O-211-15

TRADE MARKS ACT 1994

IN THE MATTER OF CONSOLIDATED PROCEEDINGS BETWEEN

BABCOCK INTERNATIONAL LIMITED
AND
BABCOCK POWER UK LIMITED

CONCERNING

BABCOCK POWER UK LIMITED'S APPLICATION UNDER NO 84234
TO REVOKE REGISTRATION NO 756324
IN THE NAME OF BABCOCK INTERNATIONAL LIMITED

BABCOCK POWER UK LIMITED'S APPLICATION UNDER NO 84235
TO REVOKE REGISTRATION NO 756324
IN THE NAME OF BABCOCK INTERNATIONAL LIMITED

BABCOCK POWER UK LIMITED'S APPLICATION UNDER NO 84236
TO REVOKE REGISTRATION NO 1283519
IN THE NAME OF BABCOCK INTERNATIONAL LIMITED

BABCOCK POWER UK LIMITED'S APPLICATION UNDER NO 84237
TO REVOKE REGISTRATION NO 1283519
IN THE NAME OF BABCOCK INTERNATIONAL LIMITED

BABCOCK INTERNATIONAL LIMITED'S OPPOSITION UNDER NO 103564
TO BABCOCK POWER UK LIMITED'S APPLICATION FOR REGISTRATION
UNDER NO 2601397

AND

BABCOCK INTERNATIONAL LIMITED'S OPPOSITION UNDER NO 103567
TO BABCOCK POWER UK LIMITED'S APPLICATION FOR REGISTRATION
UNDER NO 2601670

1. This decision concerns six sets of proceedings as follows:

1: An application under No 84232 by Babcock Power UK Ltd ("BPUK") to revoke registration No 756324 in the name of Babcock International Ltd ("BIL"). The registration is for the mark BABCOCK, which was entered into the register on 3 August 1956 and is registered for the following goods:

> Class 11
> Boilers (not parts of machines), reheaters being parts of steam generating installations, heat exchangers, (not parts of machines), air heating appliances, fuel economising apparatus, automatic and mechanical stokers, furnace grates, fuel burners, fuel feeding devices (not parts of machines), furnaces (not for testing purposes), boiler fittings (not parts of machines), boiler tubes, pipe duct arrangements for fluids and gases (being parts of industrial plant), installations for the processing and production of nuclear fuel and nuclear moderating material, tanks and pressure vessels being parts of water installations and of industrial-chemical installations, nuclear reactors and fuel cans (charged or uncharged) for use in nuclear reactors; and parts included in Class 11 of all the said goods

The application seeks revocation on grounds under sections 46(1)(a) and (b) of the Trade Marks Act 1994 ("the Act") alleging the mark has not been used in relation to any of the goods for which it is registered within the periods 4 August 1956 to 3 August 1961 (s46(1)(a)) or 3 October 2002 to 2 October 2007 or 15 November 2006 to 14 November 2011 (s46(1)(b)).

BIL filed a counterstatement in which it claimed it had made genuine use of the mark but accepted that it had not used the mark in relation to some of the goods for which it is registered. In respect of some of these latter goods, it claimed there were proper reasons for its non-use. I shall return to this later in this decision.

2: An application under No 84235 by BPUK to revoke the same registration as (1) above. The application seeks revocation on grounds under section 46(1)(b) of the Act alleging the mark has not been used in relation to any of the goods for which it is registered within the periods 3 October 1987 to 2 October 1992, 3 October 1992 to 2 October 1997 or 3 October 1997 to 2 October 2002.

Again, BIL filed a counterstatement in which it claimed it had made genuine use of the mark but accepted that it had not used the mark in relation to some of the goods for which it is registered. In respect of some of these latter goods, it claimed there were proper reasons for its non-use. Again, I shall return to this later in this decision

3: An application under No 84237 by BPUK to revoke registration No 1283519 in the name of BIL. The registration is for the mark BABCOCK, which was entered into the register on 18 January 1991 and is registered for the following services:

Class 35
Commercial and industrial management consultancy and assistance; business management services related to contracts; all included in Class 35.

Class 37
Construction, commissioning, cleaning, de-commissioning, demolition, maintenance and repair of electrical, electronic, engineering, and heat exchange apparatus and instruments, factories and of warehouses; installation and repair of liquid and gas treatment and purification apparatus and instruments; all included in Class 37.

Class 40
Treatment of liquids, gases, or metals; all included in Class 40.

Class 42
Engineering design, drawing and drafting; engineering research and consultancy; computing services; examination and testing of metals and welded fabrications to determine soundness, structure or properties; all included in Class 42.

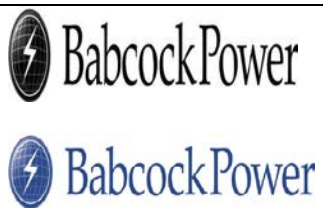
The application seeks revocation on grounds under sections 46(1)(a) and (b) of the Act alleging the mark has not been used in relation to any of the services for which it is registered within the periods 19 January 1991 to 18 January 1996 (s46(1)(a)) or 15 November 2001 to 14 November 2006 or 15 November 2006 to 14 November 2011 (s46(1)(b)).

BIL filed a counterstatement in which it claimed it had made genuine use of the mark for all services for which it is registered.

4: An application under No 74236 by BPUK to revoke the same registration as (3) above. The application seeks revocation on grounds under section 46(1)(b) of the Act alleging the mark has not been used in relation to any of the services for which it is registered within the periods 19 January 1996 to 18 January 2001 or 19 January 2001 to 18 January 2006.

BIL filed a counterstatement in which it claimed it had made genuine use of the mark for all services for which it is registered.

5: An opposition under No 103564 by BIL against application No 2601397 in the name of BPUK seeking registration of a series of two marks as shown below:

Mark	Goods
	Class 1 Chemicals used in industry; ion exchange resins

The opposition is founded on grounds under sections 5(2)(b) and (3) of the Act relying on BIL's earlier trade mark nos. 765660, 756323, 756324, 1283519 and 2507175, and under section 5(4)(a) of the Act based on use of the sign BABCOCK in the UK since at least the early 1900s in relation to various services.

BPUK filed a counterstatement in which it admitted that some of the respective goods and services are similar but otherwise denied the grounds of opposition. For reasons that will become clear, its admissions as to the similarity of certain goods and services is not relevant.

6: An opposition under no 103567 by BIL against application No 2601670 in the name of BPUK seeking registration of the mark BABCOCK POWER in respect of the following goods:

> Class 1
> Chemicals used in industry; ion exchange resins.

The opposition is founded on the same grounds as (5) above.

BPUK filed a counterstatement in which it admitted that some of the respective goods and services are similar but otherwise denied the grounds of opposition. Again, for reasons that will become clear, its admissions as to the similarity of certain goods and services is not relevant.

2. All proceedings were consolidated. Both parties filed evidence and the matter came before me for a hearing where BIL was represented by Mr Henry Ward of Counsel instructed by D Young & Co. Mr Tom St Quintin of Counsel instructed by Freeths, represented BPUK.

The evidence

3. The evidence filed is as follows:

BIL's evidence

This is a very large volume of evidence which consists of:

- A witness statement of Andrew M. Timms, Licensing and IP Manager for Doosan Power Systems, with exhibits 1-131;

- A witness statement of Ceri I Green, Consultant to Doosan Babcock Limited with exhibits 1-34;

- A first witness statement of Nicholas James William Borrett, solicitor of the Senior Court of England & Wales and Deputy Group General Counsel of Babcock International Group plc ("BIG") with exhibits 1-25;

- A second witness statement of Nicholas James William Borrett with exhibits 26-32.

To clarify, Mr Borrett is employed by BIG which is BIL's parent company whilst both Mr Timms and Mr Green are, or have been, employed by BIL's licensee (see below).

BPUK's evidence

This consists of:

- A first witness statement of James Dougherty, Director of BPUK with exhibits 1-6;

- A second witness statement of James Dougherty with exhibit 7.

4. Given the large volume of evidence filed, particularly that filed by BIL, I do not intend to summarise it here but have read all of it and will refer to it as necessary in this decision.

The revocation actions under section 46(1) of the Act

5. I intend to consider first, the four revocation actions which, as set out above, relate to two separate registrations of the mark BABCOCK and determine whether genuine use has been made of them or proper reasons for non-use exist. Section 46(1) of the Act states that:

> "The registration of a trade mark may be revoked on any of the following grounds-
>
> > (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
> >
> > (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
> >
> > (c)...
> >
> > (d)...

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made: Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or
(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date."

6. Section 100 is also relevant and reads:

"If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

7. In *Stichting BDO v BDO Unibank, Inc.,* [2013] F.S.R. 35 (HC), Arnold J. stated as follows:

"51. Genuine use. In *Pasticceria e Confetteria Sant Ambroeus Srl v G & D Restaurant Associates Ltd* (SANT AMBROEUS Trade Mark) [2010] R.P.C. 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439; [2003] R.P.C. 40 ; *La*

Mer Technology Inc v Laboratoires Goemar SA (C-259/02) [2004] E.C.R. I-1159; [2004] F.S.R. 38 and *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759; [2009] E.T.M.R. 28 (to which I have added references to *Sunrider v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (C-416/04 P) [2006] E.C.R. I-4237):

(1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely token, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3)The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider* [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22] -[23]; *Sunrider*, [70]–[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]".

8. Before I consider the revocation actions in any detail, however, there are a number of issues which I should deal with.

9. Whilst various periods of non-use are claimed by BPUK, the defence is directed to use within the latter of the periods as use within this period will suffice to preserve the registrations. The period in which genuine use must be shown and which I am considering is the same in respect of both registrations: 15 November 2006 to 14 November 2011.

10. Earlier in this decision, I made reference to the fact that the counterstatements filed by BIL in relation to registration 756324 indicated that no use had been made of the mark in respect of certain goods. The first of these are: *automatic and mechanical stokers, furnace grates*. I have not been referred to any instances of use of the mark in relation to these goods and BIL has not claimed there are proper reasons for any non-use. In his evidence, however, Mr Timms states that BIL "has used the mark in relation to these goods historically but they are now somewhat technically obsolete" and goes on to state that BIL "remains available to undertake work in relation to spares and refurbishment". It was not clear whether BIL was seeking to defend its registrations in respect of these goods. Its position became clear, however, in its skeleton argument where it confirmed it did not seek to defend the revocation actions in relation to these goods and this was reiterated at the hearing. That being the case, the application for revocation of the registration in respect of these goods succeeds.

11. BIL's counterstatement also accepted that no use had been made of the mark in relation to the following goods: *nuclear reactors and fuel cans (charged or uncharged) for use in nuclear power stations* but it claimed there were proper reasons for that non-use. It later filed evidence claiming to show use of the mark in relation to these latter goods and, at the hearing, made submissions in respect of them. Whilst the proper course of action would have been for it formally to have sought leave to amend its counterstatement once it had identified the evidence of use on which it intended to rely, I intend to deal with this as a de facto request to amend its defence, albeit a late one. This is because: 1) BPUK accepts BIL has filed evidence of the supply of these items (though challenges whether it constitutes genuine use of the mark) and 2) at the hearing, BPUK did not take issue with this course of action.

12. As set out above, both of the registrations which are subject to revocation are for the mark BABCOCK. The registrations differ insofar as 756324 is registered for certain goods in class 11 whereas 1283519 is registered for services in classes 35, 37, 40 and 42. Given that the marks and relevant periods are the same and, again, in view of the large volume and nature of the evidence filed, I intend to consider the position in respect of both marks together whilst taking account of the differing goods and services involved.

13. There is no dispute that in 1979, BIL sold off its "energy division" to a company which, in 1995, became its licensee. This latter company has undergone many changes of name during its history but during the relevant period, the evidence shows it was named Mitsui Babcock Energy Ltd (1995 to 2006), Doosan Babcock Energy Ltd (2006-2010) and Doosan Power Systems Ltd (2010-2013). To avoid

potential confusion and, given that evidence has been filed which reflects the name at the particular time being referred to by the various witnesses, I shall refer to this company as "the licensee" unless the context requires otherwise.

14. Whilst BPUK accepts that the evidence shows that some of the relevant goods and services have been supplied, it denies this constitutes genuine use of the mark in respect of them. Its primary denial is based on reasons which I summarise as follows:

> 1: the mark has only been used within composite marks which do not act as an indicator of origin for the mark alone;
>
> 2: there is no evidence of the average consumer's perception of the use of the marks; and
>
> 3: BIL and its licensee each protect and promote their own interests to the detriment of the other.

15. Referring me to the decision in *Colloseum Holding AG v Levi Strauss & Co* [2013] ETMR 34, BPUK submits that:

> "where a mark is used as part of a composite, it can only be found to have been put to genuine use if the evidence establishes that an average consumer perceives the registered mark independently to indicate the origin of the products in question. If the evidence does not establish that use of the registered mark in the composite indicates the same origin to the registered mark used alone (in the way that "Land Rover" does not indicate automobiles of the same origin as those supplied under the name "Rover"), then the use criterion is not satisfied."

