

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Royal Courts of Justice  
Rolls Building  
London, EC4A 1NL

Date: 29 November 2023

**Before :**

**Mrs Justice O'Farrell DBE**

**Between :**

**IBM UNITED KINGDOM LIMITED**

**Claimant**

**- and -**

**(1) LZLABS GmbH**  
**(a company incorporated in Switzerland)**  
**(2) WINSOPIA LIMITED**  
**(3) LZLABS LIMITED**  
**(4) MARK JONATHAN CRESSWELL**  
**(5) THILO ROCKMANN**

**Defendants**

**-and-**

**(6) JOHN JAY MOORES**

**Proposed**  
**Defendant**

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**Nicholas Saunders KC, Fred Hobson, James Weale & Henry Edwards** (instructed by  
**Quinn Emanuel Urquhart & Sullivan UK LLP**) for the Claimant  
**Roger Stewart KC, Thomas Ogden, Janni Riordan & Joshua Marshall** (instructed by  
**Clifford Chance LLP**) for the Defendants

Hearing dates: 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> November 2023

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**APPROVED JUDGMENT**

**This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 29 November 2023 at 10.30am**



**Mrs Justice O'Farrell:**

1. This claim arises out of the development by the first defendant (“LzLabs”) of software, known as the ‘Software Defined Mainframe’ (“the SDM”), which is said to enable its customers to take applications developed for IBM mainframe computers and run them on x86-based computer architectures without the need for source code changes or recompilation.
2. On 9 August 2013 the claimant licensed the IBM mainframe software to the second defendant (“Winsopia”) pursuant to an IBM customer agreement (“the ICA”).
3. The claimant’s case is that the defendants breached, or procured breach of, the ICA, using Winsopia’s access to the IBM mainframe software to develop the SDM to run IBM software systems without an IBM mainframe or the IBM mainframe software stack by reverse assembling, reverse compiling or reverse engineering the software.
4. By notice dated 24 February 2021 the claimant gave notice purporting to terminate the licence agreements for contractual breach; alternatively at common law.
5. On 21 September 2021, the claimant issued these proceedings, in which it seeks:
  - i) a declaration that Winsopia’s licence has been lawfully terminated;
  - ii) an injunction restraining Winsopia from making any further use of the IBM mainframe software, including from offering any services relying on the SDM that contains or uses any part of the IBM mainframe software (and the other defendants from procuring the same); and
  - iii) an account of profits and/or damages.
6. The defendants dispute the claims and counterclaim for injunctive declaratory relief, damages for breach of the ICA and specific performance of the same. The defendants’ case is that the SDM was developed by LzLabs following an extensive research and development process spanning almost 10 years, using strict processes and policies which applied both to LzLabs and the developers whom it engaged, and to Winsopia, to ensure that no IBM material was used other than in compliance with the terms of the ICA. In developing the SDM, LzLabs employed a clean room process and did not use Winsopia’s IBM mainframe.
7. At a case management conference on 21 October 2022 before Waksman J, directions were given to a trial on liability, fixed for 9 April 2024 with an estimate of 28 days, to include 4 reading days and 24 hearing days.
8. The following applications are before the court:
  - i) the claimant’s application dated 18 October 2023 to adjourn the trial date and for further directions;
  - ii) the claimant’s applications dated 3 August 2023 and 7 September 2023 to amend the particulars of claim and to join Mr Moores as a defendant;
  - iii) the claimant’s application dated 12 October 2023 to amend its reply;

- iv) the defendants' application dated 10 October 2023 to strike out paragraph 48 of the reply;
- v) the claimant's application dated 7 September 2023 for permission to serve out of the jurisdiction and Mr Moores' application dated 10 October 2023 challenging jurisdiction;
- vi) the defendants' application dated 10 August 2023 for an order that the claimant serve a further response to the RFI dated 29 June 2023;
- vii) the defendants' application dated 27 October 2023 seeking further disclosure and information in respect of Mr Knight.

*Trial date and revised timetable*

9. The claimant's application is for an extension of time for service of its expert evidence, consequential revisions to the timetable, an adjournment of the trial date and an extension to the trial estimate. The application is supported by the following evidence:
- i) the seventeenth witness statement of Katherine Vernon dated 27 October 2023;
  - ii) Ms Vernon's eighteenth witness statement dated 1 November 2023;
  - iii) Ms Vernon's nineteenth witness statement dated 6 November 2023;
  - iv) the witness statement of Michael Swanson, the claimant's expert, dated 2 November 2023; and
  - v) the witness statement of Professor Jon Weissman, also the claimant's expert, dated 6 November 2023.
10. The defendants do not object to a short extension of time for the claimant to serve its expert evidence but oppose any further substantial revisions to the timetable or adjournment of the trial date. The defendants rely on the following evidence:
- i) the twenty-third witness statement of Kate Scott dated 20 October 2023 (with corrections dated 27 October 2023);
  - ii) Ms Scott's twenty-fifth witness statement dated 5 November 2023;
  - iii) the witness statement of Professor Alastair Donaldson, the defendants' expert, dated 8 November 2023; and
  - iv) the witness statement of David Stephens, also the defendants' expert, dated 8 November 2023.
11. Mr Saunders KC, leading counsel for the claimant, submits that it is necessary to adjourn the start of the trial to Autumn 2024, or the first available date thereafter, in the interest of fairness to allow the claimant adequate time to prepare for trial. The current trial date of 9 April 2024 was initially fixed by Waksman J at a CMC on 21

October 2022. At that stage, it was envisaged that extended disclosure would be completed by 17 March 2023. In contrast, although some extended disclosure was given by 31 March 2023, thereafter there were a number of disclosure applications, additional disclosure through April, May, June, August and ongoing, and the volume and complexity of documents have been at the outer limits of what was within the reasonable contemplation of the parties. Issues of confidentiality have imposed a heavy burden on the parties in respect of reviewing documents, generating a number of applications in writing and at hearings. In particular, difficulty has been experienced in setting up the source code computers to afford access to the source code by the legal teams and technical experts.

12. The claimant's position is that the trial estimate of 24 hearing days (plus four days' judicial reading time) is now insufficient. The time estimate was based on the claimant calling 3 factual witnesses and 2 experts, and the defendants calling 10 factual witnesses and 2 experts. In fact the claimant has served 4 factual witness statements, the defendants have served 16 factual witness statements and there is the potential for the claimant to make available an additional 2 factual witnesses for cross examination. The claimant's view, as set out in paragraphs 15-19 of Vernon 18 and explained by Mr Saunders, is that approximately 29 days is required for evidence. If Mr Moores is joined to the proceedings, a further 1-2 days of factual evidence would be required. Together with opening and closing submissions, the claimant's current estimate is that up to 36 days is now required for the hearing.
13. Further, Mr Saunders submits that this case is technically complex and the experts need significantly more time to prepare their reports. On 23 June 2023 the claimant served further particulars of its case on deliberate concealment. On 18 August 2023 the claimant served further particulars of the technical breaches relied upon, together with its factual witness statements. Between 27 and 30 October 2023 the defendants served their factual witness statements and on 2 November 2023 they served responsive pleadings in respect of the claimant's case on deliberate concealment and the technical breaches. Mr Alepin, one of the claimant's former experts, is no longer able to act as a testifying expert as a result of his wife's ill health. Mr Swanson, the new expert, estimates that he needs 2 weeks to assimilate the recent material, and approximately 60 working days to prepare his report taking into account the further particulars of technical breach, the defendants' factual evidence and additional disclosure. This estimate is supported by Professor Weissman.
14. Mr Stewart KC, leading counsel for the defendants, submits that an adjournment of the trial date is unnecessary and would be prejudicial to the defendants. The claimant has had months to analyse the SDM source code and the relevant DR system and communications. Those difficulties were taken into account when the claimant sought and obtained extensions of time for service of its technical particulars and expert reports. There has been no material change in circumstances since the consent order dated 19 October 2023, which extended time for service of the expert reports to 27 October 2023 and maintained the current trial date. The defendants are prepared to consent to an extension of time for the claimant's expert evidence until 14 November 2023.
15. The defendants do not accept that the trial timetable is inadequate to accommodate the number of factual witnesses. Although both sides have served additional statements from witnesses of fact, there is a degree of overlap between the statements and it is

unlikely to be necessary for the claimant to put its case on all points to all witnesses. The evidence can be accommodated with disciplined cross-examination and appropriate adjustments to the trial timetable.

