

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Before :
MR EDWARD PEPPERALL QC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

MPT GROUP LIMITED

Claimant

- and -

(1) SHAUN WILLIAM PEEL
(2) MICHAEL ALAN BIRTWISTLE
(3) MATTRESSTEK LIMITED

Defendants

Miss Tina Ranales-Cotos (instructed by **Weightmans LLP**) for the **Claimant**
Miss Kelly Pennifer (instructed by **Shoosmiths LLP**) for the **Defendants**

Hearing dates: 10 & 11 May 2017
Judgment: 16 May 2017

Judgment Approved

MR EDWARD PEPPERALL QC:

1. The Claimant, MPT Group Limited, is a leading producer and supplier of mattress machinery, equipment and parts to the mattress manufacturing industry. It trades from premises in Bacup, Lancashire and was, until March 2017, the only company manufacturing such machines in the UK.
2. Until 1 September 2016, the First and Second Defendants, Shaun Peel and Michael Birtwistle, were employed by MPT in senior positions. Mr Peel was the company's Technical Manager responsible for producing drawings for machinery. He was described by Andrew Trickett, MPT's Managing Director, as the company's most senior and experienced draftsman. Mr Birtwistle was the Technical Sales Manager. He was responsible for business development and maintaining key relationships with the company's customers and suppliers.
3. Both men gave notice of their resignations on 4 August 2016 and their respective employments ended on 1 September 2016.
4. Messrs Peel and Birtwistle were subject to restrictive covenants that prevented their soliciting or dealing with customers with whom they had personally dealt for a period of six months. Almost immediately that the six months elapsed they, together with business associates, incorporated the Third Defendant, MattressTek Limited, on 3 March 2017.
5. MattressTek trades in the design, production, supply and installation of mattress machinery to mattress manufacturers. It is in direct competition with MPT. Mr Peel is the new company's Technical Director and Mr Birtwistle its Sales Director.
6. By their Particulars of Claim, MPT alleges that, in breach of their contracts of employment, both men:
 - 6.1 wrongly downloaded, misused and divulged to third parties the company's confidential information, specifically its databases of customers, sales quotations, suppliers, materials & costings and technical drawings [paras 26.1 & 27.1];
 - 6.2 solicited each other from MPT for the purpose of their intended competing business [para. 26.2];
 - 6.3 failed to answer questions truthfully as to their future intentions [para. 26.3];
 - 6.4 wrongly solicited, dealt and contracted with MPT clients during the six-month period of restraint [para. 27.2]; and
 - 6.5 wrongly interfered with MPT's supply chain [para. 27.3].
7. In addition, MPT alleges that all three defendants:

- 7.1 misused MPT's confidential information for the purposes of the design, production and supply, in competition with MPT, of machines that are very similar to the company's own range [para. 28];
 - 7.2 infringed MPT's database rights [para. 29];
 - 7.3 infringed MPT's copyright in its technical drawings [para. 30]; and
 - 7.4 wrongly conspired to use unlawful means with the intention of injuring MPT [para. 32].
8. Finally, it is said that MattressTek induced Messrs Peel and Birtwistle to breach their contracts of employment [para. 31].
9. MPT seeks injunctive relief, an account of the Defendants' profits, damages and/or equitable compensation [paras 33-38]. In particular, MPT seeks a springboard injunction to prevent the Defendants from unfairly taking advantage of the competitive advantage obtained through their alleged wrongful conduct. Miss Tina Ranales-Cotos, who appears on behalf of MPT, puts the appropriate period of springboard relief in this case at 12 months. Further, it seeks a permanent injunction to enforce the First and Second Defendants' confidentiality obligations.
10. By an application notice dated 12 April 2017, MPT sought an interim injunction and various other orders. On 24 April 2017, the matter came before His Honour Judge Hodge QC sitting as a High Court Judge. The Defendants were not then ready to deal with the matter on its merits and accordingly they gave undertakings holding the position until the application could be properly argued. Judge Hodge QC gave directions by consent and the application duly came before me on 10 May 2017 on the adjourned return day.
11. By a revised draft order, MPT now seeks, in broad terms:
 - 11.1 an interim injunction until 30 April 2018 or further order prohibiting the Defendants from soliciting, dealing or contracting with MPT's named customers and suppliers;
 - 11.2 an unlimited injunction prohibiting the Defendants from disclosing or using MPT's confidential information; and
 - 11.3 directions for a speedy trial of all issues of liability.
12. This application particularly concerns the launch of three machines by MattressTek:
 - 12.1 TapeTek:
 - (a) MattressTek's TapeTek machine allows an operator to sew the tape edging to a mattress thereby joining the sides of the mattress to its top and bottom.
 - (b) Mr Trickett says, at para. 5 of his first statement, that this machine competes with MPT's Matramax machine

12.2 TuftTek:

- (a) MattressTek's TuftTek machine compresses a mattress in the vertical plane while an operative inserts 'tufts' through the mattress to create the characteristic 'buttons.'
- (b) Mr Trickett says that it competes with MPT's PTM-4 machine. This machine is also referred to, for example in MPT's brochure, as the Powermax-4.

12.3 Conveyor:

- (a) MattressTek has also developed a belt-driven indexing conveyor for transporting mattresses.
- (b) Mr Trickett says that this has been directly copied from MPT's Matramax T180.

13. MPT claims that the Defendants could not legitimately have reached the stage of marketing machines for sale by March 2017. Their very speed in bringing these new machines to market is therefore said to give rise to the irresistible inference that this was only achieved by plundering MPT's design drawings and other confidential information.

14. Although MattressTek currently only offers these three machines, its website indicates that it intends to bring other products to the market shortly. Mr Trickett identifies that these will compete with MPT's border and 3D border machines, panel cutting machines and slitting machines.

I. SPRINGBOARD INJUNCTIONS

15. The principles upon which springboard relief is granted were usefully summarised by Haddon-Cave J. in QBE Management Services (UK) Ltd v Dymoke [2012] EWHC 80 (QB), at [240]-[247]:

“240. First, where a person has obtained a ‘head start’ as a result of unlawful acts, the Court has the power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts. This is often known as ‘springboard’ relief.

241. Second, the purpose of a ‘springboard’ order as Nourse L.J. explained in Roger Bullivant v Ellis [1987] I.C.R. 464 is “to prevent the defendants from taking unfair advantage of the springboard which [the Judge] considered they must have built up by their misuse of the information in the card index” (at page 476G). May L.J. added that an injunction could be granted depriving defendants of the springboard “which *ex hypothesi* they had unlawfully acquired for themselves by the use of the plaintiffs’ customers’ names in breach of the duty of fidelity” (at 478E-G). The Court of Appeal upheld Falconer J.'s decision restraining an employee who had taken away a customer card index from entering into any contracts made with customers.