16. For its part, BIL submits that whilst it has used the mark as part of a composite mark, BABCOCK has been "a common and constant element" used and "plainly [has] independent distinctive significance". I take note that in *Colloseum* the court stated:

> "31. It is true that the 'use' through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas 'genuine use', within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.
>
> 32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

> 33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.
>
> 34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.
>
> 35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

17. There are many references within the evidence to use of the mark BABCOCK alone. The evidence also shows that over a significant number of years, the licensee has used the mark as part of not one composite mark but several e.g. "Doosan Babcock", "Mitsui Babcock". BABCOCK is the common thread that links each composite mark which serves to emphasise to an even greater extent the significance to the average consumer of the mark BABCOCK as being indicative of trade origin. Taking the above case law in account and in view of the use shown, use of the mark only within a composite mark could be covered by the term genuine use.

18. As to the claim that BIL and the licensee protect and promote their own interests to the detriment of the other, BPUK has not filed any evidence to support its claim or explain the relevance of it. In his first witness statement, Mr Dougherty makes reference to a licence between BIL and its licensee: "the 1995 license". He exhibits at JD2, a copy of a licence dated 28 September 1995 made between BIL and Babcock Energy Limited. Mr Dougherty states his view that the "exact meaning of the 1995 Licence...was and remains unclear to [BPUK]" as regards the goods and services covered by that licence. He does so to explain that this uncertainty is the reason why the revocation actions were filed. Mr Dougherty states there has been some correspondence between the respective parties. At JD1 he exhibits copies of two letters sent to BPUK from two firms of solicitors acting for the licensor and licensee respectively. The first notifies BPUK of BIL's claimed rights and asks for further details of BPUK's intentions. The second is a cease and desist letter. I have no evidence of what, if any, response BPUK made to these letters. A licence is, de facto, a vehicle by which consent is given to another to do something. BIL has given its licensee consent to use the mark and BIL rely in these proceedings on the use made by its licensee. For the avoidance of any doubt, in his witness statement, Mr Borrett states the mark is used by the licensee with BIL's consent.

19. BPUK's statement of grounds of revocation makes no reference to any dispute about the terms, extent or meaning of any licence. BIL clearly does not accept BPUK's argument with regards the licence and use made under it. This is an entirely different situation to the pleadings point I dealt with in paragraph 11. BPUK has not made any application to amend the statement of grounds or cross examine any of BIL's witnesses. In all the circumstances, I reject Mr Dougherty/BPUK's arguments based on the licence point and go on to consider whether the evidence filed by BIL, which includes evidence from its licensee, shows genuine use of the mark on the goods and services within the relevant period.

20. The evidence shows the licensee has its European headquarters in Renfrew and its global headquarters in Crawley. In his evidence, Mr Timms states it supplies goods to the UK, carries out research, development, testing, examination, design, manufacture and inspection of goods in the UK and coordinates and manages deliveries of goods and services from/to abroad from the UK.

21. In his evidence, Mr Green expands upon this and states that the licensee's business:

> "...is and always has, related to steam generation, boilers and related equipment and services. [The] Company designs, builds, maintains, upgrades and extends the life of power plants across the world. It provides clean, efficient, flexible and integrated power solutions using the latest technologies and engineering expertise. It offers a wide breadth of capabilities spanning both traditional and renewable fuels, including full engineering procurement construction (EPC) contracts for major new power plants and innovative pollution control upgrades for existing power plants."

22. In his evidence, Mr Borrett states that BIL is a subsidiary of BIG. He states that all companies within the group are authorised to use the mark in the course of their business activities with BIL's consent, as is the licensee. He states that BIG employs "over 20,000 people in the UK" and is:

> "the UK's leading naval support business providing through life services and deep maintenance to the Royal Navy's major warships and nuclear powered submarines, in addition to operating a wide range of strategic shore-based naval support facilities...
>
> the largest specialist nuclear support services organisation in the UK operating in all sectors of the nuclear market...
>
> a leader in providing engineering, design and maintenance support to the UK's electricity transmission and distribution infrastructure (high-voltage overhead lines and steel lattice towers)...
>
> an industry sector leader in the provision of through-life integrated solutions to airport baggage handling and management requirements, and rail where [it] is a leading player in the UK rail infrastructure market and one of the largest conventional track renewals company in the UK...

> designs, builds and operates its own and its customers' broadcast infrastructure and has the industry's only fully managed global broadcast transmission network...and offers end-to-end life cycle services (from site acquisition and design to implementation and mast support) to the mobile and fixed telecommunication industry...
>
> a leading integrated school improvement service provider in the UK, employing over 1,200 skilled personnel to support schools across the UK....the largest private sector provider of vocational training in the UK...ranging from the military to the emergency services and from local authorities to commercial organisations...
>
> provides fleet and asset management, and training for the Metropolitan Police, Fire Authorities and Fire and Rescue Services."

23. BIL has filed an extensive amount of documentary evidence to support the claim that the marks have been used in relation to all of the defended goods and services. The documentation filed by Mr Timms consists of a variety of material such as promotional or explanatory material in the form of what are called 'capability brochures' or 'capability sheets' (which, he states, set out for potential customers what products and services the licensee can provide for their particular project), corporate magazines, copies of presentations, annual reports (2007-2010) and website extracts as well as invoices, purchase orders and contracts or tender documents, all of which, he says, are but samples from the many documents available. Helpfully, Mr Timms sets out tables which list each of the various goods and services covered by the registrations and highlights specific examples within his exhibits which he considers shows use of the mark in respect of these goods and services. I intend to use them as a starting point for my consideration of whether genuine use has been made of the mark in respect of the goods and services for which it is registered, though I repeat that I have reviewed all of the evidence and will refer to it as necessary.

24. Mr Timm's evidence contains the following:

> Exhibit 1: Said to be a copy of a corporate presentation available for staff to use at presentations to potential customers. Whilst undated, Mr Timms states he would expect it "to have been used dozens of times within the relevant period". References to Doosan Babcock appear on several of the slides. Of note are the following:
>
> Slide 11: Headed "Doosan Babcock" it goes on to list its areas of interest which include:
>
> - Leveraging Doosan Babcock's world-leading boiler technology
> - OEM (original equipment manufacture) and services business operating in the thermal power, nuclear, oil & gas and petrochemical industries
> - Committed to developing cleaner and more efficient coal-powered plants

- Licensor of boiler technology to Doosan Heavy and to other boiler manufacturers in India and China, South Africa and Mexico

Slide 12: Headed “Our Products” it continues:

> “Boilers and steam generation equipment
>
> We have expertise in:
>
> - Once-through boilers
> - Natural circulation boilers
> - Two-Pass boilers
> - Tower boilers
> - A leading supplier of supercritical technology”

Slide 13: Headed “Our Technology Expertise” it refers to its Posiflow™ Technology and continues:

> “Globally-recognised expertise in once-through supercritical technology using our proprietary Posiflow™ internally ribbed boiler tube technology system”

Slides 16 and 17: Referring to Doosan Babcock services, the former shows a UK turnover of £431,232,000 which includes “upgrade and life extension solutions” for customers in the coal, oil gas and nuclear sectors and the latter a list of “our most recent undertakings”. With order dates in 2006, 2007 and 2008, it refers to supplying locations in China, Thailand, USA, Brazil and the Czech Republic totalling 22 various types of boilers.

25. Exhibit 2: Headed, and referred to on each page as, “Doosan Power Systems Formerly Doosan Babcock Energy Annual Report and Accounts 2009”. At page 2 are details of its business structure which is made up of four units. The first of these is Doosan Babcock which is described, at page 2, as:

> “a leading energy services business operating in the thermal power, nuclear, oil & gas and petrochemical industries. This business unit designs, constructs and supplies advanced steam generation technology, underpinned by extensive after-market services and retrofit upgrade businesses. Doosan Babcock is currently developing some of the cleanest, most efficient coal powered plant in the world, including the integration of its carbon capture technologies. Doosan Babcock is also the last remaining steam generation OEM ...in the UK.”

The document also contains the following text:

At page 7:

> “In the area of technology development, we enjoyed considerable success with our tower boiler and lignite fuelled designs. These are

now being offered to our customers and we expect to finalise orders in the short term."

"We have also made significant progress on the combustion scene and the launch of a new and improved low NOx and low cost burner is imminent"

At page 16:

"We have completed engineering and shipments to the Trimble County 2 project site in Kentucky, where we were contracted to supply a 760MW once-through supercritical boiler for this power station owned by E.ON US. The boiler was successfully hydrostatically tested, construction is now in its final stages and start-up and commissioning has begun.

We continue to enhance our ability to provide new technology solutions which add value for our customers. For example, the company's unique H-finned economiser is enabling Detroit Edison to upgrade its capability and our unique membrane tips technology is being used by Total Western for its pressure pad upgrade."

At page 18:

"Among the successes at Longannet Power Station in Scotland, which is the second biggest power station in the UK (2.4GW), our site teams managed to compress the major outage on Unit 4 from an original plan in excess of 18 weeks to 14 weeks. The scope also included the installation of a newly designed replacement economiser and a new ash hearth, together with work on several other critical items (boiler stop valves, feed pipework, reheater repairs) as well as final tie-ins for a BOFA system, all of which added to the complexity."

At page 23:

"During the year we demonstrated a new low NOx burner at both 40MW and 60MW with a varied global fuel diet...In the coming year we anticipate such burners being trialled in a power station boiler, to demonstrate durability and performance."

26. Exhibit 3: A report, referred to at page 29 as a tender document, for work on a heat recovery steam generator inspection report, dated 14 April 2011 relating to Corby power station. With a value of well over a quarter of a million pounds (page 5) it introduces Doosan Babcock as " a multi-specialist energy services company operating in the thermal power, nuclear, petrochemical and oil and gas industries" and "a leading international steam generation OEM and supplier of the cleanest, most efficient coal powered technology in the world." (page 3).

It goes on to state (page 3):

> "...Doosan Babcock offers a total solution capability to the energy sectors, through the provision of" the following goods and services:
>
> - Utility Boilers
> - Industrial Boilers
> - Research, Development and Consultancy Services
> - Plant Repair and Maintenance
> - Petrochemical Plant Turnaround and Refurbishment
> - Thermal Plant Refurbishment and Rehabilitation
> - Nuclear Engineering and decommissioning Services
> - Pharmaceutical Refurbishment and Rehabilitation
> - Life extension and Plant Upgrade
> - Combustion Plant Solutions
> - Reburn (Gas/Coal)
> - Low NOx Burners
> - Coal Milling Equipment
> - Technical Services
> - Installation and Commissioning
> - Plant Operation and Maintenance
> - Manufacturing
> - Spares

The document lists various jobs that will form part of any contract. At page 5 there are references to the provision of services to open, clean, inspect and repair various pieces of boiler equipment. At page 8 is a reference to the provision of a "temporary Steam Package Boiler for steam heating", "temporary pumps" and "temporary pipework" and to "full HRSG chemical cleaning".

27. Exhibit 4: Doosan Babcock Energy's Annual Report and Financial Statements 2007. The preamble includes the following: "Doosan Babcock can claim an enviable record of successfully completed projects with more than 150,000 MW installed capacity worldwide."

> At page 1 is a reference to Doosan Babcock successfully completing a construction project at Sellafield whilst page 2 refers to a maintenance and repair project with British Energy "which will see Doosan Babcock providing engineering support to the UK's Advanced Gas-Cooled Reactor fleet for the next seven years." There is also a reference to the "Launch of a dedicated R & D Centre to develop state of the art boiler and related technologies".
>
> At page 6 it states:
>
> "Our unique Advanced Supercritical Retrofit offering, whereby a high efficiency supercritical boiler replaces the existing boiler whilst retaining the plants other infrastructure, provides a cost effective solution. There is strong interest in this concept and Scottish Power have commissioned feasibility studies for their plants at Longannet and Cockenzie.

The strength of our OEM position in the UK will be a major target for business growth in 2008 and beyond, as our customers look for assistance in extending the life of their facilities, especially with the current delay in ordering of new, non gas-fired plant.

Beyond the UK, we continue to undertake contracts in a number of countries. The major overhaul at Nikola Tesla in Serbia nears a successful completion, whilst we anticipate a full order release for a boiler project in Libya soon."

At page 7, under the heading "Nuclear" is stated:

"The most notable award of 2007 was the seven year deal with British Energy to be their fleet boiler OEM via the Mechanical, Engineering & Technology Support contract, a deal which spreads over all our three business streams involving operational repair and maintenance, technology and OEM asset provision and life extension projects work. This contract could be worth £550m over the seven year term."

