stated that “[i]t must be possible, if it is true, to establish that the FORC is the final thing. It would be an absolute tragedy if this case goes forward and it turns out the FORC is the real final thing.” He suggested that a third party view might “clear the ground”.
37. In light of those comments, there was correspondence between the solicitors for GKN (Gowling WLG) and the solicitors for GDELS (Jenner & Block), in which Gowling asked for confirmation of the intentions of GDELS and GDUK as regards the modification or replacement of the FORC. In letters dated 7 and 14 November 2023, Jenner confirmed in response that:
- i) GDELS and GDUK do not intend to modify and nor have they modified the FORC in any way, including by the addition of a dry-break member;
  - ii) GDELS and GDUK are not aware of any intention by anyone else, including the MOD, to modify the FORC; and that
  - iii) GKN will not be asked to replace the FORC with, or otherwise provide, the Red Plug Product or any other PGRC.
38. On 19 January 2024, Mr Remfry wrote to the MOD referring to the requirements of FT35 of TRS SV 0212, and asserting that the FORC does not comply with STANAGs 3105 and 3756 and therefore “appears not to fulfil the Ministry of Defence’s contractual requirement set out in the TRS”. He contended that STANAGs 3105 and 3756 require a vehicle side dry-break connector for safe operation.
39. On 3 April 2024 the MOD Safety Authority Secretariat replied to Mr Remfry in the following terms:

“As you are aware, your concerns have been subject to a thorough review by the Defence Safety Authority, in conjunction with Defence Equipment and Support.

The Department is content that the vehicle is compliant with the requisite standards and legislation.

The latest Capability Drop of vehicles includes a STANAG compliant Float Operable Refuelling Coupling (FORC) that has been successfully tested. All associated risks with earlier vehicle Drop refuelling is both understood and managed to a level that is both tolerable and as low as reasonably practical.

You may also wish to note that a North Atlantic Treaty Organisation (NATO) dry break is not an explicit requirement of the STANAG.”

*The defendants’ undertakings*

40. Both defendants have offered undertakings not to: (i) modify or have modified a FORC so as to incorporate a dry-break member; (ii) make, dispose of, offer to dispose of, use, import or keep whether for disposal or otherwise a coupling with a dry-break member; (iii) supply or offer to supply a refuelling coupling where they know that is to be used to make a coupling with a dry-break member; and (iv) make, dispose of, offer to dispose of, use, import or keep whether for disposal or otherwise a Red Plug Product.

*Discussion*

41. In light of the way in which the claimants have pleaded their case and the evidence before me, there are, in my judgment, two insuperable problems with the claimants’ case on the intention to modify the FORC.
42. The first problem is that to establish a s. 60(2) infringement, what must be pleaded is that the defendants knew, or that it would have been obvious to a reasonable person in the circumstances, that the FORC *would* be modified so as to include a dry-break member. In other words, the inquiry is whether it is *probable* that the FORC will be modified to include a dry-break member, such that the intention to do so would or should have been known to the defendants. But the claimants do not anywhere plead that it is probable that some ultimate users will intend to modify the FORC to add a dry-break connector.
43. Quite the opposite: the claimants’ pleaded case, set out most clearly in the AR&DCCD1, is that what is likely is that in the final AJAX vehicles the FORC will be replaced by the Red Plug Product. The corollary of that is that, on the claimants’ pleaded case, the FORC most likely *will not* be modified to add a dry-break connector.
44. The claimants cannot avoid that problem by saying that they rely on alternative cases. Even if alternative cases are pleaded, to survive strike out or summary judgment the alternative case on modification must at the very least plead that the FORC *will* be modified, and must set out (as required by the order of Meade J) the facts and matters relied upon in support of that contention. There is no such pleading, let alone a particularised pleading of that point.
45. The claimants have attempted to rectify that by the provision, at 2pm today, of a draft re-amended particulars of infringement which does now contain an assertion that the defendants knew, or that it was and will be obvious to the reasonable person in the circumstances, that ultimate users will put the invention into effect by the modification of the FORC to include a dry-break member, and to include a subsidiary displaceable member as claimed by claim 1 of the Patent.
46. There are multiple problems with that draft amendment. At the outset, it is unacceptably late. The claimants were ordered by Meade J in July 2023 to replead and particularise their case on this point. They did so in August 2023. There is no

explanation as to why this attempted repleading is only now being put forward, almost a year later, during the course of the hearing. The draft amendment is, moreover, pure assertion, with no facts and matters pleaded in support. Most importantly, the evidential material before the court is positively inconsistent with the terms of the draft amendment.

