



Neutral Citation Number: [2019] EWHC 3369 (Ch)

Case No: HC-2016-001872

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 06/12/2019

Before :

**MR JUSTICE ZACAROLI**

Between :

(1) BLUE POWER GROUP SARL

(2) BLUE WAVE CO SA

(3) BLUE MGMT LTD

- and -

(1) ENI NORGE SA

(2) ENI SPA

(3) ENIPROGETTI SPA (FORMERLY  
KNOWN AS TECNOMARE SPA)

**Claimants**

**Defendants**

-----  
-----  
**Andrew Twigger QC and Jonathan Allcock** (instructed by **Stephenson Harwood LLP**) for  
the **Claimants**

**Fionn Pilbrow QC, Philip Roberts QC and Richard Eschwege** (instructed by **Herbert Smith  
Freehills LLP**) for the **Defendants**

Hearing dates: 26 and 27 November 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.

.....  
MR JUSTICE ZACAROLI

**Mr Justice Zacaroli:**

1. This judgment addresses the following applications made at a directions hearing on 26 and 27 November 2019:
  - i) The claimants' application to amend the re-re-amended particulars of claim.
  - ii) The defendants' application to strike out certain aspects of the claim.
  - iii) The defendants' application for specific inspection of a USB stick in the possession of the claimants containing two documents over which the defendants claim privilege.
  - iv) The costs of a number of applications.
2. The claimants are associated companies who formerly conducted business of research, development and engineering of technologies in the energy sector. The defendants are an Italian oil multinational and two of its subsidiaries.
3. These proceedings arise out of a project relating to the potential transportation of compressed natural gas ("CNG") from an oil and gas field in the Barents Sea known as "Goliat". The first defendant is the operator and majority (65 per cent) licence-holder for Goliat; the minority (35 per cent) licence interest is held by the Norwegian oil company now called Equinor but formally known as "Statoil".
4. In summary, the claimants claim against the defendants: (1) alleged breach of exclusivity obligations as a result of the defendants' engagement of third parties to work on the CNG project at Goliat; (2) alleged breaches of an obligation to use best endeavours to obtain the consent of Statoil to the continuation of the CNG export project; (3) alleged breaches of obligations of confidentiality in relation to various matters, including the claimants' "tariff model" tool; and (4) alleged infringement of database rights in respect of the claimants' tariff model tool. I will refer to the claims for breach of confidence and infringement of database rights in respect of the tariff model tool as the "Tariff Model Claims".

**The Amendment Application**

5. The claimants applied to make a number of amendments to the claim, most of which have been consented to by the defendants. Those that remain in dispute concern the claimants' intention to rely upon a document which was recently sent anonymously to the defendants and, subsequently, to the claimants (the "Document").
6. The Document purports to be a hard copy of a chain of six emails. The first two, chronologically, in the chain comprise an email from Mr Forzoni (of the defendants) dated 30 September 2013 and a reply from Oystein Michelsen (of Statoil) dated 2 October 2013 (the "Forzoni/Michelsen Exchange"). In the next email in the purported chain (dated 4 October 2013) Mr Forzoni forwarded the Forzoni/Michelsen Exchange to Mr Descalzi (of the defendants). Mr Descalzi responded, copying in others on 5 October 2013. I will refer to this as the Forzoni/Descalzi Exchange. The remaining two emails consist of the Forzoni/Descalzi Exchange being forwarded

further to others, including one, Mr Salvo Carollo, who was retained as consultant by the claimants.