28. Exhibit 5: Doosan Babcock Energy's Annual Report and Financial Statement 2008 which refers, at page 1 to various 'Financial Highlights' including:

- £79m contract with Sellafield Ltd for Separation Area Ventilation project (shown at page 13 to be for the design and installation of a new ventilation system on the Sellafield site)
- Contract awarded to supply SCR and boiler pressure parts for E.ON UK's major environmental upgrade project at Ratcliffe Power Station
- US$ 550m contract for 4 x 350MW boiler units in Brazil
- Repair and remediation of the BCUs at Hartlepool and Heysham Nuclear Power Stations
- Refurbishment of boilers and evaporators for LISCO

At page 12 is a reference to the "outstanding success" at Drax Power Station of boiler enhancement works and at Scottish & Southern's Ferrybridge site of significant large bore pipework replacement.

At page 13 is stated:

> "The manufacturing facility at Renfrew has benefitted from the increased market for plant life extension and has seen an upturn in demand for its specialist expertise in production of boiler pressure parts and associated components coupled with the capability to deliver high integrity pipework" and:
>
> "Heysham and Hartlepool have seen a great deal of important work for Doosan Babcock during 2008. We have been continuously engaged in resolving the boiler closure unit issue which has taken four reactors at these sites offline for the past 14 months. We have been working closely with British Energy and other supply chain companies to engineer, manufacture and install the approved mediation works to

allow these reactors to return to a very demanding and complex schedule."

29. Exhibit 6: Doosan Power Systems Annual Report and Accounts 2010 which refers, at page 12, to the supply of boilers. It states:

> "Boilers: A year of successful delivery for boilers" and continues: 2010 was a year of successful delivery for the boiler business, although in the current economic climate there has been an impact on new order intake....Our contract to supply four 360MW units at Pecém and Itaqui in Brazil has progressed well this year, with major deliveries of steelwork, pressure parts and equipment being shipped safely to site. This project demonstrates our ability to coordinate between the UK and Indian execution centres, our suppliers in Vietnam, China and Europe, and the client's sites".

It goes on to state:

> "In the UK our contract to retrofit SCR on four 500MW units at Ratcliffe power station for E.ON UK has progressed to schedule, with major steelwork and ducting erection completed on Unit 2 during the summer outage. We continue our support to other UK utilities in developing their SCR requirements through Front End Engineering and Design studies."

It also refers to:

> "In addition, we have recently received orders for our newly-developed D-NOx^{TM} burner".

30. Exhibit 7: Copies of two documents, the first headed "Doosan Babcock Capability Sheet-No 0111" which states that Doosan Babcock "have been building and commissioning boiler plant all over the world for over a century" and "works utility, industrial and marine boiler and commissions-

- New build plant
- Existing plants after outages, prolonged shutdown and upgrades
- NOx reduction systems
- Plant subsystem, such as mills, burners, feed pumps etc".

The second document is identical save for all references to Doosan Babcock being replaced by Mitsui Babcock.

31. Exhibit 8: A copy of the Winter 2008 magazine The Edge which is said to be " a quarterly insight into Doosan Babcock Energy" and an employee magazine (exhibit 10 page 1).

At page 2 is the following:

> "9 September 2008

Doosan Babcock announced it has signed a pioneering agreement with Westinghouse Electric Company, the company which is seeking to build its AP1000 nuclear power plant in the UK”

Also at page 2, and referring to 1 October 2008, it reports on the signing of a £10 million Engineering, Procurements and Construction contract between Drax Power Limited and Doosan Babcock to supply “direct injection biomass co-firing systems to all six coal-fired generating units at the 4,000MW Drax Power Station in North Yorkshire.” which will, on completion be “the largest of its type in the world”. It states the contract “has been awarded following a competitive tender process and is a significant project for Doosan Babcock. Work will commence immediately....and...is scheduled to be complete towards the end of 2009”. Mr Timms explains that co-firing is a “low-cost option for efficiently and cleanly converting biomass to electricity by adding it as a partial substitute fuel in high-efficiency coal boilers, with only feed intake system and burner modifications required”.

At page 8 is a reference to the agreement, in March 2008, for the 3 x 350MW boilers for the Pecém and Itaqui power plants referred to above. At page 10 is a reference to existing and continuing projects. One of those listed is at Trimble County in the US. At pages 15 and 16 it refers to the 830MW supercritical boiler being built there having been “designed, fabricated, procured and developed” by Doosan Babcock and “supplied utilising Doosan Babcock’s global network. The design activities were shared between Crawley and Renfrew in the UK, Changwon in South Korea and our engineering team in China. The fabrication was done in Korea, China, Italy, Germany and Spain. Equipment and BOP materials (ductwork, burners, piping, etc.) were sourced from around the world, The delivery of all of these sub supplies was coordinated and managed from Crawley.”

At pages 18/19 is what is described as a maintenance contract of a boiler outage at Didcot worth some £10m and a repair and maintenance outage at Fife power Station in June 2008.

At pages 28-29 there is an article entitled “Pioneering duct replacement in the UK” which states that “Doosan Babcock, in conjunction with Aarding Thermal Acoustics, recently completed a turnkey project for the design and replacement of gas turbine exhaust ducts at Corby Power Station which is operated by Corby Power Ltd” a contract which Doosan Babcock “managed...from design through to assemble, installation and the removal, cutting and scrapping of the original duct sections”.

32. Exhibit 9 is the October 2007 issue of The Edge magazine.

Page 1 refers to Doosan Babcock recently securing “three significant contracts with CLP, including the Engineering, Procurement and Construction of the Emissions Control Boiler Island project for Castle Peak B station...[where it will]...supply a Boosted Overfire Air System (BOFA) and an optimised Selective Catalytic Reactor (SCR) in order to achieve the emissions requirement” and “a number of supply projects to provide burner replacement

components on Castle Peak B2, B3 and B4 stations. We will also provide technical advisory services for the refurbishment and operational requirement. In another contract, we will provide Engineering, Procurement and Construction of the Steam Conversion of the Sootblower system for Castle Peak B-3 station". It goes on to say that "The projects will be operated from our Shanghai office with initial engineering and support from Crawley and detailed engineering from Wuhan and Chennai".

At page 6 it refers to "The Spares group [having] been successful in winning, via Project Opticon, the replacement economiser for the Longannet Unit 4, and [being] busy in the early stages of the contract."

At page 14 is an article with the subtitle "T6 Vessel Replacement at Ineos, Grangemouth" which refers to "Doosan Babcock [making] short work of achieving an outstanding performance in response to an urgent requirement from the refinery and chemical complex at Grangemouth on the banks of the River Forth in Scotland, UK which Ineos acquired in 2006 from BP. The manufacture, delivery, installation and project management of a replacement 65 tonne process vessel and almost 250m of pipework (stainless and carbon steel) was completed more than 12 days ahead of an already ambitious deadline...The Doosan Babcock scope included the detailed engineering, procurement of materials, dismantling the existing vessel, manufacture of the replacement vessel, testing, transportation to site, fabrication and installation of 244m of new external pipework systems (and associated platforms and ladders), plus support to the contractor performing the heavy lift of the vessel to its final position.... Doosan Babcock also managed the nominated contractor (DtEC) for the design and supply of the vessel internals including three chimney sections and the fitting of trays"

At page 23 is a mention of the fact that "In early October we signed a significant contract with DONG Energy for 2 x 800MW *Posiflow* ultra supercritical boilers in Germany" which contain "the Posiflow internally ribbed boiler tube technology system".

33. Exhibit 10 is a copy of the Edge magazine from April 2007.

At page 1 it refers to the "World First-Doosan Babcock Supercritical Anthracite-fired Posiflow Boilers" to be installed at the Zhenxiong Power Station" which was "a combined effort involving both UK and China teams" which "confirms Doosan Babcock's position at the forefront of clean coal technology products and services". There is also a reference to Doosan Babcock winning "a £1.2m contract to manufacture, install and chemically clean furnace tube panels on Boiler 15 at Ineos Grangemouth" which involves the "supply and replace[ment of] major sections of all four water walls on a Babcock supplied boiler from circa 1975" with completion due by October 2007. In addition, there is confirmation that Doosan Babcock has "won the contract to undertake Piping and Mechanical Installation for the early works and shutdown, part of the Acetone Tow Expansion Project for Eastman Chemical at the Workington site in Cumbria. This initial contract which is valued at £800k, will involve fabrication and installation of approximately 111

process tie-ins, 2000m of piping and 60 major items of equipment including vessels and pumps."

At page 17 is an article describing how "Doosan Babcock has successfully delivered over £100m of project and construction work on the Cumbria nuclear sites over recent years for British Nuclear Group" with recent projects including "A construction and commissioning project to refurbish and modify the highly active waste export facility at Sellafield to allow British Nuclear Group to return vitirified high level waste to its Japanese customers. This project has been very successful and with construction now almost complete, commissioning and handover to our client will take place throughout 2007". Another project is the "Sludge Packaging Plant Project" which, "in consortium with Balfour Beatty, [the] design and construct[ion of] a plant to store Intermediate Level radioactive sludge from the historic Magnox fuel storage pond at Sellafield to allow our client, British Nuclear Group, to safely transfer and store 90% of waste sludge from the existing pond by 2010". There is also a mention of the "Fellside CHP Asset Care Programme" a project to "identify and rectify deficiencies in the plant and infrastructure on the plant at the Fellside CHP plant at Sellafield" to be carried out over 3 years.

At page 21 it relates how, in November 2006:

British Energy "approached the Doosan Babcock on-site team and presented us with a significant challenge. BE wanted us to order 220m of 24'nb carbon steel pipe, flanges, fittings and other materials to be able to manufacture, pressure test and install glass flaked lined carbon steel by-pass supply and return lines into the existing ECW Alpha main. BE also wanted this work completed by mid December."

At page 28 is a reference to "Major orders contributing to our total 2006/2007 order intake include the Alliant Energy Ottumwa Unit 1 superheater/reheater project with membrane tips located in the state of Iowa...[a] superheater/reheater project with membrane tips located in the state of Oklahoma....and the Associated Electric Thomas Hill Unit 3 replacement pendants with membrane tips located in the state of Missouri".

34. Exhibit 11 is a copy of The Edge magazine from December 2007.

At page 10 is a "power Projects update" which refers to Doosan Babcock's success in a "formal contract with Dong Energy for two 800MW posiflow ultra supercritical boilers for Germany", "a retrofit for the Wanghu boiler which we supplied a few years ago" and "winning the Yaomeng 2 project, our second posiflow retrofit project in China...led by Ren Hui from our operation in China [who] enjoys full support from the Crawley team."

At page 11 the article refers to a memorandum of understanding with "an EPC consortium lead by Mairengineering de Brazil for three 35-MW coal fired units for 2 power stations in Brazil" and the progress made on the Trimble Country project which "continues to march along towards the completion of

engineering equipment and pressure part supply and on to erection. The steel is almost complete and boiler erection will begin in earnest in the New Year".

At page 20 is an article giving an update on the Superheater and Reheater Replacement Project at Ottumwa in Iowa where "Doosan Babcock's design brief was to redesign the unit to improve the temperature of the Superheat steam whilst maintaining reheater steam temperature, an additional requirement was to reduce the propensity for slag build up and unplugging of the gas pass in the reheater section of the boiler." It goes on to state that "Renfrew Manufacturing built the Reheater elements" and involved "hard work put in by the Renfrew Engineering team and the Manufacturing unit". Mr Timms states that whilst the contract for this work was signed in 2005, the work was ongoing or delivered within the relevant period.

35. Exhibit 12 is a copy of the autumn 2008 issue of the Edge magazine.

At page 16 it refers to Doosan Babcock's "long history in the conditioning and disposal of waste...ongoing Research and Development is an important aspect of the service we offer."

At page 17 is an article which refers to the growing market in South America. It states "....this need for more coal-fired installations has led Doosan Babcock to uncover opportunities in these markets and most recently be awarded three boiler units of the 350MW size at the Pecém and Itaqui sites in Brazil." On the same page there is a reference to ongoing efforts to be awarded contracts to supply boilers elsewhere in Brazil and Chile.

At page 26 is an article referring to Doosan Babcock receiving a £2.8m grant from Scottish Enterprise and the Energy Minister's statements that the "grant recognised the importance of [its] research into clean and efficient energy".

36. Exhibit 13 is a copy of the spring 2009 issue of the Edge magazine.

At page 2 it states "The first boiler/turbine upgradation contract in Australia has been won by Doosan Heavy, with Doosan Babcock as the boiler partner, Upgrade components for the first two boilers in the contract will be engineered and supplied by Doosan Babcock from Renfrew".

At page 12 it states "Doosan Babcock was therefore asked by British Energy to play a key part in the Engineering, Procurement and Construction activities for several of the selected recovery projects work streams."

