



Neutral Citation Number: [2023] EWHC 1132 (Ch)

Claim No: BL-2021-000425

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

Rolls Building  
Fetter Lane  
London, EC4A 1NL

Date: 12<sup>th</sup> May 2023

**Before :**

**James Morgan KC**  
**(sitting as a Deputy High Court Judge)**

**Between :**

**(1) INHEALTH PATHOLOGY LIMITED** **Claimants**  
**(2) INHEALTH LIMITED**  
**(3) PRIME ENDOSCOPY (BRISTOL)**  
**LIMITED**

**- and -**

**(1) DR STEVAN FOX** **Defendants**  
**(2) REMEDY MODULAR SOLUTIONS**  
**LIMITED**  
**(3) REMEDY HEALTHCARE SOLUTIONS**  
**LIMITED**

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**Edward Brown KC and Katherine Ratcliffe (instructed by Trowers & Hamlins LLP) for**  
**the Claimants**

**Paul Nicholls KC (instructed by Acuity Law Limited) for the Third Defendant**

Hearing date: 10<sup>th</sup> May 2023  
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## APPROVED JUDGMENT

This judgment was handed down at a hearing and then released to The National Archives.  
The date and time for hand-down is 2pm on Friday 12<sup>th</sup> May 2023.

**Mr James Morgan KC sitting as a Deputy High Court Judge:**

### Introduction

1. The Third Defendant (“**RHS**”) applies by application notice dated 18<sup>th</sup> November 2022 to strike out the claim against it under *CPR 3.4(2)* and/or for summary judgment under *CPR 24.2* (“**Application**”).
2. Mr Nicholls KC, who appears for RHS, argues that the entirety of the Claimants’ case against RHS is based on confidential information and therefore, if as he submits, the information does not have that character the claim against RHS should not proceed further. Mr Brown KC, together with Ms Ratcliffe, appear for the Claimants. They dispute that the entirety of the claim is against RHS is so narrowly based and in any event submit that there are real prospects of the Claimants establishing at trial the allegations of confidence.
3. I am grateful to counsel for their clear written submissions and the efficient oral presentations at the hearing.

### The facts

4. The Claimants, which are each part of the InHealth group of companies, are providers of medical services to the NHS and the private sector. It is not necessary for the purposes of the Application to distinguish between the particular functions of each Claimant or individual companies within the InHealth group, which is an established, successful and profitable business.
5. The InHealth group has an endoscopy business that provides outsourced services to the NHS, whereby a patient attends its facility. This endoscopy business is the background to the claim and in particular the development of a mobile endoscopy unit known as the “Endo 3” project (“**Endo 3**” / “**the Project**”).
6. Endoscopy units may take two broad forms (1) mobile units and (2) static units. Their general nature are apparent from the description. A mobile unit (which may be constructed using modules) is designed to be relocatable from location to location, although it may stay in one place for weeks or months. It could be a converted HGV trailer or a portable building. A static unit is designed to be permanently located in one place, i.e. a bricks and mortar building.
7. The InHealth group provides endoscopy services from nine static units across England. It also provides such services through mobile units. Three were sub-contracted from a supplier, EMS Healthcare (“**EMS**”). Prior to the events below, it operated two of its own referred to as “Endo 1” and “Endo 2”. They are essentially HGV trailers which interlock to create a facility. According to the evidence of Mr Scott on behalf of the Claimants, they are “*substantial facilities with a large footprint*”, albeit that Endo 2 was designed so as to be substantially smaller than Endo 1. Part of the reason for the large

footprint is the traditional circular flow of patients through mobile and static units. In other words, the patient never enters the same space twice.

