



Neutral Citation Number: [2019] EWHC 2308 (Comm)

Case No: CL-2018-000474

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/09/2019

Before :

DAVID EDWARDS, QC (SITTING AS A JUDGE OF THE HIGH COURT)

Between :

SALT SHIP DESIGN AS	<u>Claimant</u>
- and -	
PRYSMIAN POWERLINK SRL	<u>Defendant</u>

Tim Austen (instructed by **Holman Fenwick Willan LLP**) for the **Claimant**
Henry Byam-Cook (instructed by **Wikborg Rein LLP**) for the **Defendant**

Hearing dates: 31 July 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Approved Judgment

David Edwards, QC (sitting as a Judge of the High Court) :

Introduction

1. The present application is an application by the Claimant (“Salt”), made under CPR Part 17.1(2), for permission to amend its Particulars of Claim.
2. Salt’s currently pleaded claim is for damages for breach of contract, the contract in question being a written Short Form Agreement concluded on 13 July 2017 (“the Contract”) under the terms of which Salt agreed to provide ship design services to the Defendant (“Prysmian”) in relation to a proposed cable laying vessel.
3. By its proposed amendments, Salt seeks to add:
 - i) A claim for breach of confidence concerning the alleged misuse by Prysmian of what is referred to in the draft Amended Particulars of Claim as Restricted Know-How owned by Salt;
 - ii) A claim for unlawful means conspiracy, the unlawful means alleged being (a) the originally alleged breach of contract, and (b) the proposed new plea of breach of confidence; and
 - iii) A claim for exemplary damages, which it was confirmed during the hearing before me was intended to apply only to the proposed breach of confidence and unlawful means conspiracy claims.

Salt also seeks to add claims for additional remedies, including an injunction and an inquiry as to damages.

4. Prysmian resists the proposed amendments. It submits, in broad summary, that:
 - i) The proposed amendments are “very late”, in the sense that they would cause the currently fixed trial date of 14 January 2020 to be lost;
 - ii) The draft Amended Particulars of Claim, in the way in which they deal with the new matters, are defective or exhibit a lack of clarity in certain respects;
 - iii) The proposed amendments also do not pass the merits threshold, either the ordinary threshold, i.e., that they have reasonable prospects of success, or what is said to be the heightened threshold applicable in the case of very late amendments.

All three matters, it was suggested, caused Prysmian prejudice. Prysmian submits that:

- iv) The overall balance of injustice – the injustice to Salt if the proposed amendments were refused and the injustice to Prysmian and to litigants in general if the amendments were allowed – points in favour of permission to amend being refused.

Approved Judgment**Factual Background**

5. Salt is a relatively small Norwegian ship design company. Prysmian is a member of a substantial Italian multinational corporation that carries on business in power transmission and telecommunications cables and their installation.
6. On 13 July 2017 Salt and Prysmian entered into the Contract under the terms of which Salt agreed to provide ship design services to Prysmian in relation to a proposed new cable laying vessel. Salt was referred to in the Contract as the “Designer” and Prysmian as the “Client”.
7. Clause 1.1 of the Contract explained that its purpose was as follows:

“1.1 Purpose

For the purpose of developing a Vessel type (the ‘Project’ or the ‘Vessel’), Client (the ‘Client’) has the firm intention to build a Vessel based on a design by XXX (the ‘Designer’). The Client appoints the Designer as the exclusive designer for the Project and the Designer grants the Client the right to build the Vessel based on a Designer’s developed ship design package and under terms as set out in this Contract.”

8. The term “Project” was defined at the beginning of the Contract as follows:

“Project: means the planned collaborative enterprise to achieve the Design of Prysmian New Build cable laying vessel.”

The term “Design” was defined to mean:

“Design: means all drawings, specifications and other documentation that will be produced by The Designer for this Project.”

9. The Contract, as originally concluded, provided in clause 1.2 that Salt would perform the contracted design work in four phases, details of the work (or “Scope of Supply”) in each phase being set out in Annex 1 to the Contract. These four phases were:

Phase 1: Concept Design;
 Phase 2: Tender Package;
 Phase 3: Basic Design; and
 Phase 4: Delivery Documentation.

The Contract was subsequently varied so that some of the Phase 3 work was placed into a new phase (between Phases 2 and 3) described as “Early Engineering”.

10. Clause 1.3 stipulated that Salt’s design work would be delivered to Prysmian on a specified Delivery Date for each phase. As is obvious from the descriptions of the phases (and as is implicit in clause 2.3, the terms of which are set out below), it was contemplated that, at the end of Phase 2, a tender document would be prepared for the physical construction of the vessel by a shipyard.

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11. Clause 2.1 of the Contract provided for Salt to be paid compensation for the overall Scope of Supply of EUR 1,910,000, with specified sums within that overall amount being paid for each phase. Approximately 10 percent of the overall amount was payable for Phases 1 and 2 and the remaining 90 percent for Phases 3 and 4.
12. Clauses 2.2, 2.3 and 2.4 of the Contract are of some importance and I therefore set them out in full:
 - “2.2 It is understood and agreed that if the Project materializes and a shipbuilding contract is concluded with a shipyard (the ‘Yard’), a Design Contract shall be entered into between the Designer and the Yard and all the above compensation shall be paid by the Yard.
 - 2.3 In case the project does not materialize and a shipbuilding contract is not concluded within 31st of January 2018, the Designer shall be compensated by the Client for the Phase(s) of Supply completed in the amounts indicated above. In case the Client to request the Designer to complete the Scope of Supply for Phase 3 and 4, a separate payment schedule shall be agreed.
 - 2.4 In case the Client has to compensate the Designer for the works performed by the Designer and accepted by the Client, the Designer shall issue an invoice for the related value to the Client, strictly following Client’s invoicing instruction. Client shall settle all approved invoices, correctly issued by the Designer, within 30 days from the date in which the invoice has been issued by the Designer.”
13. It is common ground between the parties that Salt has performed, and has been paid by Prysmian for, its Phase 1, Phase 2 and Early Engineering work. Final revisions of all documents in respect of Phases 1 and 2 were issued by 10 November 2017 and an Acceptance Protocol was signed by both parties on 22 November 2017.
14. In late September 2017 a request for a quotation for the construction of the proposed vessel was sent to a number of shipyards. Ultimately, three shipyards were short-listed by Prysmian: Vard Group AS (“Vard”), a Norwegian subsidiary of the Fincantieri group, Damen Group and PaxOcean Group. It is common ground, however, that no shipbuilding contract was concluded by 31 January 2018.
15. There were ongoing discussions between the parties both before and after 31 January 2018, in particular on 14 February 2018 when there was an exchange of emails which Salt alleges, but Prysmian denies, gave rise to an amendment to the Contract or to a new contract. It is accepted, however, that Prysmian never requested Salt to complete, and that Salt never did complete, any of the Phase 3 or 4 work.

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16. Ultimately, on 8 March 2018, Prysmian sent an email to Salt, with the subject line “SFA PPL-Salt/Termination”, in the following terms:

“As discussed on the phone, we refer to our agreement dated 12-13.7.17 for design of a new cable laying vessel for our Company.

As you know we have not concluded any shipbuilding contract so far in spite of having launched a tendering process to some yards since September last.

Recently a yard in an effort of getting a lower price which could incentivize us to negotiate suggested a considerable reduction of the purchase price if, among others, they make the design in house.

We are presently considering this proposal and have asked the yard to produce its own design and an offer to accommodate our overall objective.

In the meantime we wish to thank you for the work done so far kindly ask you to stop progressing any work on our project.

We shall pay you for the work done so far and in this connection we ask you to let us have computation of work done in connection with Phase 3 of the project for our consideration so that we may be mutually released from any obligation under the above agreement.

Needless to say that shouldn't we enter into a contract with the yard above we reserve to come back to you and reconsider any further cooperation.”

17. The “yard” referred to in Prysmian’s 8 March 2018 email as having offered Prysmian a reduction in the price if it could carry out the design work in-house was Vard. Vard had originally tendered for the design of the vessel in early 2017 but had lost out to Salt. Although not, therefore, engaged as the designer of the vessel, it was one of the three short-listed yards for the construction.
18. In fact, as emerged in Prysmian’s initial disclosure in these proceedings, on 5 March 2018, i.e., three days before this email was sent, Prysmian and Vard had agreed a Letter of Intent (“LOI”) which recorded that they were in negotiations to conclude “the Contract” for a cable laying vessel.