37. Exhibit 14 is headed "Doosan Babcock Capability Sheet- No 0130" and refers to "Carbon Abatement Technology". It gives details of Doosan Babcock's development of its portfolio of supercritical boilers. It explains that:

"Doosan Babcock's advanced supercritical (ASC) boiler design is a two-pass design similar in overall shape and size to the two-pass natural circulation boiler it replaces. The boiler incorporates low mass flux vertical tube once-

through furnace technology (called posiflow™) which has the advantages of a positive flow characteristic, reduced weight and faster response."

The diagram on the second page shows the boiler to be made up of various parts including burners, separator vessels, superheaters and reheaters.

38. Exhibit 15 is entitled "Trimble County 2 Project Profile" and shows it to have been prepared by Doosan Babcock Energy at Crawley. It refers to it being awarded a contract in May 2006 to design and supply a once through supercritical boiler with e.g. superheater, reheater, economiser, furnace and firing equipment, fans, airheater, mills and pressure parts.

39. Exhibit 17 is headed "Doosan Babcock Capability Sheet -0077" and gives details of the company's compliance with the Pressure Equipment Directive. It indicates that "Doosan Babcock have applied the PER to all relevant pressure equipment since April 2002. This has covered the design, manufacture and installation of equipment in all categories ranging from small bore pipework in Category 1 to reheater drums in Category IV".

40. Exhibit 18 is headed "Doosan Babcock Capability Sheet -0089" and entitled "Fossil Fired Thermal Power Plant-Packaged Equipment". It states: "Doosan Babcock has experienced staff skilled in the technical definition of packaged plant equipment including coal mills, coal feeders, fans, air heaters, sootblowers, boiler circulation pumps, compressors, duct systems, electrostatic precipitators, bag filters, flue gas desulphurisation (FGD) and various other types of Air Quality Control System equipment". The document bears a Renfrew address.

41. Exhibit 19 is headed "Doosan Babcock Capability Sheet -0088" and indicates that the company, based in Renfrew, provides the following:

- Furnace ash systems both hydraulic and mechanical
- Air Heater & Economiser systems either hydraulic, pneumatic or mechanical
- Fly ash systems both pneumatic or hydraulic
- Fly ash classification pneumatic systems
- Coarse and Fly ash silo and unloading systems into road vehicles
- Long distance ash pumping systems
- Coal handling tripper systems

42. Exhibit 20 consists of two documents, the first of which is headed "Doosan Babcock Capability Sheet -0092" and entitled "Boiler Plant Support Structures Design Capability". In the second document Doosan Babcock is replaced by Mitsui Babcock. The documents refer to the company's ability to provide customers with goods and services though "experience ...gained on both new build and retrofit applications of our own and our competitor's boilers" and indicates it can provide the following:

- Primary support structures for Boiler plant, Airheaters and SCR's

- Secondary support structures for Flues and Ducts, Pipeworks and Galleries inclusive of ancillary structures for silencers and Blowdown Vessels
- Primary support structures for Mill and Bunker bay
- Design of Coal Bunkers

The project scope includes: “analysis and design of structure, computer based detailed design and fabrication drawings, preparation of 3D model.”

43. Exhibit 21 consists of Doosan Babcock/Mitsui Babcock capability sheet No 0037 referring to its range of burners as installed in various places including Drax and Didcot power stations.

44. Exhibit 22 consists of Doosan Babcock/Mitsui Babcock capability sheet No 0087 referring to combustion engineering. It sets out how the company continues “to develop combustion equipment and has designed and manufactured burners for installation in new and existing, industrial and utility boiler plant...” including low NOx burners and complete coal, oil and gas systems “from storage to burner” including “Oil offloading, pumping, heating, storage, distribution piping, isolation valves, boiler supply and burner safety shut-off and flow control systems”.

45. Exhibit 24 consists of an invoice issued by Doosan Babcock Energy Ltd, Crawley. It bears an invoice date of 5 January 2010 and a due date of 19 February 2010 and is addressed to RWE NPOWER PLC-Aberthaw. The invoice seeks payment of approximately £52,000 for “Aberthaw power station feed system unit 7 2009”.

46. Exhibit 26 consists of an 8 page purchase order for the supply of “materials, supervision, labour, tools, tackle, equipment, consumables, documentation and testing associated with the mechanical supply and erection work as detailed in the following scope of work, drawings and specification”. It shows a purchase date of 22 February 2008 and delivery address of OSL Compound, Corus Redcar Coke Ovens and is addressed to Doosan Babcock Energy Ltd (as contractor) and from Otto Simon Ltd. It details the responsibility of the contractor to e.g. supply and install goods including a coke oven gas main, gas supply pipe and steel pipes and assemble the components of a flare stack at the Redcar site.

47. Exhibit 27 consists of an invoice worth just over £4000 from Doosan Babcock Energy Ltd at Crawley to British Nuclear Group and relates to “Renfrew Support (Saggin Boiler Tubes) for the Magnox North Oldbury power station.

48. Exhibit 28 consists of an invoice from Doosan Babcock Energy Ltd in Crawley in relation to “Sizewell B Power station, ACW pipework replacement project”. Worth over £73,000, the invoice is dated 5 January 2011 and is addressed to British Energy Generation Ltd, Sizewell.

49. Exhibit 29 consists of an invoice from Doosan Babcock Energy Ltd in Crawley relating to the replacement of exhaust ductings at Corby Power station. The invoice is dated 27 June 2008 and is said to be a “6th milestone payment” and is worth almost £176,000.

50. Exhibit 30 is an 8 page purchase order to Doosan Babcock Energy Ltd (as contractor) from Otto Simon Ltd, is dated 26 February 2008 and relates to

> "mechanical supply and erection work associated with the Redcar detarrers". It details the responsibility of the contractor to e.g. install elbows on gas pipes, seals, fabricate and install platforms, seal pots and drain and nitrogen supply lines at the Redcar site.

51. Exhibit 31 is a scope of work setting out "piping construction works for a gas turbine air inlet filtration upgrade project and anti-ice exchanger pipework installation" at the Humber refinery and Immingham combined heat and power plant. The 24 page document sets out the details of the work required and responsibilities and standards to be met. Mr Timms states that it is an agreement about the work to be undertaken by Doosan Babcock in 2010 (clause 13 refers to the work being completed in the period 14 September 2010 to 3 November 2010), though the document refers only to the "contractor". There are references to the supply, manufacture, fabrication, installation and fitting of e.g. pipe supports, shoes, guides, anchors, gaskets and free screwed or bolted instrumentation".

52. Exhibit 32 is a purchase order dated 17 September 2007 from Otto Simon Ltd to Doosan Babcock Energy Ltd and relates to work at the Corus Appleby Coke Ovens in Scunthorpe involving "mechanical supply and erection work associated with...gas collecting main flares" with modification as required.

53. Exhibit 33 consists of Doosan Babcock/Mitsui Babcock capability sheets relating to composite pipe wrapping, utilised for the rehabilitation of weakened pipework or effecting leak repairs.

54. Exhibit 34 consists of Doosan Babcock/Mitsui Babcock capability sheets relating to fossil fired thermal power plant protective systems and refers to e.g. ducting installations, pipework, expansion joints and cladding systems and their design.

55. Exhibit 35 consists of a Mitsui Babcock capability sheet relating to machining and fabrication. Under the heading "Typical Manufacturing Projects" it lists the manufacture of gas circulator impellers for Howden Power, pipework for BAe Systems and blow-out panels for Wylfa Nuclear power station.

56. Exhibit 36 consists of Doosan Babcock/Mitsui Babcock capability sheets relating to plant operations. They state the company provides services:

> "to the nuclear industry which supports the entire lifecycle of a nuclear facility. These range from design and build, through operational life, into decommissioning and finally site clear up."

57. Exhibit 37 consists of Doosan Babcock/Mitsui Babcock capability brochures which refer to the "design and supply [of] remotely operated equipment to support plant operation and decommissioning projects"

58. Exhibit 39 is an invoice dated 16 March 2011. From Doosan Power Systems Ltd, it relates to fuel canister mobile platform design work for Sizewell B power station and amounts to over £8,500.

59. Exhibit 40 headed “Doosan Babcock Project Profile” relating to work to provide a storage facility for legacy radioactive sludge as part of a decommissioning programme at Sellafield over a five year period. Photographs on the page show dates indicating they were taken in March and September 2011. Mr Timms states that the work was carried out by the Doosan Babcock unit of his company.

60. Exhibit 41 are invoices from Doosan Babcock Energy Ltd relating to work carried out at Didcot A power station (HP Feed Pump suction and mag strainer installation £22,000 plus) dated September 2009 and BP Wytch Farm (Fabrication of process operator platform £3,000 plus) dated May 2010.

61. Exhibit 42 includes an invoice from Doosan Power Systems to AJ Fabtech in West Yorkshire and dated March 2012. Relating to “Economiser Backpass headers 4 off sections, 2nd Unit”, the invoice totals almost £92,000.

62. Exhibit 43 consists of invoices from Doosan Power Systems which are headed Doosan Babcock Energy. Addressed to Burlington Resources (Irish Sea) Ltd at an address in Norway, each relates to the manufacture of an ammonia injector and SCR reactor. Both bear the same date in August 2011, appear to relate to staged payments for the same job and total over £75,000.

63. Exhibit 44 is a copy of the July 2007 issue of the Edge. At page 1 it refers to Doosan Babcock having secured a contract from Scottish Power to carry out a feasibility study into converting its two biggest power stations to clean coal technology. At page 17 it refers to the awarding of a “£2-5m contract by Rugeley Power Limited to design-check, supply and manufacture various heavy walled alloy steel headers and associated antlers for boilers 6 and 7 at Rugeley Power Station in Staffordshire....The order is for 230 tonnes of pressure parts which will be manufactured at our Renfrew factory. The supply includes superheater mixing and transfer headers, including antlers, superheater outlet headers, the reheater upper mixing and transfer headed insert, and the reheater outlet header”.

64. Exhibit 49 is an invoice from Doosan Babcock Energy Ltd dated February 2010 relating to “planning assistance for November-December 2009” at Dungeness B Power station totalling some £8,000.

65. Exhibit 50 is Doosan Babcock/Mitsui Babcock capability sheets No 0029 in which it is noted that each has “been involved in evaluating [Risk Based Inspection] methodologies for several years and can provide impartial advice on how to set up an optimum inspection programme. It also refers to the fact that: “A full range of integrated asses [sic] management services can be offered including risk management, inspection planning, site inspection, remnant life assessment, maintenance, failure investigations, failure mitigation, repair and replacement.”

66. Exhibit 52 is a copy of a signed “segment contract” between Doosan Babcock Energy Ltd and British Energy Generation Ltd dated June 2007. Clause 3.1 indicates

it is an agreement entered into as part of a Master Services agreement. In addition to services such as welding, plating, pipe fitting, rigging and heat treatment, it covers the provision of services such as project management, site management and supervision and purchasing and procurement, contract management, non-destructive testing and material analysis.

67. Exhibit 53 is a copy of an order from CPL Operation Limited in Corby to Doosan Babcock dated 15 April 2011. The order, in the sum of more than £283,000, relates to the provision of services for inspection and chemical cleaning of heat recovery steam generators.

68. Exhibit 54 is a copy of an agreement between E-On UK and Doosan Babcock Energy relating to Boiler Site Works at Ratcliffe Power Station. The lengthy document requires Boosan Babcock Energy Ltd to "design, procure, install and make good defects in accordance with the Works on all four Units" at Ratcliffe Power Station and was made, and became effective, on 16 January 2009.

69. Exhibit 55 is a copy of an agreement appointing Mitsui Babcock Energy Services Ltd as subcontractor for repair and inspection work being carried out at the Conoco site in Immingham. The contract, estimated to be worth more than £700,000, was made on 9 December 2005 but papers within the document shows it was subject to various later revisions (e.g. revision 3 is dated May 2006 but there is also mention of revision 6) and Mr Timms states that the scale of work involved means it is likely still to have been ongoing during the relevant period.

70. Exhibit 56 is a copy of an invoice dated 27 June 2008 from Doosan Babcock Energy Ltd. It relates to a 6th milestone payment for work carried out at Corby Power Station to replace "GT's exhaust ductings" and amounts to over £175,000.

71. Exhibit 57 is a copy of a sub contract agreement made 1 October 2007 whereby Doosan Babcock Energy Ltd was responsible for the "design, manufacture, supply, deliver, install of all required site preparations, receiving/inloading of free issue materials, pre-assemble of free issue materials (supplied by contractor) and installations works for the replacement of the exhaust ducting, silencers, supports and expansion joints (and removal and disposal of existing ducts and insulation, including any temporary removal and replacement of plant to enable such Works)" at Corby Power Station.