16. Mr Stewart submits that it would be grossly unfair to the defendants to adjourn the trial. In particular, further delay to the resolution of the dispute would risk catastrophic consequences for the defendants' business. Delay would increase the ongoing legal expenses of the defendants, causing particular hardship for the individual defendants to the proceedings. The claimant has already had ample opportunity to prepare and serve its expert evidence. Insofar as the adjournment is said to arise from the recent appointment of Mr Swanson, the claimant has failed to adduce proper details of the medical grounds on which Mr Alepin has been forced to withdraw from the case.
17. The principles to be applied by the court are well established. The court has very wide case management powers under CPR 3.1, including: (a) the power to extend or shorten the time for compliance with any rule, practice direction or court order; and (b) the power to adjourn a hearing.
18. When considering the exercise of such powers, the court must have regard to the overriding objective set out in CPR 1.1, namely, that the court should deal with cases justly and at proportionate cost. That includes, so far as practicable: (a) ensuring that the parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence; (b) saving expense; (c) dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party; (d) ensuring the case is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders.
19. No authority is needed for the proposition that there must be a fair hearing. The court must give the parties a reasonable opportunity to prepare and present their case. But that does not entitle a party to unlimited preparation and hearing time, particularly where that would result in unacceptable delay to resolution of the dispute or loss of a fixed trial date. When considering an application to adjourn a trial, the court must carry out a balancing exercise, endeavouring to manage the case so as to hold the trial date to which everyone has been working, whilst ensuring the least risk of irreparable prejudice to any party in all the circumstances of the case, which may necessitate revising the timetable or adjourning the trial.
20. I accept that this is a highly technical and complex case but the difficulties associated with the SDM, volume of disclosure and technically demanding details have, to a very great extent, already been considered by the court when granting earlier extensions of time. It should not come as any surprise to the claimant that the defendants have addressed the technical breach case in the factual witness statements and their responsive pleading. The timing is in part a consequence of the additional time needed by the claimant to particularise this part of its case, originally ordered to be provided by 23 June but not pleaded until 18 August 2023. Against that timescale, although there has been slippage, the defendants' evidence and pleadings are not significantly late.

21. I reject the defendants' criticism of the evidence regarding Mr Alepin's withdrawal as expert. It is clear from Ms Vernon's evidence that he has been struggling for some time to fulfil his duties as an expert but he is unable to continue as a result of his wife's illness and his inability to travel from the US. Mr Swanson has been appointed since August and working on the case since September 2023. It is appreciated that he needs some time to catch up, including time to consider the defendants' technical responses and factual witness statements. However, the estimate of 2 weeks to review the recent material and a further 60 working days to analyse the breaches is based only on a brief overview, rather than a calculated assessment. It does not take into account that Mr Swanson does not start his investigation cold and he is not working alone. He has available the full particulars of technical breaches already served by the claimant, based on Mr Alepin's work to date, together with the pleaded responses and evidence from the defendants. He has the assistance of the non-testifying experts and support personnel, who can pull together many of the documents and technical information needed to address each breach. Finally, he has the advantage of working alongside Professor Weissman, who has been involved in the case for some time.
22. In the light of those factors, I consider that a reasonable extension of time for preparation of the claimant's expert reports would be two months from the pleaded response, until 5 January 2024. Consequential amendments would be needed to the other directions, including service of any additional pleadings, which it is accepted could be done in parallel to the expert evidence. A degree of compression to the remaining timetable is inevitable but achievable given the detailed technical information now disclosed. In my judgment there is sufficient time between now and April 2024 for the parties to prepare adequately for trial, particularly if the start date is postponed by a short period.
23. I consider that the claimant's estimate of trial time is over cautious; as Mr Stewart submits, it is common for parties in large complex cases to tailor their submissions and cross examination to fit the allotted timetable. This case is no exception. However I consider that it would be appropriate to allow more time, given the volume of factual witness statements and technical issues apparently in dispute. The court could accommodate a slightly longer hearing duration. Therefore I will increase the time estimate to 32 hearing days (8 TCC weeks) plus a week of judicial reading time.
24. Having decided that there is sufficient time between now and April 2024 to give the parties a fair and reasonable opportunity to prepare their respective cases, the court must balance the desire of the claimant to adjourn the trial against the consequences of any adjournment for the parties, the court and other court users. Mr. Stewart is correct that there are hidden costs to any adjournment which would only serve to increase the vast legal resources deployed on both sides in this case. Further, the court is always reluctant to adjourn a trial date that has been fixed for many months in circumstances where other court users have been deprived of the opportunity to have their cases heard at such earlier date. Of greatest significance, the allegations against the defendants are very serious, with potentially far reaching consequences; it is unfair to keep them, and in particular the individual defendants, in jeopardy for any longer than is absolutely necessary for a fair disposal of the case.
25. Balancing those factors, the court does not consider that it is necessary or reasonable to adjourn the trial but the start date of the trial can be slightly delayed to allow for a revised timetable and the trial estimate increased.

26. The procedural timetable is revised as follows:
- i) the parties shall produce a draft list of expert issues, agreed if possible, by 1 December 2023;
  - ii) the experts of like disciplines shall produce a first joint statement, setting out any matters agreed or not agreed, and any expert issues of principle then identified, by 15 December 2023;
  - iii) the claimant shall file and serve its expert reports by 5 January 2024;
  - iv) the defendants shall file and serve their expert reports by 16 February 2024;
  - v) the claimant shall file and serve any expert reports in reply by 8 March 2024;
  - vi) the experts of like disciplines shall produce a second joint statement, setting out those issues which are agreed between them and those which are disputed, together with a brief summary of the reasons for disagreement, by 22 March 2024;
  - vii) the PTR in March 2024 is vacated and will be re-fixed for hearing on 26 and 27 March 2024 (plus 1 day's judicial reading);
  - viii) skeletons shall be filed by 4pm on 12 April 2024; and
  - ix) the start of the trial will be pushed back (from 9 April 2024) to 22 April 2024 for judicial reading, followed by the hearing from 29 April 2024 with a revised estimate of 8 hearing weeks (32 sitting days).

