



Neutral Citation Number: [2021] EWHC 3583 (Comm)

Case No: CL-2018-000474

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Covid-19 Protocol: This judgment was handed down by the judge remotely for circulation to parties' representatives by email. The date of hand- down is deemed to be as shown opposite:

Date: 24/12/2021

Before :

MR JUSTICE JACOBS

Between :

SALT SHIP DESIGN AS

Claimant

- and -

PRYSMIAN POWERLINK SRL

Defendant

Michael Ashcroft QC and Douglas Campbell QC (instructed by Holman Fenwick Willan LLP) for the Claimant

Andrew Hunter QC, Henry Byam-Cook QC and Jonathan Hill (instructed by Wikborg Rein LLP) for the Defendant

Hearing dates: 13th December 2021

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.

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MR JUSTICE JACOBS

Mr Justice Jacobs :

A: Introduction

1. Following judgment on the liability issues in this case (see [2021] EWHC 2633) a large number of issues arose for determination at a hearing of “consequential” matters arising from the judgment. That hearing took place on 13 December 2021. References in square brackets are (unless the context otherwise requires) to the paragraphs of the liability judgment. The abbreviations used are the same as those in the liability judgment.
2. This judgment concerns an application by the Claimant (“Salt”) for a publicity order pursuant to the Trade Secrets (Enforcement, etc) Regulations 2018, SI 2018/597.
3. In broad summary, the proceedings concern claims by Salt against Prysmian for the misuse of Salt’s confidential information. Salt had been selected, after a competitive process, as the designer of a new cable laying vessel (“CLV”) that Prysmian was planning to build. Working in conjunction with its client, Prysmian, Salt carried out high quality design work over many months. In breach of clause 6.4 of the Short Form Agreement (“SFA”) which governed the relationship between the parties, Prysmian made the GA plan and Specification, which were critical design documents prepared by Salt, available to a rival designer Vard Design AS, and indeed Vard as a whole, for the purposes of a Vard alternative design [375]. This occurred initially in the period of late December 2017/ early January 2018, and Prysmian continued to make those documents available in February 2018 and thereafter. Prysmian’s conduct was also a breach of its equitable duties of confidence [377]. When considering the availability of exemplary damages, I described what had occurred as a bad case of breach of confidence [470]. I concluded that Prysmian’s conduct was sufficiently high-handed or egregious so as, potentially at least, to justify a punitive response by way of an award of exemplary damages [465]. However, the question of whether exemplary damages should in fact be awarded is a matter for later determination.
4. In addition to the cause of action for breach of contract/ confidence, I concluded that Salt’s cause of action in unlawful means conspiracy succeeded [424] – [442]. The primary, and perhaps only, relevance of the separate conspiracy cause of action was to facilitate a claim for exemplary damages, which may not be available for a case of breach of a contractual or equitable duty of confidence [452].
5. Prysmian has sought permission to appeal against limited aspects of the liability judgment. There is no proposed appeal, however, against any of the conclusions of fact or law relating to the claim for breach of contract and confidence (see Sections A – E of the judgment, paragraphs [1] – [423]). The proposed appeal is limited to certain aspects of my conclusions in relation to unlawful means conspiracy and exemplary damages. In view of the fact that both aspects of the proposed appeal relate to the exemplary damages claim, which has yet to be finally determined, both parties agreed at the December 2021 “consequentials” hearing that it was sensible for the application for permission to appeal to be postponed until after the exemplary damages claim has been finally determined.
6. That determination will take place as part of a further hearing which will address Salt’s financial claims (in other words “quantum” issues) arising from the liability judgment. Salt’s primary case, as explained by Mr Ashcroft QC in his skeleton argument and

orally, is for an account of profits made in consequence of the misuse of confidential information. There will be argument at the further hearing as to whether it is permissible for Salt to advance further claims for damages, in particular exemplary damages, in circumstances where it is pursuing a claim for an account of profits. Directions were given at the December 2021 hearing for service of the parties' statements of case on the quantum issues, and for a case management conference following a stay to allow for mediation.