7. It is common ground that emails containing the substance of the Forzoni/Michelsen Exchange exist. The defendants have disclosed hard copies of such emails in this action. Moreover, the defendants have recently had access to Mr Forzoni's hard drives and have recovered what purport to be the electronic version of the Forzoni/Michelsen Exchange, in precisely the same terms as the hard copy versions previously disclosed by them. The version of the Forzoni/Michelsen Exchange that appears in the Document is, however, different in crucial respects to the versions (hard and soft) that the defendants have previously disclosed. The differences include (1) the mis-spelling of "Oystein" in the disclosed versions, corrected in the Document; (2) the mis-spelling of "sincerely" in the Document, whereas it is spelt correctly in the disclosed versions; and (3) an additional space being added between "P.O." and "Box" in the Document.
8. The defendants have not disclosed any of the other four emails purportedly identified in the Document (including the Forzoni/Descalzi Exchange). This is not surprising, according to the defendants, who maintain that no such emails exist.
9. The claimants seek to rely upon the Document for two purposes. The first is in connection with the "best endeavours" claim. They rely in this respect on the contents of the Forzoni/Descalzi Exchange. The (unofficial) English translation of that Exchange contains the following. Mr Forzoni wrote: "Excellent news, at long last! As agreed before the meeting, Statoil is formalising its refusal to join the FEED! This will allow us to free ourselves from Blue Power and the noose agreement. All that remains is to officialise the proposal at the next licence committee meeting and obtain Statoil's refusal. It is almost done!". Mr Descalzi responded by expressing delight that Statoil (in the Forzoni/Michelsen Exchange) rejected CNG as a solution for Goliat, and described Statoil as being "true to its word". The claimants seek to plead, partially in reliance on the Document, that the defendants deliberately persuaded Statoil not to consent to the continuation of the CNG project at Goliat. They continue to plead, in the alternative, that the defendants failed to use their best endeavours to persuade Statoil in this respect.
10. The claimants' second purpose in relying on the Document is in relation to the Tariff Model Claims. They rely upon the following wording (again, in the unofficial English translation): "At this point, *with the model obtained from their one*, the patent applications and the research line started in ANG, we are completely autonomous, we do not need them again" (emphasis added).
11. The defendants object to these amendments on the ground that the Document is an obvious fake. They contend that it cannot be what it purports to be (namely a forwarding of the Forzoni/Michelsen Exchange), given the critical differences between the version of the Forzoni/Michelsen Exchange in the Document and the version in the disclosed documents. They contend that I can determine that point now, since no further evidence could realistically emerge prior to or at trial going to the authenticity of the Document.
12. In relation to the best endeavours claim, the defendants have agreed to the amendments which plead that they deliberately dissuaded Statoil from agreeing to the

CNG project. The Document is pleaded as merely one of six matters from which that conclusion is to be inferred.

13. In relation to the Tariff Model Claims, on the other hand, the Document is now the only fact pleaded from which the inferences of breach of confidence and infringement of database rights is drawn. Even if the claimants are permitted to plead the Document, the defendants contend that the Tariff Model Claims should be struck out. I address that aspect further below.
14. The claimants accept that (in all but one case - that is paragraph 43I of the proposed re-re-re-amended particulars of claim) they do not need to plead the Document, or to rely on it as evidencing the forwarding of the Michelsen emails. The essential facts upon which they rely are the statements made in the Forzoni/Descalzi Exchange emails purported to be revealed by the Document.
15. Mr Pilbrow QC, for the defendants, submits that the claimants cannot overcome the problem that the Document is a fake by the simple expedient of pleading only the statements made in the relevant emails. In those circumstances, he says, the defendants would be entitled to call for the production of the emails. When (as would inevitably be the case) the claimants produced the Document, and nothing else, Mr Pilbrow submits that the defendants could then apply to strike out the pleading on the basis that since the Document is a fake the claim would be bound to fail.
16. The applicable test, it is common ground, is to be found in *Elite Property Holdings v Barclays Bank plc* [2019] EWCA Civ 204, at [41] to [42]:

41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.

42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon.”

17. Mr Pilbrow accepts that the hurdle is a high one. Notwithstanding the force of the argument, attractively presented, by Mr Pilbrow, I consider that the hurdle is on this occasion too high, for the following reasons.