47. That last point reflects and exemplifies the second insuperable problem with the claimants' case on intention. There is, on the evidence before me, no realistic prospect that the claimants will be able to establish at trial either that the defendants knew, or that it should have been obvious to a reasonable person in the circumstances, that the FORC would be modified so as to include a dry-break member.
48. Starting with the position of the defendants and their customers, the defendants have offered undertakings not to modify the FORC so as to incorporate a dry-break connector; their customers, GDELS and GDUK have confirmed that they do not intend to modify the FORC to add a dry-break; and the MOD, which is the end customer, has said in terms that it is content that the vehicle is compliant with the requisite standards and that a dry-break is not an explicit STANAG requirement.
49. Mr Campbell said that the claimants took issue with the content of the MOD letter, which the claimants considered could not be accurate in light of the terms of the relevant TRS for the AJAX vehicles. I do not, however, make any findings as to the interpretation of the TRS requirements and whether the FORC does indeed comply with those requirements. That would plainly be a matter for evidence at trial, if this issue were to go to trial, and the defendants properly do not suggest that this is a matter that I can or should resolve now. Rather, the point is that the MOD has made clear that it regards the FORC as compliant with its requirements for the AJAX programme, and there is no pleaded case, let alone evidence, as to how and why notwithstanding that stated position it is likely that the MOD will modify the FORC or require it to be modified. Nor have the claimants explained who they consider might even be in a position to modify the FORC, given the terms of the defendants' undertakings and the confirmations provided by GDELS and GDUK.
50. Turning to what the claimants do say, their pleadings are signed by statements of truth, signed by Mr Remfry. As of 17 October 2023, the date of the AR&DCCD1, therefore, Mr Remfry's stated belief was that the FORC was likely to be replaced in the AJAX vehicles rather than modified. As set out above, Mr Remfry now contends in his evidence that *either* the FORC will be modified to include a dry-break, *or* it will be substituted by the Red Plug Product. That does not, however, assert that modification of the FORC will take place or even is likely to take place. Modification is simply one of two possibilities posited by him.
51. Mr Glancy's expert report likewise does not suggest that the FORC will be modified to add a dry-break. His view is, in similar vein to Mr Remfry, that *either* the FORC will be modified to add a dry-break member, *or* it will be replaced with a device containing a dry-break, *or* a concession will be obtained from the MOD. He does not offer any opinion as to which of those possibilities is more likely.

52. Even taking the claimants' evidence at its highest, therefore, that evidence does not contend that the FORC *will* be modified so as to incorporate a dry-break member. It simply contends that modification is one of several possibilities, to resolve what the claimants contend to be the problems with the current design of the FORC.
53. Again (and as with the pleading problem), that evidential problem is not solved by saying that the claimants advance alternative cases. It is of course entirely conventional for alternative cases to be advanced on the basis of the evidence before the court, where the evidence supports (or purports to support) each of several alternative pleaded cases. In the present case, however, the claimants' evidence is consistently to the effect that modification is only a possibility. It does not (even at its highest) state that modification is a probability, let alone that the defendants knew or that a reasonable person in the circumstances would know that modification would occur. Nor is there anything in the material before me to indicate that further relevant evidence will or might be available at trial which might establish that modification is probable, as opposed to being simply one of several possibilities.
54. There is therefore no evidential material which would establish a sufficiently arguable case that the contentions now set out in the draft re-amended particulars of infringement are correct. I therefore refuse permission to amend, and the s. 60(2) claim based on FORC modification must be therefore struck out. Had I not struck out this part of the claim, I would have given summary judgment for the defendants on this issue for the same reasons set out above.
55. For completeness I note that the defendants advanced two further points (subsidiary to their primary argument as to intention), namely (i) that there was no sufficient pleading as to the claimed subsidiary displaceable member which forms part of claim 1 of the Patent, and no evidential material to establish that a pleaded case on that point would be arguable; and (ii) that the claimants had not pleaded, as required by s. 60(2), that the supply be to a person other than a licensee or other person entitled to work the invention. The draft amendments provided during the course of the hearing addressed both of these points. I do not, however, need to address these points in light of my finding on the intention issue.