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19. The copy of the Letter of Intent included in my papers was in a redacted form. Prysman was referred to in it as “Buyer” and Vard as “Builder”. Relevant provisions included the following:

“WHEREAS

The BUYER has launched a tender process for a shipbuilding contract (hereinafter also referred to as the ‘Contract’) of one (1) Cable Lay Vessel (hereinafter the ‘Vessel’) based on the design provided by SALT Ship Design AS (the ‘SALT Design’) as detailed in the tender package and invited the BUILDER to such tender (hereinafter called the ‘Project’).

The BUILDER is participating to the tender process and proposed to develop a new design for the VESSEL, based on its design type VARD 9 04 (the ‘Alternative Design’).

The BUYER has agreed to evaluate the Alternative Design with intention to sign the Contract based on the Alternative Design provided that Alternative Design fully meets the BUYER’s requirements and expectations as set out in tender documents, at its absolute discretion.

Now therefore, the Parties agree that the continuation of such negotiations necessitate the issuance of this Letter of Intent and the Parties have agreed on the following:

1. PURPOSE

- 1.1 The purpose of this Letter of Intent is to provide common terms and provisions according to which the Parties will continue in good faith to negotiate on an exclusive basis, and if possible conclude, the Contract. The Parties acknowledge that the Project remains still subject to the internal approvals and authorizations to be given at the absolute discretion of the BUYER and/or of its Affiliates [redacted]

...

3. PRICE

- 3.1 Subject to the execution of the Contract the contract price of the Vessel to be delivered to the BUYER at the shipyard shall be [redacted] Only [redacted] (hereinafter referred to as the ‘Contract Price.

...

5. CONTRACT DOCUMENTATION

5.1 [redacted]

For the avoidance of doubt, the Parties acknowledge that the Alternative Design is still under development and that the Contractual Technical Documentation is subject to the final approval of the BUYER at its absolute discretion.”

20. Mr Austen pointed in his submissions to the link in the recitals between (a) the tender, expressly stated to be based on Salt’s design, (b) the requirement that any alternative design produced by Vard meet Prysmian’s requirements and expectations as set out in the tender documents, and (c) the Contract, which involved the construction of the vessel for which the tender (based on Salt’s design) had been produced. Mr Byam-Cook submitted that the recitals clearly contemplated that Vard would produce its own alternative design.
21. Also included in Prysmian’s initial disclosure was a document described as “Vard 9 04 General Arrangement 1995-101-001 Rev 8”, a general arrangement (or GA) plan produced by Vard for the proposed new cable laying vessel. The document was dated 13 April 2018; thus, by 13 April 2018, a little over one month after the LOI had been concluded, Vard had seemingly already produced an eighth revision of its proposed GA plan.
22. On a date which is unclear, but which appears from a press release bearing that date (exhibited to the first witness statement of Clare Veronica Chyb served in support of the application) to have been around 29 April 2018, Prysmian entered into a shipbuilding contract with Vard for the construction of the cable laying vessel.

Procedural History

23. In correspondence between the parties immediately following Prysmian’s 8 March 2018 email, Salt disputed Prysmian’s entitlement to proceed with the project without Salt.
24. This correspondence included emails sent by Prysmian on 16 March and 10 April 2018 in which Prysmian made clear that, although it considered that it would be entitled to use Salt’s design work for the new vessel, it did not propose to do so:

“In fact if we go ahead with the proposal we have recently received your design shall not be used.

...

We are fully aware of you [sic] intellectual property rights under art 6.4 of the Agreement and we have no intention at all to breach them”

(16 March 2018 email)

“Although we would be entitled to use the design [i.e., Salt’s design] we re-confirm that your design shall not be used.”

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(10 April 2018 email).

25. On 11 May 2018 Holman Fenwick Willan LLP (“HFW”), Salt’s English solicitors, sent Prysmian a pre-action letter of claim. The letter asserted that Prysmian was not free to terminate the Contract, to deprive Salt of its rights as exclusive designer, and to proceed to build the vessel using another design. The letter also stated that:

“13. SSD [Salt] reserves its rights in full, including in respect of any other claims it may have under the Agreement and/or in respect of its design for the Vessel.”

26. A response was sent by Wikborg Rein LLP (“WR”), Prysmian’s English solicitors, on 25 May 2018. WR denied Salt’s claim, but it reiterated the point made in Prysmian’s 16 March and 10 April 2018 emails that, although Prysmian did not intend to use Salt’s work in any subsequent construction of the vessel, it was entitled to do so:

“12. [...] On 10 April 2018, the Client noted the Designer’s position, and said that while it disagreed, it was willing to pay for the work done to date, and that it was also willing to refrain from using the Designer’s work in any subsequent build, notwithstanding its right to do so under the Contract.”

27. This statement of entitlement provoked an expression of concern from HFW and a reservation of Salt’s rights. In HFW’s letter of 13 June 2018, it said:

“Design Documents

10. SSD [Salt] is concerned by the suggestion in paragraph 12 of your letter that PP [Prysmian] is entitled under the Agreement to use SSD’s work ‘in any subsequent build’. Article 6.4 states that SSD shall retain all intellectual property rights related to the Scope of Work. Article 6.2 envisages that PP shall have a licence to use SSD’s Design Documents, but only on the terms of a ship design contract between SSD and the shipyard engaged for the Project.

For obvious reasons, no such agreement has been made, and, therefore, PP has no right to use work produced by SSD in respect of the Project, either for the Project or for other purposes.

11. SSD reserves all of its rights in respect of any infringement of its intellectual property rights.”

28. The Claim Form in this action was issued by Salt on 12 July 2018. In it, Salt claimed damages, calculated on various alternative bases, for breach of contract by Prysmian in concluding a shipbuilding contract for the construction of the cable laying vessel without procuring that the yard contract with Salt for the further Phase 3 and 4 design work.

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29. Paragraph 4 of the Claim Form said, reflecting the earlier correspondence between the parties and their respective solicitors:

“4. The Defendant has provided written assurances by its solicitors that it is not using the Claimant’s designs. The Claimant reserves the right to bring further claims should it later appear that the Claimant’s designs have been used in breach of the Contract and/or in breach of the Claimant’s intellectual property rights.”

The breach of confidence claim which Salt now seeks to add by way of amendment is, effectively, the claim which Salt purported to reserve.

30. On 6 September 2018 Salt served Particulars of Claim articulating Salt’s claim for breach of contract.
31. In the course of explaining the breach of contract alleged, the Particulars of Claim alleged in paragraphs 25 and 26 that, to the best of Salt’s knowledge and belief, Prysmian had now concluded a shipbuilding contract with Vard to construct the vessel and to “bring the Project to fruition”.
32. Paragraph 27 of the Particulars of Claim referred to the 8 March 2018 email I have already mentioned. Paragraph 28 was in the following terms:

“28. In the circumstances, the Project has materialised and Prysmian has entered into a shipbuilding contract, but in breach of clause 1.1 and/or clause 2.2 of the Contract, Prysmian has not procured that Salt be the designer of the Vessel. In further breach of clause 1.1 and/or clause 2.2 of the Contract Prysmian has not procured that the Yard contract with, and in fact pay, Salt for such design work in accordance with the Contract, or alternatively in accordance with a separate contract made on or about 14 February 2018.”

The phrase “the Project has materialised”, reflected the language used in clause 2.2 of the Contract.

33. Prysmian served its Defence on 18 October 2018. The essence of its defence, set out in paragraphs 3 and 21, was that, if the Project had not materialised and if Prysmian had not concluded a shipbuilding contract for the construction of a cable laying vessel on or before 31 January 2018, as, in fact, occurred, then Prysmian’s only obligation was to pay Salt for the work it had done.
34. As Mr Byam-Cook put it in paragraph 12 of his skeleton argument, Prysmian’s case was that, on the proper construction of the Contract, Salt’s right of exclusivity as a designer was limited in time to 31 January 2018. So, or so the logic of Prysmian’s case appears to dictate, if Prysmian concluded a shipbuilding contract on 1 February 2018 (the date of the contract, one might think, being a matter within Prysmian’s control) which involved the use of another designer, then Salt could have no complaint.

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35. In paragraph 23 of its Defence, responding to paragraphs 25 and 26 of the Particulars of Claim, Prysmian said this:

“23. As to Paragraphs 25 and 26, it is admitted that Prysmian has entered into a shipbuilding contract with Vard. Otherwise Paragraphs 25 and 26 are denied. The shipbuilding contract is for the construction of a cable laying vessel to be designed by Vard. Salt’s design work has not and will not be used in the construction, and/or the shipbuilding contract with Vard is not based on the Scope of Supply under the Contract. As such, Prysmian has not brought ‘the Project to fruition’ as alleged but embarked upon the construction of a different vessel.”