*Amendments to pleadings / joinder / strikeout applications*

27. By its application dated 7 September 2023, the claimant seeks permission to: (a) amend its claim form and particulars of claim in the form of the draft Re-Re-Re-Amended Particulars of Claim ("the RRRAPOC"); (b) join John Moores as a sixth defendant; (c) serve the RRRAPOC and Amended Claim Form outside the jurisdiction on Mr Moores in the USA; and for (d) consequential directions. The earlier application dated 3 August 2023 is a fall-back amendment position if the court refuses to join Mr Moores.
28. Further, by application dated 12 October 2023, the claimant seeks permission to amend its Reply and Defence to Counterclaim.
29. The claimant relies on the following evidence filed in support:
- i) Ms Vernon's twelfth statement dated 3 August 2023;
  - ii) Ms Vernon's fourteenth statement dated 7 September 2023;
  - iii) Ms Vernon's fifteenth statement dated 20 October 2023;
  - iv) Ms Vernon's sixteenth statement (jurisdiction) dated 23 October 2023;

- v) Ms Vernon's seventeenth statement dated 27 October 2023.
  - vi) Ian Mitchell's witness statement dated 27 October 2023;
  - vii) Paul Knight's witness statement dated 27 October 2023;
30. The applications are opposed by the defendants and Mr Moores on the grounds that the proposed amendments have no real prospect of success, the proposed joinder of Mr Moores is precluded by section 35 of the Limitation Act 1980 and the joinder application is made too late and would cause unjustifiable prejudice. Jurisdiction is challenged by application dated 10 October 2023.
31. By further application dated 10 October 2023, the defendants seek (a) to strike out the claimant's defence of contractual estoppel and to strike out paragraph 48 of the claimant's reply; and (b) permission to amend the Defence and Counterclaim to seek a declaration that Winsopia is entitled to enforce clause 1.11.4 of the ICA for the benefit of the other defendants. The application to amend the Defence and Counterclaim is agreed but the application to strike out is disputed.
32. The defendants rely on the following evidence:
- i) Ms Scott's twenty-first statement dated 10 October 2023;
  - ii) Ms Scott's twenty-third statement dated 20 October 2023 (amended 27 October 23);
  - iii) Mr Rockmann's second statement dated 20 October 2023;
  - iv) Mr Cresswell's second statement dated 20 October 2023;
  - v) Ms Scott's jurisdiction statement dated 10 October 2023;
  - vi) Mr Moores' statement dated 10 October 2023;
  - vii) Ms Scott's second jurisdiction statement dated 27 October 2023;
  - viii) Mr Moore's second statement dated 1 November 2023.
33. The current pleaded claim against the five existing defendants has as its foundation an allegation of breach of the ICA concluded between the claimant and Winsopia. The material provisions of the ICA include clause 4.1:

“4.1.1 Authorised Use

Under each licence, IBM authorises the customer to:

- a. use the ICA Program's machine-readable portion on only the Designated Machine. If the Designated Machine is inoperable, the Customer may use another machine temporarily. If the Designated Machine cannot assemble or compile the ICA Program, the

Customer may assemble or compile the ICA Program on another machine. If the Customer changes a Designated Machine previously identified to IBM, the Customer agrees to notify IBM of the change and its effective date;

- b. use the ICA Program to the extent of authorisations the Customer has obtained;
- c. make and install copies of the ICA Program, to support the level of use authorised, provided the Customer reproduces the copyright notices and any other legends of ownership on each copy or partial copy; and
- d. use any portion of the ICA Program IBM provides i) in source form, or ii) marks restricted (for example “Restricted materials of IBM”) only to: (1) resolve problems related to the use of the ICA Program, and (2) modify the ICA Program so that it will work together with other projects.

#### 4.1.2 The Customer’s Additional Obligations

For each ICA Program, the Customer agrees to:

...

- b. ensure that anyone who uses it (accessed either locally or remotely) does so only for the Customer’s authorised use and complies with IBM's terms regarding ICA Programs;

...

#### 4.1.3 Actions The Customer May Not Take

The Customer agrees not to:

- a. reverse assemble, reverse compile, otherwise translate, or reverse engineer the ICA Program unless expressly permitted by applicable law without the possibility of contractual waiver; or
- b. sublicense, assign, rent, or lease the ICA Program or transfer it outside the Customer’s Enterprise.”

34. The pleaded case is that, in breach of the ICA, Winsopia used the IBM mainframe software, or permitted it to be used for the purpose of development and/or otherwise reverse engineered parts of the IBM mainframe software. Initially, the pleaded case was one of inference, with selected examples (see paragraphs 23-28 of the Re-Re-Amended Particulars of Claim). The particulars of the technical breaches served on 18 August 2023 set out detailed examples of the alleged breaches under the following categories:

- i) reverse engineering of the IBM mainframe software by disassembly, decompilation and translation;

- ii) reverse engineering through the systematic creation and analysis of compiler listings;
  - iii) reverse engineering through the systematic use of traces, dumps, slip traps, packet sniffing and other debugging tools and techniques;
  - iv) copying IBM source code, macro expansions and copy books;
  - v) transferring “unscrubbed” and/or partially “scrubbed” materials containing IBM mainframe software;
  - vi) reverse engineering through deliberate generation and catching of exceptions; and
  - vii) further use outside enterprise and use beyond the designated machine.
35. The existing pleaded case alleges that the other defendants procured the breaches of the ICA. It is alleged that each and every breach by Winsopia of the ICA was undertaken at the direction, instruction or request of LzLabs and with the assistance of LzLabs Limited, each of whom knew and intended that the breaches should occur. Further, Mr Cresswell and Mr Rockmann are said to be liable for procuring breaches of the ICA by virtue of their capacity as directors and executive officers of Winsopia (paragraphs 29-34).
36. The proposed amendments in the draft RRRAPOC comprise two distinct additions to the case. First, the claimant seeks to join Mr Moores as a sixth defendant, alleging at paragraph 34C that he procured breaches of the ICA. It is alleged that Mr Moores is the ultimate beneficial owner of the corporate defendants and was ultimately in control of the defendants, who followed his instructions in relation to the development of the SDM. Mr Moores directed and coordinated the development of the SDM, participating in the detail of its development, testing and marketing. In so doing, Mr Moores gave instructions and took steps that knowingly and intentionally induced and/or facilitated breaches of the ICA. The allegations include:
- i) Mr Moores personally decided to use a re-seller to assist Winsopia in entering the ICA for the purpose of deliberately concealing and thus facilitating breaches of the ICA;
  - ii) he instructed and/or authorised the regular movement of individuals between the first, second and third defendants and Texas Wormhole LLC, another company owned and controlled by Mr Moores, thereby negating any real operational separation between the defendants;
  - iii) he facilitated communication between employees of LzLabs and Winsopia, circumventing the code of conduct put in place to maintain operational separation between the defendants;
  - iv) he instructed and/or authorised the transfer of IBM mainframe software from individuals working for Winsopia to individuals working for LzLabs; and