8. Given the space restrictions at customer locations and other factors, the Claimants say – and for the purposes of the Application I should accept – that it employs Simon Bird (“**Mr Bird**”) to design and implement efficiency improvements into its units. This may be by reducing their footprint, introducing efficiencies in staffing and working practices or otherwise.
9. In late 2018, the InHealth group introduced a new form of static unit at Bicester (“**Bicester Unit**”). As can be seen from two photographs contained within a Tweet that the InHealth Group sent out in October 2018, its design differed from Endo 1 and Endo 2 in that it was a single unit and was much smaller in size. It also did not have wheels, but that is hardly surprising given it was not a mobile unit.
10. According to the evidence, from around 2019, the InHealth group started designing and developing a new mobile design, namely, Endo 3. The Claimants allege that this was “*an innovative new design*”, which had a much smaller footprint than Endo 1 or Endo 2 and is “*quicker and more straightforward to transport and set-up*”. I shall return to this in more detail below, but they also allege that Endo 3 replicates “*innovative principles*” of the Bicester Unit.
11. It is necessary for endoscopy units to comply with the relevant technical and detailed requirements in hospital technical notes (“**HTNs**”) and hospital building memoranda (“**HBM**s”). Subject to meeting certain requirements, endoscopy units are accredited by the Joint Advisory Group on GI Endoscopy (“**JAG**”).
12. The First Defendant (“**Dr Fox**”) was employed within the InHealth group from around 2009. He was also a director of the First and Third Claimants. He is a medical doctor practising as an endoscopist carrying out clinical work to perform endoscopies. Dr Fox had no involvement in the Project.
13. In short, the Claimants allege that, during 2020 and whilst subject to a range of duties and obligations owed to them, Dr Fox unlawfully gathered and sent to various email addresses a substantial amount of InHealth’s confidential and commercially sensitive information and intellectual property regarding its overall business and its development of Endo 3. It alleges that he did so for the purposes of providing it to RHS (and the Second Defendant (“**RMS**”)) in order to give them a springboard advantage in setting up a competing business.
14. RHS was incorporated in December 2016. Its original business was insourcing, namely, the operation by a commercial service provider of an NHS facility to provide additional capacity. The Claimants allege that, in late 2020, RHS first secured work for modular endoscopy services and that this competing business was established through the unlawful actions of Dr Fox. RHS accepts that it worked with third parties, including Elite Systems (“**Elite**”), in order to produce its own modular units for endoscopy (and other) services.
15. Part of the Claimants’ case is that on 16<sup>th</sup> November 2020 Dr Fox sent an email from his InHealth account to [steve.fox@gstmedical.com](mailto:steve.fox@gstmedical.com) attaching a CAD design by Elite for

an endoscopy unit (“**2020 Design**”). Dr Fox admits that he assisted in the production of this design. The Claimants allege that the 2020 Design has “*very obvious similarities*” to the design of InHealth’s Bristol static facility (“**Bristol Plan**”).

16. There is an issue as to when Dr Fox ceased to be employed by the Second Claimant, but it is common ground that he ceased to provide any services to the Claimants in February 2021. He also then ceased to be a director of the First and Third Claimants.
17. At this point in time, Endo 3 had not launched to market. According to the second witness statement of Mr Scott on behalf of the Claimants, Endo 3 and Endo 4 (which I understand to be similar) were delivered to customers in October 2021 and the first patients visited the units in November 2021. On 17<sup>th</sup> November 2021, the InHealth group received a Certificate of Registration for a UK Design in respect of Endo 3. It has pending applications for patents to the UK Intellectual Property Office and the European Patent Office.

### **Procedural events**

18. The parties have agreed a helpful procedural chronology and I do not set it out in detail here. Proceedings were issued on 9<sup>th</sup> March 2021 against Dr Fox and RMS. Following an application for an interim injunction, on 12<sup>th</sup> April 2021, those Defendants agreed final injunctions and undertakings. They included undertakings not to use, disclose or permit the disclosure of any “Confidential Information” as defined.
19. RHS was joined to the proceedings by consent on 21<sup>st</sup> July 2022. The claim against it is set out in the Claimants’ Amended Particulars of Claim (“**APoC**”), which includes a confidential Schedule running to 17 paragraphs (“**APoC Schedule**”). By virtue of the earlier order of Master Kaye dated 24<sup>th</sup> March 2021, the APoC Schedule (and any further statement of case which responds, or is in reply, to it) is to be treated as confidential.
20. On 26<sup>th</sup> August 2022, RHS filed its Defence and then, on 12<sup>th</sup> October 2022, its Amended Defence (“**AmDef**”). The Claimants had previously filed a Reply to the Defence (“**Reply**”).