36. Paragraph 25 of the Defence, which responded directly to the allegation by Salt in paragraph 28 of the Particulars of Claim that the “Project has materialised”, said that the allegation was denied “for the reasons set out above”. Prysmian’s pleaded reasons for asserting that the Project had not materialised thus included that:

- i) The shipbuilding contract with Vard was for the construction of a cable laying vessel “to be designed by Vard”;
- ii) Salt’s design work “has not and will not be used in the construction” of the vessel by Vard;
- iii) The shipbuilding contract with Vard was not “based on the Scope of Supply under the Contract”; and that
- iv) Prysmian had “embarked on the construction of a different vessel”.

37. Salt served its Reply on 15 November 2018. In paragraphs 19, 20 and 21, which responded to paragraph 23 of the Defence and to the allegation that Prysmian had not brought the Project to fruition, Salt pleaded a number of alternative cases (the numbers in square brackets in the quotation that follows are mine):

“19. The penultimate and final sentences of paragraph 23 are not admitted, but in any event their relevance is denied. [1] The Project comprised the design and construction of a new build cable laying vessel for Prysmian, and such Project has come to fruition based on Prysmian’s admission that it has entered into a contract for the design and construction of such a vessel.

20. Alternatively, [2] Salt will contend that the Project consisted of the design and construction of an advanced cable laying vessel capable of carrying a market leading payload of cables in two carousels, and laying cables to a market leading water depth, or in the further alternative [3] the Project consisted of the design and construction of any vessel with a materially similar specification to the Contract Specification.

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Pending disclosure from Prysmian, based on its current information and belief, Salt will contend that the Project has also come to fruition if either of these alternative constructions of the Contract is correct.

21. If (which is denied on Salt’s primary case) the Project only concerned the construction of a vessel with a materially similar specification to the Contract Specification, then Prysmian’s allegations that the shipbuilding contract with Vard is not ‘based on’ the Scope of Supply under the Contract, and that Prysmian has embarked upon the construction of a ‘different vessel’, are vague and unparticularised. Salt is unable to identify what Prysmian’s case is as to whether any aspects of the technical specification of the vessel Prysmian has contracted with the Yard to construct are materially the same as, or materially similar to, the technical specification of the Vessel to be designed by Salt under the Contract. Prysmian is required to particularise the differences it alleges. Prysmian is further required to prove the matters alleged in the penultimate and final sentences of paragraph 23, including by reference to the precise technical specification of the vessel being constructed by Vard.”
38. Thus, Salt’s case as to what was required to bring the Project to fruition was:
 - i) The design and construction of a new-build cable laying vessel; alternatively
 - ii) The design and construction of an advanced cable laying vessel capable of carrying a market leading payload of cables in two carousels, and laying cables to a market leading water depth; alternatively
 - iii) The design and construction of a vessel with a materially similar specification to the Contract Specification.
 39. Neither Salt’s primary nor its secondary or tertiary cases as to what was required to bring the Project to fruition strictly depends upon Vard’s use of Salt design; the tertiary case, for example, requires no more than proof that the specification of the vessel to be constructed by Vard was materially similar to the Contract Specification.
 40. Prysmian’s positive pleaded case as to why the Project had not been brought to fruition, however, includes the matters identified in paragraph 36 above, including that Salt’s design work had not and would not be used in the construction of the vessel, and that the vessel was a “different vessel” to that reflected in the Scope of Supply under the Contract.
 41. On 7 December 2018 the case came before Daniel Toledano, QC (sitting as a Judge of the High Court) for a case management conference. Directions were given at that stage towards a 4-5 day trial (including 1 day of pre-trial reading time) to be fixed for a date not before 14 October 2019 and which was ultimately fixed to commence on 14 January 2020.

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42. The directions made, without descending into unnecessary detail, provided for:
- i) Disclosure in February 2019, with each party giving initial disclosure of documents relied upon and at the same time serving requests for specific disclosure with further disclosure to be given by 22 February 2019. Disclosure of confidential documents was to be confined to a “Confidentiality Club”;
 - ii) A mediation to take place on an agreed date prior to 29 March 2019;
 - iii) Sequential exchange of factual witness statements on 26 April (Salt) and 24 May 2019 (Prysmian), with concurrent supplementary factual statements to be served on 21 June 2019;
 - iv) The parties to have permission to apply to adduce expert evidence from an expert in the field of naval architecture in relation to the issues identified in paragraph 15 of the List of Issues.
43. Paragraph 15 of the List of Issues, which was formally approved by the court at the case management conference, read as follows:
- “15. Has the Defendant, by reason of concluding the shipbuilding contract after 31 January 2018 (described in Paragraph 11 above), brought the Project to fruition or has the Project not materialised? As to this, and to the extent relevant on the true construction of the Contract:
- (1) Has or will the Claimant’s design work be used in the construction by Vard?
 - (2) Is the shipbuilding contract with Vard based on the Scope of Supply under the Contract?
 - (3) Will the cable laying vessel being constructed by Vard have a materially similar specification to the Contract Specification?”
- As will be appreciated, paragraph 15 reflected the issues contained in the extracts from the parties’ statements of case set out in paragraphs 35 to 40 above.
44. The dates for disclosure, service of factual and supplementary factual witness statements and applications for permission to adduce expert evidence were subsequently extended by agreement between the parties in correspondence. Prysmian says, and it appears to be the case, that the extensions, which were modest, were sought by Salt.
45. Initial disclosure and service of requests for further disclosure occurred on 8 February 2019. Salt has complained about the adequacy of Prysmian’s disclosure and about Prysmian’s refusal to provide documents in response to its requests for specific disclosure, which have largely been rejected. There was a mediation on 18 April 2019, which failed to produce a settlement; Salt says (but Prysmian denies) that this was principally because of the inadequacy of Prysmian’s disclosure.

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46. Under the timetable as extended, factual witness statements were due to be served by Salt by 14 June 2019, but no such statements have been served. There has been no agreement to further extend this date and there has been no application to the court. The reality is that service of factual statements has been overtaken by the dispute about Salt's proposed Amended Particulars of Claim.
47. So far as this is concerned, on 9 May 2019, following the failed mediation and the day before the extended 10 May 2019 deadline for applications for permission to adduce expert evidence, WR sent an email to HFW suggesting that this date be extended to 30 May 2019.

WR went on to suggest that, in light of recent correspondence and discussions, there should be a meeting between the parties' solicitors to discuss various procedural matters, including:

- “1. Whether either parties' pleadings require amendment prior to service of factual and expert evidence.”

The question plainly postulated that it might be sensible for service of factual and expert evidence to follow any amended pleadings.

48. HFW responded by email on 13 May 2019 saying that Salt intended to amend its Particulars of Claim. The email said that HFW would be in a position to send WR a draft of the proposed amendments by the middle of the following week. In subsequent emails the parties agreed to postpone the deadline for applications in relation to expert evidence pending WR's sight of the draft Amended Particulars of Claim. Nothing was expressly agreed in relation to factual evidence.
49. In the event, the draft Amended Particulars of Claim were only provided to WR on 5 June 2019. When WR said that, due to vacations and the other commitments of its legal team, including its client's IP counsel, it would only be able to respond substantively by 28 June 2019, HFW issued the present application. The application was issued on 19 June 2019 on the (realistic) basis that, if issued any later, it was unlikely to be heard until the Michaelmas Term.

The Draft Amended Particulars of Claim

50. I described in paragraph 3 above the broad nature of the amendments proposed to be made in the draft Amended Particulars of Claim.

As there explained, the draft Amended Particulars of Claim seeks to add two additional causes of action:

- i) A claim for breach of confidence; and
- ii) A claim for unlawful means conspiracy (between Prysmian, V. Delta and Vard)

as well as additional remedies in respect of these new causes of action, including a claim for exemplary damages (based on the second of the three categories described by Lord Devlin in *Rookes v Barnard (No. 1)* [1964] AC 1129, 1226-8).

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51. The claim for breach of confidence is proposed to be put on three bases:
- i) Breach of an express contractual duty of confidence contained in clause 6.4 of the Contract;
 - ii) Breach of an equitable duty of confidence; and
 - iii) Violation of Article 2 of Directive (EU) 2016/943 (referred to by counsel as “the Trade Secrets Directive”).
52. As for the claim of unlawful means conspiracy, the draft Amended Particulars of Claim allege that Prysmian, V. Delta (Prysmian’s agent and appointed supervisor under the Contract) and Vard had conspired together to injure Salt by one or both of two unlawful means:
- i) By agreeing, in breach of Prysmian’s contractual obligations, that Vard would proceed with the design and construction of the vessel without Salt’s involvement; and
 - ii) By agreeing, in breach of Prysmian’s obligations of confidence, that Vard would do so using the Restricted Know-How owned by Salt and embedded in its designs.