18. First, and most importantly, assuming in the defendants' favour that the Document cannot be a genuine forwarding of the Forzoni/Michelsen Exchange, that does not in itself preclude it being a copy of a genuine exchange of the emails comprising the Forzoni/Descalzi Exchange. In other words, it is possible that the fakery lies in the apparent connection between the Forzoni/Michelsen Exchange and the remainder of the emails. One thing that is certain is that the conclusion that the Document is a fake is not inconsistent with the existence of genuine emails containing the statements revealed by the Forzoni/Descalzi Exchange. It is not wholly fanciful, therefore, that one or more of the other emails is also a copy of, or a copy of parts of, other genuine emails. The likelihood of such a conclusion is tempered by the fact that it would, at the very least, call into serious question the defendants' disclosure exercise carried out to date (since no copies of any of the emails in the Document, other than the Forzoni/Michelsen Exchange, have been disclosed by them). At worst, it would prove dishonest concealment by the defendants. At this stage of the proceedings, however, before any witness statements have been exchanged and therefore any witnesses' evidence has been tested in cross-examination, that does not provide a reason to deny the amendment being made.
19. Second, the claimants have not so far investigated the meta-data of the emails located on Mr Forzoni's hard drives. In advance of that being done, it cannot be wholly ruled out that the documents on his hard drives are themselves modified from the versions that are contained in the Document. In other words, it remains more than fanciful that the Document is a genuine forwarding of emails, and that the already disclosed versions are not the original versions.
20. Third, it is not correct to say that there can be *no* additional evidence on this at trial. Leaving aside the meta-data point (which is probably capable of being resolved relatively quickly) various of the people implicated in the purported email chain are likely to be giving evidence at trial. Their reaction in cross-examination to the Document or the contents of one or other of the emails purportedly revealed by it is potentially relevant evidence.
21. For these reasons, I am not persuaded that I should disallow the amendments sought to be made by reference to the contents of the Document.
22. I add that the claimants relied on the fact that certain of the emails in the Document referred to events which actually happened, as corroboration of the authenticity of the Document. I consider this to be of little weight, however, given that it is equally likely that someone set on creating fake evidence would have included such contents in order to give a greater appearance of authenticity.

### **The Strike-out Application**

23. Among the re-re-re-amendments to the particulars of claim to which the defendants have agreed (without prejudice to their strike-out application) is the deletion of large swathes of the original pleading of the Tariff Model Claims. Those claims were previously pleaded with sufficient particularity that the defendants accepted they were not susceptible to being struck out.
24. The claimants have, however, voluntarily deleted those particulars, thus expressly (or at least implicitly) recognising that they could not establish those matters at trial. In

place of those particulars, reliance is now placed solely on the Document. More precisely, reliance is placed solely on the words “*with the model obtained from their one*” in the Forzoni/Descalzi Exchange. The claimants contend that these words give rise to the inference that the defendants developed their own tariff model by misusing confidential information and/or infringing database rights belonging to the claimants in their own tariff model. They are unable, however, to provide any particulars as to which of their models were copied or which if any of the models developed and used by the defendants were the product of such copying.

25. The claimants accept that following these amendments there is now no properly pleaded case in respect of the Tariff Model Claims. The defendants pointed out, in their skeleton, the numerous deficiencies in those claims (both as regards breach of confidence and infringement of database rights). It is unnecessary for me to address those deficiencies, however, given the claimants’ acceptance that the re-re-amended pleading does not disclose a sustainable cause of action.
26. The claimants contend, however, that the pleading should not be struck out, but that the Tariff Model Claims should be stayed so that they will be dealt with, if at all, after the conclusion of the main trial, after all other issues have been determined. Mr Twigger QC, who appears for the claimants, submits that if it turned out at trial that the Document is genuine, then it would follow that the defendants have been guilty of serious wrongdoing and concealment, including but not limited to the failure to disclose the Forzoni/Descalzi emails and any and all of the defendants’ own tariff models which they had developed by copying the claimants’ models. It would be unfair, it is said, in those circumstances that the claimants would have been deprived (by the striking out of the claims) of the opportunity to pursue claims in respect of that wrongdoing.
27. The claimants recognise that the option of applying for a stay arises solely from the peculiarity that the authenticity of the Document will be (or is at least likely to be) in issue at the trial, as a result of the claimants’ success on the amendment issue relating to the best endeavours claim. Mr Twigger QC submits that there are only two possibilities in that respect.
28. The first is that the Document is found at trial to be a fake. In that case, the Tariff Model Claims will disappear, because the only evidential foundation for them (the Document) will have been removed. In that eventuality there would be no prejudice to the defendants.
29. The second possibility is that the Document is found to be genuine, in which case Mr Twigger submits that the unfairness I have outlined above would arise. In fact, however, I note that this second possibility would require a lot more than a simple finding that the Document is genuine. A finding that the Document was genuine would lead only to the conclusion (so far as is relevant to the Tariff Model Claims) that Mr Descalzi had used the critical words contained in the email of 5 October 2013 (“*with the model obtained from their one*”). The claimants would need to establish significantly more – not least that these words had the meaning for which they contend – in order to prove that the defendants had indeed developed a model by copying from the claimants’ model or models. That alone would still not plug the admitted gaps in the claimants’ pleading of the Tariff Model Claims (for example, identifying what confidential information was acquired by the defendants, to what