- v) he directed and/or approved that Winsopia use machine readable portions of the IBM mainframe software or parts thereof on devices which were not designated machines as defined in the ICA.
37. Second, the claimant seeks to introduce a new claim against all defendants, including Mr Moores, of unlawful means conspiracy at paragraph 44A. It is alleged that the defendants combined with each other to achieve the common end of developing the SDM using unlawful means, namely, breaches of the ICA by Winsopia and procurement of such breaches by the other defendants. It is said that the combination was entered into with the intention to injure the claimant, by developing a competitor product which would damage the claimant's mainframe business, the defendants undertook concerted action consequent upon the combination, knowing that the breaches and procurement of such breaches were unlawful, and the claimant suffered damage as a result of the conspiracy.
38. The allegations of breach of the ICA and procurement of breach are denied. The primary defence is that the defendants' actions were acts of observation, study and testing, or to achieve interoperability of an independently created computer program with other programs, within their statutory rights. Further, the Re-Amended Defence and Counterclaim raises issues of limitation as follows:
- i) It is said that the claimant has at all material times since at least 2013 (alternatively, by no later than May 2017) been aware of the existence of LzLabs, the nature of the work in which it was engaged, and the relationship between LzLabs and Winsopia (paragraph 61).
  - ii) Reliance is placed on the two-year contractual limitation period set out in clause 1.11.4 of the ICA, now said to be enforceable by Winsopia in relation to actions against the other defendants (paragraphs 83-85 & 121).
  - iii) The claims in contract and tort are said to relate to acts committed prior to 21 September 2015 and therefore, are statute-barred by reason of sections 5 and 2 of the Limitation Act 1980 (paragraph 87).
39. The existing Reply and Defence to Counterclaim denies that the claims are time barred and raises a plea of deliberate concealment:
- i) It is said that clause 1.11.4 of the ICA does not apply to these claims (paragraph 47).
  - ii) Reliance is placed on alleged acts by the defendants that constituted deliberate concealment within the meaning of section 32 of the Limitation Act 1980 (paragraph 52).
  - iii) It is said that the defendants are estopped from relying on clause 1.11.4 of the ICA because (i) they impliedly represented to the claimant that Winsopia was complying with the ICA by continuing to use the IBM mainframe software and make payments while concealing its wrongdoing, (ii) the claimant relied on those implied representations by not terminating the ICA and suing the defendants forthwith, and (iii) it would be inequitable for Winsopia to be permitted to rely on clause 1.11.4 in those circumstances (paragraph 48).

- iv) Clause 1.11.4 does not apply to the claims against the first, third, fourth or fifth defendants (paragraph 49).
40. Further particulars of the claimant's case on deliberate concealment were served on 23 June 2023. The claimant's case is that the defendants took substantial steps deliberately to conceal their wrongdoing and/or committed and procured breaches in circumstances where they would be unlikely to be discovered for some time. Therefore, the claimant did not discover, and could not with reasonable diligence have discovered, the concealment prior to 25 August 2020, less than two years prior to the issue of proceedings.
41. The proposed amendments in the draft Amended Reply and Defence to Counterclaim raise the following new points:
- i) On a proper construction of clause 1.11.4 of the ICA, alternatively by reason of an implied term (obvious or to give business efficacy), the clause does not apply where the relevant cause of action involves dishonest conduct or there is dishonest concealment.
  - ii) The contractual time bar does not apply to any breach which has been deliberately concealed by the party in breach.

*Test on applications to amend*

42. Once a statement of case has been served, a party may amend it only with the consent of the other party or with permission of the court: CPR 17.1.
43. CPR 17.3 provides that the court has a general discretion to allow an amendment to a statement of case, subject to CPR 17.4 (amendments of statement of case after the end of a relevant limitation period) and CPR 19.6 (adding or substituting parties after the end of a relevant limitation period).
44. On an application by a party to amend its pleading, where there is no issue of lateness or adverse impact on the trial date, the principles can be summarised as follows:
- i) When deciding whether to grant permission to amend, the court must exercise its discretion having regard to the overriding objective.
  - ii) Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
  - iii) Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.
  - iv) An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success: *Kawasaki Kisen Kaisha Ltd v James Kimball Ltd* [2021] EWCA Civ 33 at [18]; *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr LJ (as she then was) at [36].

- v) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success but without conducting a “mini-trial”: *Swain v Hillman* [2001] 1 All ER 91. A “realistic” claim is one that carries some degree of conviction and is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472.
45. On an application to amend where the amendments are late and there is a risk to the trial date the following principles are applicable, as set out in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) per Coulson J (as he then was) at [19] and *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr LJ (as she then was) at [36]-[38]:
- i) In exercising the court’s discretion whether to allow an amendment, the overriding objective is of the greatest importance. Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court’s limited resources.
  - ii) Therefore, such applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
  - iii) The starting point is that the proposed amendment must be arguable, coherent and properly particularised. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success.
  - iv) An amendment is late if it could have been advanced earlier, or involves duplication of steps in the litigation, costs and effort. Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.
  - v) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay.
  - vi) A very late amendment is one made when the trial date has been fixed and where permitting the amendment would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.
  - vii) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

46. Mr Stewart submits that the proposed amendments and the joinder of Mr Moores as a sixth defendant should be refused on the grounds that: (i) there is no properly pleaded breach of the ICA; (ii) there is no properly pleaded mental element of the allegations of wrongful procurement or unlawful means conspiracy; (iii) the claims are time-barred by contractual limitation and/or statutory limitation; and (iv) the amendments are too late.

*Breach of the ICA*

47. The defendants rely on the Software Directive (Directive 2009/24/EC) embodied in English Law by the Copyright, Design and Patents Act 1988, in support of their defence that, regardless of the terms of the ICA, as a lawful user of the ICA programs, Winsopia had the benefit of its statutory rights to make back-up copies, decompile, observe, study and test the functioning of the computer programs, copy and adapt them in accordance with their intended purpose, including for error correction and interoperability.

48. Both parties made their submissions by reference to the Software Directive, Article 4 of which provides:

“1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:

- (a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;
- (b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;
- (c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.”

49. Article 5 provides:

“1. In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

3. The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.”

50. Article 6 provides:

“1. The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

- (a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;
- (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and
- (c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

- (a) to be used for goals other than to achieve the interoperability of the independently created computer program;
- (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or
- (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.”

51. The complaint made by Mr Stewart, on behalf of Mr Moores, is that the claimant has not engaged with the above rights afforded under the Software Directive and therefore

should not be permitted to add a new claim to join him as a sixth defendant, particularly in circumstances where serious allegations of dishonesty have been raised.

52. That objection is rejected. Clearly, there is an argument as to whether what was done by the defendants fell within their statutory rights but the dispute is not simply confined to an issue of interpretation of the statutory provisions. I note that none of the parties has suggested that the underlying facts are agreed and that the court should resolve liability by means of a preliminary issue or sub-trial. The claimant has set out in its pleadings the alleged breaches of the ICA and has now served extensive particulars of the technical breaches relied on. On the face of the pleadings, there are no admissions in respect of those allegations and therefore they are disputed; as to the acts carried out by the defendants, the purpose for which they were carried out, whether they constituted breaches of the ICA and whether the defendants can avail themselves of protection under the Software Directive. Those are all matters for trial. For current purposes, the court is satisfied that they raise issues to be tried that have a real prospect of success.