Salt alleges that this conduct would inevitably injure Salt and could, therefore, be inferred to have been agreed and carried out by the three parties with an intent to do so.

53. The application for permission to make these amendments was supported by a first witness statement of Clare Chyb, a solicitor at HFW. A witness statement was served by Eleanor Midwinter, a solicitor at WR in response, and a further witness statement was served by Ms Chyb in reply.
54. Salt has been represented before me by Tim Austen and Prysmian by Henry Byam-Cook, both of counsel. I am grateful to them for their written and oral submissions, all of which I have taken into account even if I do not mention every point made in this judgment.

Principles

55. CPR Part 17.1(2) provides that, in the absence of consent, a party may amend a statement of case after it has been served only with the permission of the court.
56. There was little, if any, difference between Mr Austen and Mr Byam-Cook as to the principles by reference to which applications for permission to amend should be approached. Both agreed that the starting point in the modern era was the Practice Note of the Court of Appeal in *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735.
57. *Swain-Mason* was a professional negligence case where an application for permission to re-amend the Particulars of Claim to introduce a new case was made at the beginning of a trial which had already been adjourned once.

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Permission was granted by the trial judge conditionally, and a subsequent application to disallow the amendments was dismissed. The Court of Appeal allowed the appeal and refused permission for the amendments.

58. At [69] and [70] Lloyd LJ, who gave the leading judgment in the Court of Appeal, endorsed the following passages in the decision of the Court of Appeal in *Worldwide Corpn Ltd v GPT Ltd* [1998] CA Transcript No. 1835 as reflecting the tenor of the CPR:

“We are doubtful whether even applying the principle stated by Bowen LJ [in *Cropper v Smith*], the matter is as straightforward as [counsel for Worldwide] would seek to persuade us. But, in addition, in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) ‘mucked around’ at the last moment. Furthermore the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.”

“Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, [counsel for Worldwide] has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it.”

Mr Austen, in the course of his submissions, emphasised that, in the second passage I have quoted, Lloyd LJ distinguished amendments prompted by “some new factor appearing from some disclosure only recently made”.

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59. Lloyd LJ went on to explain at [72] that, when considering an application for permission to amend, it was always a question of striking a balance, and that there should be no inflexible or over-dogmatic approach. He accepted, however, that:

“... the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on the party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court.”

60. Mr Byam-Cook also relied upon the following passage in Lloyd LJ’s judgment at [73] in which he emphasised the importance, in the context of a very late amendment, of proper pleading:

“A point which also seems to me to be highly pertinent is that, if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules.”

As I indicated in paragraph 4 above, one of the grounds upon which Prysman resists the proposed amendments is that it says they lack clarity in certain respects.

61. Since *Swain-Mason*, there have been a number of statements or summaries of the principles applicable to applications for permission to amend by first instance judges, in particular in:
- i) The decision of Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38(a)] to [38(g)]; and
 - ii) The decision of Coulson J in *CIP Properties v Galliford Try* [2015] EWHC 1345 (TCC) at [19].
62. Carr J’s summary of the principles in *Quah Su-Ling* was cited with approval by Sir Geoffrey Vos, Chancellor of the High Court, in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 at [41], where he summarised the position in this way:

“In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted.

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There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal.”

I was also referred by the parties to the recent judgment of HHJ Eyre QC in *Rose v Creativityetc Limited* [2019] EWHC 1043 (Ch).

63. The summaries in *Quah Su-Ling* and *CIP Properties* are similar, and I respectfully agree with and endorse them. Any differences of emphasis between them are best regarded as referable to the facts of the particular cases. It is unlikely to be helpful for me to attempt a yet further distillation of the relevant principles in my own words, and I decline to do so.
64. It is, of course, important to bear in mind, as Stuart-Smith J said in *Vilca v Xstrata Limited* [2017] EWHC 2096 (QB) at [22], that, to the extent that previous authorities contain statements of principle, they are useful; but otherwise previous decisions are essentially illustrations of the exercise of the court’s discretion in the particular circumstances of the relevant case.
65. As reflected in the authorities that I have cited, the starting point is that an application for permission to amend will be refused if it is clear that the proposed amendment has no real prospect of success, the test to be applied in that regard being the same as that for summary judgment under CPR Part 24.
66. Beyond that, as Carr J said in *Quah Su-Ling* at [38(a)], whether to allow an amendment is a matter for the discretion of the court to be exercised in accordance with the overriding objective. As the learned judge said:
- “Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.”
67. The factors that fall to be taken into account in carrying out this balancing exercise will include those identified by Hamblen J in *Brown v Innovatorone Plc* [2011] EWHC 3221 (cited by Coulson J in *CIP Properties* at [17]):
- “(1) the history as regards the amendment and the explanation as to why it is being made late;
 - (2) the prejudice which will be caused to the applicant if the amendment is refused;
 - (3) the prejudice which will be caused to the resisting party if the amendment is allowed;
 - (4) whether the text of the amendment is satisfactory in terms of clarity and particularity.”

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68. The authorities make clear that particular considerations apply in relation to “very late” amendments. A very late amendment, as explained by Carr J in *Quah Su-Ling* at [38(c)], is an amendment made when the trial date has been fixed and where to permit the amendment would cause the fixed trial date to be lost.
69. Mr Austen suggested in paragraph 44 of his skeleton argument that too much significance had been attached to the question of whether proposed amendments could be labelled “late” or “very late”:
- “While there has been in recent times a tendency to put labels on ‘late’ and ‘very late’ amendments, it is submitted that such categorisation is rarely helpful, given that lateness is only a relative concept, and it is necessary to take into account all the circumstances in accordance with Swain-Mason.”
70. I do not agree that the label “very late” is unhelpful; it is an appropriate way of describing amendments whose effect will be that a trial date will have to be vacated, a serious matter. I accept, however, that, as was recognised by Carr J herself (at [38(d)]), lateness is not an absolute but a relative concept.
71. Trial dates are, of course, usually fixed in this court at or shortly after the first case management conference, which will take place after statements of case have been served but before disclosure has been given. The trial date may be, as was the case here, some 12 months away. It is no more than obvious to say that an amendment put forward on the day before the trial, when all the work towards that trial has been done and which may lead to significant wasted costs, may raise additional considerations to those that may arise in relation to an amendment proposed when the trial is still six months or more away, although if both amendments require the trial date to be vacated both will qualify as “very late” amendments.
72. In *Rose*, HHJ Eyre QC said at [39] that:
- “In my judgment there are not, as [counsel for Rose] suggested, a series of separate categories with bright-line divisions between them and with different approaches applicable to the separate categories. Rather there is a continuum or spectrum with different factors likely to carry different weight at different points on the continuum.”
73. That remark was made, as Mr Byam-Cook correctly pointed out, in the context of a submission that, in relation to amendments that were neither “late” nor “very late”, what one might describe as the old rule applied, i.e., that amendments should generally be allowed provided that any prejudice to the other party could be compensated in costs and the public interest in the efficient administration of justice was not significantly harmed, a submission the judge rejected. I agree with the remark nonetheless. The result of the balancing exercise in any case will turn on its own particular facts, which include the extent to which the amendment is late and the consequences that will ensue if it is allowed.

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74. The authorities that have been cited to me, however, undoubtedly support the proposition that the later an amendment is put forward, the heavier the burden on the party seeking permission to justify its lateness and to show the strength of the new case and why justice requires that party to be able to pursue it. The risk to the trial date may mean that the lateness itself causes the balance to be loaded against the applicant.
75. Equally, as Lloyd LJ made clear in *Swain-Mason*, the need for the proposed amendment to be properly articulated and for the new case to have a real prospect of success assumes a greater importance if the consequence of the amendment will mean that the trial has to be vacated.

Analysis

76. The burden lies upon Salt to persuade me that I should exercise my discretion in its favour and that I should grant it permission to make the amendments sought.
77. It is convenient, however, to consider matters by reference to the objections raised by Prysmian. As set out in paragraph 4 above, these objections fall under four headings (with the matters relied upon under the first, second and third feeding into the fourth):
- i) Lateness;
 - ii) The defective nature of, or the lack of clarity in, the proposed amendments;
 - iii) The merits threshold, in particular the heightened threshold said to be applicable to very late amendments;
 - iv) Prejudice, Prysmian's submission being that the balance of prejudice is such that permission to make the amendments should be refused.