extent it was used, if at all, in developing their own models, and identifying sufficient extraction or re-utilisation so as to constitute infringement of a database right).

30. The parties are agreed that the question whether the Tariff Model Claims should be stayed, rather than struck out, is essentially a case management decision. CPR 1.4(2) provides that active case management includes deciding which issues can be disposed of summarily, deciding the order in which issues shall be tried, and dealing with as many aspects of the case as it can on the same occasion. The claimants' application for a stay is properly characterised as an application that there be a preliminary issue of all of the issues, but for the Tariff Model Claims, with the Tariff Model Claims being determined at a subsequent trial.
31. The defendants referred me to the ten considerations that Neuberger J said, in *Steele v Steele* [2001] C.P. Rep 106, should be taken into account on such an application. These include asking whether the determination of the preliminary issue would dispose of the case or at least one aspect of the case (whichever of the parties succeeds), whether the determination of a preliminary issue may unreasonably fetter either or both parties or, indeed, the court, in achieving a just result, and to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. The overriding question is whether, taking into account all factors, it is just to order a preliminary issue.
32. In this case, the principal objection to directing that the Tariff Model Claims be determined subsequently to the main trial is that the determination of those claims will lead to substantial duplication in terms of both documentary and oral evidence. In particular, many of the witnesses involved in the main trial will have to be involved again in the second trial. The cost to both sides of splitting the trial in this way would be substantially greater than if the Tariff Model Claims were to be determined at the main trial.
33. As against this, it is important to consider the prejudice to the claimants. The claimants contend that it would be unfair if it was established at trial that the Document was genuine, but then they were unable to pursue the Tariff Model Claims which sprung from it. That needs to be balanced against the fact that, notwithstanding that there has been very extensive disclosure in this action, the claimants have been unable to identify *any* example of a model created by the defendants on the basis of which they could sustain a pleading that its contents, or part of them, had been copied from any model created by the claimants.
34. The claimants point to the fact that the search terms "model" or its Italian equivalent were applied only to documents in the possession of two custodians, and only over a limited date range. That ignores the fact, however, that the relevant models were limited to those concerning CNG and that the search term "CNG" was used for all custodians and over the whole period from 2008 to 2015. The defendants have indeed - by this route - disclosed versions of their own tariff models as late as 2013 and 2014. While I accept that comparing one model with another, to try to find evidence of copying sufficient to support a case in breach of confidence or infringement of a database right, is not a straightforward task, the claimants have had assistance from an expert for many months. It is with the benefit of that expert assistance that they have come to the conclusion that there is nothing in the models disclosed by the defendants

that supports a sustainable cause of action in breach of confidence or infringement of database rights.