*Wrongful procurement or unlawful means conspiracy*

53. The tort of procuring a breach of contract requires: (i) a breach of contract; (ii) conduct by the defendant to procure or induce that breach; (iii) knowledge or recklessness on the part of the defendant as to the existence of the relevant term in the contract; and (iv) knowledge of the defendant that the conduct induced or procured would result in a breach of that term: *OBG v Allan* [2007] UKHL 1 per Lord Hoffmann at [39]-[44]; per Lord Nicholls at [191]-[193] & [202].
54. The tort of unlawful means conspiracy requires: (i) a combination between the defendant and others; (ii) an intention to injure the claimant; (iii) unlawful acts carried out pursuant to the combination as a means of injury; and (iv) causation of loss to the claimant: *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271(CA) at [108]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19 at [8]; *The Racing Partnership Ltd v Done Bros* [2020] EWCA Civ 1300 per Arnold LJ at [139].
55. A necessary element of the tort of inducing a breach of contract is intentional or reckless inducement of the breach: *OBG v Allan* [2007] UKHL 1 per Lord Hoffmann at [39]. Likewise, the mental element necessary to establish unlawful means conspiracy is intent to injure: *OBG v Allan* per Lord Hoffmann at [62] and Lord Nicholls at [164]-[166].
56. Mr Stewart correctly draws to the court's attention the requirement that the claimant must set out clearly and with precision the case that it proposes to make to justify each of the claims of procurement and conspiracy, each of which requires proof of deliberate wrong-doing and dishonesty. The pleadings must be clear and specific. The claimant must identify the facts and matters upon which it relies to establish knowledge, deliberate wrongdoing and dishonesty. The claimant must identify that on the basis of the facts pleaded, an inference of dishonesty is more likely than innocence or negligence: *Three Rivers v Bank of England (No.3)* [2001] UK HL 16 per Lord Millett at [183]-[186]. However, it is important not to conflate the claimant's obligation to plead its allegations with sufficient clarity to provide notice of the case

which is made against the defendants, with the claimant's obligation to prove those allegations at trial.

57. The claimant relies on the identified actions of Mr Moores, summarised above, as intentional procurement of a breach of the ICA and/or unlawful means conspiracy. Further, the claimant relies on its particulars of deliberate concealment as evidencing the required mental element of the offences, namely, inference drawn from the deliberate concealment that the breaches were intentional and/or dishonest.
58. It is said by the defendants that the claimant has misinterpreted communications within and between the defendants; on analysis, those communications do not support allegations of concealment or dishonesty. But that is a matter for trial. It would not be appropriate for this court to carry out a mini-trial based on limited selected documents.
59. The court is satisfied that the allegations of wrongful procurement of breach of contract and/or unlawful means conspiracy are pleaded with sufficient clarity and precision to provide the defendants with adequate notice of the case against them.

#### *Contractual limitation*

60. Mr Moores relies on clause 1.11.4 as precluding the claimant from bringing any claim against him. The claimant's case is that Mr Moores is not entitled to rely on the ICA because only Winsopia and the claimant are parties to it. However, the parties have agreed that the defendants are entitled to amend their pleaded case to assert the benefit of that clause in the face of the claims made, not just against Winsopia, but also against the other defendants.
61. In the Reply and Defence to Counterclaim, a plea of estoppel is raised at paragraph 48:

“Further or alternatively, the Defendants are estopped from relying on clause 1.11.4 of the ICA because (i) the Defendants repeatedly impliedly represented to IBM UK that Winsopia was complying with the ICA by continuing to use the IBM mainframe software and to make payments to IBM while concealing its wrongdoing, (ii) IBM UK relied on those implied representations by not terminating the ICA and suing the Defendants forthwith, and (iii) it would be inequitable for Winsopia to be permitted to rely on clause 1.11.4 in those circumstances.”
62. Ms Scott in her twenty-first statement contends that the claimant's pleaded case on implied representation is inadequate and that the estoppel argument is not supported by the evidence the claimant has filed for trial and therefore has no reasonable prospect of success. Ms Vernon disputes these criticisms in her fifteenth statement, stating that the implied representation case is pleaded in clear terms at paragraph 48 of the reply and is supported by the evidence of Ian Lyon (expectation that customers would abide by the requirements of their contracts) and Emma Wright (belated awareness of the defendants' alleged wrongdoing).

63. The court is not satisfied on the material before it that the estoppel claim is bound to fail. The defendants have identified a number of challenges that they would make to the asserted claim but the efficacy of such challenges turns on an analysis of the documentary and witness evidence that will be subject to interrogation at trial against the relevant legal principles. In any event, it is but one part of the claimant's response on limitation and no useful purpose would be served by dealing with the merits of that argument in isolation from the other parts of the issue. On that basis it is not appropriate to strike it out.
64. The defendants object to the proposed amendments in the draft Amended Reply which seek to raise new arguments that: (i) on a proper construction of clause 1.11.4 of the ICA, it does not apply where there has been dishonesty or deliberate concealment; and (ii) the contractual time bar does not apply to any breach which has been dishonestly or deliberately concealed by the party in breach.
65. As to (i), Mr Hobson, counsel for the claimant, submits that it involves legal analysis as to the scope and effect of clause 1.11.4 of the ICA. That is a question of interpretation which will be a matter for submissions at trial. Reliance is placed on *Granville Oil v Davis Turner* [2003] 2 CLC 418 per Tuckey LJ at [15]. Mr Stewart accepted that the proper construction of the contract was a matter for trial.
66. As to (ii), Mr Hobson explained that this argument relies on the same facts already pleaded in the particulars of deliberate concealment served on 23 June 2023. The defendants assert that there is no proper or pleaded basis upon which to allege dishonesty but the claimant's case is that it relies upon the primary facts set out in its particulars, from which it will invite the court to infer dishonesty. That is a plausible case which has a real prospect of success at trial.

### *Statutory Limitation*

67. Mr Stewart submits that the proposed amendments to the particulars of claim and the joinder of Mr Moores are not permitted by statute and are defective because they are statute-barred by the Limitation Act 1980.
68. Section 35 of the 1980 Act provides:
- (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced –
    - (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
    - (b) in the case of any other new claim, on the same date as the original action.
  - (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either –

- (a) the addition or substitution of a new cause of action;  
or
- (b) the addition or substitution of a new party;

...

- (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.
- (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
- (5) The conditions referred to in subsection (4) above are the following –
  - (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already an issue on any claim previously made in the original action ...”

- 69. CPR 17.4 provides that where a party applies to amend his statement of case and a period of limitation has expired under the Limitation Act 1980, the court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.
- 70. CPR 19.6 provides that where an application is made to add a party after expiry of a period of limitation under the Limitation Act 1980, the court may add or substitute a party only if the relevant limitation period was current when the proceedings were started and the addition or substitution is necessary for the purpose of pursuing the existing claim.
- 71. Thus, the court does not have discretion to allow an amendment to introduce a new claim or add a new party after the expiry of the limitation period unless the express exceptions set out in CPR 17.4 and/or CPR 19.6 above apply in accordance with the provisions of section 35.
- 72. Where the merits of a limitation defence are obvious from the pleaded case, or the court is in a position to determine a disputed limitation defence on submissions or following a preliminary issue trial, the court can ascertain whether the proposed amendment is caught by section 35(3). If the proposed amendment is caught by section 35(3), there is no power to allow it; if it is not so caught, the court must

consider the application to amend by reference to the general principles summarised above.