242. Third, ‘springboard’ relief is not confined to cases of breach of confidence. It can be granted in relation to breaches of contractual and fiduciary duties (see Midas IT Services v Opus Portfolio Ltd, unreported Ch.D, Blackburne J. 21/12/99, pp. 18-19), and flows from a wider principle that the court may grant an injunction to deprive a wrongdoer of the unlawful advantage derived from his wrongdoing. As Openshaw J. explained in UBS v Vestra Wealth (supra) at ... [3]-[4]:

“There is some discussion in the authorities as to whether springboard relief is limited to cases where there is a misuse of confidential information. Such a limitation was expressly rejected in Midas IT Services V Opus Portfolio Ltd, an unreported decision of Blackburne J made on 21 December 1999, although it seems to have been accepted by Scott J in Balston Ltd v Headline Filters Ltd [1987] F.S.R. 330 at 340. In the 20 years which have passed since that case, it seems to me that the law has developed; and I see no reason in principle by which it should be solimited.

In my judgment, springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further economic loss to a previous employer caused by former staff members taking an unfair advantage, and ‘unfair start’, of any serious breaches of their contract of employment (or if they are acting in concert with others, of any breach by any of those others). That unfair advantage must still exist at the time that the injunction is sought, and it must be shown that it would continue unless restrained. I accept that injunctions are to protect against and to prevent future and further losses and must not be used merely to punish breaches of contract.”

243. Fourth, ‘springboard’ relief must, however, be sought and obtained at a time when any unlawful advantage is still being enjoyed by the wrongdoer: Universal Thermosensors v Hibben [1992] 1 W.L.R. 840 Nicholls V-C; see also Sun Valley Foods Ltd v Vincent [2000] F.S.R. 825, esp. at 834.
244. Fifth, ‘springboard’ relief should have the aim “simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendant's misconduct” (per Sir [Donald] Nicholls VC in Universal Thermosensors v Hibben [1992] 1 W.L.R. 840, at 855A. It is not fair and just if it has a much more far-reaching effect than this, such as driving the defendant out of business (at 855A).

245. Sixth, ‘springboard’ relief will not be granted where a monetary award would have provided an adequate remedy to the Claimant for the wrong done to it (Universal Thermosensors v Hibben [1992] 1 W.L.R. 840, at 855B).
246. Seventh, ‘springboard’ relief is not intended to punish the Defendant for wrongdoing. It is merely to provide fair and just protection for unlawful harm on an interim basis. What is fair and just in any particular circumstances will be measured by (i) the effect of the unlawful acts upon the Claimant; and (ii) the extent to which the Defendant has gained an illegitimate competitive advantage (see Sectrack NV v (1) Satamatics Ltd (2) Jan Leemans [2007] EWHC 3003, Flaux J.). The seriousness or egregiousness of the particular breach has no bearing on the period for which the injunction should be granted. In this regard, it is worth bearing in mind what Flaux J., said at ... [68]:
- “I agree with Mr Lowenstein that logically, the seriousness of the breach and the egregiousness of the Defendants’ conduct cannot have any bearing on the period for which the injunction should be granted - what matters is the effect of the breach of confidence upon the Claimant in the sense of the extent to which the First Defendant has gained an illegitimate competitive advantage. In my judgment, Mr Cohen’s submissions seriously underestimate the unfair competitive advantage gained by the Defendants from access to the Claimant’s “customer list” and ignore, in any event, the impact (if the injunction were lifted) of actual or potential misuse of other confidential information such as volume of business or pricing information. It is important in that context to have in mind that the Claimant maintains in its evidence that all the information said to be confidential remains confidential.” (emphasis added)
247. Eighth, the burden is on the Claimant to spell out the precise nature and period of the competitive advantage. An ‘ephemeral’ and ‘short-term’ advantage will not be sufficient (per Jonathan Parker J. in Sun Valley Foods Ltd v. Vincent [2000] FSR 825, esp. at 834).”

II. THE PROPER APPROACH TO THIS APPLICATION

16. Miss Ranales-Cotos argues that, by reference to the proper application of the well-known principles in American Cyanamid Co. v Ethicon Ltd [1975] A.C. 396, H.L., the Court should grant an interim injunction pending a speedy trial. By contrast Miss Kelly Pennifer, who appears on behalf of the Defendants, resists the application contending that no springboard advantage has been obtained, alternatively that any such advantage is no longer subsisting or is significantly shorter than Miss Ranales-Cotos’ 12 months. Accordingly, Miss Pennifer contends that this application should be

approached not by reference to standard American Cyanamid principles but by applying the modified approach advocated in, among other cases, NWL Ltd v Woods [1979] 1 W.L.R. 1294 & Lansing Linde Limited v Kerr [1991] 1 W.L.R. 251.

17. As is trite law, the usual approach to interim injunctions is to require the applicant to show at least a serious issue to be tried. Provided he does so, the court should ordinarily decide whether to grant an injunction not by assiduously analysing the likely merits of the parties' cases at trial but by considering:
 - 17.1 whether, if the injunction were refused, damages would be an adequate remedy for the applicant;
 - 17.2 whether, if the injunction were granted, the respondent would be adequately compensated by the applicant's cross-undertaking in damages;
 - 17.3 where there is doubt as to the adequacy of such remedies, the balance of convenience, perhaps more accurately described as the balance of the risk of doing an injustice; and
 - 17.4 where other factors are evenly balanced, the court should consider preserving the status quo ante.

18. In some cases, however, the court's decision as to whether to grant interim relief effectively disposes of the claim. Indeed, this is a particular issue in this class of litigation where former employers seek to restrain unfair competition, whether by enforcing restrictive covenants or seeking springboard relief. This concern can often be addressed by ordering a speedy trial, particularly where the restrictive covenants still have a significant period to run. This was the solution adopted by the Court of Appeal in Lawrence David Ltd v Ashton [1989] I.C.R. 123.

19. Sometimes even a speedy trial cannot be heard before the likely period of any final injunctive relief has all but expired. This issue was addressed by Staughton L.J. in Lansing Linde (supra) at 258A:

“If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In those circumstances, it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a *lettre de cachet*, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question.”

20. Such cases therefore call for some greater consideration of the likely merits than would ordinarily be appropriate at the interim stage. As Staughton L.J. observed at p.258C, it is for the court to control the extent of the assessment. There can be no trial on the written evidence.

21. It is clear, as Miss Ranales-Cotos submits, that where this modified approach is applied, the greater consideration of the likely merits arises when the judge is assessing the balance of convenience: per Lord Diplock in NWL (supra) at pp.1306-1307 and per Staughton and Beldam L.J.J. in Lansing Linde (supra) at p.258C and pp.266G-268A.
22. In covenant cases, the length of the potential final injunction is of course certain. Springboard cases are, however, different. It cannot be right that I should take the likely length of any springboard advantage as 12 months simply because such period is asserted by MPT. Miss Pennifer is right to submit that I first need to form some view upon the evidence as to the likely length of any final springboard injunction and then as to the likely date when judgment might be handed down after a speedy trial.