7. During the trial of the liability issues which took place in May and June 2021, and also following the liability judgment which was handed down in September 2021, Salt intimated an intention to apply for an injunction. The potential injunction related to the use of the CLV (or to one or more aspects of that vessel) which has been built by Vard, the Leonardo da Vinci, and which Prysmian is now operating. Salt did not, however, apply for any injunction at the consequentials hearing. The current position, therefore, is that there are no constraints on Prysmian using the Leonardo da Vinci, and all aspects of that vessel, as it wishes. Whilst it remains possible that an application for an injunction may be made by Salt in the future, Mr Hunter QC who appeared for Prysmian made it clear that any such application would be met (amongst other things) by an argument based on the delay in making the application. Since no application was made, I did not consider it necessary or appropriate to make any decision as to whether or not an injunction could successfully be obtained at a later stage. It is sufficient and (in view of the arguments relating to the publicity order) important to note, as I have, that no application has been made for an injunction, and that there are no constraints on Prysmian's conduct in relation to the Leonardo da Vinci.

B: The application for a publicity order

The application and its legal basis

8. Salt applies for the following order:

The Defendant shall display the following notice to all persons accessing its home page (<https://uk.prysmiangroup.com/>) from an internet protocol (IP) address identifying the United Kingdom, for a period of 12 months from the date hereof, such notice to be in no smaller than 12-point type:

“On 30 September 2021 the High Court of Justice of England and Wales ruled that Prysmian Powerlink SRL had misused Salt Ship Design AS's confidential information in relation to the design of Prysmian Powerlink SRL's Leonardo da Vinci cable laying vessel. A copy of the full judgment of the High Court is available on the following link [link given]”

9. During the course of argument, the focus of the application moved from the Prysmian Group UK directed home page (which was in fact the home page of Prysmian's parent company) to more specific webpages within the site. There are a number of web pages on the website which relate to, and in many respects extol the virtues of, the Leonardo da Vinci. These include a recent page which records that the vessel has recently (on 17

November 2021) been picked as the Best Support Vessel of the Year by readers of Offshore Wind Journal. That page describes the vessel becoming “operative last July” (ie July 2021) with another webpage (which sought votes for the Offshore Wind Journal award) describing the vessel being delivered in August.

10. The website also has a page dedicated to the Leonardo da Vinci. The page has a slideshow of 8 pages with photographs and links enabling the reader to “read more”. These 8 pages appear to be less recent than the page described in the previous paragraph in that they largely describe events which occurred during construction; for example, the keel laying ceremony and the arrival of the vessel in Norway for completion and other matters. Beneath the slide show are various other photographs, design drawings and links, including a link to a YouTube video under the heading: “Prysmian Group introduces Leonardo da Vinci – a genius in motion”. I was taken to this part of the website during oral argument, and the focus of Salt’s application was for the notice to appear in that section of the website.
11. The application is based upon the Trade Secrets (Enforcement etc) Regulations 2018 (“the 2018 Regulations”). In the liability judgment, I held [472] – [482] that the 2018 Regulations were applicable to the confidential information relied upon by Salt in the proceedings. There is no proposed appeal from that decision.
12. The relevant regulation for present purposes is Regulation 18. This provides:

Publication of judicial decisions

“18.—(1) In proceedings for the unlawful acquisition, use or disclosure of a trade secret, a court may order, on the application of the trade secret holder and at the expense of the infringer, appropriate measures for the dissemination of information concerning the judgment, including its publication in whole or in part.

(2) Any measure a court may order under paragraph (1) must preserve the confidentiality of trade secrets as provided for in regulation 10.

(3) In deciding whether to order a measure under paragraph (1) and when assessing whether such measure is proportionate, the court must take into account where appropriate—

(a) the value of the trade secret,

(b) the conduct of the infringer in acquiring, using or disclosing the trade secret,

(c) the impact of the unlawful use or disclosure of the trade secret,

(d) the likelihood of further unlawful use, or disclosure of the trade secret by the infringer, and

(e) whether the information on the infringer would be such as to allow an individual to be identified and, if so, whether publication of that information would be justified, in particular in the light of the possible harm that such measure may cause to the privacy and reputation of the infringer.”