### **The claim against RHS**

21. The pleaded claim against RHS in the APoC was the subject of detailed submissions at the hearing before me. It proceeds as follows:
  - i) Paragraph 4 alleges that the Project involved confidential information, trade secrets and intellectual property relating to its design as set out in the APoC Schedule;
  - ii) Paragraph 5 alleges that a number of steps have been taken by the Claimants to keep the Project confidential including (1) a restricted system folder, (2) access to it being limited to specified individuals (not including Dr Fox) and (3) commercial partners being required to sign NDAs;
  - iii) Paragraph 6 alleges that Dr Fox was, or should have been, aware that the Project was confidential by reason of (1) and (2) and identification of relevant documents with the words “confidential” or similar;
  - iv) Paragraphs 7 to 13 allege the contractual and statutory duties that Dr Fox is said to have owed to the Claimants;

- v) Paragraph 14 alleges RHS (in common with the other Defendants) owed an equitable duty of confidence to the Claimants not to misuse or disclose confidential information in relation to the Project;
  - vi) Paragraph 15 alleges the Defendants were party to a “Common Design” which, in summary, was a plan to gain a competitive advantage including (but not limited to) by copying and using the Claimants’ “confidential information”;
  - vii) Paragraph 16 alleges the Common Design would be achieved by unlawful means, including breaches of duty by Dr Fox and breach of duties of confidence;
  - viii) Paragraph 18 alleges that the facts and matters from which the Common Design can be inferred are “*set out below*”, i.e. in paragraphs 19 to 40A;
  - ix) Those paragraphs 19 to 40A set out (amongst other things), in varying degrees of detail, the information obtained / transmitted by Dr Fox during 2020 in relation to matters including (but not limited to) financial costings, quotations, the business case for Endo 3, standard operating procedures and designs. There is some overlap with the APoC Schedule. In paragraphs 33 and 35, it is alleged that Dr Fox forwarded to his private / RHS email addresses copies of the schematic drawing of the Project;
  - x) In my judgment, those facts – which of course remain to be proved at trial – provide a sound basis for the Claimants’ overarching submission that Dr Fox used the know-how of the InHealth Group in order to give the “blueprints” of a mobile endoscopy business to a start-up competing business, thereby giving it a head start;
  - xi) I should specifically note paragraph 38, which refers to the transmission by Dr Fox of the 2020 Design on 16<sup>th</sup> November 2020 and alleges it was a design of an endoscopy unit produced by one or more of the Defendants and Elite. Paragraph 40 alleges that the 2020 Design incorporates seven elements of confidential information from the Bristol Plan;
  - xii) The causes of action alleged against RHS are (1) unlawful means conspiracy, (2) inducement or procurement of breaches of Dr Fox’s contractual and statutory duties, (3) breach of confidence and (4) breach of the *Trade Secrets (Enforcement etc) Regulations 2018*;
  - xiii) The relief claimed includes a claim for loss and damage under four heads and these include (1) diversion of business and (2) wasted management time.
22. For the purposes of this application, it is unnecessary to refer to the AmDef in detail. It is denied that (i) the matters in the APoC Schedule and (ii) those seven elements in paragraph 40 of the APoC, constitute confidential information. The allegations of unlawful conduct are all denied.
23. In paragraph 12 of the Reply, the Claimants plead that all of the information in the APoC Schedule is confidential. Paragraph 35.1 pleads that the Claimants have lost at least two business opportunity from NHS Trusts, the lost profit being estimated at not less than £371,280.

**The law: strike out and summary judgment**

24. The Application relied on *CPR 3.4(2)* and *CPR 24.2* but, with one important caveat, Mr Nicholls KC relied principally on the latter.
25. The principles on a summary application are well known and may conveniently be taken from *Easycare Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. I do not set them

out here, but note that at point (v), Lewison J said that the court must take into account not only the evidence actually placed before it on the application, but also the evidence that can reasonably be expected to be available at trial.