THE ALLEGED SPRINGBOARD ADVANTAGE

23. In QBE (supra), Haddon-Cave J. further elucidated the approach to assessing the length of the springboard advantage at [285]:

“First, the appropriate measure for the length of a springboard injunction is the length of time that it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the victim.

Second, it must be emphasised that the exercise is a relative one and any advantage must be measured as such. Wrongful activities may have both positive and negative effect, i.e. benefitting the wrongdoer whilst simultaneously harming the victim. Thus, for instance, the unlawful poaching of key staff is likely to advantage the wrongdoing party whilst disadvantaging the victim who has lost key staff and may have to recover lost market ground.

Third, it is relevant to look at the period of time over which the unlawful activities have in fact taken place. The relationship of this period with the length of any springboard relief is, however, kinetic not linear.

Fourth, there may be many different factors at play during the period of unlawful activity materially affecting the advantage gained which may, or may not, obtain in similar assumed circumstances of purely lawful activity. These factors might include, for instance, (i) the advantage of soliciting junior employees whilst still being employed and in positions of power, compared with the trying to recruit as an ex-employee, (ii) the advantage of stealth and secrecy, so that management are unaware and do not take defensive measures, and (iii) conversely, the advantage sometimes of being able to work speedily and not having to be covert.

Fifth, the nature and length of the ‘springboard’ relief should be fair and just in all the circumstances.”

24. Miss Ranales-Cotos puts the springboard advantage in this case at a further 12 months. As I have already observed, MPT claims that the Defendants could not legitimately have reached the stage of marketing its machines for sale by March 2017. In support of this case, Mr Andrew Trickett, explained, at para. 41 of his first statement, the time taken by MPT to bring new machinery to the market:

“From our considerable experience of developing the Matramax tape edge machine we allocated 12 months to perfect the initial prototype machine followed by 4-6 months of customer on-site testing so in essence 18 months would be [a] reasonable period for a machine of this complexity. It should be noted that this timeframe relates only to one machine. The Defendants have developed to our knowledge at least three different machines within this period (the equivalent of the Matramax) ... This simply is not achievable within this timeframe.”

25. Likewise, Mr Paul Rodgers, MPT’s Technical Director, said at para. 6 of his own statement that on average it takes 18 months to develop a machine from concept to the point of sale. In addition, Mr Trickett gave some examples in his second statement of the time taken by MPT on a number of specific projects to update machines.

26. The time point was answered by the Defendants. For example, Mr Peel responded, at para. 31 of his first statement:

“Michael and I have been working around the clock to achieve what we have managed to achieve. We have not been working the typical 8 hours a day, 5 days a week. Our working days have been 12 hours and 6 days a week, sometimes even 7 days.”

27. Miss Ranales-Cotos observed that this was effectively a claim to have done a year’s worth of work over a six-month period. Miss Pennifer happily adopted the observation. Further she submitted that the greater speed with which the Defendants had been able to produce their own machines was explicable by three factors:

- 27.1 First, they had between them some 30 years’ experience of designing and working with mattress machines.
- 27.2 Secondly, they had been able to dedicate themselves to the task and were free of the distractions of the everyday running of a business.
- 27.3 Thirdly, they had the advantage (not enjoyed by MPT) of sharing facilities with an associate company that provided a metalwork fabrication capability.

28. In addition, it seems to me to be relevant that Messrs Peel and Birtwistle were, for the first time, working in their own business. As anyone who becomes self-employed after years of employment will tell you, there is no motivation like having a real stake in a fledgling business while losing the security of a regular wage cheque.

29. That said, there were other things to do. Neither man was free to work on the new machines immediately, and Mr Birtwistle also had to re-wire their new factory premises.
30. In my judgment, it is unlikely that MPT will establish at trial that any springboard advantage will subsist until May 2018. Such period when added to the 8½ months that have already elapsed since Messrs Peel and Birtwistle left MPT would mean that they were not able to compete freely with their former employer for 20½ months. That, in my judgment, would be excessive where MPT's own evidence is that one could take a machine from concept to production in 18 months.
31. Furthermore, taking into account Messrs Peel and Birtwistle's undoubted experience and expertise in this sector, the advantages of being able to focus simply on design and production, their easy access to a metal fabrication facility and their evident drive to make a success of their new business, I consider that the Court is more likely to conclude at trial that the advantage obtained, if any, will subsist until at least September 2017 (12 months after the two men left MPT) and, at best, the end of the year (being 16 months after they left).

TRIAL DATES

32. In her written submissions, Miss Ranales-Cotos indicated that a speedy trial could be heard at the end of October 2017. In fact, as I pointed out to counsel at the outset of this hearing, the Court could accommodate a hearing much sooner than that and dates in July and August were then available.
33. That said, there are limits to the expedition with which one can sensibly list any case for trial. The central issue in this case is whether the Defendants have used MPT's drawings and other confidential information in order to design their own range of machines. For a number of reasons, I consider that a summer trial might be too ambitious and that Miss Ranales-Cotos was probably not so far out with her original suggestion of an October trial:
 - 33.1 The Defence will not be served until 19 May 2017.
 - 33.2 In order properly to litigate this case, the parties will need to give disclosure of their own confidential design drawings and databases. In view of the allegations made, it is unlikely that either party will be satisfied with limiting the other's disclosure obligations. Indeed, it would not be surprising if one or other party ends up making an application for specific disclosure in this case.
 - 33.3 Given the confidentiality of the documents that will have to be disclosed and the evident distrust between the parties, it is likely that the parties will seek to negotiate the terms of a confidentiality club rather than simply relying on the protection offered by r.31.22 of the Civil Procedure Rules 1998.
 - 33.4 Thereafter the parties will need to serve witness statements. Much of this work has been done, but they will still need a little time between the completion of disclosure and exchange of evidence.

- 33.5 Both parties intend to obtain engineering evidence in respect of the issue of copying. The experts will need to examine sample machines from both MPT and MattressTek. They will also need to analyse the parties' technical drawings for evidence of copying or original design.
- 33.6 Further, both parties will seek to rely on IT evidence in order either to prove or disprove the viewing, use or transmission of MPT's electronic files. Both envisage obtaining reports but there is some hope that the IT evidence might not need to be called at trial.
- 33.7 Arranging a trial with a number of witnesses in August is notoriously difficult. One or other key player will almost inevitably be on holiday at any point in the month.
34. Taking all of this into account, I consider that the case will not be ready for trial until at least September and that judgment is unlikely to be handed down before October 2017.