13. This essentially replicates, with different punctuation in the case of paragraph (3), Article 15 of the EU Directive referred to in argument as the “Trade Secrets Directive”: ie Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

14. Recital (31) of the Trade Secrets Directive explains the policy behind Art. 15:

“(31) As a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions, including, where appropriate, through prominent advertising, in cases concerning the unlawful acquisition, use or disclosure of trade secrets, on the condition that such publication does not result in the disclosure of the trade secret or disproportionately affect the privacy and reputation of a natural person. ”

15. There has been no reported case on the application of these provisions. However, there have been a number of reported cases on provisions which are equivalent, but not exactly the same, in the IP Enforcement Directive 2004/48/EC (“the 2004 Directive”). The 2004 Directive, and the 2006 Regulations which were made pursuant thereto, contained no list of potentially relevant factors to be taken into account or express requirement to consider the effect on privacy and reputation. The policy behind the equivalent provisions was identical to that contained in Recital (31) set out above.

16. In *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 510 (Ch), Warby LJ referred (in paragraph [51]) to a number of authorities relating to the exercise of the court’s discretion under the 2004 Directive, and summarised the position as follows:

“[52] These authorities indicate that it is common practice to make such orders in IP litigation, and that policy favours doing so, in view of the difficulties which owners of IP rights face in identifying and successfully pursuing infringers. The court will take account of all the circumstances, but the following factors may count in favour of making such an order: (a) deterrence of the infringing defendant; (b) that publication of the result would be a deterrent to other infringers. Factors that may count against the grant of such an order include the strength of the policy grounds on the particular facts of the case, and any procedural or practical obstacles to making an effective and proportionate order. The applicant will need to present the court with a precise form of order, and a workable solution. The solution will need to identify appropriate platforms or publications for the notice. It may include a notice, with a hyperlink to the main judgment. ”

17. There have also been cases on the making of publicity orders where a finding of non-infringement has been made (ie, where a defendant has successfully defended a case of infringement) pursuant to the Court's general jurisdiction to grant injunctions under s.37 of the Senior Courts Act 1981.
18. Relying upon one of those cases, *Philip Warren & Son Ltd v Lidl Great Britain Ltd* [2021] EWHC 2372 (Ch), Prysmian submitted that the relevant test was whether the making of a publicity order is "necessary and proportionate". I accept, as is clear from the terms of paragraph (3) of Regulation 18, that the court is concerned with an assessment of whether a measure is "proportionate". I do not, however, accept that a test of necessity should be substituted for the language of the 2018 Regulations. These confer a discretion on the court ("the court may order") to order "appropriate measures for the dissemination of information concerning the judgment". The court is concerned with what is "appropriate", rather than a more stringent test of necessity. Indeed, in *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1339 (a case where the court referred to the 2004 Directive), the Court of Appeal identified the relevant question as being whether the order is "desirable". The court said that such orders should normally only be made where they serve one of the two purposes now set out in Recital (31) of the Trade Secrets Directive.
19. Paragraph (3) also identifies a number of specific matters which the court is required to take into account "where appropriate". Salt contended, correctly in my view, that the facts of the case did not bring (d) and (e) into play. The parties' arguments therefore focused on (a) – (c). I consider that the specific matters set out in paragraph (3) should be in the forefront of the court's analysis of whether to order a measure under paragraph (1). I also accept, however, that the listed factors are not exclusive: there may be other relevant factors which bear upon the exercise of the court's discretion.

The parties' arguments

20. Salt submitted that factors (a) – (c) in the present case all pointed towards the making of a publicity order. The trade secrets that were infringed were of substantial commercial value. On the basis of the findings in the liability judgment, Prysmian's conduct was such as to potentially give rise to a punitive response by way of an award of exemplary damages. Prysmian's conduct had a damaging effect on Salt. The vessel had been built using, and with the benefit of the Salt design, without Salt receiving any credit or acknowledgment. Prysmian and Vard were taking the glories of awards bestowed on the vessel without acknowledging Salt's design role. Salt's reputation in the market was also tarnished, in circumstances where it was known that Salt was replaced as vessel designer by Vard. Salt also faced a new competitor in the specialist market, with Vard now established as the designer of an award winning vessel, without any recognition or publicity that Prysmian and Vard used Salt's excellent work as a springboard for the Vard design.
21. Salt referred in this context to evidence of Mr Arne Stenerson, Salt's managing director who gave evidence at trial. In his first witness statement for the trial, he referred to Salt's loss of the project to Vard as "certainly" having a negative effect on Salt's business and its perception in the vessel design market. The loss of a project to a shipyard designer after the concept design phase was particularly harmful to Salt's reputation. In his fourth witness statement, served in support of the application for a publicity order, Mr Stenerson repeated and to a degree expanded upon these points. He