(i) Lateness

78. So far as Prysmian's first objection is concerned, I accept that the amendments, if allowed, would cause the 14 January 2020 trial date to be lost. I accordingly accept that, applying the definition set out in Carr J's judgment in *Quah*, the proposed amendments are very late.
79. Mr Austen advanced two submissions in this regard:
- i) First, he sought to argue, although in a realistically restrained way, that, if the amendments were allowed, the 14 January 2020 trial date could nonetheless still be maintained;
 - ii) Secondly, and in the alternative, he said that, if there was a problem with the January 2020 trial date, it was a problem that already existed so that the amendments would make no difference.

I reject both submissions.

80. So far as Mr Austen's first submission is concerned, on the current trial timetable Salt's factual witness statements ought to have been served on 14 June 2019. There is plainly no point in that being done whilst the statements of case are in a state of flux.

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81. The reality is that, if the amendments are allowed, there will need to be directions for:
- i) Service of an Amended Defence and an Amended Reply;
 - ii) Disclosure in relation to the new issues raised by the amendments (whether or not this renders moot the dispute about the adequacy of Prysmian's existing disclosure remains to be seen);
 - iii) Factual witness statements;
 - iv) Expert evidence.
82. So far as disclosure and factual evidence are concerned, I accept Mr Austen's submission that, given the issues embraced by paragraph 15 of the List of Issues, there is a significant overlap between the issues proposed to be raised by the amendments and the issues already in play and the disclosure therefore required in relation to them. A similar point can be made in relation to factual witness statements.
83. But even taking that into account, in particular given the proposed new case of conspiracy, there is likely to have to be broader disclosure than that originally required; equally, factual witness statements are likely to be more numerous and/or more extensive than those that would have been served in relation to the currently pleaded issues.
84. In circumstances where this application was heard on the last day of the Trinity term, and where the process of serving amended statements of case is realistically unlikely to start before September 2019, the suggestion that all this can be accomplished in an orderly fashion for a trial commencing on 14 January 2020 is, in my judgment, unrealistic. It is in no-one's interest that an unachievable timetable is set or maintained, such that at a very late stage the trial has to be adjourned.
85. I should record that it is common ground between the parties that the additional issues would require that the current trial estimate of 4-5 days be extended by (in Prysmian's submission, at least) a further 2-3 days. Enquiries of the listing office indicate that this would not in itself pose a problem; the court could accommodate a trial with a longer estimate of 6-8 days in January 2020, or, if it was felt sensible to push the trial date back, in April or May 2020.
86. As for Mr Austen's second submission, I agree with Mr Byam-Cook, that, even if the current state of compliance with the ordered directions is such that an adjournment of the January 2020 trial date might be required (which Mr Byam-Cook did not accept) or might be sensible (as I suggested during the course of argument), it is not something that Salt can sensibly pray in aid.
87. The problem of non-compliance, Mr Byam-Cook suggested, was one of Salt's making:
- i) Initial disclosure had taken place on time, and the mediation had taken place only a little later than ordered (on 18 April rather than by 29 March 2019);
 - ii) It was Salt that had failed to comply with the next step in the trial timetable, namely the direction that it should serve its factual statements by 14 June 2019;

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- iii) Furthermore, if Salt had complaints about Prysmian's disclosure and its refusal to provide the further disclosure sought, then it should have brought those matters forward and issued the appropriate application.
88. It was, thus, Mr Byam-Cook submitted, Salt's fault that the preparation for the January 2020 trial was some way behind the current timetable. If the fact that there were substantial disclosure issues still to be resolved, with factual witness statements and expert evidence to be served only thereafter, meant that the January 2020 trial date was now too tight, Salt only had itself to blame.
89. There is some force in these criticisms, although once it became apparent that there was a dispute about the proposed Amended Particulars of Claim it was almost inevitable that service of factual witness statements would have to be postponed until that dispute had been resolved and the scope of the issues and thus the evidence required had become clear. The matter should, however, on any view have been raised with the court.
90. Where I disagree with Mr Byam-Cook, however – although, given their impact on the trial date, the proposed amendments would still be regarded as very late - is with his submission that Salt is to be criticised for delay in bringing the amendments forward since 8 February 2019. In my judgment, if there was any culpable delay on Salt's part in this respect, it was relatively minor.
91. The position in this regard, as I have explained, is that initial disclosure was given by the parties on 8 February 2019, each party accompanying its initial disclosure with specific disclosure requests. Prysmian disclosed some 42 documents, including seven which were the subject of the Confidentiality Club arrangements.
92. These seven documents included the GA plan for the Vard vessel, which was not disclosed in native .dwg format but only as a view-only .pdf document. It could be accessed only through a window on a WR online data room, with no facility for downloading, copying or printing the document which meant that using the document was difficult. Two of the other six documents disclosed by Prysmian in relation to the Vard design were said by Ms Chyb in her second statement to be incapable of being viewed through the data room at all.
93. On 8 February 2019, accompanying its own initial disclosure, Salt made specific requests for disclosure falling within four broad categories. The first category sought disclosure of 77 specific plans or technical documents produced by Vard in connection with the construction. The other categories concerned correspondence and minutes of meetings between Prysmian and Vard; contractual documents between Prysmian and Vard relating to the cable laying vessel; and any Vard tender proposals and quotations.
94. On 14 March 2019 WR wrote to HFW disclosing three further documents, two involving communications between Prysmian and its agent V. Delta and one concerning the Vard specification but refusing to disclose any documents in relation to Salt's remaining requests. Prysmian refused, in particular, to disclose any version of the Vard GA plan other than revision 8 dated 13 April 2018, or any of the other specific design documents sought in the first category.

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95. HFW pursued these disclosure requests in correspondence on 27 March and 3 April 2019, suggesting that the specific documents in the first category should at least be disclosed as they were relevant to Prysmian's pleaded case, set out in paragraph 23 of its Defence, that Salt's design work had not been used by Vard in the construction of the vessel.
96. In its 27 March 2019 email HFW said, referring to the issues raised in the statements of case encapsulated by paragraph 15 in the List of Issues, including Prysmian's own positive pleaded case that Salt's design work had not been used:
- “Our client has requested earlier versions of technical documents because the evolution of the design implemented by Vard is likely to be instructive with regard to points (a) to (c) above, and because it would not be difficult for Prysmian to make them available.
- As to paragraphs 18-20 in your letter, the Letter of Intent and GA Plan have left Salt in no doubt that its design work is being used in the construction of the vessel being built by Vard. The similarities between the GA Plan and Salt's design for the Project are evident, and the Recitals to the Letter of Intent make explicit that the 'Vessel' for which Vard was proposing an 'Alternative Design' to Prysmian was the same Vessel that Salt had provided a design for. The Recitals also use the term 'Project' to describe this same Vessel.”
97. In its subsequent 3 April 2019 email, HFW said:
- “Our client does consider that its design has been used and it intends to list the common features. It will however take time to complete that exercise, and it should not be a precondition to disclosure of the technical documents requested. The documents are relevant and there are not enough of them to make proportionality a pertinent consideration.”
98. The parties were, by this stage, hard up against the planned mediation. Prysmian refused to give any further disclosure prior to the mediation and insisted that the mediation went ahead without this disclosure issue being resolved.
99. As I indicated in paragraph 47 above, on 9 May 2019, following the mediation, WR sent an email to HFW suggesting a meeting to discuss further procedural steps, including whether either parties' pleading required amendment. This prompted a response from HFW on 13 May 2019 that Salt intended to amend its Particulars of Claim.
100. The draft amendments were only produced on 5 June 2019, and although they included serious allegations in relation to which careful thought was obviously needed, I agree that some criticism can legitimately be made of the time taken after the mediation to produce them. I reject, however, the submission that, if amendments were to be made, they should have been made shortly after 8 February 2019 and implicitly before the mediation.

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101. It does not fall to me to resolve the dispute about disclosure today but, in my judgment, Salt was entitled to pursue its further disclosure requests in correspondence and to try to persuade Prysmian to give this further disclosure before preparing any amended pleading.

By April 2019, when it became clear that Prysmian was not prepared to comply, the parties were preparing for the mediation.

102. Mr Byam-Cook also submitted that, even if (which he did not formally accept) Salt could not have pleaded its breach of confidence claim, and that part of the unlawful means conspiracy claim which relied upon the breach of confidence as unlawful means, until after disclosure, Salt could have pleaded at the outset that part of its unlawful means conspiracy case that relied upon the original breach of contract. He suggested that the proposed amendments owed their origin not to his client's disclosure but simply to a re-appraisal of the case by new counsel.