35. In reality, if the claimants were to establish at the first trial that the Document evidences emails that were actually sent and that the critical words relied on in the Forzoni/Descalzi Exchange indeed referred to a CNG tariff model or models developed by the defendants which was copied from the claimants' model or models then, as I have indicated above, the claimants will likely have established serious, widespread and fraudulent concealment on the part of the defendants. Mr Roberts QC, for the defendants, accepted that in such circumstances, the claimants would in all likelihood be permitted to commence new proceedings, even if the Tariff Model Claims were struck out.
36. I asked Mr Twigger what the claimants' position would be if the only causes of action sought to be advanced were the Tariff Model Claims. In that event, a stay would not be an option, because the claimants could not depend upon the authenticity of the Document being determined in another trial. He suggested that in those circumstances he would probably be seeking determination of the authenticity of the Document as a preliminary issue. Whether such an application would succeed if the only claims advanced were the Tariff Model Claims is irrelevant. No such application is made in this case, where the question of the authenticity of the Document is closely bound up with other issues already raised in the action, and would present the same problems, as to duplication of witnesses who are otherwise required to give evidence at the trial.
37. Overall, taking into account the above factors, I conclude that the additional burden, in terms of duplication of documents, witnesses, cost and court time (including in this respect the burden on other court users), of splitting the trial does not justify making the order sought by the claimants. For those reasons, and in view of the fact that the stay application was the only substantive argument raised against the strike-out application, I accede to the application of the defendants to strike out the Tariff Model Claims.

### **The Specific Inspection Application**

38. This application arises out of an order that I made on 20 December 2018 upon an application by the defendants for *Norwich Pharmacal* relief. Part of that application related to documents – accepted as being at least arguably subject to legal professional privilege of the defendants – dating from the time when the parties were working together on the CNG project and which had been discovered within the claimants' documents. The other part of the application related to two documents (referred to as the "HSF Documents") which post-dated the commencement of this action, which were accepted to be subject to the legal professional privilege of the defendants, and which were found on a USB stick in the possession of the claimants.
39. I refused to make a *Norwich Pharmacal* order in relation to the bulk of the application. In relation to the HSF Documents, however, I made the following order:

“As regards the HSF Documents USB Stick:



(1) The Claimants shall instruct Wikborg Rein (employing, if they consider it necessary, external IT support) to provide to Stephenson Harwood:

(a) Copies (including metadata) of all of the documents on the HSF Documents USB Stick, except for (i) the HSF Documents and (ii) any In-House Lawyer Documents located on the HSF Documents USB Stick (together “the Excluded Documents”);

(b) A list of the Excluded Documents which are on the HSF Documents USB Stick, provided that instead of using the filenames of such documents the list shall use the placeholders “*HSF Document 1*”, “*HSF Document 2*” and “*Other Privileged Document [1, 2, 3, etc.]*” as appropriate;

(c) A description of and, insofar as practicable, an extracted version of all metadata recoverable from the HSF Documents USB Stick itself (but not the metadata from the documents on it, save as provided for in (a) above);

(d) A description of the folder structure (if any) on the HSF Documents USB Stick and of the locations of the files within that folder structure (using, for the purposes of such description, the same placeholders for the Excluded Documents as described in (b) above);

(e) Photographs of the exterior of the HSF Documents USB Stick.

(2) The Claimants shall, by 4pm on 25 January 2019, inform the Defendants whether they have any objection to the Defendants inspecting the HSF Documents USB Stick and/or anything on it, giving particulars of the basis of, and the nature and scope of, the objection.

(3) If no such objection is made, then the Claimants shall instruct Wikborg Rein to make the HSF Documents USB Stick available at their offices in London, on a date within 7 days thereafter, for a period of ten hours during one day, so that it can be inspected by solicitors from Herbert Smith Freehills, acting for the Defendants, and/or IT personnel instructed on behalf of the Defendants, on the following terms:

(a) For the avoidance of doubt, the provisions of CPR 31.22 shall apply to the HSF Documents USB Stick and its contents (and Herbert Smith Freehills shall draw the attention of these provisions to any external IT personnel engaged by them in this context); and

(b) A solicitor from Wikborg Rein shall be present during the said inspection, provided that no information regarding the

content of any Privileged Documents may be divulged by Wikborg Rein to SH or the Claimants.