CONCLUSIONS

35. Accordingly, I am satisfied that this is a case in which it will not be possible to have a trial, even on a speedy basis, until any springboard advantage (if established at trial) will be likely to have expired or substantially expired. This situation has arisen, in my view, because, through no fault of MPT, I am hearing this interim injunction some 8½ months after the First and Second Defendants left MPT's employment.
36. For these reasons, I conclude that this case calls for a greater examination of the merits in accordance with the approach in NWL (supra) and Lansing Linde (supra).

III. COPYING & RETAINING MPT'S CONFIDENTIAL INFORMATION

37. Messrs Peel and Birtwistle were senior and longstanding employees. Between them, they had some 30 years' experience in this industry. They were trusted and had full and unfettered access to the company's electronic and hard-copy documents.
38. It is not in dispute that, before leaving MPT, Messrs Peel and Birtwistle copied a significant quantity of the company's data. Specifically, they attached external drives to their MPT computers and copied databases containing details of customers, suppliers, machinery drawings, manuals, machine component lists & costings, sales quotations, orders, price lists and discount structures. The vast extent of the copying is evident from the reports prepared by Cyfor, who undertook a forensic examination of the MPT computers used by Messrs Peel and Mr Birtwistle, and KPMG, who have examined the Defendants' computers and devices.

39. The data taken was fairly described by Mr Trickett, at para. 30 of his first statement, as MPT's "crown jewels" built up over many years and by substantial investment.
- ~~40.~~ By their own witness statements, the two men admit copying and taking away the company's data. They acknowledge that such conduct was wrongful and apologise.
41. Although I am not finally deciding any issues in this case, it would appear that this admitted conduct was a flagrant breach of the two men's contractual duties of fidelity: Robb v Green [1895] 1 Q.B. 1, at 18-19; Faccenda Chicken Ltd v Fowler [1987] 1 Ch. 117, at 136A; Roger Bullivant Ltd v Ellis [1987] I.C.R. 464, at 474. It also appears to have been an infringement of MPT's database rights and/or its copyright in its technical drawings.
42. Miss Ranales-Cotos also argues that the First and Second Defendants' actions were in breach of the express confidentiality provisions at clause 16 of their respective contracts of employment. While their conduct would indeed appear to be a clear breach, Miss Pennifer argues that clause 16 was too widely drawn and that it was not an enforceable agreement against the copying and misuse of confidential information. I will return to this issue later in this judgment, but for present purposes the point is academic given that the Claimant is likely to succeed in proving breach of the implied duty of fidelity. Establishing that the same actions breached an additional express term of their contracts of employment adds nothing to the plain breach of the implied duty of fidelity.

IV. USE OF THE CONFIDENTIAL INFORMATION

43. Of course, a springboard advantage is not achieved merely by taking data but by its use. Here the evidence is less clear and it is necessary to consider the matter with some care, remembering that I have not heard any witnesses and that this is not a trial.
44. In Universal Thermosensors Ltd v Hibben [1992] 1 W.L.R. 840, Sir Donald Nicholls V.C. found at trial that the defendants had both stolen and used their former employer's confidential documents for the purpose of obtaining business. In dismissing the damages claim, he held at p.850H that there was no irrebuttable presumption that any business obtained had resulted from the defendants' wrongful use of the confidential information. The Vice Chancellor continued, at pp.850H-851B:
- "Whether particular business was obtained as a result of misuse by him of a plaintiff's confidential information is essentially a question of fact in each case. In seeking to answer that question, the court will inquire into the facts and the surrounding circumstances as much in this case as in any other. In doing so, of course, a court will not take leave of common sense. It will view with considerable circumspection, even scepticism, a contention by a defendant who has chosen to use a list, that he already carried some of the information in his own head and that looking at the list for any particular name or names was quite

superfluous and unnecessary. Moreover, any doubts and obscurities arising from the evidence are likely to be resolved against the defendant. So that, in practice, such a defendant will have a difficult row to hoe.”

45. Often, as in this case, it is asserted that a former employee could have reached the same competitive position even without their misuse of the employer’s confidential information. Nourse L.J. considered this issue in Roger Bullivant (supra) at pp474H-475B:

“The value of the card index to the defendants was that it contained a ready and finite compilation of the names and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to them. Most of the cards carried the name or names of particular individuals to be contacted. While I recognise that it would have been possible for the first defendant to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs’ property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of Robb v Green [1895] 2 Q.B. 315 which, let it be said, is no more than fair and honourable dealing, should be steadfastly maintained.”

46. Pressed for evidence of misuse, Miss Ranales-Cotos relied on the following matters:

- 46.1 The admitted use of MPT’s data.
- 46.2 The untruthful answers given by Messrs Peel and Birtwistle as to their future intentions.
- 46.3 The Defendants’ failure to respond to letters from MPT’s solicitors.
- 46.4 The Defendants’ destruction, and the timing of such destruction, of the best evidence, namely the devices on to which they had copied MPT’s data.
- 46.5 The speed with which the Defendants have been able to bring their machines to market.
- 46.6 The similarity between the parties’ respective machines.
- 46.7 A specific design feature of MPT’s Matramax that appears to have been copied in the TapeTek.
- 46.8 The incorporation of a carriage guide on the TapeTek.
- 46.9 The Defendants’ failure to disclose their original design drawings, which Mr Peel claimed in evidence, would “prove” the Defendants’ case.
- 46.10 The evidence in exhibit SP2.

(1) ADMITTED USE OF THE DATA

47. There is some limited direct evidence of misuse of MPT's confidential information:

47.1 Mr Peel said, at para. 30 of his first statement:

"I designed our machines from scratch from a blank piece of paper, beginning with sketches of my design ideas, working them through typical design phases, component and prototype builds and testing. I did not base my designs on MPT's or use their drawings save in one respect. I acknowledge that in relation to the TapeTek machine design, I did access MPT drawings to check the measurement for the floor to operational height of the needle of the sewing head. I remember accessing this measurement more than once because I didn't write it down the first time. I cannot say for certain that I did not look at anything else but if I did I cannot now remember. I could just as easily have got this measurement from looking at a machine or possibly even on line. For example Michael carried out a quick on-line search on 1 May 2017 of Matpart Ltd's website (www.matparts.com). In the brochures section of that website Michael found an on-line operating manual for the MatraMax Tape Edger (pages 1-53 of SP1). At pages 54-59 are screenshots which showed the link on the website through which you access the brochure. Section 8 of the brochure states the overall height of the machine, namely 69 inches / 1750 mm. It is possible to use this information available on-line to calculate the sewing head height by deducting the height of a sewing head (which can be accessed from any supplier of that type of sewing head) from the overall height. Looking at the head height on MPT's drawings, therefore, saved me no more than 30 minutes. It is also worth explaining that the operating manual provides a full set of assembly drawings showing each individual component of the MatraMax Tape Edger including the bearings sizes, shaft diameters, full motoring gearbox specifications and gearbox ratios. In other words the brochure, which is readily available online, provides the full electrical schematics for the MatraMax Tape Edger including the inverter program settings."