103. I do not accept this. It is not clear to me that, prior to disclosure, Salt had the necessary information properly to allege the combination between Prysmian, V. Delta and Vard and therefore the conspiracy. In my judgment, on the evidence I have read, the proposed amendments stem, wholly or at least in substantial part, from the information obtained by Salt through Prysmian's disclosure, in particular the GA plan and the LOI.

104. In summary, therefore:

- i) I accept that the proposed amendments will cause the January 2020 trial date to be lost, and to that extent are to be regarded as very late amendments;
- ii) There is some scope for criticising Salt for the time taken to bring forward the proposed amendments following the 18 April 2019 mediation, but I reject the submission that Salt is seriously to be criticised for delays before then.

(ii) *Defects in the amended pleading*

(iii) *The merits threshold*

105. It is convenient to take these two points together.

106. Prysmian advanced a number of criticisms of the proposed breach of confidence and unlawful means conspiracy claims. It said that:

- i) The new claims were not properly or sufficiently pleaded;
- ii) Even if the draft Amended Particulars of Claim were technically sufficient, these new claims nonetheless had no reasonable prospect of success, or at least did not have sufficient prospects of success to justify the very late amendments.

107. So far as the second of these points is concerned, Mr Byam-Cook said that Prysmian did not necessarily accept that the new claims were governed by English law; but he did not positively argue that they were governed by some different system of law, or that the principles under that other system of law were different to those of English law. (Mr Byam-Cook also reserved Prysmian's position in relation to jurisdiction but made no application in that regard.)

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108. No separate criticism was, as I understood it, made in relation to the claim for exemplary damages; but, as this claim was said to relate solely to the breach of confidence and unlawful means conspiracy claims, Mr Byam-Cook said that it was affected or infected by the same criticisms.

Breach of confidence

109. So far as the breach of confidence claim is concerned, Mr Byam-Cook submitted that the draft amendment was overly vague with regard to the nature of the right allegedly infringed and that it contained inadequate particulars of exactly what Prysmian was said to have misused.
110. These points were forcefully argued, but I do not consider them to be well-founded. In my judgment, Salt's proposed pleading is sufficient and Prysmian knows very well the case it has to meet, in essence (as it was put by Mr Austen in argument) that Salt's designs and the confidential know-how embedded in them have been used as a springboard for the proposed vessel to be built by Vard.
111. The claim of breach of confidence is proposed to be advanced, as I have explained above, on three bases: breach of an express, contractual duty of confidence, breach of an equitable obligation of confidence; and violation of the Trade Secrets Directive. No criticism can, I consider, be made of the fact that it is put on these three alternative bases. The first basis relies upon clause 6.4 of the Contract, which provided as follows (the paragraph numbering in square brackets is mine):

“6.4 [1] The design, data, documents and know-how and all relevant copyrights, patents or other intellectual property rights related to the Scope of Work supplied by Designer under this Contract shall remain the intellectual property of Designer, even if not specifically so marked. However, any relevant copyrights, patents or other intellectual property rights supplied by the Client shall remain the property of the Client.

[2] Both parties acknowledge that secrecy related to proprietary design solution is of outmost [sic] importance, and no documents describing design solutions based on input provided by the Client, related to topside layout details, mission critical equipment or interface of such equipment into the Vessel can be made accessible to third persons without Client's and Designer's prior consent – unless such design solutions are, or in the future comes into public domain. For the avoidance of doubt, the aforementioned shall not prevent the client to use such documents for the purposes of marketing the Vessel to its client(s) or for tendering purposes. Furthermore, the parties will agree on a design presentation, including 3D rendering of the Vessel and key vessel information which can be used by both parties when presenting the vessel to third persons.

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[3] The Client may disclose relevant documentation only to its suppliers and employees on a need to know basis. The Client is not entitled to send or make available the General Arrangement and/or Building Specification as a complete document to a third party, including any suppliers, but excepting the Yard, without the prior approval of the Designer.”

112. In paragraph 9a of the draft Amended Particulars of Claim, Salt pleads that:

“9a. Pursuant to the second paragraph of clause 6.4 of the Contract, both parties acknowledged that the confidentiality of the proprietary design solutions was of utmost importance. In the premises, an obligation of confidentiality on Prysmian arose under the Contract in relation to the design solutions that remained the intellectual property of Salt under the first paragraph of clause 6.4”

113. In paragraph 9b Salt pleads that:

“9b. The second paragraph of clause 6.4 further gave rise to an obligation on Prysmian not to disclose or otherwise use any know-how or documents setting out the design solutions devised by Salt within the Scope of Work under the contract and based on input provided by Prysmian (the ‘Restricted Know-How’).

Examples of Restricted Know-How include the confidential General Arrangement and Building Specification documents produced by Salt under Phase 1 and 2 of the Contract.”

114. Mr Byam-Cook submitted that clause 6.4 of the Contract distinguished between two concepts, namely:

- i) “Proprietary design solutions i.e., solutions which belong to [Salt] because for example it might have a patent in respect of them”, and
- ii) “Documents describing design solutions based on input provided by [Prysmian] i.e. documents created as part of [Salt’s] collaboration with [Prysmian]”, with Salt not owning these documents because they were the fruits of the collaboration between Salt and Prysmian.

115. Mr Byam-Cook said that this distinction was recognised in paragraphs 9a and 9b of the draft Amended Particulars of Claim, but that the statement of case defined Restricted Know-How to mean the second of these and therefore related to material that Salt did not own. It was only this Restricted Know-How that was alleged in paragraphs 32 to 40 of the draft Amended Particulars of Claim to have been misused.

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116. Mr Byam-Cook further pointed out that the obligation alleged to have been breached was that set out in paragraph 9a of the draft Amended Particulars of Claim not that alleged in paragraph 9b. He said that further confusion arose because in paragraph 9c of the draft Salt had drawn a distinction between Restricted Know-How on the one hand and its intellectual property on the other:

“9c. The Restricted Know-How and the intellectual property rights vested therein are the property of Salt, pursuant to the first paragraph of clause 6.4.”

117. The proper construction of the Contract is ultimately a matter for trial, but I am not persuaded by any of these points. The second paragraph of clause 6.4 of the Contract obviously has to be read in the context of the first (and paragraph 9a of the draft Amended Particulars of Claim refers to them both) and, of course, in the context of the Contract as a whole.

118. I do not consider for the purposes of this application, as Mr Byam-Cook suggests, that the language of the second paragraph of clause 6.4, draws a distinction between two concepts, or that Salt has wrongly failed to recognise such a distinction in its proposed amended pleading:

- i) The first paragraph of clause 6.4 recognises Salt’s interest in its design, data, documents and know-how and intellectual property – what is described in the second paragraph as the “proprietary design solution”;
- ii) The second paragraph goes on to explain that no documents describing design solutions – inevitably those provided by Salt, because it is identified in the Contract as the “exclusive designer” – based on input provided by Prysmian relating to certain matters can be made accessible to third parties without both Salt’s and Prysmian’s prior consent.

What was thus protected from disclosure without Salt’s prior consent was, in shorthand, the confidential information embedded in Salt’s proprietary designs. It is, in that respect, no different to Vard’s confidential technical know-how which Mr Byam-Cook said in paragraph 5 of in his skeleton argument for the case management conference was contained in Vard’s designs and should be protected through the Confidentiality Club process.

119. No doubt other phrases could have been used in the draft Amended Particulars of Claim than “Restricted Know-How” to describe that part of any proprietary design solution created by Salt which is protected by the first paragraph of clause 6.4; but the phrase will, in my judgment, do perfectly well. Equally, I do not regard it as inaccurate to say that it is the obligation of confidence pleaded in paragraph 9a of the draft pleading, which refers to both the first and second paragraphs of clause 6.4, which Prysmian is alleged to have breached.

120. Paragraph 9c of the draft refers to “the Restricted Know-How and the intellectual property rights vested therein”; it is not drawing a distinction between Restricted Know-How and intellectual property, rather it is saying that Salt has rights to the intellectual property vested in the Restricted Know-How.