(4) If an objection is made, then the parties shall use their best endeavours over a period of 14 days thereafter to reach agreement regarding the objection and the appropriate course of action, to be embodied if possible in a consent order. If no such agreement has been reached by the end of that period, each party shall have permission to make an application seeking further directions from the Court.”

40. Following the making of that order, the parties began to comply with its terms. Throughout the early part of 2019 the defendants reiterated the urgent need to obtain inspection of the USB stick so that they could locate the source of the leak of the HSF Documents. The USB stick having been reviewed by Wikborg Rein, the claimants objected to its inspection by the defendants on the grounds that it contained a number of privileged documents. The parties then engaged with the obligation in paragraph 1(4) of the Order to use best endeavours to reach an agreement on the appropriate course of action.
41. This culminated in the claimants sending to the defendants, on 29 March 2019, a draft order which would enable the defendants to inspect a copy of the USB stick for a period of 10 hours at the offices of Wikborg Rein. At that time, the only point of objection by the defendants was as to the limited time they were allowed for inspection.
42. There was, however, following receipt of that draft order, no further progress made by the parties on this issue. There was in fact no substantive response at all from the defendants until October 2019.
43. In the meantime, at the end of January 2019, the claimants had informed the defendants that a key individual providing instructions on behalf of the claimants, Mr Nettis, was seriously ill. In the event, Mr Nettis’ illness led to a lengthy hiatus in these proceedings, with no substantive progress being made and no hearings taking place until November 2019, and to the vacating and relisting of the trial, first to April 2020 and subsequently to November 2020.
44. Prior to the receipt of the draft order on 29 March 2019, however, the defendants had made the point that Mr Nettis’ illness should not hinder progress being made in relation to inspection of the HSF Documents. That turned out to be true, given that the claimants were indeed able to offer inspection in the terms of the draft order of 29 March 2019.
45. The only evidence as to the reasons why the defendants failed to respond to the draft order of 29 March 2019 until October 2019 is that contained in the fourth statement of Andrew Moir (a partner at Herbert Smith Freehills LLP). He said that, by the end of March 2019, the process by which inspection could be ordered was “all but agreed, when this issue, in common with all other issues between the parties ‘went on ice’”. He then said that “now the litigation has revived, the Defendants have returned to the point, and sought to give effect to the agreement reached and to carry out the inspection ordered.”

46. If this evidence is intended to justify the defendants' inaction by reference to Mr Nettis' illness, then it plainly does not, for the reasons I have set out above. The most that can be said is that the defendants decided, at a point in time when the action itself "went on ice", that they would not pursue the point.
47. The claimants object to the point now being revived. They contend that by their inaction the defendants have effectively abandoned their application for inspection of the USB stick. Moreover, they contend that the revival of the point, at a time when the Document (containing the Forzoni/Descalzi Exchange) had surfaced, was a cynical attempt to embark on a fishing expedition to try to discredit Mr Nettis.
48. The defendants counter this by contending that they have an absolute right under CPR 31.3 (which is not dependent on the order made in respect of the *Norwich Pharmacal* application) to inspect the USB stick, because it is a disclosed document. The claimants accept that it is a disclosed document, but maintain that the court has a discretion as to whether to permit inspection: see *Derby v Weldon (No.9)* [1991] 1 WLR 652, per Vinelott J. This case was decided under the former regime relating to discovery, but Mr Pilbrow, for the defendants, accepted that the court did indeed retain a discretion as to whether to order inspection.
49. In considering the exercise of that discretion, it is important to note that the HSF Documents are not said to be relevant to any issue *in the action*. Inspection is not sought, therefore, for the purposes of the action at all. Instead, it is sought in order to help in identifying the person guilty of the wrongdoing (the leak of the HSF Documents) on which the *Norwich Pharmacal* application was based. That is, it is sought in relation to a separate potential action, against the wrongdoer if and when identified.
50. Accordingly, I decline to exercise the discretion so as to order inspection, in the action, in respect of the USB stick. The application is properly characterised as one that is made pursuant to the permission contained in my order of 20 December 2019. I am fortified in that conclusion by the fact that this is the basis of the application as expressed in the application notice.
51. I consider that the court has a broad discretion when considering what order it is appropriate to make, pursuant to paragraph 1(4) of the Order of 20 December 2019. That is because it arises in the context of enforcing a *Norwich Pharmacal* application, where – once the conditions for an order have been satisfied – the court has a discretion whether to make an order.
52. Had this issue arisen for determination in March 2019, then I have no doubt that it would have been appropriate to order inspection. The only objection taken by the claimants related to protection of privilege and, as demonstrated by their agreement to the terms of the draft order of 29 March 2019, that was capable of being addressed.
53. The question, therefore, is whether the defendants' inaction in pursuing inspection of the HSF Documents between the end of March 2019 and the beginning of October 2019 ought to disqualify them from making this application.
54. In my judgment, it should not. While delay would preclude the defendants from relying on urgency as a ground for seeking inspection, the purpose of the order of 20