72. Exhibit 59 is a copy of a purchase order for the supply, by Doosan Babcock Energy Ltd of weld repairs at the SABIC UK petrochemical site at Wilton, Redcar. It is dated November 2009.

73. Exhibit 60 is a copy of a purchase order issued to Doosan Babcock Energy Ltd and dated 31 July 2007. The scope of work, which relates to Corus's premises at Appleby and Dawes Lane, totals some £150,000 and refers to the fabrication, inspection, surface treatment, surface preparation, documentation, general transport protection and delivery of flare stack assemblies.

74. Exhibit 61 is a letter of acceptance dated 22 December 2010 from Scottish and Southern Energy to Doosan Babcock Energy. The letter refers to boiler maintenance

at Ferrybridge “C” Power Station to take place throughout 2011 at a contract target price of over £1.5m.

75. Exhibit 62 is a copy of a master services agreement between British Energy and Doosan Babcock Energy Ltd made in June 2007 for works at the former’s power stations and other sites. The agreement is in respect of on-site general plant maintenance and overhaul contract and in vessel inspection and repairs.

76. Exhibit 63 is a copy of a segment contract between Doosan Babcock Energy Ltd and British Energy Generation Ltd. Dated June 2007, it relates to the provision by the former, of project management and engineering services in various locations within the UK in support of “AGR boiler integrity” which it explains is advanced gas cooled reactor nuclear power station.

77. Exhibit 64 consists of 9 invoices, all dated within the relevant period and addressed to a number of companies. They total almost £1m and relate to: Main boiler overhaul and engineering at Fawley Power Station, Boiler overhaul and tube leak repairs at Didcot A, Maintenance at Sizewell B, fabrication of process operator platform for BP Wytch Farm and mechanical support or maintenance at Great Yarmouth and Little Barford power stations.

78. Exhibit 67 is a Doosan Babcock Energy capability sheet No 0069. It notifies of the company’s ability to carry out various survey, design and engineering services with design work being undertaken using Autocad software and the provision of “specialist construction, panel building, testing, commissioning and installation services”.

79. Exhibit 70 is a Doosan Babcock Capability Sheet no 0108 entitled Chemical Cleaning. It describes how Doosan Babcock identify, write specifications for and perform cleaning services for plant including “major repairs or modification, cleaning plant after water chemistry disruption; removal of long term build up of scale and deposits”.

80. Exhibit 73 is a Doosan Babcock/Matsui Babcock Capability Sheet no 0135 entitled “Decommissioning, Dismantling and Deplanting”. It refers to nuclear facilities and states it provides services which “range from design and build, through operational life, into decommissioning and finally site clear up.”

81. Exhibit 78 is a purchase order to Doosan Power Systems Ltd dated 16 March 2011. It relates to an SRC reactor and Ammonia Injection system including the supply, completed assembly, installation of insulation and installation, precommissioning and commissioning of spares for that system. Mr Timms explains that these are items in the form of gas treatment equipment as they are parts of industrial boilers which help convert NOx into less harmful substances. The order totals over £200,000.

82.Exhibit 79 is a Doosan Babcock/Mitsui Babcock capability sheet entitled “Installation and crating Services I.C.S.E”. It includes the following text:

> “Specialising in the Semiconductor, Biomedical and Pharmaceutical markets but also operating across the entire range of equipment transfers....we provide world “smothercare” solutions from the Vendor’s overseas point of origin, delivering your precious investment, right through to the factory floor, by air flotation, safeguarding your production plans...We take care of all aspects of the move, including detailed planning with client’s Facilities, Purchasing and Engineering staff. We handle International Freight Management, and all logistics...We arrange and handle all site installation work, provide cranes, forklifts, certified and experienced installation teams and adhere to HSE regulations, including detailed preparation of Risk Assessments, and site Method Statements.

83. Exhibit 80 is a Matsui Babcock Capability sheet entitled “NOx Control Systems NOxStar”. It includes the following; “post combustion process that continually injects controlled quantities of ammonia-based reagent with relatively small quantities of hydrocarbon (typically natural gas or propane) into the superheater/reheater pass of a boiler. The reagents are injected...through an injection grid.”

84. Exhibit 81 is made up of two invoices from Doosan Babcock Energy both dated 9 August 2011. They relate to 20% and 10% of the total completion work value of the provision of services to manufacture an ammonia injector and SCR Reactor and total more than £75,000. Mr Timms states that these are parts of “industrial boilers used to help convert NOx into less harmful substances i.e. gas treatment”.

85. Exhibits 83 and 84 are Doosan Babcock/Mitsui Babcock capability sheets entitled NOx Control Systems: Reburn and NOx Control Systems: Selective Non-Catalytic Reduction (SNCR). Each of the Doosan Babcock sheets bears the following text: “Doosan Babcock is the first choice supplier for staged combustion technologies to reduce NOx emissions, and our OFA (Overfire Air) and BOFA (Boosted Overfire Air) technologies are now found on numerous Utility boilers of differing types around the globe.” The sheet at Exhibit 83 refers to an application of this technology at Longannet Power Station.

86. Exhibit 85 is a Mitsui Babcock/Doosan Babcock capability sheet entitled “Water Chemistry”. It refers to “Unplanned boiler outages [being] surprisingly common...the most common causes being the presence of dissolved gases such as oxygen or carbon dioxide, incorrect pH or excessive levels of hardness salts, silica, iron/copper etc. Many of these failures are avoidable by the application of correct water treatment.”

87. Exhibit 86 is an invoice dated 7 December 2011. It was issued by Doosan Babcock and indicates it is for “Aberthaw Power Station Carbon Capture Pilot Project Design & Engineering”. It totals over £200,000. Mr Timms acknowledges the invoice to date from just outside the relevant period but states that the services were provided prior to the end of that relevant period.

88. Exhibit 87 consists of 5 invoices. The first two appear to be duplicates as do the final two. All date from 2010 and refer to 1) the provision of engineering services to a print firm in Kent (£4,000 plus), boiler inspection, reporting and equipment hire to a

Hampshire company (£28,000 plus) and provision of engineering support to Slough Heat & Power (£7,000 plus).

89. Exhibit 89 is a Mitsui Babcock/Doosan Babcock capability sheet no 0091. Entitled “Boiler Mechanical Design” it refers to the design of various structures for or as part of boiler installations.

90. Exhibit 90 is a Mitsui Babcock/Doosan Babcock capability sheet no 0094 entitled “Boiler Plant Civil Works and Foundations Design Capability. It refers to “extensive experience in overseeing the design of civil works and foundations for a range of boiler parts” and “boilers, airheating and SCRs support structure; stair tower and lift shaft structure; mill and bunker bay structures; coal mills; various fans; backyard structures; drain vessel and condensate tanks; slag and ask handling plant structure; ask silos, trenches and sumps”.

91. Exhibit 99 is a Doosan Babcock capability sheet no 0085 entitled “Pressure Part Design”. It states: “The design of the pressure part components and systems are undertaken utilising Doosan Babcock in-house procedural systems and computer software.”

92. Exhibit 101 is a Doosan Babcock/Mitsui Babcock capability sheet no 0151 entitled “Civil Engineering Testing Services”. It refers to the company offering a “wide range of research, development, consultancy and other specialist products and services. This provision extends beyond internal Doosan Babcock activities to the Energy Division worldwide, including customers in the civil engineering, power, petrochemical, process and offshore industries” and “component testing services” which “can be carried out in one of our test machines or in a custom made rig...”

93. Exhibit 103 is a Mitsui Babcock/ Doosan Babcock capability sheet no 0059 entitled “Full Scale Component Testing. It refers to the “comprehensive range of component testing services...in support of the Energy, Oils & Gas and Civil Industrial sectors.” It states that “ a wide range of components tested previously, including but not limited to testing of: subsea piping, bridge components, ropes and lock up devices.”

94. Exhibit 106 is a purchase order date 4 March 2011 to Doosan Babcock Energy Ltd from a company in Dewsbury in relation to work detailed as backpass side A/B split inlet and hydrostatic pressure test at Ratcliffe Power Station.

95. Exhibit 107 is an invoice from Doosan Babcock Energy Ltd to a Hampshire company for boiler inspection, reporting and equipment hire in the sum of £28,000 plus. It is dated 17 May 2010.

96. Exhibit 110 is a Mitsui Babcock capability sheet no 009 entitled “Chemical Analysis Services”. It says it is the “leading independent specialist in the analysis of metals and metal alloys both in the laboratory and on-site”.

97. Exhibit 118 is a Mitsui Babcock/Doosan Babcock capability sheet no 0021 entitled “Ultrasonic Inspection of Steel Welds”. It refers to “manual and automated Ultrasonic Testing”.

98. Mr Timms states that whilst he has referred to individual goods and services in his evidence, the goods and services are “very much interrelated and comprise solutions to energy needs”.

99. In his witness statement, Mr Borrett states that the group’s principal client is the Ministry of Defence and that in 2011, some 52% of its income came from this client. At JB3, JB3, JB4 and JB5, Mr Borrett exhibits a number of brochures, some of which, he states, are available online and have been sent to customers. They date from between 2008 and 2010, prominently feature the mark throughout and give details of the range of services provided by the company as prefaced above and which he states includes all the services for which the relevant marks are registered. At JB6, Mr Borrett exhibits a copy of the company’s annual report and accounts for 2010. He states the total group revenue for the financial year ending 31 March 2010 was £1,895.5m (of which £1,668.6m was generated in the UK) with an operating profit of £148.1m which he states demonstrates the strength of the business and its leading position in their principal market sectors. For the following year the figures are said to have been £2,894.5 (£2,210.4m) and £157.5m respectively.

100. In respect of its nuclear related services, Mr Borrett states that the group employs over 3,500 nuclear engineers, scientists and technicians, (the largest in the sector) and offers concept design, engineering and build of civil nuclear facilities, design and manufacture of nuclear equipment, operational support and maintenance, detection and measurement solutions, decommissioning equipment and services and safe management of radioactive fuel and waste, including handling, transportation and storage. To confirm this, at JB7 he exhibits various corporate and marketing literature showing the mark which date from between March 2009 and August 2011. At JB8 he exhibits what are described as example contracts. Pages 482 to 575 are parts of a framework contract dated 11 April 2011 which refer to the provision of specialist nuclear services at the Magnox power station at Berkeley Glos, pages 576 to 590 are parts of a non disclosure agreement with the Nuclear Decommissioning Authority dated 21 April 2008 and pages 591 to 599 relate to an agreement dated 3 July 2009 for the design, supply, installation and commissioning of skiphandler tooling at Sellafield.

101. At JB10 and JB11 Mr Borrett exhibits material relating to work carried out on the UK railway infrastructure. The former consists of corporate literature in the form of business plans for the years 2010 and 2011/2012 which show the mark and give details of various works carried out including, at page 608, the completion of track renewal work to the value of £2.5m at Elderslie and at page 610 to civil engineering, way works and power distribution on the Settle-Carlisle project. Pages 676 to 761 consists of redacted invoices dating from between February 2009 and October 2011 for various work carried out on the railway at various locations across the UK.

102. At JB12 are corporate brochures from 2009 and 2010 relating to airport services which show the mark. I note that at page 718 is a reference to “our 900-strong workforce [offering] engineering solutions and services across the entire project life cycle from concept design to system build and from maintenance services to full asset management”. Example contracts entered into are exhibited at JB13 including, at page 749 onwards, for the design, build and installation of additional check-in capacity at Heathrow airport with a starting date of March 2010, at page

763 onwards, for the design, build and test of baggage systems at Heathrow including the creation, installation and configuration of Airport Data Repository and MIS Software with a date of 2 August 2010 and at page 775 onwards for the provision of various consultancy services in relation to the handling of baggage at Heathrow dated 1 July 2010. Also included within this exhibit are sample, redacted, invoices in relation to the above works and a letter dated 14 May 2008 confirming acceptance of a subcontract for the provision of construction and engineering services for steelwork at Heathrow East Terminal.

103. In relation to its work in the defence sector, Mr Borrett states that it includes e.g. flying training, airfield ground equipment and flight simulator maintenance and support including computer-based training and aircraft fleet maintenance, military training solutions, facilities management, the production and manufacture of specialist military vehicles, the refitting and decommissioning of nuclear submarines, maintaining and refitting warships, designing, building and maintaining aircraft carriers and naval equipment, base porting services including the management and upgrade of engineering plant and equipment and delivery of training. At JB15 he exhibits copies of various corporate and marketing documents dating from 2009, 2010 and 2011 to support these claims of which show the mark throughout. At JB16 are exhibited samples contracts and includes one, at page 880, dated 27 March 2008 relating to a £10billion Future strategic Tanker Aircraft contract for which his company is identified as one of five main suppliers and sub-contractors.

