

ENGLAND AND WALES / JUDGMENT

Trayport Limited v E-Star Trading GmbH & Ors

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2026] EWHC 164 (Ch) IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES INTELLECTUAL PROPERTY LIST (ChD) Case No: IL-2023-000129 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 06/02/2026 Before : HH JUDGE DAVIS-WHITE KC (sitting as a Judge of the Chancery Division)

- ----- Between : TRAYPORT LIMITED

- and -

(1) E-STAR TRADING GMBH (a company incorporated under the laws of Germany)

(2) EXXETA AG (a company incorporated under the laws of Germany)

(3) KARSTEN SCHMID

(4) ANDREAS KAMPER

- -----

- ----- Claimant Defendants Mr Jonathan Moss, Ms Laura Adde and Mr Joseph Kay (instructed by Pinsent Masons LLP) for the Claimant Mr Tom Mountford and Mr Grant Kynaston (instructed by Jones Day) for the First and Second Defendants Mr Daniel Burgess (instructed by Blake Morgan LLP) for the Third Defendant The Fourth Defendant did not appear and was not represented Hearing dates: 10-12 June, 9 July 2025

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 06 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. HH JUDGE DAVIS-WHITE KC HH JUDGE DAVIS-WHITE KC Approved Judgment Judge Davis-White KC :

Introduction

Trayport Ltd v E-Star Trading GmbH & Ors 1. 2. 3. 4. 5. 6. I have before me two applications, broadly, to set aside an order made by Master Pester on 30 January 2024. That order gave permission to serve the Claim Form and Particulars of Claim (“PoC”) on the First to Fourth Defendants at various addresses in Germany and ancillary orders in connection therewith (the “Order”). There have been various orders extending time both for service of the Claim Form and

PoC and for the making of the two applications before me. The Order of Master Pester was made on the Claimant's application by application notice dated 10 January 2024. The first application in time is made by the 1st Defendant, E-Star Trading GmbH ("E-Star"), and the Second Defendant, Exxeta AG ("Exxeta"). The application notice is dated 20 December 2024. E-Star and Exxeta are represented before me by Mr Tom Mountford and Mr Grant Kynaston instructed by Jones Day. When referring to Mr Mountford's submissions, I am referring, by way of shorthand, to the submissions of the entire counsel team. The second application in time is made by the Third Defendant, Mr Karsten Schmid ("Mr Schmid"). The application notice is undated but was issued on 17 April 2025. Mr Schmid is represented before me by Mr Daniel Burgess instructed by Blake Morgan LLP. The Fourth Defendant does not appear and is not represented before me. As I understand it, there has not been (or at the time of the hearing before me had not been) service of the Claim Form and PoC on him pursuant to the order of Master Pester dated 30 January 2024. The Claimant, Trayport Limited ("Trayport"), is represented before me by Mr Jonathan Moss, leading Ms Laura Adde and Mr Joseph Kay, instructed by Pinsent Mason LLP. Pinsent Mason LLP came onto the record for the Claimant comparatively recently, on or about 2 June 2025. Prior to that, Trayport was represented by Deloitte LLP. However, Mr Harris, who is now the supervising partner at Pinsent Mason LLP, was formerly the relevant partner at Deloitte LLP. When referring to Mr Moss's submissions, again I am referring, by way of shorthand, to the submissions of the entire counsel team. I am grateful to the legal teams for all parties for the helpful and focussed manner in which submissions and evidence was directed and also for the management of the documents put before me. I apologise for the delay in producing this judgment but should confirm that I have had the benefit of transcripts of the hearing in this case. I have also had the benefit of a letter dated 2 December 2025 from the First and Second Defendants' solicitors, Jones Day, pointing out the Court of Appeal decision in Playtech Software Limited v Games Global Limited [2025] EWCA Civ 1472 and sending me a copy of the judgments on that appeal. No party asked to make or submitted any further submissions in the light of the Court of Appeal's judgment. 7. To obtain an order for service of proceedings outside the jurisdiction on a defendant, a claimant will have to: HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors

- (1) establish that each claim raises a serious issue to be tried, that is, that it is a claim with a real (as opposed to fanciful) prospect of success;
- (2) establish to the relevant standard, which is that there is "a good arguable case", that each claim falls within one of the jurisdictional gateways set out in paragraph 3.1 of CPR PD 6B;
- (3) establish to the relevant standard that England is the appropriate forum;
- (4) make full and frank disclosure, (see CPR r6.37(3)). The requirement set out in (4) above arises from the nature of the application for service out as being one that is made without notice to the Defendant. 8. The grounds of challenge to the order for service out, and to this court taking jurisdiction over the relevant Defendants, are, in large part, common to the First to Third Defendants. In broad terms it was said, at least at the commencement of the hearing before me, that the Claimant had failed in meeting each of the four required

criterion as follows:

- (1) None of the claims brought by Trayport raised a serious issue to be tried;
- (2) A number of the claims raised by Trayport did not fall within one of the jurisdictional gateways in CPR PD6B paragraph 3.1. This point has since fallen away as a result of Mr Moss's skeleton argument raising and relying on further jurisdictional gateways;
- (3) England is forum non conveniens in that it is not clearly or distinctly the more appropriate forum than any other available foreign forum (and in particular, Germany);
- (4) The Claimant, on the application before Master Pester, failed in its duty of full and frank disclosure and fair presentation, such duty arising from the fact of its application being made on a without notice basis. Accordingly, it is submitted, the order for service out should be set aside. 9. 10. At the commencement of the hearing before me, the Claimant made a without notice application for an order for confidentiality which, on examination, was identified as being an order pursuant to CPR r31.22, regarding the use that parties could make of a particular document, and an order limiting access to the court file, pursuant to CPR r5.4. For the reasons given at the time I made the first order but adjourned consideration of the second order until judgment on the hearing. The position may therefore need to be dealt with in any order to give effect to this judgment. . I shall deal with the particular causes of action relied upon by the Claimant in more detail later in this judgment. However, it is useful to give a flavour of them now. In broad terms the main claims are in respect of alleged misuse of/access to the Claimant's software, contained in or forming a software platform called "Joule". I explain Joule in more detail later on this judgment but, put very broadly, it is a software platform containing a number of databases and which provides customers of HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 11. 12. Trayport, who buy access to it, dealing and trading information. It also enables customers to make deals in the wholesale energy commodities markets. Different customers may have different levels of access to Joule. The Joule platform is alleged to contain matters that are the intellectual property of Trayport, protected by, among others, copyright law, trade secrets law, database law, the law of confidentiality and so on. The misuse of Trayport's information is largely pleaded as a matter of inference. The overall primary misuse identified is the use of confidential information belonging to Trayport in the creation of a new software platform belonging to and marketed by E- Star which is said to replicate functions of Joule and which, in effect, competes with it (see e.g. paragraph 91 of the Particulars of Claim ("PoC") (the "Copying Case"). One of the matters upon which such inference is based is a series of alleged accesses said to have been made by employees of the First and Second Defendants, E-Star and Exxeta (together the "corporate Defendants") to the Trayport platform by using individual accounts granted to the corporate Defendants (or its employees) by customers of Trayport, but in alleged breach by those customers of the agreements with Trayport under which the customer is entitled to access and interact with (and download information from) Joule. Again only in broad terms, and without breaking down which claims are brought against

which Defendant, the PoC assert copyright infringement; database infringement; breach of a non-disclosure agreement; breach by Mr Schmid of employment and termination of employment contracts; inducing breach of contracts by customers of Trayport; procurement of breach by Mr Schmid of his employment/termination of employment contracts; breach of equitable duties of confidence; breach of the Trade Secrets (Enforcement, etc) Regulations 2018; infringement of the Trade Marks Act 1994; vicarious liability of E-Star and Exxeta for the unlawful acts of others (including the Fourth Defendant) and, for good measure, unlawful means conspiracy. There are two further discrete claims which are that, in breach of an employment contract and a termination agreement relating to such employment with Trayport, Mr Schmid, now a managing director of E-Star, wrongly solicited employees of Trayport to join E-Star and/or has gone to work with a competitor to Trayport, namely E-Star, during a period when he was prohibited by such contracts from working for competitors. Other aspects of these contracts are also relied upon as mirroring other direct claims against Mr Schmid (e.g. for breach of equitable duties of confidence). The Evidence 13. The evidence before me comprised a number of witness statements, including one provided to me between the main part of the hearing in June 2025 and the final part of the hearing in July 2025. The time initially allowed for the hearing proved to be inadequate and the hearing had to be adjourned. 14. The relevant witness statements are as follows:

- (1) Mr Jeremy Neil Harris (“Mr Harris”), then partner of Deloitte LLP, for the Claimant dated 10 January 2024 (“Harris 1st”); HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (2) Mr Rhys Elis Thomas (“Mr Thomas”) partner at Jones Day, for the First and Second Defendants dated 20 December 2024 (“Thomas 1st”);
- (3) Mr Harris for the Claimant dated 14 March 2025 (“Harris 2nd”);
- (4) Mr Justin Weare (“Mr Weare”), partner at Blake Morgan LLP for the 3rd Defendant dated 17 April 2025 (“Weare 1st”); (5) Mr Thomas for the First and Second Defendants dated 25 April 2025 (Thomas 2nd ”);
- (6) Mr Harris for the Claimant dated 16 May 2025 (“Harris 3rd”);
- (7) Mr Weare for the Third Defendant dated 30 May 2025 (“Weare 2nd”);
- (8) Mr Harris for the Claimant dated 19 June 2025 (“Harris 4th”) (made after the first three days of the hearing before me and before its continuation in July). 15. 16. 17. In addition there is a letter dated 19 June 2025 from the Claimant’s solicitors, Pinsent Masons LLP, setting out the Claimant’s case regarding its unlawful means conspiracy claim and on whether or not Mr Schmid falls within the definition of “E-Actors”, being a category of employees or personnel at one or both of E-Star and Exxeta whom are said to have carried out various acts for, or in respect of which it is sought to make, the corporate Defendants liable. I note that in some respects some of the witness statements strayed beyond setting out relevant factual evidence

and helpfully indicating the main authorities or principles of law that it was relying upon and seeking to address, and instead engaged in argument about what cases did or did not decide, which was not appropriate. I should add that I was referred to over 85 cases in the main and supplementary authorities bundles and a number of extracts from textbooks, statutes and other materials. The Factual Background 18. 19. I take the following from the relevant witness statements or, where there is no agreement, the PoC and written evidence. Trayport is a company incorporated in England and Wales. It owns and operates a network of software systems used by and/or linked to brokers, exchanges and clearing houses, to assist businesses with wholesale energy commodity trading. In particular, it owns (and owns intellectual property rights in relation to) a proprietary software platform known as “Joule” (“Joule”). That platform is the dominant platform for energy trading in the European wholesale energy markets. Joule aggregates energy trading data from brokers and exchanges, across the different types of energy commodities and contracts, to simplify the process of best price discovery and to assist with trade analysis to enable clients to maximise trading opportunities. It has over 6,300 trader subscribers and works with over 30 trader firms as well as over 50 brokers and exchanges. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 20. 21. 22. 23. 24. 25. The price discovery information that is given to a particular Trayport customer depends upon the customer’s relevant requirements and permissions granted to the customer by Trayport and permissions granted by the relevant trading venue. Each trader client will have a different view of the market depending on what permissions they have with different venues. Joule comprises both a “front-end” and a “back-end”. The back-end comprises the “Joule Direct” Platform, underpinned by a number of Joule databases which receive data from Trayport’s venue partners (brokers and exchanges) as well as data received from venues which use third party trading systems. Joule allows traders to aggregate these prices into Joule. The back-end aggregates and delivers that data to the front- end which comprises a graphical user interface (“GUI”). The GUI is a unique selling point of Joule. Information displayed from venues in relation to which the customer has access permission, is then displayed on one “stack” rather than the customer having to review multiple screens (one for each venue). This is a major selling point. Joule’s GUI was the first market solution providing an aggregated, multi-venue display that enabled traders to view derivatives contracts and pricing in real-time. In addition, the front-end enables customers to execute trades on the live market. Joule has a respectable history. Its predecessor was a suite of software products known as “GlobalVision”. That platform was developed during the 1990s as a generic platform capable of trading any type of instrument, to be used by brokers as an in-house system. Towards the end of the decade an internet trading version was developed. In 2003 the last version, “GV8”, was released. In 2010 work began on developing the next generation platform which ultimately became Joule. Certain functionality from GV8 was incorporated into and rebranded under Joule and some elements of the underlying software architecture still use GV8 Terminology. In short, Joule was developed by or for Trayport at a substantial cost over an approximately 25 year period. Joule was released in 2011 and Joule 2.0 was released in 2013. Each of the First and Second Defendants is incorporated in