said that the dramatic change of ship designer for such a benchmark project was impossible for Salt to explain, and therefore Salt's unique market leading position suffered immensely. This was compounded by the fact that during construction of the Leonardo da Vinci, both Vard and Prysmian used the vessel quite aggressively to mark their position in the market, promoting Vard as the leading CLV designer and therefore seriously hurting Salt's position.

22. Salt submitted that the best way of publicising the wrongs done to Salt, and the role of Salt in the design of the vessel, to those who may be interested market participants, was by requiring Prysmian to put a notice on its website.
23. Prysmian submitted that the order should not be made for various reasons. (a) There was no need for further publicity: there had already been substantial publicity. (b) The website was not controlled by Prysmian (ie the Defendant itself), and a notice on the home page of the Prysmian Group would harm a party which was not a party to the proceedings. (c) There was no practical need to deter Prysmian: it was not in the market for another vessel, and the liability judgment and attendant publicity were deterrent enough. (d) The notice would not be published to those with an interest in the subject matter of the dispute namely those involved in the ship design and construction market. It would not deter others, but would be liable to punish Prysmian and cause it to lose face with those with no interest in the market. (e) In the small ship design and construction market those who might benefit from being informed of the result are liable already to have learned of it. (f) Salt could readily inform third parties of the liability judgment, by a link to the Bailii page where the judgment is reported. (g) The notice would potentially mislead those who saw it, and might make some readers consider that the use and trading of the Leonardo da Vinci was wrongful. It was not possible accurately to sum up the liability judgment in a short sentence. (h) The publicity order may impinge upon an appeal and/or the prospects of settlement.
24. In response to Mr Stenersen's witness statement, Ms Midwinter made her 11th statement, essentially in order to provide evidence which supported the points summarised above. She also referred to a proposal which had been made "at an early stage" by Prysmian for the preparation of a press release jointly with Salt. This would have explained that the reasons for changing designers were, as she described it, "entirely unrelated to the Claimant's work", and crediting Salt for the work done on an earlier concept design. Salt was, however, not interested in pursuing this.
25. In his oral submissions, Mr Hunter emphasised that publicity on the website would result not only in information being given to those within the narrow niche category of third parties interested in CLV design (principally those who might order a CLV or shipyards who might build one), but also a "huge number" of other third parties who were entirely irrelevant audiences. This was a relevant consideration in relation to proportionality, as well as whether there would be deterrence of third parties.

Discussion

26. I consider that, looking at all the circumstances, it is appropriate to make the publicity order sought by Salt in these proceedings, essentially for the reasons given by Salt as summarised above. The notice should not appear on Prysmian's home page, but rather on the principal page (described above) which publicises the Leonardo da Vinci: ie the

page which has the 8 page slideshow, and which contains the link to the YouTube video and other information. My reasons for reaching that conclusion are as follows.