104. Mr Borrett states that BIG also works with both public and private sector customers on a wide range of property related services including facilities management, quantity and building surveying, building design, mechanical and electrical design and construction management, supply chain management, health and safety and project management. At JB17 he exhibits corporate and marketing literature relating to these services which date from 2007 to 2011 which show the mark. At JB18 he exhibits redacted copies of sample invoices relating to such services carried out in the UK and which date from 2011.

105. At JB19 are exhibited copies of corporate and marketing literature relating to use of the mark in relation to energy and communication fields. They date from 2008 to 2011 and show the mark. At JB20 are exhibited e.g. example contracts and redacted invoices relating to such work which show dates throughout the relevant period. At page 1003, for example, is an invoice in relation to consultancy services.

106. At JB21 are exhibited copies of literature bearing the mark relating to education and training services dating from 2011, and at JB22, final tenders relating to the development and delivery of a training programme for the London Fire Brigade including design and planning of training courses, construction of suitable training facilities, implementation of computer-based training, acquisition, replacement and disposal of equipment and the management of training facilities.

107. At JB23 are exhibited copies of literature bearing the mark dating from 2010 and 2011. They are a mobile assets management brochure, a case study brochure and a mining and construction brochure. At JB24 is exhibited a copy of a leaflet in the form of a Capability Statement regarding Integrated Technology which Mr Borrett states provides an overview of the range of ICT and information knowledge

management consultancy capabilities offered under the mark. At JB25 is a Scientific Services Capability leaflet which describes the availability of e.g. analytical chemistry, calibration and asbestos management survey services which is dated July 2010.

108. The above is but a brief summary of the evidence filed by BIL. Whilst BPUK has accepted that certain goods and services have been supplied by BIL, it submits that it is not sufficient for a positive finding of genuine use of the mark. In his witness statement, and as indicated above, Mr Dougherty criticises BIL's evidence as "[consisting] largely of general corporate and marketing literature-such as 'Capability Brochures', corporate magazines, and presentations" and "only a small number of invoices and contracts". BPUK submits that much of the evidence filed relates to activities outside the UK, that there is no evidence that any goods were marked with the trade mark and, in respect of evidence such as promotional literature, no evidence of them having been distributed, if at all, within the UK or elsewhere. It also submits that absent any context of the market for the goods and services, it is not possible to conclude that the volume of any supply is sufficient to preserve or create a market share.

109. BIL's evidence comes from a number of sources, including its licensee and other companies within the same group of companies as BIL. The mark is said to have been used by each of them with BIL's consent. It is true that not all of the evidence is dated, that some of it would appear for internal use only or relate to other countries and there is no detail of to whom, specifically, any promotional material may have been circulated or when. Whilst throughout the material a number of marks are used, there are innumerable references to the mark BABCOCK in the form in which it is registered and within composite marks. In considering the evidence, it is a matter of viewing the picture as a whole, including whether individual exhibits corroborate each other. In Case T-415/09, *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, the General Court ("GC") considered the need to get a sense from the overall picture of the evidence even where individual pieces may not, of themselves, be compelling and stated:

> "53 In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (COLORIS, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07 P Ferrero Deutschland v OHIM, not published in the ECR, paragraph 36)."

110. In *Dosenbach-Ochsner AG Schuhe und Sport v Continental Shelf 128 Ltd*, BL O/404/13, Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, stated:

"21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in Matsushita Electric Industrial Co. V. Comptroller-General of Patents [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

> [24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not 'show' (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

111. Registration No 756324 covers a range of goods within Class 11 which are (parts of) boilers and plant installations. A number of tender documents, contracts and invoices have been filed, some of which date from within the relevant period. Others date from outside the relevant period but, given the nature of the goods concerned and the lead time from the initial consultancy and/or tendering process to final performance of the contract, clearly relate to them being supplied within the UK within the relevant period. There is evidence from within the relevant period showing e.g. the supply of boilers, fuel economisers, boiler stop valves, feed pipework, reheaters, temporary steam packages, pumps and pipework at Longannet (Timms, Ex 2), large bore replacement pipework at Drax (Timms, Ex 5), Boilers at Ratcliffe (Timms, Ex 6), biomass co-firing systems at Drax and gas turbine exhaust ducts at Corby (Timms, Ex 8), economisers at Longannet, pressure vessels and pipework at Grangemouth (Timms, Ex 9), plant for storing and processing radioactive sludge at Sellafield (Timms, Ex 10), coke oven gas mains and gas supply pipes at Redcar (Timms, Ex 26) and exhaust ductings at Corby (Timms, Ex 29). Whilst turnover figures for the goods have not been supplied (either as individual components or in totality), a number of documents within the evidence show that significant costs are involved. For example, invoices show the cost of a feed system unit at Aberthaw totalled some £52,000 (Timms, Ex 24) pipework at Sizewell was supplied at a cost of

some £73,000 (Timms, Ex 28) and a 6th milestone payment for exhaust ductings at Corby amounted to almost £176,000 (Timms Ex 29). It is clear from the evidence that BIL and associated companies combine to be a major supplier of boilers and related equipment as is specified in the registration in class 11. It is not disputed that the company is the only remaining OEM manufacturer. Taking the evidence as a whole, I am more than satisfied that genuine use of the mark has been made within the relevant period in relation to all of the goods for which 756324 is registered. This finding, of course, is subject to the admission of non-use by BIL referred to earlier in this decision.

112. Registration No 1283519 covers a range of services in a number of classes. I intend to deal with each class of services in turn.

113. The services as registered in class 35 are: "Commercial and industrial management consultancy and assistance; business management services related to contracts". Within the evidence there is an invoice from Doosan Babcock Energy Ltd to British Generation Ltd, (Timms, Exhibit 49), which totals some £8000 for "planning assistance" at Dungeness B Power Station. There are also capability brochures (Timms, Exhibits 50 and 51), which refer to it providing risk based inspection planning, consultancy work and integrated asset management services including risk management, inspection planning, remnant life assessment and the provision of expertise in equipment and protective systems to be used in potentially explosive atmospheres. A contract (Timms, Exhibit 52) specifies the scope of work and services "that may be provided...under this Agreement" and includes "managerial skills, capability and experience, project management, contract management and sub-contract management. The evidence also includes e.g. an extract from a contract (Borrett, Exhibit JB13) for consultancy services relating to a project at the Central Control Room at Heathrow airport, a document entitled "infrastructure" which gives details of services provided to the MoD, Local Government and in the education, home affairs, pharmaceutical and petrochemical fields. It includes articles entitled "Babcock Asset Management" and "Babcock Project Management" and gives details of the services provided (Borrett, Exhibit JB17), invoices for professional consultancy services supplied to Electricity North West Services Ltd (Borrett,Exhibit JB20) and a marketing brochure relating to consultancy services to those in the educational field (Borrett, Exhibit JB21). Again, taking the evidence as a whole, I am satisfied that the mark has been used within the relevant period in relation to the services as specified in class 35.

114. The services as registered in class 37 are: "Construction, commissioning, cleaning, de-commissioning, demolition, maintenance and repair of electrical, electronic, engineering, and heat exchange apparatus and instruments, factories and of warehouses; installation and repair of liquid and gas treatment and purification apparatus and instruments". The evidence includes e.g. invoices for the repair and inspection of boilers at Immingham (Timms, Exhibit 55) and the replacement of exhaust ductings at Corby (Timms, Exhibit 56), an agreement for the making good of defects at Ratcliffe (Timms, Exhibit 54), an order for the inspection and chemical cleaning to the value of over £280,000 (Timms, Exhibit 53), the installation and decommission of ductings (Timms, Exhibit 57), boiler maintenance at Ferrybridge (Timms, Exhibit 61), invoices for repairs, fabrication and maintenance of equipment (Timms Exhibit 64), invoices relating to the management and upgrade of engineering

plant (Borrett, Exhibit JB15), an article describing the repair and maintenance of an evaporator inlet header at Fife (Timms, Exhibit 8), a purchase order for the installation of an SCR Reactor and Ammonia Injection System at a cost of over £200,000 (Timms Exhibit 78) and a letter from National Grid accepting a tender for the construction of a tower (Borrett, Exhibit JB20). Taking the evidence as a whole, I am satisfied that the mark has been used within the relevant period in relation to each of the services specified in this class.

115. The services as registered in class 40 are: “Treatment of liquids, gases, or metals”. Again, Mr Timms identifies a number of documents which he states are evidence of use of the mark in relation to such services. At his Exhibit 80 is a Mitsui Babcock capability sheet no 0032 which gives information on a post-combustion process by which ammonia-based reagents are injected with a hydrocarbon in a superheater/reheater pass of a boiler. The document states “The process can be retrofitted to existing plant and is irrespective of fuel”. This is not evidence of treatment services as specified but instead is evidence of the supply of goods i.e. a piece of equipment that enables such treatment. Similarly, the evidence exhibited at Timms Exhibit 81, which are invoices “raised upon completion of works” for 10% and 20% of the value of a purchase order, indicate they relate to the “provision of services to manufacture” an ammonia injector and SCR reactor and whilst the goods manufactured may allow for the treatment of e.g. gases, they cannot be relied upon to support a claim to have provided treatment services themselves. Mr Timms also identifies Exhibits 82 to 85 as supporting the claim to have used the mark on the specified services. Each of these is a capability brochure which refers either to NOx control systems (Exhibits 82-84) or to Water Chemistry (Exhibit 85). The first brochure (no 0033) refers to “two stage combustion (as a) primary control measure to reduce the oxides of nitrogen from utility power plant” and refers to the ability of such systems to be “retrofitted to existing plant as well as new build”. The second and third (nos 0035 and 0036) refer to Doosan Babcock being “the first choice supplier for staged combustion technologies to reduce NOx emissions” and again indicate they can be retrofitted to existing plant or incorporated into new boiler designs. The last document (no 0109) states that: “Boiler water chemistry has a direct impact on the safe and reliable operation of hot water and steam raising plants”. It goes on to explain how “contaminants can lead to failure through deposition over-heating and through corrosion” but that many of these failures “are avoidable by the application of correct water treatment.” The document indicates that the services provided include: “operational reviews, training, support and advice, troubleshooting, failure analysis, new regimes, establishment of best practice [and] chemical cleaning” and that the company’s “dedicated water chemistry experts provide advice on all matters relating to water chemistry, including feed and boiler water conditioning, steam purity control and related topics such as chemical dosing, blow down, water & steam sampling and analysis”, work “in conjunction with our boiler inspection engineers to identify plant deterioration influenced by water chemistry and determine which of the many possible damage mechanisms were involved. We are then able to diagnose the root causes and produce advice on what action to take to avoid reoccurrence”, are “able to advise on all aspects of chemical cleaning for both new and in service plant” and “can provide advice on lay up procedures to preserve the plant in optimum condition”. In my view, whilst all of these documents indicate that equipment can be fitted and advice given about treatment services, they do not show or support any claim that any treatment

services themselves have been supplied. I find that the trade mark has not been used within the relevant period in relation to “Treatment of liquids, gases or metals”.

116. The services as registered in class 42 are: Engineering design, drawing and drafting; engineering research and consultancy; computing services; examination and testing of metals and welded fabrications to determine soundness, structure or properties”.

117. In respect of engineering design, drawing and drafting services, the evidence includes an invoice dated December 2011 for design and engineering work to the value of over £218,000 relating to Aberthaw (Timms, Exhibit 86), an invoice dated March 2011 for mobile platform design at Sizewell to the value of over £8,000 (Timms, Exhibit 39), an invoice dated April 2010 for the provision of engineering services to Aylesford Newsprint totalling over £4,000 (Timms, Exhibit 87), a contract for the provision of design drawings at Corby (Timms, Exhibit 88) a letter from National Grid accepting a tender for the design of a new transmission line tower, an invoice for “overhead line Design Span” (Borrett, Exhibit JB20) and capability sheets which indicates the services provided include the production of drawings or reviewing the drawings produced by others and “we offer a fully integrated service covering feasibility study, design, development and implementation...” (Timms, Exhibits 96 and 97). I am satisfied the mark has been used in relation to these services.

118. As regards engineering research and consultancy services, the evidence includes a Doosan Babcock inspection report dated April 2011 relating to research, development and consultancy services carried out for Corby power station (Timms, Exhibit 3), and invoice dated March 2010 for the provision of engineering support to Scottish & Southern Energy to the value of over £6,000 (Timms, Exhibit 87), a redacted invoice to Electricity North West Services Ltd for professional consultancy services (Borrett, Exhibit JB20) and a copy of The Edge magazine from July 2007 which reports that the company has secured a contract from Scottish Power to “study feasibility of converting its two biggest power stations to clean coal technology” (Timms, Exhibit 44). I am satisfied the mark has been used in respect of these services.