73. Difficulty arises where the court is not in a position to determine the issue of limitation at the date of the application to amend. If the proposed amendment were to be permitted, so as to allow ventilation of the arguments on full evidence at trial, this could have the effect of depriving the other party of an arguable limitation defence by reason of the provision in section 35(1), whereby the amendment would be deemed to have been made when the claim was issued (“the relation back rule”).
74. One option, where it is arguable that a new claim is statute-barred, is for the court to refuse permission to amend, leaving the claimant to start fresh proceedings: *Chandra v Brooke North* [2013] EWCA Civ 1559 per Jackson LJ at [66]-[68]. That enables the claimant to pursue its new claim without gaining the benefit of relation back under section 35(1) so as to deprive the defendant of its arguable limitation defence. However, it has the disadvantage of producing a multiplicity of proceedings that are likely to be consolidated, with the attendant wasted costs.
75. The alternative approach, which is proposed by the claimant in this case, is to restrict its new claims against Mr Moores to such claims which are not statute- barred under the Limitation Act 1980 so as to ensure that the claimant will gain no advantage from the relation back rule. This practice has been endorsed by the Court of Appeal in *MasterCard Inc v Deutsche Bahn AG* [2017] EWCA Civ 272 per Sales LJ (as he was then) at [4] and *Libyan Investment Authority v King* [2020] EWCA Civ 1690 per Nugee LJ at [22].
76. The proposed pleading on limitation is at paragraph 11A of the draft RRRAPOC:
- “For the purposes of the Claimant’s claims against the Sixth Defendant:
- 11A.1 The Claimant does not pursue any claims in respect of which any time limit under the Limitation Act 1980 (subject to the operation of section 32 of the Limitation Act 1980) would have expired by the date on which the amendments contained in these Re-Re-Re-Amended Particulars are consented to or permitted by the court.
- 11A.2 The Claimant will not contend that such claims were issued or deemed to have been issued, for the purposes of limitation under the Limitation Act 1980, prior to the date on which the amendments in these Re-Re-Re- Amended Particulars of Claim were consented to by the parties or were permitted by the court.”
77. In her sixteenth witness statement, Ms Vernon has offered an additional undertaking on behalf of the claimant in respect of the contractual limitation defence:
- “For the purposes of the Claimant’s claims against the Sixth Defendant, if and insofar as the time limit under clause 1.11.4 of the ICA may apply to any such claims:

- a. The Claimant does not pursue any claims in respect of which the time limit under clause 1.11.4 would have expired by the date on which the amendments contained in the Re-Re-Re- Amended Particulars are consented to or permitted by the court.
  - b. The Claimant will not contend that such claims were issued (or deemed to have been issued), for the purposes of clause 1.11.4 of the ICA, prior to the date on which the amendments in the Re-Re-Re-Amended Particulars of Claim were consented to by the parties or were permitted by the court.”
78. Mr Stewart submits that the application for joinder and/or amendment should not be permitted because it is arguable that at least parts of the claims that are identified in the proposed pleading are statute-barred. For the purpose of the alleged cause of action in conspiracy, any damage, if any, was suffered no later than when the SDM began to be marketed in March 2016, more than six years ago. The vast majority of the allegations of breach of contract and procurement made by the claimant to support the claim in conspiracy predate both the marketing of the SDM and 7 November 2017 (six years ago). The claimant has made no attempt to link individual allegations of procurement against individual breaches of contract or to allege that there was some individual agreement in relation to individual breaches. The claimant has made no attempt to particularise a coherent claim in procurement or conspiracy which post-dates 7 November 2017.
79. Further, Mr Stewart submits that the claimant has no real prospect of relying on section 32(1)(b) of the Limitation Act. There has been no deliberate concealment and the claimant had sufficient knowledge to trigger time running for the purposes of section 32, more than six years before the date of this hearing, either because it had actual knowledge of what it alleges was concealed or because it could with reasonable diligence have discovered it.
80. Finally, it is submitted that where, as in this case, the defendants have at the very least a reasonably arguable statutory limitation defence which the claimant cannot overcome by recourse to CPR 17.4 or CPR 19.6, there is no proper basis on which to depart from the conventional approach where section 35 of the Limitation Act is engaged: *DR Jones Yeovil Limited v Drayton Beaumont Services Limited* [2021] EWHC 1971 (TCC). The claimant’s proposals simply stave off the question whether the proposed new claims are time barred until trial, which would deprive the defendants of the benefit of their contractual limitation defence.
81. Mr Saunders does not accept that the alleged breaches are confined to pre-November 2017 matters and submits that the case includes both later matters and allegations of continuing breach.
82. It is clear from the technical particulars that the allegations of breach of the ICA span a period of time of at least between 2013 and 2021. Equally, the pleaded case against Mr Moores is based on actions and documents identified as continuing through to 2020. It would not be appropriate for the court to carry out a detailed analysis of each and every claim in order to determine whether it has a real prospect of success. Indeed, the parties have not suggested that the court should embark on such a mini trial. It follows that, even if the court refused permission for the amendments in

respect of which it is arguable that the claims are statute-barred, there would remain other allegations to which such arguments could not apply.

83. This is a paradigm case in which the sensible solution is to allow the proposed new claims against Mr Moores but expressly limited to claims which are not statute-barred under the Limitation Act 1980, as pleaded in paragraph 11A of the draft. Further, the undertaking proffered by Ms Vernon in respect of the contractual time bar should be incorporated into the pleading for the avoidance of any doubt.

#### *Lateness*

84. Mr Stewart submits that the amendments are very late and the claimant cannot satisfy the heavy burden on it to show the strength of the new case and why justice to the claimant and the defendants requires the claimant to be able to pursue it. He submits that the amendments could have been put forward sooner. The claimant has had Mr Moores in its sight from the outset of this litigation and the inferential case now relied on could have been made sooner. The claimant first intimated that it wished to join Mr Moores on 30 June 2023 but no application was made to join him until 7 September 2023. The claimant's reliance on disclosure is considerably overstated. The joinder and amendments threaten the trial date which would have enormous repercussions for the defendants and the ability of LzLabs to market and sell the SDM. If the amendments are permitted and Mr Moores is joined, it will put an excessive burden on the defendants and Mr Moores and their legal teams in the run up to trial.
85. In my judgment the claimant has established to the court's satisfaction that the proposed amendments should be permitted, subject to the clarification on the contractual time bar set out above, for the following reasons.
86. Firstly, the proposed amendments are arguable, cogent and sufficiently detailed to allow the defendants to understand the case against them.
87. Secondly, the claimant has provided adequate explanation for the delay in making the amendments, namely, the late and ongoing disclosure, which forms the basis for its case that Mr Moores shares liability with the other defendants.
88. Thirdly, the court does not accept that the proposed amendments are very late amendments. The timetable needs to be revised and some adjustment is required to the start date but it is still possible for the trial to go ahead, as explained earlier in this judgment. Having regard to the size and complexity of the case, the additional allegations could not be described as imposing an intolerable level of disruption such as to cause unfair prejudice to the defendants in having to respond to the new claims.
89. Fourthly, if the amendments are not permitted, the claimant will suffer prejudice by losing the opportunity to present its full case against the defendants and seek appropriate remedies through injunctive relief and/or damages. The very substantial overlap between the claims against the existing defendants and the claims against Mr Moores provide a compelling argument for joinder.
90. Fifthly, if the amendments are permitted, Mr Moores will not suffer any significant prejudice. His legal team have been in place since the outset of these proceedings and

the new allegations do not add a significant burden to what is already a very substantial case.

91. For those reasons, the court permits the amendments and, subject to the jurisdiction challenge, allows the joinder of Mr Moores.
92. For the same reasons, and on the same terms, the court permits the amendments as against the existing defendants.