27. First, as indicated above, I consider that the matters in paragraph (3) (a) – (c) of Regulation 18 should be in the forefront of the court’s analysis. Each of these matters favours an order for dissemination.
28. As to (a): the trade secrets are valuable, for reasons which are apparent from the liability judgment. Realistically, Prysmian did not contend otherwise.
29. As to (b): the conduct of Prysmian, the infringer, has been described in the liability judgment. I described [470] Prysmian has having engaged in a blatant misuse of confidential information to facilitate an outcome where it could obtain a ship built by Vard with the benefit of the Salt design, but at a significantly lower cost. There is no proposed appeal against my decision as to the misuse of confidential information in breach of contract or the equitable duty of confidence. I did also say that the case was sufficiently serious to justify, potentially at least, the imposition of exemplary damages. However, I recognise that there is a potential appeal on the availability of exemplary damages in the present case, and I therefore do not attach weight to that factor. My basic findings as to misuse are sufficient for the purposes of (b).
30. As to (c): there is in my view sufficient evidence as to the impact on Salt. Mr Stenersen gave, in my view, plausible evidence as to the negative impact on Salt. Indeed, his evidence to that effect in his first witness statement for trial was not really challenged in cross-examination. Salt has not only been deprived of the opportunity to earn additional design fees, but has also lost the association which it would have had with a prestigious CLV project. I do not consider that it matters, for present purposes, that Salt has not produced detailed data supporting the case of a negative market reaction, and has not identified particular projects that were lost. Such evidence may not be easy to obtain. Furthermore, applications for publicity orders at the end of a trial should not turn into mini-trials of disputed issues of quantum. The court should in my view form a common-sense view of the plausibility of the case that the misuse of confidential information has had an impact on the party whose trade secret has been misused.
31. Secondly, I consider that the policy reasons for publicity identified in Recital (31) of the Trade Secrets Directive are applicable in this case. Publicity of the court’s decision will assist in providing a deterrent to future infringers, whether they be companies who are considering building a CLV or shipyards who may be considering constructing one. Such organisations, or others acting on their behalf, are likely to seek information about the latest CLV from the relevant webpages within the Prysmian website. Publicity of the judgment will serve as a warning that the misuse of confidential information does have significant adverse consequences. In addition, whilst I accept that the public as a whole will not be particularly interested in the misuse that occurred in this case, there are sections of the public who will be interested. The publicity given by the Prysmian Group to the Leonardo da Vinci generally, and to the award that has recently been received, is directed at an audience interested in the vessel. It is likely that many within that audience will be interested in learning of the misuse that occurred.
32. Third, as Warby LJ said in *Duchess of Sussex*, publicity orders are commonly made and policy favours doing so, in view of the difficulties which owners of IP rights face in

identifying and successfully pursuing infringers. The latter point is to some extent, but not exclusively, an aspect of deterrence.

33. Fourth, Prysman made various points which are summarised in paragraph [64] above. I did not consider that any of the arguments raised against the publicity order outweighed the above factors which made it appropriate to make such an order.
34. I do not accept that there is no need for further publicity, in the light of the publicity which already exists. Whilst there has indeed been some publicity, and a number of articles written about the case, this has not been extensive. Mr Stenersen's evidence, unsurprising in my view, is that in his conversations with major players in the market, some have never heard of the dispute or the judgment. In my view, publicity on Prysman's website will be an effective way of bringing the infringement to the attention of market participants who are not already aware of it, and will serve the aim of deterrence. The evidence is that all such participants are not so aware at the present stage. Whilst Salt can also put a notice on its website, that is not in my view a good reason why Prysman should not be required to give its own publicity to the court's decision. Such publicity on Prysman's website is likely to have a greater reach, since Prysman is the party which is in a position to, and wishes to, publicise the vessel which has actually been built with the benefit of the Salt design. It is unrealistic to expect Salt, which is a much smaller organisation, to give or to wish to give an equivalent degree of publicity to a vessel ultimately designed by a rival designer.
35. I accept that it would not be appropriate for the notice to appear on the home page of the Prysman Group. This is because there is nothing to suggest that those who visit the home page will generally have any interest in the Leonardo da Vinci or its background. The same cannot, however, be said for those who visit the webpages which are dedicated to that vessel. Whilst it may be the case that Prysman (ie the Defendant company) does not control the website, there is no reason to think that it would not be able to procure the placement of an appropriate notice on the relevant webpages. Mr Campbell QC, who argued the publicity issue on behalf of Salt, also made the fair point that the Prysman Group was running a website for the whole group; that the publicity given to the Leonardo da Vinci was for the benefit of Prysman, a company within the wider group; and that it was just that aspects of Prysman's business which reflected well on the group (such as the promotion of the cutting-edge and award winning Leonardo da Vinci) should be balanced by information as to an infringement which did not reflect well.
36. I do not accept that it is a significant point, against the making of the order, that Prysman is not in the market for another CLV. The notice will act as a deterrent for the misuse of confidential information by Prysman generally in its business dealings, as well as acting as a deterrent for third parties, whether designers or shipbuilders or others.
37. I accept Mr Hunter's point that the notice on the Leonardo da Vinci webpage will likely come to the attention of people who have no real interest in the subject-matter of the dispute. For example, the webpages may likely be visited by prospective customers for the services that the Leonardo da Vinci can offer. However, I do not regard this as a telling or decisive point when weighed in the balance. It is inevitable that a notice on a website will not be of interest to all users of the relevant web page. However, I accept Mr Campbell's submission that it is quite likely that anyone serious about building a