47.2 Mr Birtwistle said, at paras. 26 and 29 of his first statement:

"26. I have accessed the drive since leaving MPT on my new PC but I only browsed out of curiosity, not in the context of carrying out any specific task or in relation to producing designs (which Shaun led on rather than me anyway ...). For that reason I cannot recall what files I may have accessed but I can say that I have not used those files to gain any kind of head start in the design process or otherwise ...

29. I did start to build up the beginnings of a database of potential customers during the 6-month period but I never completed it. I had access to customer email addresses which had saved automatically to my personal email account, MPT Yahoo email account and personal phone over the years at MPT, which I looked at when I started to build this database up, and I apologise for that. However, we did not gain any

head start from having access to this information. These customers are generally well known and it would have been relatively easy for me to obtain the contact details by using information which is publicly available on the internet. In fact, I decided in the end that it wasn't worth completing the database and never used it anyway."

48. There is therefore clear evidence of some misuse of MPT's confidential information. The real battleground, however, is as to whether this was the full extent of the misuse or just the tip of the iceberg.
49. In my judgment, if the Defendants went no further than the use admitted in these paragraphs then that would be insufficient to justify the springboard relief sought. The advantage obtained from this admitted conduct would be ephemeral and, taking into account the undertakings that have now bound the Defendants for just over 3 weeks, no longer subsisting.
50. While this evidence does not of itself either prove or disprove more extensive misuse of MPT's confidential information, two conflicting points may be made about it:
 - 50.1 As Miss Pennifer stresses, it was volunteered by the Defendants without there being, at this stage, evidence from the Claimant to prove such misuse. She invites me not to cherry pick by accepting the incriminating while dismissing the exculpatory.
 - 50.2 On the other hand, as Miss Ranales-Cotos urges, it is not just evidence of some misuse of MPT's confidential information but might well be a cloak for greater wrongdoing. In other words, the admissions might be part of a strategy of "confess and avoid."

(2) UNTRUTHFUL ANSWERS

51. MPT alleges that the following untruthful answers were given by the two men:
 - 51.1 On 4 August 2016, Mr Peel told Mr Trickett that he wished to work from home and spend more time with his child by working as a freelance CAD designer, while Mr Birtwistle said that he had been offered a position doing panel wiring.
 - 51.2 On further questioning, both men denied any intention of going into partnership together.
 - 51.3 A few days later, Mr Peel declined to say where he was going. Subsequently, Mr Peel told Mr Rodgers that he was not planning to work in MPT's industry because he had too much respect for him. He repeated that he intended to spend more time at home and work on a freelance basis.
 - 51.4 At some later point during his notice period, Mr Birtwistle told Mr Rodgers that his new job would be building electrical control panels.
52. For the reasons set out more fully at paras 86-88 below, I do not regard this lack of candour as to the Defendants' future plans to lead to any inference of

copying. In my judgment, all that can really be said is that the Court should take a jaundiced view of the Defendants' current explanations given their failure to answer straight questions truthfully last summer. While I take this into account, my preliminary view – since I am not trying this case – is that it is not a particularly strong point in MPT's favour.

(3) THE FAILURE TO RESPOND TO THE SOLICITORS' LETTERS

53. On 26 September 2016, MPT's solicitors wrote to both men reminding them of their post-termination obligations. Specifically, the letters reminded both men of their duties of confidentiality, including their duties not to use or disclose such confidential information, and their obligations to return any company property, data or documents to the company. MPT did not then have any evidence that either man had breached his contract of employment, but the letters clearly indicated the seriousness with which it sought to protect its confidential information and with which it viewed unfair competition.
54. Messrs Peel and Birtwistle ignored the solicitors' letters, and indeed do not explain in their evidence why they continued to retain the stolen data after receiving these letters. If they had thought better of using MPT's data, one might have thought that their consciences would have been pricked by receipt of the letters and that they would either have come clean at that point, or panicked and disposed of the stolen data. They did neither, but instead held the stolen data until the spring of 2017. Their conduct in this respect does them no credit, but does not of itself prove misuse of the data.

(4) THE DESTRUCTION OF THE DEVICES

55. In the course of her submissions, Miss Ranales-Cotos candidly conceded that MPT did not have clear evidence of misuse of its data, but that was because the Defendants had destroyed the evidence. She asserted that it was for them to explain their conduct.
56. Messrs Peel and Birtwistle claim that they have now thrown away the drives that contained the copied data. As to this:
- 56.1 Mr Peel said, at para. 18 of his first statement:
- "I became uncomfortable with the fact that I had information (on a Toshiba hard drive) that I realised I shouldn't have and ... I destroyed that hard drive. I took the information because I thought that it might be useful at some point. I realise now that I should not have done that and I apologise."*
- 56.2 He added, at para. 41 of his second statement:
- "About two months ago, if not longer, I accessed the Toshiba Drive to look at some personal insurance documents. I started to feel uncomfortable about having it and thought it was probably best to get rid of it. I therefore disposed of it in the skip outside our office."*
- 56.3 Mr Birtwistle said, at para. 26 of his first statement:
- "In or around the end of March 2017 I started to get uncomfortable about having that hard drive (a customer of MPT told me that MPT*

were going to sue us). I started to realise that I shouldn't have it. So I panicked and threw the drive away."

57. Thus, Messrs Peel and Birtwistle disposed of important evidence that might have proved or disproved the true extent of their use. While the burden remains on MPT to prove its case, the destruction of this evidence at a time when the net was closing in, particularly in Mr Birtwistle's case given his admission (at para. 26 of his first statement) that he disposed of his drive after hearing that MPT might be about to commence proceedings, entitles me, in my judgment, to be sceptical of their claims not to have made any significant use of MPT's data.

(5) SPEED WITH WHICH THEY BROUGHT THEIR MACHINES TO MARKET

58. I have already analysed this issue. Notwithstanding their ability to focus on the design and production of their new machines, the Defendants have certainly brought their machines to market quickly. The point is not, however, decisive for the reasons set out at paras 26-29 above.

(6) SIMILARITIES BETWEEN THE MACHINES

59. In the course of her submissions, Miss Ranales-Cotos took me to a side-by-side photograph showing the similarity between the TapeTek and MPT's Matramax. In order to assist the comparison, the photograph of the TapeTek had been modified to put it in MPT's colours. Certainly to the lay eye, the two machines look strikingly similar.
60. This does not, of itself, prove copying. Indeed, the observations of Megarry J. in Coco v AN Clark Engineers Ltd [1969] RPC 41, at 51, are apt to the exercise that I must undertake:

"The plaintiff's engineering expert deposes to many resemblances between the two engines ... It will be seen that some of these items relate to design and others to the components used; and plainly the two engines enjoy a number of close and important similarities. But as Mr Alexander pointed out with some force, that is not enough. What matters is how far the Scamp achieves these similarities by drawing on confidential information imparted by the plaintiff in confidence, and how far these factors had produced in the Coco an engine which had originality or other qualities that could provide information of a confidential nature. I remain in almost complete darkness as to the extent to which the ideas were common to the moped world."