119. Computing services are also said to have been provided under the mark. In his evidence, Mr Timms refers me to four exhibits (Exhibits 67, 95, 98 and 99). They are each capability sheets, entitled “Control and instrumentation”, “Hot Ducting (Engineering and Design)”, “Plant modelling and imaging” and “Pressure part design”. They each refer to the use of computer technology, e.g. “work undertaken by the Group utilises the Autocad suite of software”, “designs using computer software” and “laser scanning uses CAD model to create engineering drawings”. Whilst these documents show that BIL and associated companies use computers and software to assist it in the delivery of its goods and services (as, no doubt, do many businesses in most areas of trade), they do not show it offers computing services per se. Mr Borrett also exhibits a number of documents to show the use made of the mark in relation to these services. At JB21 is an “Education Capability Flyer” which has an issue date of May 2011. It includes a number of case studies, one of which refers to how it has delivered services to the London Borough of Lewisham “delivering ICT managed services; providing hardware...”. At JB24 he

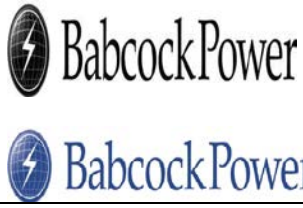
exhibits two Capability Statements. The first is entitled “Integrated Technology Information Knowledge Management” and states that “Babcock’s Keynsham Data Centre ....hosts a wide range of MoD and industry business-critical systems and information”, that it provides “bespoke applications to meet end user’s needs, or enable interaction between existing applications and databases by providing the necessary data exchange interfaces”, that it is “responsible to many of the business-critical systems used within the MoD today”, that its capabilities “combined with Keynsham Data Centre’s connectivity and Babcock’s accredited encryption technology enables an extensive data warehouse to be created, and made securely available to a vast number of MoD and industry users”, that it can “provide users with remote IT infrastructure access to conduct secure ‘business as usual’ activities from anywhere in the world and that its data centre “hosts business-critical information with national security implications which must be available 24 hours a day, seven days a week”. The second Capability Statement is entitled “Babcock Information and Knowledge Management”. It refers to secure hosting services and states: “Babcock has extensive system integration and process flow experience, especially between MoD and industry systems. The Keynsham Data Centre...and Babcock’s accredited encryption technology enable secure connectivity for many thousands of MoD and industry users to their business-critical applications”. Whilst somewhat limited, the evidence is sufficient to show that the mark has been used in relation to computing services.

120. The remaining services in this class are “examination and testing of metals and welded fabrications to determine soundness, structure or properties”. Evidence to support use in relation to these services includes a purchase order from A & J Ekströms Ltd which includes a hydrostatic pressure test (Timms, Exhibit 106), an inspection report which sets out a workscope reference which includes for an engineering visual inspection of boiler gas path components and an inspection of the boiler drums and de-aerator (Timms, Exhibit 3), a purchase order from Otto Simon Ltd where the scope of work includes for the visual inspect of welds and magnetic particle testing of welds (Timms, Exhibit 60), invoices to Marchwood Power Ltd for boiler inspections (which Mr Timms explains will invariably involve examination and testing of metals and welded fabrications to determine soundness, structure or properties) (Timms, Exhibit 107) and a leaflet entitled scientific Services Scientific Analysis & Calibration Testing includes a reference to its calibration services to examine and test the form (straightness and flatness), torque, profile, surface texture etc. of instrumentation (Borrett, Exhibit JB25). There are also multiple Doosan Babcock/Mitsui Babcock capability sheets which set out details of its testing services including corrosion testing, pipework integrity testing, fatigue assessment, creep and fatigue damage and fracture mechanics testing services (e.g. Timms, Exhibits 119 – 123. I am satisfied that the mark has been used in relation to these services.

121. In view of my findings as detailed above, the application for revocation of registration 756324 succeeds only in respect of *automatic and mechanical stokers, furnace grates*. The application for revocation of registration 1283519 succeeds in respect of: *Treatment of liquids, gases or metals* as is registered in class 40.

The opposition actions by BIL against BPUK's application Nos. 2601397 and 2601670

122. BPUK's applications are for the following marks:

No 2601397	No 2601670
	BABCOCK POWER

123. Both have a filing date of 15 November 2011 and were published in the *Trade Marks Journal* on 6 April 2012 and 13 April 2012 respectively. Originally filed for a broader specification of goods, both were reduced and now seek registration in respect of *Chemicals used in industry; ion exchange resins.*

124. BIL have opposed the marks on grounds under sections 5(2)(b), 5(3) and 5(4)(a) of the Act. In relation to its objections under sections 5(2) and (3) of the Act, it originally relied on five earlier marks, however, in its skeleton argument and at the hearing it indicated that "the most relevant...now that the applications have been stripped down to such a limited specification" are the following:

Mark	Relevant dates	Specification
765660 BABCOCK	Filing date: 17 May 1957 Date of entry in register: 17 May 1957	Class 1: Chemical substances and mineral substances (raw or prepared), all for use in nuclear fissionable or fertile materials; and chemical substances and mineral substances (raw or prepared) all for use as moderating material in nuclear reactors.
756323 BABCOCK	Filing date: 3 August 1956 Date of entry in register: 3 August 1956	Class 7: feedwater de-aerators and demineralizers (machines),

125. Whilst BPUK admitted in its counterstatements that certain goods and services are similar, that admission was made on the basis of the other marks no longer relied upon by BIL and so is not relevant to the specifications now being compared. I proceed on the basis that BPUK deny there is any similarity between the respective goods.

126. Under section 5(4)(a) BIL relies upon use of the sign BABCOCK since at least the early 1900s throughout the UK in connection with engineering services and equipment and, in particular, goods and services used in the power industry and the

construction, installation and commissioning of such goods and services for use in the power industry being project definition, power generation plant design, plant and component supply, construction, commissioning, operation and decommissioning of power generation plant and associated research, management and consultancy services, and products and services for use in carbon efficient power generation solutions such as carbon capture and air pollution control systems, i.e. 'clean coal technology'.

127. BPUK filed counterstatements in which it denied the marks relied upon by BIL were "very similar" to its application 2601670. It also denied the marks relied upon by BIL were "similar when taking into account the overall impression for the mark as a whole" to its application 2601397.

128. I intend to deal first with the objections under section 5(2)(b) of the Act. There is no dispute that the two marks relied on by BIL are earlier marks within the meaning of section 6 of the Act. BPUK has put BIL to proof of use of its marks. Given that the registration procedure for the earlier marks relied on by BIL were completed more than five years before the date of publication of BPUK's applications, proof of use of the earlier marks relied upon is applicable under section 6A of the Act. BPUK has sought proof of their use.

129. Earlier in this decision, I set out the principles on genuine use as stated by Arnold J in *Stichting BDO v BDO Unibank, Inc* [2013] F.S.R. 35 (HC). I do not intend to repeat them here but go on to consider the evidence filed by BIL insofar as it relates to the goods relied on. Given the dates BPUK's marks were published, the relevant periods within which BIL must show use are 7 April 2007 to 6 April 2012 and 14 April 2007 to 13 April 2012. Self-evidently, these periods substantially overlap, differing by just a week.

130. In its skeleton argument and at the hearing, BPUK submitted that BIL had failed to show any use on any of the goods relied on in its oppositions. For its part, in its skeleton argument, BIL indicated that it relies on the evidence of Mr Green and the second witness statement of Mr Borrett in support of its grounds of opposition. In his witness statement, Mr Green states that he "makes this witness statement for the purposes of describing my Company's goodwill and reputation in the Babcock name going back *beyond* the 5 year period described in Andrew Timms' First Witness Statement..." which, given the dates referred to by Mr Timms, would appear to mean Mr Green's evidence pre-dates the relevant periods that I am now considering in respect the oppositions. I note that in Mr Borrett's second witness statement he refers to, and indicates he relies on, his first witness statement. Despite the apparent anomalies, as indicated above, I have reviewed all the material filed.

131. I consider, first, the goods as covered by BIL's mark 765660 which are chemical and mineral substances for various nuclear related purposes. As far as I can see, none of the witnesses make specific mention of the supply of these goods. There are, however, some references in the evidence to chemicals, namely:

> At CIG17, Mr Green exhibits a brochure published by BIG which refers to chemical engineering and states, at page 9:

> "Our involvement in chemicals includes petro-chemicals, organic and inorganic fertilizers, fine chemicals, minerals processing titanium dioxide, chloride route extractive metallurgy and hydrochloric acid recovery."

132. Whilst the brochure refers to an "involvement in chemicals" in the stated areas of industry, there is no indication that the company has supplied any chemicals related to the nuclear field. In any event, the brochure is said to date from 1992 and so pre-dates the relevant date.

> At CIG 21, Mr Green exhibits the licensee's brochure which does refer to its involvement in the nuclear field. At page 3 it states:
>
> > "As a leading provider of after sales products and services to the power generation, Petrochemical, process and nuclear industries...."
>
> At page 12 it expands on its nuclear services and states that it is the:
>
> > "leading UK contractor for Nuclear Power Station mechanical outage work, repair of high integrity nuclear components, and the provision of related technical support."

Whilst this refers to an involvement in the nuclear industry, there is no indication that the company has supplied any chemicals through its involvement in this field but in any case Mr Green states that the brochure was published in 2001 so again, it pre-dates the relevant date.

133. In his exhibit 85, Mr Timms has provided a capability brochure from the licensee. The brochure is headed "Water Chemistry" and states:

> "Unplanned boiler outages due to tube failures are surprisingly common and lead to high maintenance costs as well as being disruptive to production. The causes of such failures range from the common to the obscure, with the most common causes being the presence of dissolved gases such as oxygen or carbon dioxide, incorrect pH or excessive levels of harness salts, silica, iron/copper etc. These contaminants can lead to failure through deposition over-heating and through corrosion. Many of these failures are avoidable by the application of correct water treatment.
>
> ...Water treatment regimes need to be carefully planned and monitored and involve balancing the conflicting priorities of cost and suitability."

The brochure goes on to list the services which the licensee can supply which includes "Chemical cleaning". It also lists the applications to which those services can be put and this includes "Chemical dosing". It also states:

> "Our dedicated water chemistry experts provide advice on all matters relating to water chemistry, including feed and boiler water conditioning, steam purity control and related topics such as chemical dosing...

> We are also able to advise on all aspects of chemical cleaning for both new and in service plant."

The brochure is not dated.

134. As indicated earlier, it is a question of taking a view of the matter on the basis of the evidence as a whole but, despite a careful review of it, I can see no reference to the supply, under the mark, of chemical and mineral substances as included within the registration in class 1. There is no indication that any goods as registered have been supplied whether separately or as part of any service at any point in time and certainly not within the relevant periods. Given the requirements of section 100 of the Act set out above, it is a matter for BIL to *show* what use it has made of its mark in relation to the goods. It has failed to do so. That being the case, it is not therefore entitled to rely on this registration in its oppositions.

135. In respect of registration 756323, the goods relied upon are feedwater de-aerators and demineralizers (machines). In his witness statement, Mr Green provides the following explanation of the components and processes that "come together to form the "Boiler Island" portion of a conventional (coal, oil or gas) power station". He states:

> "i ***Feed water treatment*** –The feed water that is to be fed into the boiler to be converted to steam must be pure. It must therefore pass through "water softeners and demineralisers", which themselves use "ion exchange resins". The water also needs to be preheated and therefore passes through various types of "heat exchangers" (which may be parts of machines or otherwise, and which may require "ventilators for heat exchangers"), such as "shell heat exchangers", or "feed water heaters" (which may be parts of machines or otherwise)."

136. BPUK has not challenged the above statement and I therefore understand the goods to be machinery which allows for de-aeration and demineralisation of the water fed into a boiler in order to keep that water "pure". I have not been directed to any particular part of the evidence which shows use on such goods nor have I been able to locate any such evidence. Despite many references within the evidence to boilers and ancillary equipment, the only mention of feedwater de-aerators or demineralizers that I can see are to be found in Mr Timms' evidence, at exhibit 3, which is a tender document dated 14 April 2011 and so dates from within both relevant periods. Paragraph 2.6 is headed "De-aerators" and refers to the inclusion, in the cost of the proposed maintenance and repair work, of "opening, cleaning, inspection and closing up of the De-aerator" but there is no mention e.g. of the provision of any de-aerators as part of or ancillary to that service. At paragraph 2.18, headed "Feedwater Piping System" is a reference to carrying out inspections and checks but none to the provision of goods. Despite a thorough review of the evidence, I can see nothing to show that such goods as are covered by the registration in class 7 have been supplied at any time. Again, given the requirements of section 100 of the Act, BIL has failed to *show* use of the earlier mark in relation to such goods and I therefore find that it is not entitled to rely on it in the opposition proceedings.

137. Given my findings on the absence of use shown of BIL's marks as relied upon, the objections founded on section 5(2)(b) and (3) of the Act fail.

The objection under section 5(4)(a) of the Act

138. BIL also rely on grounds under section 5(4)(a) of the Act. Section 5(4)(a) states:

> "A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –
>
> (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or
>
> (b)...
>
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark."