*Challenge to jurisdiction*

93. On 8 September 2023 Constable J granted the claimant permission to serve the application for joinder on Mr Moores out of the jurisdiction. By application dated 10 October 2023, Mr Moores seeks a declaration that the court has no jurisdiction and/or will not exercise any jurisdiction in relation to the claims against Mr Moores contained in the draft Re-Re-Re-Amended Particulars of Claim and that paragraphs 1 to 3 of the order of Constable J dated 8 September be set aside.
94. CPR 11(1) provides that a defendant who wishes to (a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
95. CPR 11(6) provides that an order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including (a) setting aside the claim form; (b) setting aside service of the claim form; (c) discharging any order made before the claim was commenced or before the claim form was served; and (d) staying the proceedings.
96. The applicable legal principles are not in dispute and are summarised in the speech of Lord Collins of Mapesbury JSC in *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2011] UK PC 7 at [71]:
  - i) The claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, that is, a substantial question of fact or law or both.
  - ii) The claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, in this case, one of the gateways set out in CPR PD6B paragraph 3.1.
  - iii) The claimant must satisfy the court that in all the circumstances this jurisdiction is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.
97. It is common ground that, if the proposed amendments were permitted against the defendants and the proposed claims against Mr Moores disclosed a serious issue to be tried the gateway test would be satisfied on the basis that: (i) an injunction is claimed against Mr Moores (PD 6B paragraph 3.1(2)); (ii) Mr Moores is a necessary or proper

party (PD 6B paragraph 3.1(3)); (iii) claims in tort are made against Mr Moores (PD 6B paragraph 3.1(9)); and (iv) claims are made against Mr Moores for procuring breaches of contract (PD 6B paragraph 3.1(8A)).

98. Further, Mr Moores does not advance a free-standing argument that England is not the appropriate forum for the claims, as explained in Ms Scott's first statement on jurisdiction dated 10 October 2023.
99. The basis of challenge to jurisdiction is the contention that the proposed claims against Mr Moores are defective on their face, have no real prospect of success and there is no serious issue to be tried against Mr Moores in respect of them.
100. For the reasons set out above, the court considers that the claims against Mr Moores are properly pleaded and have a real prospect of success. Therefore, there is a serious issue to be tried on the merits of the claims and the challenge to jurisdiction is dismissed.

#### *RFI*

101. By application dated 10 August 2023, the defendants seek an order that the claimant provide a full and proper response to the defendants' RFI dated 29 June 2023 regarding the claimant's pleaded date of knowledge of the link between LzLabs and Winsopia.
102. As set out above, the defendants rely on defences of contractual and statutory limitation. In its Reply and Defence to Counterclaim, the claimant asserts that the defendants' acts constituted deliberate concealment within the meaning of section 32 of the Limitation Act 1980 and therefore the limitation period did not start to run until the claimant discovered such deliberate concealment.
103. In response to a request for clarification as to when the claimant discovered the alleged deliberate concealment, on 11 May 2022 the claimant responded:

“The Defendants bear the burden of proof on limitation and have not adequately set out a case. This request is an attempt to reverse the burden of proof. Without prejudice to that, the Claimant's case is that it discovered the concealment shortly before starting this claim.”
104. In response to a further request for particulars as to when the relevant facts were discovered, on 23 June 2023 the claimant responded:

“The Claimant responds to this Request and the Requests below without thereby waiving its own privilege in any privileged communications ... the Claimant did not know of the relationship between the First Defendant and the Second Defendant (and accordingly of the possible involvement of the Second Defendant in the First Defendant's activities and/or the possibility that the Second Defendant had thereby breached its contract with the Claimant) until 25 August 2020. Therefore, and in any event, the Claimant did not know that it had any potential cause of action against the Defendants or any of them prior to that date.”

105. On 29 June 2023 the defendants raised a further RFI, seeking the following information:

“1. Please identify the basis for the Claimant's reliance on the date of 25 August 2020.

2. Without prejudice to the generality of the foregoing, please identify what the Claimant says caused it to learn of the relationship between the First Defendant and the Second Defendant on that date, who at the Claimant learned it and how it was learned.”

106. The claimant’s response was:

“Not entitled. This Request trespasses on communications which are privileged to the Claimant and/or IBM Corporation.”

107. The factual witness evidence relied on by the claimant in these proceedings includes a witness statement dated 18 August 2023 prepared by Ms Emma Wright, a qualified solicitor who, in 2020 was the claimant’s Litigation Counsel, UK & Ireland. In her statement, she explains:

“9. I am aware that one of the issues in these proceedings is the date on which IBM UK learnt of the link between the Second Defendant, Winsopia Limited (“Winsopia”), and the First Defendant, LzLabs GmbH (“LzLabs”).

10. As to this, to the best of my recollection, I confirm that I was not aware of any link between Winsopia and LzLabs until 25 August 2020.

11. I am also aware that IBM UK’s claims against the Defendants concern the Defendants’ development of the Software Defined Mainframe (“SDM”) product, which IBM UK alleges was developed by using and accessing IBM’s code, and IBM’s mainframe systems, in a way that breached relevant licence agreements.

12. Prior to 25 August 2020, to the best of my recollection, I had no knowledge of any of the Defendants in these proceedings. I was not considering, nor did I have any reason to consider, any claim in respect of the matters raised in these proceedings before that date.

13. Prior to 25 August 2020, I also do not recall having any knowledge of the existence of the SDM, or that any company was developing the SDM, such that I had no reason to think that the development of the SDM somehow constituted a breach of any party’s licence agreements with IBM UK. To the extent that kind of monitoring is carried out, it is done by parts of IBM UK’s business team and, as a matter of course, if the business had any concerns about competitors or issues which gave rise to potential claims, the business would consult the legal team about these concerns. In this regard, and strictly without waiving privilege, no one from IBM UK’s various business teams ever raised any issues with me about the Defendants or the development of the

SDM until after I became aware of the link between Winsopia and LzLabs in August 2020. If they had notified anybody else in the IBM UK legal team about potential wrongdoing by Winsopia before that time, I am sure that I would have known about it.

14. In my role as IBM UK's Litigation Counsel, I was responsible for ensuring that IBM UK's relevant senior managers, including its Board of Directors, were appraised of potential litigation matters. Given my role, I consider it inconceivable that IBM UK's senior or Board-level management would have been considering the matters raised in these proceedings without my knowledge."

108. In their application, the defendants seek an order that the claimant should provide a substantive, full and proper response to the requests contained in the defendants' 29 June RFI so as to enable them to test the claimant's allegations of concealment.
109. The application is supported by the seventeenth witness statement of Ms Scott dated 10 August 2023, who states that without such answers, the defendants will not be in a position to test the claimant's allegations of deliberate concealment, including issues such as whether the information that was allegedly obtained on 25 August 2020 could reasonably have been obtained prior to that date and whether the claimant did know (or could with reasonable diligence have discovered the relevant matters) prior to the applicable contractual and/or statutory limitation period.
110. Mr Stewart submits that what knowledge the claimant contends it learned on 25 August 2020, and from whom it learned it, is highly material to the statutory and contractual limitation issues in the case. The claimant has pleaded reliance on the date of 25 August 2020 and led evidence from Ms Wright that she became aware of the link between LzLabs and Winsopia on that date. However Ms Wright does not identify whether she was the individual at the claimant who learned the information first or from whom she received the information. The defendants are entitled to know when, from whom, by what method and on what date, the claimant came to acquire the pleaded knowledge. Absent any further explanation about the nature of the communications, to whom the privilege is said to belong or the type of privilege relied on, the defendants are unable to adequately scrutinise whether privilege is properly asserted or test the evidence relied on by the claimant. Further it is said that given the positive plea as to knowledge acquired by it on a particular date, the claimant has waived the right to claim privilege in any communication as the transaction by which knowledge was acquired has been put in issue.
111. The application is opposed by the claimant for the reason set out in Mr Pantlin's thirteenth witness statement dated 20 August 2023, that it is not possible for the claimant to answer the 29 June RFI without waiving privilege belonging to the claimant and/or IBM Corporation.
112. Mr Saunders submits that the claimant has already provided a proper response to the requests, making it clear that they trespass on communications which are privileged in the hands of the claimant and or IBM Corp. The claimant should not be required to give any further response in circumstances where that would involve the claimant disclosing the substance of privileged communications or otherwise involve the risk of a waiver of privilege. There has been no waiver of privilege. The claimant has

stated in its RFI response that it did not know of the relationship between LzLabs and Winsopia until 25 August 2020. That in itself is not a privileged fact. However, the claimant has not pleaded any case as to how it came to learn of that relationship. Therefore that is not a matter which the claimant has put in issue. The relevant question for the purposes of section 32 of the Limitation Act 1980 is whether the claimant discovered, or could with reasonable diligence have discovered, the facts relevant to its causes of action prior to 21 September 2015, six years prior to the commencement of proceedings.