61. The Defendants instructed an engineer, Mr Neville Tranter of Hawkins & Associates Ltd, to inspect their three machines against the machines that they are alleged to have copied. In his preliminary report, Mr Tranter made the observation that the machines had a number of similarities, but that the appearance of each of these machines is largely dictated by their intended functions. For example, any tape edging machine needs to incorporate a flat table large enough to accommodate a mattress. It needs to be capable of

vertical adjustment in order to accept mattresses of different thicknesses. It also needs to incorporate a sewing machine mounted on an arm assembly that will travel around the perimeter of the table base in order to sew the tape edging.

62. While, to the untutored eye, the machines look similar, it is clear upon the evidence before me that there are also a significant number of differences between the TapeTek and MPT's Matramax. Mr Peel identified 8 differences at para. 40 of his first statement; four of which were relied upon by Miss Pennifer as the principal points of difference at this interim stage. They were:
 - 62.1 A new carriage guide rail and guide block, which Mr Peel claimed was at the heart of the TapeTek design and around which every other aspect of the machine had been designed.
 - 62.2 An increased range of table movement allowing the TapeTek to accommodate mattresses from 45mm to 546mm deep. By contrast, Mr Peel explained that the Matramax has a maximum capacity of 305mm.
 - 62.3 The TapeTek only requires one electrical supply, compared to two for Matramax.
 - 62.4 Improved stability meant that the TapeTek can be run at faster speeds.
63. In addition, Miss Pennifer relied on a letter from Silentnight setting out nineteen factors that, in that customer's view, favourably differentiated the TapeTek from other machines on the market. Finally, Mr Tranter listed nine points of difference at para. 3.1.2 of his report.
64. Mr Trickett responded to the alleged points of difference at paras. 26 and 43 of his second statement.
65. In my judgment, Miss Pennifer was right to submit that in many instances Mr Trickett rather missed the point. His response to the Silentnight letter, for example at paras 26.2 & 26.5, descended into a debate as to whose machine was better. In respect of other differences (paras 26.8 & 26.14), Mr Trickett explained that MPT had also made like modifications in the last 5-6 months. Such modifications were therefore made after Messrs Peel and Birtwistle left MPT. As to the points of difference, Mr Trickett observed that they were neither novel nor particularly innovative.
66. Miss Pennifer correctly submitted that the Court was not concerned with whose machine was better or with whether MPT had also now incorporated similar design modifications. The issue under consideration is whether the machines are so similar that the Court can infer copying, or sufficiently dissimilar that the Court can infer that they are the product of the Defendants' own independent design work.
67. As to the TuftTek, Mr Peel asserted that this machine incorporated an innovative design to lift and clamp the mattress being worked on. Mr Trickett responded that MPT's AutoTuft machine would also do that. But, as Miss

Pennifer observed, that is not to compare like with like. The AutoTuft is a fully automated machine and is not therefore comparable to the TuftTek. The true comparator machine, as indeed asserted by Mr Trickett in his first statement, is MPT's Powermax-4; a tufting machine that does not have a lifting facility.

68. There was somewhat less to say about points of difference between the two companies' conveyors, but then a conveyor is a very simple machine and it is not surprising that two belt-driven conveyors designed to transport mattresses around a factory might be reasonably similar.
69. Miss Ranales-Cotos points to the limitations of Mr Tranter's report, namely that it was based on visual inspections and that he had not had access to design drawings. The point could fairly be made in response that she had equally invited my lay comparison between photographs of the rival machines. In any event, Mr Tranter concentrated on and identified a number of substantive differences between the parties' machines.
70. Further, Miss Ranales-Cotos submitted that it might be that the Defendants had deliberately made some changes to give the impression that there had been no copying. Indeed, some of the differences might be explained by a conscious policy of combining the best features of MPT's various machines; for example, combining the mattress depth capacity of the Matramax HL with the lack of overhead cabling of the Matramax.
71. I accept the force of these submissions, but ultimately I can only judge the matter on the current state of the evidence. In my judgment, the defence evidence referred to demonstrates a significant number of points of difference between the two companies' machines. As Miss Ranales-Cotos says, that finding does not disprove copying, but it does mean that the Defendants have placed credible evidence before the Court that they have not, save in the minor respect acknowledged by Mr Peel, designed these machines by using MPT's drawings.

(7) COPYING A DESIGN FEATURE

72. Miss Ranales-Cotos took me to one particular part of the design of the tape edging machines that, she submitted, was inexplicably common to both machines. By reference to a comparison photograph, she submitted that both used a rounded guard on the pivoted sewing block. In response, Miss Pennifer pointed to the very different designs of that particular part of the two machines: the TapeTek appeared to use an integrated head with the rounded guard while the Matramax had a rectangular head to which a design patch up had been added to create the rounded edge and avoid a pinch point.
73. Of course, detailed examination of the machines and their design drawings may in due course reveal clear evidence either of copying or of new and independent design. However, I am not satisfied at this stage that MPT is likely to establish copying by reference to this one design feature, which, as Miss Pennifer submits, is in any event rather different on the two machines.

(8) THE CARRIAGE GUIDE

74. As indicated above, the incorporation of a carriage guide in the TapeTek is a point of difference. Mr Trickett responded to this by pointing out that Mr Peel designed just such a carriage guide for MPT in November 2015. That said, he accepted that this was just a concept drawing and that there was a lot more work to be done to incorporate this feature. It has not, to date, been developed by MPT.
75. Miss Ranales-Cotos argued that MPT had copyright in the design drawing. That may be right, but there is no evidence that this early concept drawing was used by MattressTek in developing to production a machine featuring the carriage guide.

(9) FAILURE TO DISCLOSE THE DRAWINGS

76. Mr Peel asserted that disclosure of the Defendants' design drawings will disprove copying. As I observed to Miss Pennifer, if the Defendants have documents that could easily disprove the Claimant's case, they take some risk by not deploying that evidence at this interim hearing.