26. On the assumption that at least part of the claim would continue in any event against RHS (and the other Defendants), Mr Brown KC reminded me of the additional requirement in *CPR 24.2(b)* that summary judgment should not be granted unless there is no other compelling reason why the case or issue should be disposed of at trial. The fact that similar issues remain to be determined at trial may, depending on the circumstances, be a compelling reason not to give summary judgment: *White Book* at 24.2.5, citing *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715, [2015] BLR 544.
27. The caveat is that Mr Nicholls KC submitted it is an abuse of process to plead as confidential that which is not: *Ocular Sciences Ltd v Aspect Vision Care* [1997] RPC 289, 359; *Shenzhen Senior Technology Material v Celgard LLC* [2021] FSR 1 at [32]. Mr Brown KC did not submit to the contrary.
28. Further:
  - i) As submitted by Mr Brown KC, where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend: *White Book* at 3.4.2, citing *In Soo Kim v Youg Geun Park* [2011] EHWK 1781 (QB);
  - ii) Mr Nicholls KC did not dispute that principle, but drew my attention to [40] in that judgment where Tugendhat J said that it was normal for the court to refrain from “*striking out that pleading*” without giving an opportunity for the defect to be put right “*provided that there is reason to believe that he will be in a position to put the defect right*”.

### **The law: confidentiality**

29. The starting point is that, following *Coco v A.N. Clark (Engineers) Ltd* [1968] FSR 415 at 419 (cited with approval in *Spycatcher* [1990] 1 AC 109, 268 and in *Campbell v MGN* [2004] 2 AC 457 at [13]), there are three elements necessary to establish a breach of confidence:
  - i) the information must have the necessary quality of confidence about it;
  - ii) it must have been imparted in circumstances importing an obligation of confidence;
  - iii) there must have been an unauthorised use of it to the detriment of the party communicating it.
30. In *Thomas Marshall Ltd v Guinle* [1979] Ch 227 at 248, Megarry V-C identified elements which may assist in identifying information which can be protected as confidential. Whilst he so expressed himself “*very tentatively*”, his guidance has subsequently been applied by Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] RPC 29 at [237] and in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 657 (Ch) at [650]. The four elements are:
  - i) The party claiming confidentiality must believe that release of the information would be injurious to him or of advantage to his rivals or others;

- ii) The party claiming confidentiality must believe that the information is confidential, i.e. not already in the public domain;
  - iii) The party's belief under the two previous heads must be reasonable; and
  - iv) The information must be judged in the light of the usage and practices of the particular industry or trade concerned.
31. Mr Nicholls KC submitted that information will not have the necessary quality of confidence if it is generally accessible, i.e. in the public domain. That is a fair starting point but, as Mr Brown KC submitted:
- i) A claim for breach of confidence is not defeated simply by proving that there are other people in the world who know the facts in question: *Franchi v Franchi* [1967] RPC 149 at 152-153;
  - ii) The test of accessibility is a question of degree depending on the particular case: *CF Partners (UK) LLP v Barclays Bank PLC* [2014] EWHC 3049 (Ch) at [124];
  - iii) Information may be confidential even where the information is accessible to the general public technically if the degree of public knowledge about it is limited: *Toulson & Phipps on Confidentiality* (4<sup>th</sup> ed), §§4-053, 4-054.
32. Mr Brown KC also relied on the further principles that have been developed in the context of the design of products and which may be summarised as follows:
- i) Something that has been construed solely from materials in the public domain may possess the necessary quality of confidence: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the equality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components: *Coco* at 420;
  - ii) As a result, work and skill on the production of drawings may result in confidential information, even though the work is on constituent materials available for the use of anybody and the results can be the same as these produced by other persons going through the same process as the person who created the information: *Inline Logistics Ltd v UCI Logistics Ltd* [2001] EWCA Civ 1613 at [24];
  - iii) The principal issue is whether features of the design can be readily ascertained from publicly accessible examples of the article, or on the level of generality of the information asserted to be confidential: *Kerry Ingredients (UK) Ltd v Bakkavor Group Ltd* [2016] EWHC 2448 (Ch), *per* Newey J at [66], citing Arnold J's dictum in *Force India* at [222];
  - iv) While reverse engineering a generally available product in the market in order to investigate the ingredients and/or processes involved may not itself be a breach of confidence, the possibility that someone could do so does not deprive those ingredients and/or processes of their confidential nature, at least if the reverse engineering would involve a significant amount of work: *Kerry Ingredients (UK) Ltd v Bakkavor Group Ltd* at [67].
33. In terms of the circumstances of receipt, the question is whether a reasonable person standing in the shoes of the recipient would have realised that the information was being provided in confidence: *Coco* at 420-1. Mr Nicholls KC fairly submitted that there is a link between the first and second elements of the test in *Coco*.