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121. The second aspect of Mr Byam-Cook’s complaint about the breach of confidence claim concerns the allegation of breach as to which he says that the draft pleading fails to particularise what specific pieces of confidential information Prysmian is alleged to have misused in relation to the Vard vessel.
122. This complaint is, in my judgment, unjustified. Paragraph 37 of the draft Amended Particulars of Claim alleges that Prysmian and Vard have combined to misuse “the Restricted Know-How in the interim and final designs of the Vessel”, that Restricted Know-How being, as previously defined, the design solution devised by Salt within the Scope of Work.
123. The draft Amended Particulars of Claim plead that Prysmian’s and Vard’s misuse of Salt’s designs can be inferred from a number of facts:
- i) Vard had itself tendered for the design of the vessel back in 2017, but its tender had been rejected in favour of Salt’s tender and design;
 - ii) Vard was apparently able to produce its own allegedly alternative, design in a short space of time; by 13 April 2018, a little over a month after the conclusion of the LOI and only three or so months since Salt’s Phase 1 and 2 designs had been provided to it at the start of 2018, Vard had produced the eighth draft of a GA plan. In circumstances where Salt itself had taken nearly a year to reach the stage it had, Salt infers that Vard can only have proceeded as quickly as it did by using Salt’s designs;
 - iii) The links in the LOI to which I referred in paragraph 20 above.
124. The draft Amended Particulars of Claim, furthermore, does not simply rely upon inference. In paragraph 36, Salt pleads by reference to the disclosed GA plan that Vard’s design contains a significant number of material similarities to Salt’s designs. Pending disclosure or the provision of further information, some six specific features are identified. I accept the submission made by Mr Austen that the presence of each of these features cannot be taken in isolation; it is the combination, and the coincidence of the combination, of them in Salt’s design and in Vard’s design that is important.
125. As Mr Austen observed in argument, in paragraph 65 of her witness statement, Ms Midwinter said (on the basis of information from Vard’s lawyers) that:
- “Vard did not start with Salt’s concept design and then adapt it. That was not necessary or what was agreed.”
- She notably did not say that Vard had not incorporated features of Salt’s design in its own design in order, as the LOI described it, that its Alternative Design fully met Prysmian’s requirements and expectations as set out in the tender document, which was, of course, based on Salt’s design.
126. For these reasons, I reject Prysmian’s complaint that Salt’s proposed breach of confidence claim is not properly or sufficiently pleaded. As I indicated earlier, in my judgment Prysmian knows very well the case it has to meet.

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It is the case in relation to which Salt has sought comfort and has sought to reserve its rights ever since Prysmian decided in March 2018 that it would proceed with the construction of a cable laying vessel without Salt.

127. I also reject the submission that the breach of confidence claim is a claim which has no real prospect, or insufficient prospect, of success.
128. As I have indicated earlier, I accept that the consequence of granting permission to Salt to make the proposed amendment would be that the January 2020 trial date would have to be put back, and that the amendment can, therefore, regarded as very late. I also accept that, this being so, it is appropriate to scrutinise the amendment with care and to consider whether the case proposed to be made is of sufficient strength that it should be allowed to go forward.
129. There is, however, no fixed, precisely-defined higher threshold that has to be met in the case of very late amendments; rather, the strength of the case has to be considered together with other relevant factors: lateness, and the consequences that might flow from that, which may depend upon exactly how late the amendment is, and prejudice, both to the opposing party and to the general public interest in the efficient and proportionate disposal of proceedings.
130. Whether or not the proposed new claim for breach of confidence will ultimately succeed is a matter for trial. For the present, all I need say is that I am satisfied on the basis of:
- i) The recitals to the LOI;
 - ii) The apparent speed with which Vard is alleged to have been able to develop its own design for the vessel, whether a matter of a few weeks or a few months; and
 - iii) The pleaded similarities between the Salt design and the Vard design, explained in Ms Chyb's two witness statements,

that the case is one that has reasonable prospects of success, and that, when considered together with the other matters mentioned in paragraph 129 above, it is of sufficient strength that it should be allowed to go forward.

131. I bear in mind in addition to the matters identified in paragraph 130 above that all of the documents that might show how Vard's design came to be prepared, and whether and to what extent it used Salt's design, are likely to be in Prysmian's and Vard's possession and that so far, save for a small number of documents, Prysmian has refused disclosure. It is not surprising in such circumstances that Salt's case depends in part on inference.

Unlawful means conspiracy

132. Mr Byam-Cook's principal attack on the proposed unlawful means conspiracy claim was upon the adequacy of, and the evidence to support, the plea of intent on the part of the supposed conspirators, Prysmian, V. Delta and Vard.

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133. Mr Byam-Cook’s pleading point was that there was no pleaded allegation of intent on the part of Vard at all. But this is wrong:
- i) Paragraph 43 of the draft Amended Particulars of Claim alleges that:

“Further, in or around February 2018, the precise date being unknown, Prysmian, V. Delta and/or Vard combined with intent to injure Salt by unlawful means”.

That is, in itself, an allegation that Vard possessed the requisite intent;
 - ii) Insofar as particulars of that allegation were required, paragraph 43 of the draft pleads that:

“The intent to injure Salt is inherent in the nature of the acts pleaded above, in particular from the requirement that Vard base its further design work on Salt’s design of the Vessel and thereby using the Restricted Know-How.”

So, it is said that the nature of the acts pleaded earlier, viz., misusing Salt’s design and proceeding with Vard as the designer instead of Salt, was such that injury to Salt was inevitable and could thus be inferred. That does not seem to me to be an unreasonable inference, although ultimately the matter is one for trial;
 - iii) It should be borne in mind in this context that the tort of unlawful means conspiracy does not require that the predominant intention of the conspirators is to injure the claimant: see *JSC BTA Bank v Khrapunov* [2018] UKSC 19 at [13] per Lords Sumption and Lloyd-Jones. Or that each conspirator had exactly the same aim in mind: see *Civil Fraud, Law and Practice*, paragraph 2-121.
134. Paragraphs 44 and 45 of the draft Amended Particulars of Claim plead additional particulars of intent on the part of Prysmian and V. Delta (but not Vard).
135. Paragraph 44 pleads that intent on the part of Prysmian and V. Delta can be inferred because they had particular knowledge of the process of design of the vessel, having worked with Salt on Phases 1 and 2 and, it is inferred, with further ship designers and ship-builders prior to the Project. It relies upon their awareness of five specific matters:
- i. Vard did not have the knowledge to design the Prysmian New Build cable laying vessel de novo in the time reasonably available;
 - ii. Prysmian had already received outline designs for the Vessel from Vard in early 2017 as part of the tender for the design work (which was eventually won by Salt) and had rejected such designs as inadequate and insufficient;

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- iii. Vard had subsequently offered to carry out the design work for the Prysmian New Build cable laying vessel at a price that did not properly account for the effort and cost of creating, developing and refining such a design from the start;
- iv. Vard was required to use the Restricted Know-How to take the existing design of the Vessel through the following Phase 3 and 4 design stages;
- v. It was highly undesirable that the extensive design work already carried out by Salt would be disregarded, and Prysmian wished Vard to develop Salt's design based on the Restricted Know-How."

136. Paragraph 45 pleads that an intent to injure can further be inferred because of the financial incentive to use Vard for design work rather than Salt, an incentive it says can be demonstrated by three matters (the bold type appears in the original):

- "i. The significantly lower price charged by Vard to Prysmian to carry out the design work for the Vessel. Paragraphs 39 and 44(iii) are repeated;
- ii. The increased fees and/or commission that it is inferred were chargeable by V. Delta to Vard for the procurement of both the shipbuilding and design services from Vard. Such fees and/or commission (payable to V. Delta's affiliate, MARCAS) were permitted by virtue of the general terms of engagement of V. Delta agreed with Prysmian dated 9 January 2017, being:

'10. GENERAL

In relation [sic] any procurement activities to be carried out by V. Delta hereunder, procurement shall be arranged by V. Delta as agent only for and on behalf of Prysmian and V. Delta shall be entitled to utilize the services of its associated company MARCAS International Limited, which negotiates with selected suppliers, including shipyards, the best available price, terms and conditions for the bulk purchase of goods and services for the marine industry **in respect of which MARCAS is entitled to fees and/or commission.**'

(emphasis added)

- iii. The Yards, which were shortlisted for construction and/or design of the Vessel were determined, at least in part, by their willingness to pay a substantial commission to MARCAS in respect of V. Delta's procurement services. In this regard, paragraph 11 is repeated."