113. The court refuses to make an order for the claimant to provide a further response to the RFI for the following reasons.
114. First, for the reasons explained in an earlier judgment by this court when considering date ranges for disclosure, the circumstances in which the claimant became aware of the relationship between LzLabs and Winsopia on 25 August 2020 is not a material issue in the case. Even if the defendants could establish that the claimant had, or should have had, such relevant knowledge prior to 25 August 2020, that would have no bearing on the statutory or limitation defences unless the defendants could show that the claimant had such knowledge prior to 21 September 2015 (in relation to statutory limitation) or 21 September 2019 (in relation to contractual limitation).
115. Second, as submitted by Mr Saunders, the relevance of privileged material to a matter in issue does not result in a waiver of privilege. In *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2009] EWHC 1437 (Ch) Morgan J stated at [52]:
- “Relevance is a necessary precondition for disclosure but it is not itself a sufficient condition for a finding of waiver. The position is the same even where the legal advice is highly relevant, rather than relevant to a lesser extent, and even where an investigation of the issue may be hampered by the absence of the privileged material.”
116. Third, as submitted by Mr Saunders, there has been no waiver of privilege by the claimant’s pleaded case or deployment of Ms Wright’s evidence as to the date of knowledge. Her state of knowledge is not covered by privilege. In *Various Claimants v MGN Ltd* [2020] EWHC 553 (Ch) Mann J explained at [84]:
- “The law of privilege protects communications. It does not, as a doctrine, protect an inquiry as to what a solicitor knows at any particular point of time. The question of what a solicitor knows is not, per se, a no-go area in litigation. By and large privilege will create a formidable obstacle to trying to prove it, because the communications (and resulting documents) will be privileged and the inquiring party will not be able to penetrate that privilege to get proof. However, if the knowledge can be proved another way then I cannot see a reason in principle why the inquiring party should not be able to seek to do that.”
117. In this case, privilege is claimed in respect of the underlying communications that were the source of the claimant’s knowledge. However, the pleaded case and evidence do not extend to any waiver of privilege in respect of such communications.

118. In summary, the further information sought is not relevant to the issues in the case, privilege is claimed in respect of the communications and the claimant has not waived privilege. For those reasons, the application is refused.

*Mr Knight*

119. By application dated 27 October 2023, the defendants seek an unless order that the claimant provides further disclosure and information in respect of Mr Knight: (i) the name of Mr Knight's team; (ii) the full names and roles of all individuals comprising the "approximately 6-8 sellers" who formed part of Mr Knight's team, including the dates in which they occupied these roles; and (iii) a full list of all other individuals with whom Mr Knight worked in his team(s) during the period 1 April 2013 to 31 March 2020.
120. The application is supported by the fifth witness statement of Ms Huts dated 27 October 2023, who states that the information is required in order to mitigate the prejudice caused to the defendants by the deletion of Mr Knight's mailbox.
121. The application is opposed by the claimant, as set out in Mr Pantlin's fourteenth witness statement dated 1 November 2023.
122. In the court's earlier judgment at [2023] EWHC 2142, in relation to Mr Knight's documents, I ruled as follows:

"71. In my judgment following the July 2023 CMC, I decided that, in the light of the deletion of Mr Knight's documents, the claimant should extract, process and search the .nsf files of Mr Roseblade, Mr Bates, Mr Wilson and Mr Ball. Unfortunately, it has since transpired that the documents of Mr Bates, Mr Wilson and Mr Ball have also been deleted.

72. Mr Pantlin has produced a twelfth witness statement dated 15 August 2023, identifying an alternative individual, Mr Ian Lyon, whose .nsf file would be available for extraction. He explains that Mr Lyon works in the claimant's sales team and was the sales manager to whom Mr Knight reported.

73. The defendants are not satisfied that Mr Lyon is a satisfactory substitution for Messrs Bates, Wilson and Ball, who were themselves substitutes for Mr Knight.

74. In these circumstances, the court considers that it would be appropriate for the claimant to provide information to the defendants as to Mr Knight's position and role in the company, his team, his line manager and any other relevant individuals, so that the defendants can consider appropriate individuals as substitute custodians."

123. On 17 August 2023 Mr Lyon produced his factual witness statement, in which he stated that in 2016 he was a first line sales manager and Mr Knight, a member of the sales team who was the contact point for Winsopia, reported directly to him. Mr

Knight and Mr Lyon had regular, usually weekly, catch up meetings in which Mr Knight would update him on his customer accounts.

124. By letter dated 30 August 2023, the claimant's solicitors wrote to the defendants' solicitors, providing further information:

“a. During the relevant period, Mr Knight was part of a group of approximately 6-8 sellers at the Claimant who reported directly to Mr Lyon and either worked directly with end-user customers or through intermediary re-sellers or so-called Business Partners.

b. The group of 6-8 sellers in which Mr Knight worked reported directly to Mr Lyon in his capacity as Sales Leader.

c. Each of the sellers, including Mr Knight, worked individually on client opportunities and only stood to earn commission on their respective assigned accounts. It was not the practice of sellers to share responsibility for a particular customer because they would only be paid on their named accounts. It follows that, other than Mr Knight, no seller at the Claimant would have had day-to-day responsibility for engaging with, or in relation to, Winsopia.

d. Mr Lyon recalls that the commercial arrangements with Winsopia were led by TES as the relevant Business Partner, with support from the Claimant via Mr Knight. To the extent that TES corresponded with Winsopia, such documents would already be in the Defendants' position. They would not be in the possession of the Claimant unless the Claimant was copied or unless a particular communication was forwarded to it.

For the above reasons, other than Mr Lyon, the Claimant has no reason to believe that there are any other individuals at the Claimant who should be added as additional custodians in place of Mr Bates, Mr Ball and/or Mr Wilson. Of course, if Winsopia is aware of any other individuals at the Claimant that it communicated with, it should identify them for our consideration. It has not offered any such names to date.”

125. Mr Weale, counsel for the claimant, submits that there is no merit in the substance of the defendants' application for the simple reason that there is no further relevant information or documentation that can be given.

126. The court is satisfied that the claimant has provided relevant and detailed information to the defendants in compliance with the court's direction. For that reason, the defendants' application is dismissed.

### *Conclusion*

127. The parties are invited to draw up an agreed order reflecting the court's rulings set out above.

128. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for costs or permission to appeal, and any time limits are extended until such hearing or further order.