## Preliminary points

34. It is helpful to deal with the following related preliminary points.
35. First, timing. The Claimants' case is based on alleged unlawful conduct during 2020. In other words (i) prior to the cessation of Dr Fox's association with the Claimants and (ii) at least 10 months prior to the delivery of Endo 3 to the customer. It is therefore not in point that, post-termination of Dr Fox's association with the Claimants, they may not have been able to restrain him from making use of his own skill and knowledge (*c.f. FSS Travel v Johnson* [1998] IRLR 382 at [29]-[35]). Further, given that the claim is based on RHS having gained an unlawful head start, open publicity about Endo 3 in late 2021 – as to which see at least pages 878 and 883-891 in the Application bundle - may not be significant unless, as Mr Nicholls KC submitted, it can be seen as further evidence of a course of conduct to the effect that the Claimants never intended information about Endo 3 to be treated as confidential.
36. Second, Mr Nicholls KC did not make any separate submissions in relation to the second limb in *Coco*, namely, the circumstance in which information was imparted. His point was that the relevant information was clearly not confidential. But, assuming there is a real prospect of the Claimants establishing that the relevant information was confidential, in my judgment, there is a like prospect of them establishing the second limb. I refer to the matters set out in paragraphs 21(ii) and 21(iii) above, which were not challenged for the purposes of this Application.
37. Third, it also seems to me that those matters provide some support for the Claimants' case in relation to the first limb in *Coco*. On the evidence before me, I am unable to accept for the purpose of this Application Mr Nicholls KC's submission that the Claimants never intended information about Endo 3 to be treated as confidential.

### **The merits**

#### ***A wider case?***

38. It was submitted by Mr Nicholls KC that the Claimants' case boils down to two claims: (i) the Common Design concerning the misuse of confidential information about the Project and (ii) misuse of confidential information concerning the 2020 Design. He submitted that there was no properly pleaded claim against RHS outside those parameters, or at least not one that went anywhere in terms of actionability. In my judgment, whilst the drafting of the APoC could perhaps be improved upon, this is an unduly simplistic approach for at least the following reasons.
39. First, the Common Design is clearly alleged to extend beyond the misuse of confidential information. Paragraph 15.1 alleges a design to start up a healthcare (specifically endoscopy) business in competition with the Claimants. Paragraph 15.5 alleges the intention to divert business opportunities. Paragraph 15.6 alleges the intention to recruit employees.
40. Second, the Claimants have a real prospect of establishing that the transmission of even non-confidential information by Dr Fox in 2020 to the other Defendants for the purpose of assisting them in setting up a competing business was a breach of his duties to the Claimants. This might not apply to purely trivial information (although this was not conceded by Mr Brown KC, at least where it was intended to be used to assist a competitor), but it cannot be said that all, or perhaps even much, of the information referred to in paragraphs 19 to 40A falls within that category.