(10) EXHIBIT SP2

77. At para. 34 of his second witness statement, Mr Peel said that the Defendants have instructed KPMG to examine their computers. He explained that items potentially containing MPT's information were isolated by KPMG and that he and Mr Birtwistle had then worked through the list, purely on the basis of the file names denoting files Y for yes where they appeared to contain MPT information and N for no where they did not. He then explained that a list of the Y files was exhibited at Exhibit SP2.
78. Miss Ranales-Cotos took me to the exhibit. Many of the files appear to be old, and neither created nor modified in recent months or years. Some, however, were created in 2017. Specifically, I was taken to the following:
- 78.1 At page 88-91 of the exhibit, there was a list of files that appeared to relate to MPT's prices, master bills of materials and drawings on Mr Peel's desktop computer. All of these appeared on the E drive.
- 78.2 Likewise, I was taken to pages 80-88 which listed files on the E drive of Mr Birtwistle's desktop computer.
- 78.3 I was then taken to pages 1 and 47-52. Pages 47-52 evidenced a series of files that had been created on Mr Peel's computer between 13:45 and 13:49 on 24 January 2017. Pages 1 and 47 also revealed some activity on Mr Birtwistle's computer in late 2016 and early 2017.
79. Interpretation of this exhibit will be a matter for the IT experts in due course, but I agree with Miss Ranales-Cotos that this may be evidence of the now discarded devices being connected to the Defendants' computer. Indeed, the fact that files had been on the E drive (whereas the internal hard drive of a computer is more commonly designated as the C drive) might well indicate

that external memory devices had been connected to USB ports on the Defendants' computers.

80. This evidence may, in due course, establish greater use of MPT's confidential information than has thus far been admitted. However, in circumstances where Mr Birtwistle has admitted some browsing and Mr Peel has admitted plugging in the Toshiba drive that he took and checking a measurement, I do not consider that it is self-evident that this evidence proves greater misuse or transmission of MPT's data.

CONCLUSIONS

81. I approach the issue of misuse of MPT's confidential information as follows:
- 81.1 The burden is on MPT to prove not just that the Defendants took its data, but that they actually used such data in order to bring their machines to market.
- 81.2 There is no irrebuttable presumption that the Defendants used MPT's data just because they took it.
- 81.3 In view, however, of Messrs Peel and Birtwistle's conduct in taking, retaining and later browsing the stolen data, even after receipt of the solicitors' letters, I approach their protestations that they only made marginal use of the data with circumspection.
- 81.4 I also take into account that Messrs Peel and Birtwistle have disposed of important evidence, namely the USB drives and a laptop, that might have proved or disproved the true extent of their use. The destruction of this evidence at a time when the net was closing in, particularly in Mr Birtwistle's case given his admission (at para. 26 of his first statement) that he disposed of the drive that he held after hearing that MPT might be about to commence proceedings, entitle me, in my view, to be sceptical of their claims not to have made any significant use of MPT's data.
82. For these reasons, I consider that MPT has succeeded in establishing a prima facie case. Such case is, however, largely built upon inference, and notwithstanding the healthy scepticism with which I view the Defendants' case, the balance of the evidence before me indicates that they have developed machines that are not simply copies of any individual machine in MPT's range. They have incorporated a number of new features. This evidence is to be put into the scales against the factors that support MPT's invitation that I should draw inferences of widespread misuse of their data.
83. While I cannot and do not make findings at this interim stage, on balance I consider that the evidence before me is more supportive of the Defendants' case that its machines have been developed without, save in one instance, use of MPT's confidential information.

V. OTHER CAUSES OF ACTION

84. As already set out above, MPT's case does not simply rest on the alleged misuse of its confidential information. Miss Ranales-Cotos briefly opened the other ways in which she puts MPT's case. None, in my judgment, take the case any further at this interim stage.

(1) FAILURE TO ANSWER QUESTIONS TRUTHFULLY

85. Miss Ranales-Cotos referred to me an extract in Goulding's Employee Competition (3rd Ed.) at paras 2.189-2.196 in support of her submission that one incident of the duty of good faith is to answer questions truthfully. The principle admits to a number of exceptions, one being that employees are entitled to refuse to answer questions about their private lives.
86. I am far from satisfied that these employees were under a duty to disclose their true intentions to MPT. The law will step in to prevent unfair competition or to hold employees to enforceable restrictive covenants or to protect confidential information. Equally, employees must not induce others to breach their own contracts of employment, conspire to cause their employer injury or, in most cases, solicit their colleagues for their new enterprise. Subject to these matters, employees are otherwise free to make their own way in the world. I should therefore be reluctant to hold that an incident of the duty of fidelity is that, when asked a straight question a departing employee is under a contractual obligation to explain his own confidential and nascent plans to set up in lawful competition.
87. That said, even if I am wrong, establishing this alleged breach gets MPT nowhere on this application. Any springboard advantage arises, if at all, not from the fact that the First and Second Defendants were not candid last August but because they are said to have set about misusing MPT's confidential information in designing and bringing to market their own suite of machines.

(2) SOLICITING EMPLOYEES

88. Miss Ranales-Cotos argues that the synchronised resignations plainly indicate that one must have solicited the other to leave MPT. Such act would be a breach of the duty of fidelity. As the passage at 2.181 in Goulding makes plain, "discussions between employees as to proposed concerted competitive activity will rarely if ever be acceptable." See also Haddon-Cave J. in QBE (supra) at [170]-[179].
89. Taking into account the synchronised resignations and the discussions that plainly took place between the First and Second Defendants, MPT has, in my judgment, established a serious issue to be tried as to this alleged breach. That said, it again gets MPT nowhere on this application. Any springboard advantage that might now be subsisting 8½ months after these two men left MPT arises from their competitive activity since last September and not any such solicitation. Indeed, Miss Ranales-Cotos accepted that her own submission to the contrary was, to use her words, "a bit far fetched."

(3) THE ECONOMIC TORTS

90. Finally, Miss Ranales-Cotos argued the case on the basis of unlawful means conspiracy and inducing breaches of contract. According to the Particulars of Claim, there was a conspiracy between Messrs Peel and Birtwistle to copy, retain and misuse MPT's confidential information and databases in order to obtain an unfair and unlawful shortcut in the design, production, marketing and supply of competitive machines. MattressTek was said to have been a party to the conspiracy from its incorporation. [See Particulars of Claim, para. 32.]
91. In addition, MattressTek is alleged to have induced the two men's further breaches of their contracts of employment from its incorporation. [Particulars of Claim, para. 31]
92. In my judgment, the economic tort case raises a serious issue to be tried. It also brings MattressTek into the case.

VI. SERIOUS ISSUE TO BE TRIED

93. For the reasons set out above, I find as follows:
- 93.1 There is no doubt that Messrs Peel and Birtwistle were in breach of their duty of fidelity and that they probably infringed MPT's copyright and database rights by copying and retaining MPT's drawings and other databases.
- 93.2 On the Defendants' own admissions, at the very least they have made some use of such information. Specifically, Mr Peel has obtained a measurement from MPT's drawings in the course of designing the TapeTek machine and Mr Birtwistle has both browsed MPT data and used the data to start the compilation of a customer database.
- 93.3 While there is no actual evidence of other use, the Court is entitled to treat with some scepticism the Defendants' claims that they went to the trouble of taking substantial volumes of data but then made no real use of it.
- 93.4 These circumstances coupled with the speed with which the Defendants were able to bring their machines to market, raise, in my judgment, a serious question to be tried as to the misuse of MPT's confidential information.
94. While MPT has also established an arguable claim for other breaches of duty, I do not consider that such arguments advance the claim for an interim injunction.