vessel of this kind will find their way to the relevant web pages of Prysmian since that is where there is information readily available.

38. Prysmian suggests that the publicity order may impinge upon an appeal or the prospects of settlement. Unsurprisingly, I have received no real information or evidence as to the prospects of settlement. I have no basis to conclude that publicity will inhibit settlement. Nor do I consider that the publicity order may impinge upon an appeal. The proposed grounds of appeal are narrow. They do not seek to challenge my basic conclusions as to the misuse of confidential information in breach of contract and equitable duty. The proposed grounds relate to aspects of the case for exemplary damages. Even if the proposed appeal in that regard were to succeed, it would have no impact on the reasons which in my view make it appropriate to grant the publicity order.
39. I have given consideration to the argument that users of the website (for example potential customers for the Leonardo da Vinci) would be misled, for example into thinking that the use and trading of the vessel was wrongful. During the course of Mr Hunter's argument, I suggested that the wording of the notice might make it clear that the court had not granted any relief which prevented Prysmian from trading the Leonardo da Vinci. Mr Campbell suggested that if I were minded to include any such wording, it should be qualified by stating that no such relief had been granted "to date".
40. On balance I consider that it is appropriate for wording to be included so as to advise users of the website that the court has not granted any relief which prevents Prysmian from trading the Leonardo da Vinci. The case-law makes clear that a publicity order is not intended to be punitive. This does not mean, as Mr Hunter submitted, that a publicity order should not be made if it would result in people thinking worse of the infringer. This may happen, and is in my view an aspect of deterrence. However, it would in my view be punitive if potential customers of Prysmian were wrongly to think that Prysmian was not permitted to use or trade its vessel, and that therefore they should not do business with Prysmian in relation to that vessel. Whilst it does not seem to me that there is anything positively misleading in the wording proposed by Salt, the possibility of customers misunderstanding the position should in my view be catered for and avoided. That is one reason why, in paragraph [7] of this judgment, I have explained the position in relation to injunctive relief, and also why I consider that the notice should also refer to the present judgment as well.
41. Accordingly, I will in principle make a publicity order as follows (the parties will have an opportunity to give me any points of detail on the wording):

"The Defendant shall display the following notice to all persons accessing the following Leonardo da Vinci page on the Prysmian Group website (<https://www.prysmiangroup.com/en/new-vessel-leonardo-da-vinci>) from an internet protocol (IP) address identifying the United Kingdom, until 30 June 2022, such notice to be in no smaller than 12-point type:

"On 30 September 2021 the High Court of Justice of England and Wales ruled that Prysmian Powerlink SRL had misused Salt Ship Design AS's confidential information in relation to the design of Prysmian Powerlink SRL's Leonardo da Vinci cable laying vessel. A copy of the full judgment of the High Court is

*available on the following link [link given]. On * December 2021, the High Court of Justice of England and Wales made further rulings in the case. A copy of the further judgment is available on the following link [link given]. The court has not granted any order which prevents Prysmian from trading the Leonardo da Vinci.”*

42. I consider that the period should be 6 months, until the end of June 2022. As in *Enterprise v Europcar* [2015] EWHC 300 (Ch), visits to the relevant web page are likely to be sporadic. A 6-month period will give a reasonable chance of a reasonable number of market participants seeing it. I also bear in mind that Prysmian Group’s website says (<https://www.prysmiangroup.com/en/insight/projects/leonardo-da-vinci-the-best-support-vessel-of-the-year>) that there will be an official launching ceremony in the second quarter of 2022. Visits to the web page may increase at around that time, and in my view it is appropriate that the notice should appear on the website until the anticipated date of the official launching ceremony.