41. Third, the allegations of misuse of confidential information in paragraphs 15.2, 15.3 and 15.4 are not in fact limited to the Project or the 2020 Design. There is a properly arguable case that at least some of the information in paragraphs 19 to 40A, which does not concern the Project, was confidential. By way of example only, the full P&L breakdown for the Claimants' Gastroenterology business (paragraph 26) and the Endo 2 spreadsheet (paragraph 29.1). I should add that the same can be said in relation to information about the Project which was not design based, for example the "*Endo 3 business case*" (paragraph 29.3).
42. Fourth, paragraph 16 sets out the five categories of unlawful means used to achieve the Common Design. Only one (paragraph 16.5) is based solely on duties of confidence. The others include breaches of duty by Dr Fox and inducements thereof by RHS.
43. Fifth, although Mr Nicholls KC made the forensically sound point that the pleading was originally drafted before RHS was joined, in my judgment, the Claimants have adequately set out a case so as to tie RHS into the alleged wrongdoing and set out a proper case against it. It is alleged to be party to the Common Design and I have referred above to paragraph 16 of the APoC. In my judgment, the wording of paragraph 18 is sufficient to allege that all the matters that follow were part of the Common Design to which RHS was party. Of course, it is not necessary for RHS to have carried out each and every act itself. It is sufficient if the act was carried out by a co-conspirator pursuant to the Common Design. In fact, there are some direct references to specific steps taken for or behalf of the Third Defendant – see paragraphs 31, 37, 37.2, 37.3 and 40A.
44. It follows from the above – and the inclusion of a claim for relief by way of damages as already described – that the Claimants have a properly arguable claim, i.e. one with a real prospect of success, against RHS outside the narrow parameters suggested by Mr Nicholls KC. It therefore follows that, even were his submissions as to the lack of confidentiality to be accepted, this would not result in dismissal of the claim against RHS.

### ***Endo 3***

45. As already stated, the APoC Schedule runs to 17 paragraphs. There is a sub-heading before paragraphs 11 to 17 headed "*Endo 3*". As already noted, paragraph 12.1 of the Reply pleads that all of the APoC Schedule is confidential.
46. During the course of the hearing the Claimants shifted, or at least substantially clarified, their position. Notwithstanding the plea in the Reply, Mr Brown KC acknowledged that the matters in paragraphs 1 to 10 of the APoC Schedule were background and could be moved into the main part of the APoC. Although this was somewhat trailed by paragraph 7 of Mr Scott's confidential second witness statement (paragraphs 1 to 10 set out "*commercially sensitive details about InHealth's Endo 1 and Endo 2 mobile endoscopy units, which are by way of background to paragraphs 11 to 17*"), it was a significant concession. I note that Mr Nicholls KC had earlier spent part of his oral submissions vigorously demolishing any argument that confidentiality could attach to those parts of the APoC Schedule.
47. There is no objection to matters being set out as background to the information which is said truly to be confidential. But there is a serious objection to that information being

described in a statement of case, supported by a statement of truth, as being confidential when it is not. This is a regrettable state of affairs.