VII. ADEQUACY OF DAMAGES

THE CLAIMANT

95. Miss Ranales-Cotos submitted that damages would not be an adequate remedy for MPT. She took two points:

- 95.1 MattressTek being a fledgling business, the Defendants are unlikely to be able to meet any award of damages.
- 95.2 Any award is unlikely to compensate MPT for its true losses given the difficulties in quantifying and assessing damages in these cases. In support of this submission, Miss Ranales-Cotos relied on recent observations by Leggatt J. in Marathon Asset Management LLP v Seddon [2017] EWHC 300 (Comm.), at [164].
96. Realistically, Miss Pennifer accepted that damages would be an inadequate remedy for MPT.

THE ADEQUACY OF THE CROSS-UNDERTAKING

97. By contrast, Miss Ranales-Cotos argued that damages pursuant to MPT's cross-undertaking would plainly be an adequate remedy for the Defendants. In support, she relied on the company's filed accounts for the years ended 30 April 2015 and 2016 and its management accounts for the trading year ended on 30 April 2017.
98. However, the filed accounts show a marked drop off in sales, gross profit, operating profit and net assets, with the level of dividends now exceeding the recent profitability:

<i>All figures in £</i>	2015	2016
Sales	5,138,231	3,964,513
Gross profit	1,587,285	1,094,221
Operating profit	615,633	111,632
Dividends paid	312,333	272,240
Net assets	312,921	161,548

99. Miss Pennifer observed that the parties' combined legal expenditure was already £155,000 at the time of last week's hearing. Accordingly, she submitted that, by trial, MPT's assets were likely to be exhausted by the legal costs leaving insufficient also to compensate the Defendants under the cross undertaking in damages.
100. Miss Ranales-Cotos sought to counter the defence argument by relying on management accounts for the year ended 30 April 2017. Those accounts were, however, prepared by MPT's accounts team and may well be subject to adjustment by the company's external accountants. They do appear to show an improvement in the net asset position to £367,089.77, but I do not consider this position to be clearly made out. In particular, I am concerned by the following aspects of these draft accounts:
- 100.1 The accounts appear to show dividends of £300,885 together with £213,226 on the profit and loss account.

- 100.2 An improvement in the net assets of about £206,000 in a year in which dividends of about £300,000 were drawn would tend to indicate that a net profit of about £500,000.
- 100.3 Such net profits could only be achieved by incurring a corporation tax liability of about £100,000, and yet the relevant ledger entry is only £8,777.
101. All of this may well be capable of explanation, but the evidence before me does not, in my judgment, clearly establish MPT's ability to meet any cross-undertaking in damages.
102. There is a further consideration. Just as damages would be difficult to assess in the Claimant's favour, so too it would be very difficult for the Defendants to establish their true losses.
103. For these reasons, I conclude that damages are not an adequate remedy for either party.

VIII. BALANCE OF CONVENIENCE

104. It is here that I consider the likely merits of the case, or the risk of least injustice.
105. I have already analysed the various causes of action. While I am satisfied that the Claimant has established a case sufficient to get it over the low hurdle of a serious issue to be tried, such case is largely built upon inference and, for the reasons given above, does not in my judgment establish that the Claimant is likely to establish sufficient misuse of its data to justify a springboard injunction at trial.
106. Accordingly, I dismiss the application for springboard relief.

IX. CLAIM TO ENFORCE THE CONFIDENTIALITY CLAUSE

107. Clause 16.1 of the contracts of employed provided:
- "You will not, either during your employment or thereafter, use to the detriment of the Company or any of its customers, except in the proper course of your duties, divulge to any third party or otherwise make use of, and shall use your best endeavours to prevent the use or disclosure by or to any person of any Confidential Information or any other information designated as 'confidential' which may have come to your knowledge in the course of your employment. For the avoidance of doubt any information contained on the Company's IT Systems is regarded as confidential. This restriction shall continue to apply after the termination of your employment without limitation in time but shall cease to apply to any information or knowledge which subsequently comes into the public domain, other than as a result of unauthorised disclosure by you.*

For the purposes of this clause Confidential Information means (but is not limited to): information about the Company including its finances, affairs, processes, technical data and know-how, future business strategy, marketing strategies and business development plans, customer lists, pricing/fee structures and pricing/fee discounts, employees and personnel details, plans or strategies, methods, designs, formulae, technology and business activities; and information about the Company's customers including any of their personal details and any information given to the Company in confidence by any customers."

108. As I have already indicated, Miss Pennifer challenged the enforceability of clause 16 of the contracts of employment:
- 108.1 She submitted that it purported to provide perpetual protection in respect of the company's confidential information even though much confidential information will have a shelf-life beyond which it cannot be reasonably protected.
- 108.2 She argued that it defined confidential information in unreasonably wide terms, such that it purported to protect information that would already be in the public domain and/or form part of the employee's knowhow.
109. I reject the first point since confidentiality clauses can be enforced even where they are of indeterminate duration: see Stanley-Burnton L.J. in Caterpillar Logistics Services Ltd v Huesca de Crean [2012] EWCA Civ 156, [2012] 3 All E.R. 129, at [66].
110. There is, however, force in Miss Pennifer's second point. Wide and generic definitions of confidential information are objectionable. Indeed a similarly wide clause was conceded to be unenforceable in Marathon (supra). Leggatt J. regarded, at [114], such concession to have been rightly made. See also Tugendhat J. in Caterpillar at first instance [2011] EWHC 3154 (QB).
111. Further, where employers seek to protect confidential information by way of injunction, it is "essential that they should make it absolutely clear what it is that they are seeking to protect": per O'Connor J. in Thomas v Mould [1968] 2 Q.B. 913, at 922F. See also Laddie J. in Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289, at 360.
112. For these reasons, I refuse the relief as drafted.
113. That said, even without relying on clause 16, MPT undoubtedly has a right to protect the confidentiality of its drawings and its customer lists. In a case such as this, where the Defendants have admitted both taking and using (albeit to a limited extent) their former employer's confidential information, I consider that the Claimant is entitled to some protection pending trial. Accordingly, I am prepared to grant the Claimant limited injunctive relief until trial or further order to prevent the Defendants from retaining, copying, using,

manufacturing machines in accordance with and divulging to any third party the following classes of documents:

113.1 the Claimant's technical drawings of its range of machines;

113.2 the Claimant's customer lists;

113.3 the Claimant's supplier lists; and

113.4 the Claimant's bill of materials database.

114. I will order that there be excluded from such order the one limited respect in which Mr Peel admits using the machine drawings, namely the measurement referred to at para. 30 of his statement.

115. Such order will not inconvenience the Defendants if they are telling the truth. Let them be warned, however, that if they are not, then it may be that they will place themselves in contempt of court by further manufacturing their machines pending trial.