December 2019 was to assist the defendants in identifying the source of the leak, and that remains the purpose of providing inspection. I do not accept that the lack of evidence of anything having been done by the defendants to track down the wrongdoer (whether by way of internal investigation or otherwise) since March means that they cannot continue to rely on the need to identify the source of the leak as a justification for obtaining inspection. At most it is a factor to be weighed in the balance.

55. On the other side of the scales, I consider that there is little, if any, prejudice to the claimants. So far as the expense of compliance is concerned, any prejudice has been removed by the defendants' offer to pay those expenses. The other ground of prejudice relied on by the claimants was that the defendants could use this as an excuse to make wide-ranging enquiries of the claimants, on the basis of matters discovered on the USB stick, in an effort to embarrass Mr Nettis in relation to other aspects of the proceedings, for example in relation to the authenticity of the Document. That, however, is not a course open to the defendants, given the express limitation in their proposed order, that they can make no use of matters discovered upon inspection of the USB stick save for the purposes of investigating the source of the HSF Documents.
56. Accordingly, I propose to grant specific inspection of the USB stick. As to the terms upon which it should take place, while the claimants cannot be held to the offer made in the draft order of 29 March 2019 (given that it was time limited for acceptance, and the time has long passed), I am satisfied that the procedure which had been all but agreed between the parties in March 2019 continues to be adequate protection of the claimants' privilege. I consider therefore that the terms of that draft order provide a fair balance between the interests of the parties.

### **The Costs of Abandoned or Struck-out Causes of Action**

57. The claimants accept that they should pay the costs of and occasioned by the amendments. They dispute, however, that this should include the costs thrown away by the amendments, that is the costs of the defendants in responding to the claims that are now abandoned or struck out.
58. This issue arises in respect of two heads of claim: the abandonment of an aspect of the 'best endeavours' claim; and the combined effect of the amendments to, and strike out of, the Tariff Model Claims.
59. I can deal with the first of these very shortly. The claimants previously pleaded that as a result of the defendants' failure to use best endeavours to persuade Statoil to consent to the continuation of the CNG export project, the claimants lost the chance to be appointed as main contractor for the FEED. In its place, the claimants now plead that they lost the chance to enter into a licence agreement with the defendants. The claimants accept that, as a matter of principle, they should be liable for the costs thrown away by the abandonment of their original case on causation, but stress that it is only costs that are *exclusively* referable to that case that should be paid by them.
60. I agree that any order made at this stage should be limited to costs incurred by the defendants that are exclusively referable to the abandoned claim in causation. The defendants do not ask for any immediate assessment, or payment on account, in

respect of those costs, so the question as to the extent to which any costs were in fact incurred exclusively in relation to the abandoned claim in causation does not concern me.