### **Licence issue**

56. The remaining issue is the licence issue. This is a short point. The second claimant was struck off the register of companies on 25 May 2021 and restored to the register on 13 January 2023. At §§13–14 of the amended particulars of claim, the claimants plead that on 20 May 2021 Mr Remfry terminated the second claimant's exclusive licence, but that in light of the company's restoration to the register the second claimant was "entitled at all material times" to an exclusive licence under the Patent, whether in writing or not, and that that "unwritten exclusive licence" was formalised by written agreement between the two claimants, executed on 13 February 2023.
57. The termination of the second claimant's licence was confirmed at the time by the claimants' then patent agents on 27 May 2021, in a letter to GKN saying that "all

PGRC IP rights belong to Mr Remfry. They were licensed to PGRC-DSL. This licence is being terminated, please see attachments.”

58. Mr Remfry, in his first witness statement dated 28 April 2023 explained the reasons for terminating the second claimant’s licence, saying:

“I terminated the exclusive licence I had granted it because PGRC-DSL was to be struck off and I did not want the benefit of the licence being *bona vacantia*. I would not have terminated the exclusive licence had I and the other director not applied to have PGRC-DLS struck off the register of companies. “

59. The defendants’ reply and counterclaim took issue with the claimants’ pleaded case on this point, denying that any “entitlement” arose by virtue of the restoration of the second claimant to the register, and saying that the claim that the unwritten exclusive licence was then “formalised” was not understood. The amended reply and defence to the counterclaim of the first defendant made no response to these points.
60. The claimants’ case is now, as Mr Campbell clarified, not that any unwritten licence arose automatically by virtue of the restoration of the second claimant to the register, but rather that there was an oral unwritten licence granted by Mr Remfry immediately following the termination of the written licence, and that the oral licence then subsisted and remained in effect following the restoration of the second claimant to the register. It was that oral licence which was, according to the claimants, formalised by the 13 February 2023 written agreement.
61. In support of this new case, the third witness statement of Mr Remfry states that he granted the second claimant “an unwritten exclusive licence immediately following the termination of the written licence. That unwritten licence was then formalised by a new written licence.”
62. The problem with this assertion is that it is not pleaded. Nothing in the current version of the amended particulars of claim comes close to alleging that following termination of the written licence Mr Remfry granted the second claimant an unwritten oral licence. The claimants would therefore have to amend to plead the point. Mr Campbell said that they could do so. No draft amendment was provided, however, even during the course of the hearing. That is a distinctly unpromising start to any application to amend to address this point.
63. More importantly, in light of the material before the court, any application to amend would be completely hopeless. Until Mr Remfry’s assertion in his third witness statement, there was nothing whatsoever to suggest that an unwritten licence had been granted immediately following termination of the written licence. On the contrary, the amended particulars of claim pleaded that the second claimant’s licence had been terminated, and Mr Remfry’s first witness statement explained why it was necessary to terminate that written licence, so as not to have a licence subsisting when the second claimant was struck off the register. The explanation given in that first witness statement is squarely inconsistent with the contention that Mr Remfry now makes in his third witness statement.

64. Moreover, Mr Remfry's new claim is impossible to reconcile with the fact that seven days after the written licence was terminated his patent agents, presumably on his instructions, wrote to GKN saying in unambiguous terms that the rights to the Patent belonged exclusively to Mr Remfry, and that he was terminating the licence to the second claimant.
65. In light of that evidence, Mr Remfry's belated claim to have granted an unwritten exclusive licence to the second claimant is wholly implausible. It is a bare assertion with no details whatsoever of when the supposed licence was granted, how it was granted, and why it was never mentioned before on the numerous occasions where the matter has been dealt with, whether in the pleadings or the evidence. Moreover, the other evidence before the court not only fails to support this new claim but positively contradicts it – and importantly, that evidence emanates not from the defendants but from the claimants themselves. There is, therefore, no material before the court to establish a sufficiently arguable case that the allegation now made by Mr Remfry is correct.
66. Nor is there anything to provide reasonable grounds to believe that a fuller investigation at trial would provide further evidence that might alter that conclusion. If Mr Remfry had, indeed, granted the oral licence that he now claims to have granted, he could have explained that fully in both his first and his third witness statements. There is no explanation as to why he has not done so; nor any indication of any further relevant evidence which might be available if this point were permitted to go to trial.
67. The second claimant's claim will therefore be struck out in respect of the period between 20 May 2021 and 13 February 2023. Again, as with the FORC modification issue, if I had not struck out this aspect of the claim I would have granted summary judgment in favour of the defendants on this issue, for the same reasons as given above.

## **Conclusion**

68. The defendants' strike out application succeeds both in respect of the FORC modification issue and in respect of the licence issue.