48. Be that as it may, it remains necessary to consider paragraphs 11 to 17 of the APoC Schedule on their individual and collective merits. In my judgment, it is possible to refer to most of the relevant material in an open judgment without compromising the Claimants' claimed confidentiality. A very limited part of the text is set out in a confidential schedule to this Judgment ("**Confidential Schedule**").
49. In his skeleton argument and orally, Mr Nicholls KC set out paragraph-by-paragraph his submissions as to why each of paragraphs 11 to 17 did not identify, or sufficiently identify, confidential information. Mr Brown KC criticised that approach as (i) failing to have regard to certain matters which were expanded upon in the existing evidence and would be the subject of disclosure and further evidence in due course and (ii) being overly narrow by failing to have regard to the point that individually non-confidential items can, by the process of ingenuity, be combined to create a confidential product.
50. Paragraph 11 of the APoC Schedule states that "*The Claimants have developed a mobile unit replicating innovative principles of its earlier product (the Bicester Unit), but [Confidential Schedule]*". Mr Nicholls KC argued that the relevant features of the Bicester Unit (including it being a single unit, not on wheels) were in the public domain from around later 2018. That being so and Endo 3 being based on it, it must follow that there was nothing confidential about at least the design of Endo 3.
51. But that submission does not have full regard to other aspects of the APoC Schedule and the evidence in relation to design and engineering. In particular:
- i) In paragraph 26 of Mr Bird's first witness statement ("Bird 1"), he states in similar terms to that in paragraph 11 of the APoC Schedule that "...*I also began to work on a new mobile unit, looking to replicate the innovative principles of, and learn lessons from, the static Bicester Unit, but [Confidential Schedule]*". He thereby identifies that Endo 3 was to be a development from the Bicester Unit. This must be the case to some extent because the Bicester Unit was static, whereas Endo 3 was mobile;
  - ii) Paragraph 13 of the APoC Schedule says that "*Significant work has been undertaken on the design and structural engineering of Endo 3 in order to incorporate [see Confidential Schedule]*". That is supported by paragraph 27 of Bird 1. The precise nature of that design and engineering work will likely be the subject of disclosure and further evidence in due course. It is a fair reading that it is being said that such design and engineering work is different from that in the Bicester Unit, which I repeat was static rather than mobile. Even were that not the case, it is properly arguable that such design and engineering work (which was likely behind the scenes) was not sufficiently accessible to the public for it not to attract confidence;
  - iii) Paragraph 14 of the APoC Schedule says that the development of Endo 3 represents a substantial financial investment and time commitment by the Claimants over a two year period "*to develop the design, including in particular its compliance with the relevant HTNs, HTBs and requirements for JAG accreditation*". That is supported by paragraph 28 of Bird 1. The detail of that investment will again likely be the subject of disclosure and further evidence in due course. Whilst the relevant HTNs, HTBs and JAG criteria are all in the

- public domain, there appears to be a measure of flexibility as to how they are applied, particularly in the context of a mobile unit. The intellectual process by which those criteria are applied to such a new product seems on the face of it to be important and one that would have real value in the hands of a competitor;
- iv) Paragraph 16 of the APoC Schedule identifies features of Endo 3, including [see Confidential Schedule] and it is said that it [see Confidential Schedule]. This is supported by paragraph 36 of Bird 1. There may well be cross-examination as to what differences there are from the Bicester Unit and/or the extent to which this information can be gleaned from publicly available information as opposed to detailed drawings and plans. But in my judgment these are matters for trial;
- v) I repeat the point already made above that it is alleged that Dr Fox forwarded to his private / RHS email addresses copies of the schematic drawing of the Project. Even if it is possible to reverse engineer Endo 3 from publicly available information (which I am not deciding), the fact is that Dr Fox – and by extension RHS – did not do so. The Claimants are entitled to cross-examine Dr Fox at trial as to why he did not do so in support of the submission that it was because the information was of real advantage to RHS and by extension, confidential to them.
52. Paragraph 15 contains details of the costs that the Claimants incurred with their supplier of Endo 3 and Endo 4, Expandable. It is unlikely that a third party could have obtained details of those costs from Expandable, not least because it was subject to an NDA with the Claimants. Mr Nicholls KC argued that a third party could nevertheless have asked Expandable what it would charge for a mobile unit. But that does not fully answer the point. There is a real prospect of the Claimants establishing that information related to the price they were charged was confidential. It could be valuable information in the hands of a competitor as it may, for example, allow them (i) to negotiate a lower price with Expandable, (ii) reduce its costs compared to the Claimants and (iii) thereby assist in undercutting them in the market.
53. Despite the sustained and vigorous submissions of Mr Nicholls KC, I am satisfied that the Claimants have shown a real prospect of establishing that at least the information identified above in paragraphs 11, 13, 14, 15 and 16 of the APoC Schedule was confidential. To put it, as the Claimants have, based on *Thomas Marshall v Guinle*, they have a real prospect of establishing at least to that extent that (i) they have the relevant two beliefs, (ii) their beliefs are reasonable and (iii) that is so taking into account the usage and practice of the particular industry or trade concerned.
54. Given that conclusion, I do not consider it appropriate to attempt an exercise of excising any parts of the information which may not be confidential. In fairness, Mr Nicholls KC did not suggest that I should. Such an exercise would be inappropriate given that (1) all information – whether confidential or otherwise – will have to be considered by the trial judge in any event as part of the Claimants’ wider case and (2) issues as to confidentiality may, even after a trial, not be straightforward: *Force India* at [238].