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137. Mr Byam-Cook complains that Salt has offered no evidence to substantiate the existence, or Prysmian's and V. Delta's awareness of, the five pleaded facts in paragraph 44, and that the three matters pleaded in paragraph 45 are internally inconsistent and/or unsupported by evidence.
138. Some of the facts alleged in paragraph 44 do appear to be debatable, for example the allegation in paragraph 44(iv) that Vard was positively "required" to use Salt's Restricted Know-How. I do not consider that the express terms of the LOI go that far.
139. Prysmian does not help its cause, however, by misstating the allegations. In paragraph 60 of her statement, Ms Midwinter takes Salt to task for alleging that:
- "Vard lacked the requisite credentials to design a cable laying vessel"
- going on to give a number of examples of cable laying vessels that have been designed and/or built by Vard.
140. But that, with respect to Ms Midwinter, is not the allegation made; the allegation made in paragraph 44 i. is that Vard did not have the knowledge to design the Prysmian new build cable laying vessel:
- "... de novo in the time reasonably available",
- a reference, as I read it, to the comparatively short period of time that elapsed between the execution of the LOI and the date when Vard apparently produced revision 8 of the GA plan.
141. Some of the facts alleged, however, appear to be true at least in substantial part:
- i) It is true that Vard's original tender in early 2017 had been rejected; Ms Midwinter is very careful to say, on instructions from her client, that it was ruled out of the tender "primarily" because its pricing was less competitive; she does not say whether part of the reason was its proposed design;
 - ii) It is plain that the price at which Vard ultimately offered to carry out the design work (in conjunction with the construction) was significantly lower than that which would be charged by Salt; that was the essence of what was said by Prysmian itself in its 8 March 2018 email;
 - iii) The question that arises – the answer to which only Prysmian and Vard know but which is ultimately a matter for trial – is how Vard's lower price and its very speedy production of plans came about: was Vard able to put forward a lower price (obviously lower than the price in its own original tender, which had been rejected, and lower than Salt's price) because of the design work that Salt had done already and the documents that accompanied the invitation to tender;

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- iv) Ms Midwinter asserts in paragraph 62 of her statement, on the basis of information from Vard's lawyers, that V. Delta was not, in fact, paid a commission by Vard (she says that V. Delta was not paid a commission by Prysmian either) for the current project; but paragraph 6 of the Defence appears to accept that, whether authorised to do so or not, V. Delta did in fact seek such a commission from tendering yards;
 - v) Paragraph 44 (v) is not a matter that requires evidence but is, Mr Austen submitted, simply a matter of common sense.
142. In my judgment, although the currently pleaded case of intent depends substantially upon inference, which is unsurprising for the reasons previously explained, it cannot be said to be a case that has no reasonable prospect of success. Nor do I think, recognising that the proposed amendment is very late, that the apparent strength of the case is such that, weighed together with other matters, it should not proceed to trial.
- (iv) Prejudice, and the overall balance*
143. Salt's case as to the prejudice it would suffer if it were refused permission to make its proposed amendments, and the justice which it said demanded that permission should be given, was set out in paragraphs 60 to 63 of Mr Austen's skeleton argument.
144. The thrust of the argument is the usual one; Salt has viable claims for breach of confidence and for unlawful means conspiracy (and for exemplary damages) and justice demands that it should be allowed to bring them. In paragraph 60 of Mr Austen's skeleton argument, he said this:
- “60. Salt is a ship design business, and depends on proper protection of its intellectual property. Without the ability to bring claims (whether by amendment or otherwise) for infringement of that intellectual property, ultimately Salt's business will be steamrollered by the activities of far larger businesses such as Prysmian and Vard (Fincantieri).”
- He made the point that the claim for breach of confidence, in principle, makes available further and more extensive remedies than its existing claim, and that the conspiracy claim might succeed even though the currently pleaded contract claim did not.
145. As to the consequences that would flow from the making of these new claims, Mr Austen emphasised that, whilst the breach of confidence and unlawful means conspiracy claims were new, the facts upon which they depended, namely the similarities between Salt's and Vard's respective designs, the extent to which Vard had used Salt's designs, and more generally the circumstances in which Vard had come to replace Salt as designer were similar to, or substantially overlapped with the matters already in issue.
146. So, Mr Austen submitted, the additional burdens imposed by these new claims were limited. Any additional disclosure that was required in relation to the new claims was limited; there was no question of disclosure needing to be completely re-done.

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This was not a case, as sometimes occurs in relation to amendments made very close to trial, where the parties have, effectively, to start again and completely re-do disclosure and witness statements. Factual witness statements have not yet been served so there would be no wasted costs in relation to them.

147. Mr Byam-Cook's case as to the prejudice to his client largely relied upon the matters with which I have already dealt:
- i) The lateness of and the alleging delay in bring forward the amendment;
 - ii) The suggestion that the new claims were not properly or sufficiently pleaded;
 - iii) His submission about the merits of the new claims.

He also emphasised the serious nature of the new allegations, in particular the conspiracy claim. He relied upon the additional procedural steps required, in terms of additional disclosure and more extensive factual and expert evidence, and the impact of these matters on the trial date and the length of the trial. He also suggested that there was a real risk of costs escalating in a way out of proportion to Salt's realistic best claim. Mr Byam-Cook's principal submission (see paragraph 40 of his skeleton argument) was that:

“Given that this is a ‘very late’ amendment, the Claimant’s delays should be the predominating consideration and the application dismissed on this ground alone.”

148. I have considered all these matters carefully. Having done so, my conclusion is that, recognising that the proposed amendments are very late, this is nonetheless a case where, weighing all the relevant matters together and taking into account the overriding objective, permission should be granted to Salt to make the amendments.
149. I have reached this conclusion for the following principal reasons.
150. First, as I have indicated, I accept that the amendments, if allowed, would require the January 2020 trial to be vacated and are therefore to be categorised as very late.
151. Secondly, however, this is not one of those cases where the amendments are made at or close to the start of the trial and where the prejudice to the opposing party and to other litigants is extreme. They are amendments that have been put forward when the trial is still six months away, where there remain issues as to disclosure, and where factual witness statements have not yet been served. This is not a case where substantial costs are likely to be thrown away.
152. Nor, thirdly, is it a case where, adopting the phraseology used in the extract from *Worldwide* cited by Lloyd LJ in *Swain-Mason* (see paragraph 58 above) Prysmian can complain that it is being totally “mucked around” at the last moment.
153. Salt has always made clear that it considers that Prysmian is not entitled to use its design work, and Prysmian, both itself and through its solicitors, has confirmed that it does not intend to do so. Salt has repeatedly reserved its rights to protect its intellectual property if it emerges that it has been misused.

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Through the process of disclosure in this case, Salt considers it has emerged that its intellectual property has been misused, and it now wants to seek appropriate relief. Justice requires, in my judgment, that it be allowed to do so. I have already explained that I consider that the apparent strength of the new claims is such that they should be allowed to go forward.

154. Fourthly, although I accept that the new claims will involve a certain amount of disclosure and evidence beyond that already required, there is a substantial overlap between the issues raised by the new claims and those already in issue as reflected in paragraph 15 of the List of Issues. The paragraph 15 issues will have to be addressed at trial already, and it is plainly sensible and consistent with the overriding objective that the new claims be dealt with at the same time.
155. Fifthly, although the expanded case cannot, in my judgment, be ready to be tried on the currently fixed date in January 2020, the additional period of time required is comparatively modest. Ms Midwinter said in paragraph 88 of her witness statement that the earliest that the parties could now be ready for trial would be May 2020. I agree that this case should be capable of being ready for trial by then. The delay involved is, therefore, in the order of three to four months. The listing office has already confirmed that a trial with a longer estimate of 6-8 days, which I think is realistic, can be accommodated in May.
156. Sixthly, in circumstances where the January 2020 date is still almost 6 months away, the prejudice and disruption to other litigants and to the administration of justice is likely to be limited. Late adjournments can cause court and judicial resources to be wasted, but at this distance I would expect that the slot that was reserved for Salt and Prysmian can be made available to other litigants.
157. Undertaking the balancing exercise that is required, and taking into account the overriding objective, I have therefore decided that permission to amend should be granted.

Conclusion

158. Permission to make the amendments contained in the draft Amended Particulars of Claim exhibited to Ms Chyb's first witness statement is granted.
159. The trial currently fixed to commence on 14 January 2020 with an estimate of 4-5 days should be vacated. It should be re-fixed to take place on a date not before 4 May 2020 with a longer estimate of 6-8 days (including 1 day of pre-trial reading time).
160. As indicated above, directions will be needed to take this matter forward. I consider that directions should be made now for service of an Amended Defence and an Amended Reply. I would invite the parties to agree these dates. Directions thereafter are, in my judgment, best left to a further case management conference, which I consider should be fixed for a date reasonably early in the Michaelmas term.
161. The directions at that stage will include the further disclosure required in relation to the new issues, but any disputes in relation to the disclosure already given should be resolved at that time.

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Any necessary application(s) should be served well in advance of the case management conference, and the hearing estimate should allow sufficient time for any such application to be dealt with.

162. I invite the parties to agree an order that reflects this judgment. I would hope that any disputes in that regard, and also in relation to the question of costs which I reserve, can be dealt with on paper; but if that is not possible, I will hear argument when this judgment is handed down.