139. Halsbury's Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

> "The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:
>
> (1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
>
> (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and
>
> (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.
>
> The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House."

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

> "To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:
>
> (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
>
> (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.
>
> While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.
>
> In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:
>
> (a) the nature and extent of the reputation relied upon;
>
> (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
>
> (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
>
> (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
>
> (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances."
>
> In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

140. The earlier use must relate to the use of the sign for the purposes of distinguishing goods or services. For example, merely decorative use of a sign on a T-shirt cannot found a passing off claim: *Wild Child Trade Mark* [1998] RPC 455 (AP).

141. In *Advanced Perimeter Systems Limited v Multisys Computers Limited,* BL O-410-11, Mr Daniel Alexander Q.C. sitting as the Appointed Person considered the relevant date for the purposes of s.5(4)(a) of the Act and concluded as follows:

> "39. In *Last Minute*, the General Court....said:
>
> > '50. First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes* v *Pub Squash* (1981) R.P.C. 429).
> >
> > 51. However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000.'
>
> 40. Paragraph 51 of that judgment and the context in which the decision was made on the facts could therefore be interpreted as saying that events prior to the filing date were irrelevant to whether, at that date, the use of the mark applied for was liable to be prevented for the purpose of Article 8(4) of the CTM Regulation. Indeed, in a recent case before the Registrar, *J Sainsbury plc v. Active: 4Life Ltd* O-393-10 [2011] ETMR 36 it was argued that *Last Minute* had effected a fundamental change in the approach required before the Registrar to the date for assessment in a s.5(4)(a) case. In my view, that would be to read too much into paragraph [51] of *Last Minute* and neither party has advanced that radical argument in this case. If the General Court had meant to say that the relevant authority should take no account of well-established principles of English law in deciding whether use of a mark could be prevented at the application date, it would have said so in clear terms. It is unlikely that this is what the General Court can have meant in the light of its observation a few paragraphs earlier at [49] that account had to be taken of national case law and judicial authorities. In my judgment, the better interpretation of *Last Minute*, is that the General Court was doing no more than emphasising that, in an Article 8(4) case, the *prima facie* date for determination of the opponent's goodwill was the date of the application. Thus interpreted, the approach of the General Court is no different from that of Floyd J in *Minimax*. However, given the consensus between the parties in this case, which I believe to be correct, that a date prior to the application date is relevant, it is not necessary to express a concluded view on that issue here.
>
> 41. There are at least three ways in which such use may have an impact. The underlying principles were summarised by Geoffrey Hobbs QC sitting as the Appointed Person in *Croom's TM* [2005] RPC 2 at [46] (omitting case references):
>
> (a) The right to protection conferred upon senior users at common law;
> (b) The common law rule that the legitimacy of the junior user's mark in issue must normally be determined as of the date of its inception;

(c) The potential for co-existence to be permitted in accordance with equitable principles.

42. As to (b), it is well-established in English law in cases going back 30 years that the date for assessing whether a claimant has sufficient goodwill to maintain an action for passing off is the time of the first actual or threatened act of passing off: *J.C. Penney Inc. v. Penneys Ltd.* [1975] FSR 367; *Cadbury-Schweppes Pty Ltd v. The Pub Squash Co. Ltd* [1981] RPC 429 (PC); *Barnsley Brewery Company Ltd. v. RBNB* [1997] FSR 462; *Inter Lotto (UK) Ltd. v. Camelot Group plc* [2003] EWCA Civ 1132 [2004] 1 WLR 955: "date of commencement of the conduct complained of". If there was no right to prevent passing off at that date, ordinarily there will be no right to do so at the later date of application.

43. In *SWORDERS TM* O-212-06 Mr Allan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

> 'Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.' "

142. I have no evidence of any use of either of the marks applied for by BPUK. That being the case, the relevant date is the filing date of the applications i.e. 15 November 2011.

143. In its notices of opposition, BIL claim:

> "The use of the marks applied for in relation to the goods and services covered by those applications is likely to give rise to the mistaken belief amongst members of the interested public and trade that the Applicant's business and/or goods and services have a commercial connection to, are licensed or approved of by [BIL] or are otherwise associated with [BIL] or its licensees' business contrary to the fact. Such a likelihood of deception is likely to cause damage to [BIL] and its licensees."

144. BIL bases its objection on this ground on use of the mark BABCOCK since the early 1900s in respect of:

> "goods and services used in the power industry and the construction, installation and commissioning of such goods and services for use in the power industry. Amongst others, the Opponent and its licensees have sold and supplied the following goods and services under and by reference to the mark BABCOCK: project definition, power generation plant design, plant and component supply, construction, commissioning, operation and decommissioning of power generation plant and associated research,

management and consultancy services, and products and services for use in carbon efficient power generation solutions such as carbon capture and air pollution control systems, i.e. clean coal technology".

145. In its counterstatements, BPUK states that it:

> "...denies that [BIL] can properly claim ownership of all goodwill generated by the use of the Babcock name since 1900. There are numerous companies who might trace their rights back to a common heritage with Babcock & Wilcox, and each may be able to assert ownership of separate and discrete goodwill in the Babcock name on that basis. Ultimately it is a matter of evidence as to the use of the relevant marks, which marks, and in respect of what. If [BIL] chooses to pursue its claim to a separate and distinct goodwill in the Babcock mark *solus* then [BPUK] reserves the right to adduce evidence of its own separate and distinct goodwill attaching to use of the name "Babcock" in relation to the whole or part of the goods and services of the Applications.
>
> In any event, [BPUK] denies that there would be any misrepresentation by use of the marks applied for which would be liable to deceive or cause confusion on the relevant public because the mark applied for, particularly when taken as a whole, are capable of distinguishing the business of [BPUK]" from those of other undertakings, including [BIL]. In any event the relevant consumer (and BPUK's customers) would know very well that [BPUK] is part of Babcock Power, a separate and distinct undertaking from [BIL] or any of its alleged licensees."

146. As set out above, BPUK's evidence consists of two witness statements from James Dougherty. The first contains an explanation of BPUK's reasons for lodging the revocation actions and makes submissions regarding what Mr Dougherty sees as the insufficiency of the evidence filed by BIL in its defence of those revocation actions. The second serves as a vehicle to exhibit a Wikipedia extract relating to a German company, Deutsche Babcock AG but does not give any explanation as to its relevance. Neither of Mr Dougherty's witness statements contains any evidence showing use of any particular mark by BPUK or any third party at any time.

147. In its skeleton argument and at the hearing, BPUK accepted that BIL owns goodwill in respect of "boilers". BIL's claimed goodwill, as set out in paragraph 56, goes wider than this, though the claimed goodwill is limited to the extent that it relates to goods and services in the field of power generation. I set out earlier in this decision a brief summary of the evidence filed on behalf of BIL. It shows use of the sign BABCOCK, over a significant number of years, by or with the permission of BIL, in relation to, in particular, the design, supply, commissioning, operation and decommissioning of various types of power generation plant and associated project work. It is clear that it is a major player in the power industry (and, in respect of OEM, the only remaining manufacturer) in the UK. Taking that evidence as a whole, I have no hesitation in finding that BIL has established a protectable goodwill, in relation to project definition, power generation plant design, plant and component supply, construction, commissioning, operation and decommissioning of power generation plant and associated research, management and consultancy services,

and products and services for use in carbon efficient power generation solutions such as carbon capture and air pollution control systems, i.e. clean coal technology.

148. BPUK's applications seek registration in respect of "Chemicals used in industry; ion exchange resins". There is no evidence that BIL has sold any such chemicals, however, power generation is clearly an industry which will use chemicals (Timms Exhibits 3 and 85). As referred to above, Mr Green has provided an unchallenged statement that chemicals and ion exchange resins are used in the course of treating water which is fed into boilers which themselves are used in the generation of power. Whilst it is not essential for a positive finding under section 5(4) that the parties be in the same field of trade, (see *Lego Systems A/S v Lego M Lemelstrich Ltd* [1983] FSR 155), I find that there is a connection between the respective parties' goods and services.

149. I have to consider the matter from the viewpoint of the relevant public who are actual or prospective customers of BIL (see *Fine & Country* [2012] EWHC 2230 (Ch)). In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated:

> "There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc. [1990] R.P.C. 341 at page 407* the question on the issue of deception or confusion is
>
> > "is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]".

150. As the evidence shows, power generation is a core industry in the infrastructure of a nation. The provision of plant to provide such power is a highly technical and highly specialised industry which involves lengthy design, tendering and other pre-contract negotiations directed at the provision of bespoke and detailed solutions with e.g. ongoing maintenance and repair also being involved. Given the nature of the goods and services supplied and the costs and timescales involved, the relevant public, itself likely to be made up of highly technical and specialist individuals with significant experience in the industry, will pay the highest degree of attention to the purchase of them. Chemicals for use in industry and ion exchange resins are also specialised and a high degree of care is also likely to be involved in their purchase.

151. BIL relies on its sign BABCOCK solus. The marks applied for are comprised of the words BABCOCK POWER, either in block capitals or, in combination with what I will describe as an electrical flash device within an elongated roundel, in title case. Neither the flash device nor the word POWER is distinctive of goods for use in the power generation industry. Babcock is a surname and, in the absence of any evidence to the contrary, I consider it will be seen as a relatively uncommon surname by the relevant public.

152. On behalf of BIL, Messrs Timms, Borrett and Green all give evidence as to the company's history and that of its licensee which was, at one point, a division of BIL but has since become a separate company. It is not disputed that BIL is one of a

number of subsidiary companies which have Babcock as part of their company names with their parent company being Babcock International Group. Mr Borrett gives evidence that they include Babcock Rail Ltd, Babcock Networks Ltd and Babcock Airports Ltd. JB6, the Babcock International Group PLC's annual report and account 2010, lists others such as Babcock Marine Holdings (UK) Ltd, Babcock Land Ltd, Babcock Aerospace Ltd and Babcock Communications Ltd with group revenue for the year ending March 2010 (UK generated) stated to be £1,668.6m.

153. Mr Dougherty has given unchallenged evidence that BPUK is a subsidiary of Babcock Power Inc and states that the parent and subsidiary business operate worldwide. No evidence of any particular trade by either company has been filed showing, where, when or under which mark any such trade may have taken place. Nor has any evidence been filed of any third party use of a sign incorporating the name Babcock by any company other than those in the BIL "family" mentioned above. Whilst, as indicated earlier, Mr Dougherty has exhibited a Wikipedia extract which gives information of a company called Deutsche Babcock AG, there is no evidence that he is or has been an officer of this company or that he has any personal knowledge of the company. The accuracy of the information in the extract is therefore uncorroborated but, in any event, the text does not provide any evidence of any trade by Deutsche Babcock AG or any other third party whether in the UK or elsewhere under the sign Babcock and so cannot assist BPUK's case.

154. In my view, the distinctive element within BPUK's marks as applied for is the word Babcock. The evidence shows that BIL licenses others to use the sign Babcock and that they use it along with descriptive words in the course of their particular areas of trade. There is no evidence of any use of the mark BABCOCK by any unrelated companies. In my view, and despite the highest degree of care taken over the purchase, I consider that, given the distinctive element of each mark is the relatively uncommon surname Babcock, coupled with the connection between the respective goods and services, a substantial number of the relevant public are likely to be deceived into thinking that BPUK's goods are those of BIL or are licensed or approved by them and damage, in the form of the loss of customers or potential customers, will follow.

155. The oppositions by BIL to BPUK's applications, under section 5(4)(a) of the Act, succeed.

Summary

156. BIL accepted that it had made no use of its mark no 756324 in relation to *automatic and mechanical stokers, furnace* grates and to this extent only, the revocation action against the registration succeeds. Registration No 756324 will be revoked in respect of these goods as of 16 November 2011, the date of the filing of the applications for revocation. The application for revocation of registration no 1283519 succeeds in respect of *Treatment of liquids, gases or metals* as is registered in class 40 and the registration will be revoked in respect of these services as of 16 November 2011. BIL's oppositions to BPUK's application nos. 2601397 and 260670 fails under sections 5(2)(b) and (3) but succeeds under section 5(4)(a) of the Act.

Costs

157. BIL has been largely successful in defending its registrations from the applications for revocation of its registrations. It has also been successful in its opposition under section 5(4)(a) to BPUK's application for registration. BIL is therefore entitled to an award of costs in its favour. It has indicated that it seeks an off scale award. I therefore allow BIL a period of one month from the date of issue of this decision to submit full details of its claim and copy it to BPUK. BPUK will then have one month to respond. I will then issue a supplementary decision on costs. The period for appeal against this decision will run from the date of issue of my decision on costs.

Dated this 7TH day of May.

Ann Corbett
For the Registrar
The Comptroller-General