### ***2020 Design***

55. Paragraph 40 of the APoC alleges that “*The 2020 Design incorporates confidential information from [the Bristol Plan], as is apparent from similarities in the designs including...*” (emphasis added). There are then listed seven design features. For the purpose of the Application, I am satisfied that the Claimants have at least a real prospect

of establishing that the 2020 Design was derived from the Bristol Plan. Indeed, Mr Nicholls KC did not submit to the contrary.

56. During the course of the hearing and in response to Mr Nicholls KC's submissions and questions from the Bench, Mr Brown KC did not press the argument that the seven design features were individually, or collectively, confidential. In my judgment, this was entirely realistic. The information lacks the necessary quality of confidence. In particular, the features are sufficiently accessible to the public and/or could not possibly assist a competitor given that some of them are based on the peculiar features of the Claimants' static (not mobile) facility at Bristol.
57. However, Mr Brown KC made two follow-on submissions:
- i) The Claimants had a properly arguable case that confidentiality attached to the Bristol Plan as a whole. Even if derived from publicly accessible information, it constituted a new work which involved human ingenuity. In that form, it was a valuable piece of information because it allowed a competitor to produce a plan (1) without investing the same time and money and (2) with the confidence that it had been successfully used by an established and successful business. If the current pleading was insufficient to set out that case he said that the Claimants should be given an opportunity to amend;
  - ii) Even if the word "confidential" was struck out from the APoC, paragraph 40 had continuing utility in two respects (1) in support of the claim that the transmission of non-confidential information was unlawful (see paragraphs 40 and 42-44 above) and (2) as an evidential tool to show that, if denied by Dr Fox, he had in fact engaged in the copying of the Claimants' information in 2020.
58. Notwithstanding Mr Nicholls KC's arguments, I accept the second of those submissions. I also conclude that the current formulation of paragraph 40 is insufficient to set out fairly the alternative case that the Claimants now apparently wish to run. It therefore follows that the current plea of "confidentiality" in paragraph 40 has no real prospect of success and is an abuse of process. It seems to me that the issue is whether or not now to strike out the word "confidential" and/or to give directions in relation to a possible amendment.
59. I have considered the case of *In Soo Kim* where the Tugendhat J reversed the decision of the Master to strike out the claim in its entirety. In my judgment, it is clearly a more draconian step to strike out the entirety of a claim than to strike out parts of it, *a fortiori* if it is only one word. In the former, the claim is ended and it may be necessary for fresh proceedings to be commenced with all the costs and delay associated with that. In the latter case, the remainder of the claim will continue and there will usually be the opportunity for a properly formulated application to amend to be made. Accordingly, whilst in the latter case, the court should still consider whether strike out remains appropriate in the light of a possible rectifying amendment, the discretionary exercise involves somewhat different considerations.
60. I have considered those matters. In my judgment, it is appropriate to strike out the word "confidential" and not to give directions in relation to a possible re-amendment for the following reasons:

- i) As drafted, the plea of confidentiality in paragraph 40 does not have a real prospect of success and is an abuse of process. It should not have been pleaded without a properly formulated basis;
- ii) Notwithstanding the Claimants' long notice of the Application, there is not before me an application to re-amend supported by draft re-amended particulars of claim in relation to paragraph 40;
- iii) Whilst an amendment along the lines indicated by Mr Brown KC may have proper prospects of success (although I am not determining that), it is important that there be a properly formulated draft upon which each side can make submissions as appropriate;
- iv) Given my decisions above, the vast majority of the claim against RHS will continue and there will be further case management. There is little prejudice to the Claimants, if so advised, in making in due course a proper application to re-amend;
- v) Conversely, it would be inappropriate to leave untouched an abusive allegation pending the making of any such application, the timing and ultimate resolution of which is for another day.

**Conclusion**

61. Save to the limited extent identified above in relation to paragraph 40 of the APoC, the Application fails.

CONFIDENTIAL SCHEDULE

[NOT REPRODUCED HERE]