61. In relation to the Tariff Model Claims, the claimants contend that even though they have been struck out, the costs thrown away should be reserved until trial. The argument for doing so is similar to the argument that the claims should be stayed, namely that if it turns out at trial that the Document is genuine, then it would be unfair that the claimants had been required to pay the costs of the original, struck out cause of action.
62. I reject this contention. The relevant costs relate to those parts of the pleading which the claimants voluntarily abandoned through their recent amendments. In truth the claimants recognised, by the wholesale deletion of those original claims for breach of confidence and infringement of database rights, that those claims were not sustainable. The fact that they may, after findings at trial, be able to advance similar types of claim on a different basis is not a reason for departing from the usual course of requiring them to pay the costs thrown away of the originally abandoned claims.
63. The defendants seek an order that the claimants pay an amount on account of those costs. They seek payment of the sum of £876,000, which represents 50% of the costs which they estimate have been incurred by them in responding to the Tariff Model Claims.
64. The claimants accept the principle that they should be obliged to make a payment on account but contend that the amount should be limited to £665,000.
65. The defendants' figure has been arrived at by a detailed, but nevertheless rough and ready, approach to the costs arising in respect of various stages of the action.
66. For example, in relation to pleadings, the defendants have taken the number of paragraphs over which the Tariff Model Claims were addressed in the amended defence, as a proportion of all the paragraphs in the document. The resulting percentage was then applied to the total costs estimated to have been incurred in pleading the amended defence. The claimants point out, however, that in the original defence the Tariff Model Claims occupied a much smaller proportion of the pleading.
67. In relation to disclosure, the defendants have estimated the relevant costs by estimating the percentage of documents harvested, or reviewed, at various stages of the disclosure exercise that related to the Tariff Model Claims, and have applied the average percentage to the overall cost of disclosure. Again, the claimants have pointed to a flaw in the defendants' approach, namely that in arriving at the appropriate average, the defendants have ignored the low percentage of originally reviewed documents which were relevant to the Tariff Model Claims.
68. The defendants have claimed just over £15,000 in relation to the costs of interim applications. The claimants contend that the defendants would not, at the end of the action, be entitled to repayment of costs paid pursuant to orders made upon interlocutory applications (on the pay-as-you-go principle), and that there should be no different outcome when it comes to assessing the quantum of the costs thrown away.

69. I consider that the objections made by the claimants to the amount claimed in respect of statements of case, disclosure and interim applications are well made. On the other hand, the less scientific reductions for which the claimants contend in relation to witness statements, counsels' fees and expert evidence have less force.
70. The defendants say that the claimants' criticisms should be viewed as already catered for by the fact that only 50% of the estimated costs are being sought by way of interim payment. In my view, that is a complete answer to the objections to witness statements, counsels' fees and expert evidence, but is not an answer to objections which identify an error in the methodology which the defendants themselves have adopted.
71. Accordingly, taking into account these points, I propose to order an interim payment in the sum of £735,500. This is reached by accepting the claimants' reductions in respect of statements of case, disclosure and interim applications, but rejecting their other reductions.
72. It is agreed between the parties that, as to £690,000 of this sum, it will be satisfied by payment out of the amounts standing as security for costs and, as to the remainder, will be paid by the claimants to the defendants.

### **The Costs of the Specific Disclosure Application**

73. The final matter is the costs of an application for specific disclosure which was issued on 7 November 2019. The court was not troubled with that application, as it was fully agreed between the parties prior to the hearing. The claimants rely on the fact that of the categories of disclosure requested, most (but not all) have been either voluntarily provided or appear – by agreement subsequently made by the defendants – in the order made, to which the defendants have consented.
74. The defendants point to the fact that in some cases – in particular documents relating to a criminal investigation the defendants have instigated in Italy into the alleged faking of the Document – they had never refused to provide disclosure, but needed to make inquiries in Italy first, and that the claimants have agreed to that disclosure not being made available until 2020. They also point to the fact that the order, as finally consented to, was substantially agreed within a week of the application being issued.
75. Without reciting all of the lengthy correspondence to which I was taken, before and after the application was issued, I consider that the just order in all the circumstances is costs in the case. In the course of that correspondence, numerous questions were asked of each side of the other in relation to the Document including, but extending beyond, the requests for disclosure which were included in the application. In my judgment, in agreement with the defendants, this is best characterised as part of the “to and fro” of litigation.