Germany. The Third and Fourth Defendants are employed as managing directors of the First Defendant. Under German law, E-Star was legally separated from Exxeta in about August 2022. E-Star is the legal successor to Exxeta regarding the latter's rights in relation to the separated business. Following separation of the business and E-Star, the two companies are separate and Exxeta retains only a residual stake in E-Star. In this judgment I sometimes make reference to E-Star as shorthand for E-Star/Exxeta. Exxeta and now E-Star have conducted a relevant business for over 15 years involving a suite of energy trading software solutions which enable (now) E-Star's customers to connect via an API (or application programming interface) to connect to energy trading data and systems including Joule. They also offer consultancy services on energy trading. Customers with a licence from Trayport may use the E-Star products to connect to Joule via E-Star's API. When so connected the E-Star products provide additional functionality to mutual customers of Trayport/E-Star, allowing the customers to better interrogate, configure and utilise data. The evidence of the corporate Defendants is that they (initially Exxeta and more recently E-Star) have conducted their business in a substantially unchanged manner for over 15 years and in full view of Trayport. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 26. 27. 28. 29. 30. 31. The E-star range of software also has a respectable history. The main components are E-Star Energy Trader (a 'front-end' solution first released in 2003); E-Star Internal Market and E-Star Market Adapters (both 'back-end' services released for use by customers in 2008); and E-Star Algorithmic Trading Solution (available to customers since 2013). The corporate Defendants say that there has been routine co-operation between Exxeta/E-Star and Trayport over many years in resolving technical issues for mutual customers. Trayport also has the ability to track activity on its platform, though there appears to be a factual dispute as to the extent of such tracking. Equally, there has been an extended period of complaints by Trayport of misuse or at least unauthorised use/access of Trayport platforms by Exxeta dating back to at least 2013. The Third Defendant, Mr Schmid, is the former Chief Technology Officer of Trayport. He was previously employed by Exxeta and joined Trayport in April 2013. The terms of his contract of employment with Trayport are set out in a Trayport letter dated 26 March 2013 (when he was employed as a product manager) ("the Employment Agreement"). The employment ended on 31 December 2021 pursuant to an agreement dated 7 December 2021 (the "Termination Agreement"). Mr Schmid's Employment Agreement contained employee restrictive covenants applying post-employment and paragraph 64 of the Particulars of Claim assert that in breach of the restrictive covenants in that Employment Contract Mr Schmid took up employment with E-Star on 1 June 2022. The current dispute dates back to at least 15 December 2022, when Deloitte LLP, on behalf of Trayport, wrote a letter of claim pursuant to the General Practice Direction for Pre-Action Protocol of the Civil Procedure Rules to Exxeta and E-Star. The letter complained of "Concerning Activities" (as defined), being that Dr Kamper and other employees, it was said, had been accessing Trayport's network extensively, for prolonged periods of time and without a licence and in that time had been engaging in "unlawful activities". Undertakings were sought by 12 January 2023, in the absence of which legal proceedings were threatened. There is some merit in the submissions of the relevant

Defendants before me that the Claimant precipitately issued their claim on 1 August 2023 and then issued an amended claim form on 4 January 2024 (adding in the Third and Fourth Defendants) with no particulars of claim, because the latter had not been finalised. This was despite knowing since April 2023 that E-Star and Exxeta were not agreeing to accept service within the jurisdiction through solicitors. The Claimant then issued an application for permission to serve out dated 10 January 2024, again with no particulars of claim being put forward, and to extend time for service. The PoC, in my judgment, reflect some haste in their preparation. This is indicated, by way of example, by causes of action being alleged inconsistently against different persons in different parts of the PoC. I should also add that it is somewhat surprising that the PoC (leaving aside annexes) extend to some 148 paragraphs and 52 pages. The first witness statement of Mr Harris, which was not accompanied by any Particulars of Claim until the court asked for them, and which when provided were provided in draft, extended to 23 pages and 68 paragraphs. Mr Harris 1st witness statement obviously made no analysis or reference to the detail of the PoC. As well as dealing, in what can only be described HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors as very broad summary manner, with the merits of the causes of action relied upon (in 10 paragraphs), he also dealt with jurisdictional gateways (in 25 paragraphs) and forum conveniens (in 3 paragraphs). That part of the witness statement dealing with identifying what the claims were and, in effect, the merits test for service out (a claim with a real prospect of success) set out the claims “at a high level” and set out the separate causes of action that the Claimant believed that the Defendants were liable for, and the relief sought, primarily in two paragraphs which took up less than a page of the witness statement. In referring to the merits test the witness statement referred to 10 paragraphs of the witness statement in total. As regards disclosure in relation to the Defendants’ position on these claims it was simply said that the allegations were “denied” but that the First Defendant had not provided any evidence to substantiate its denials. No points were made against the identified jurisdictional gateways applying. No factors were identified as pointing to Germany or elsewhere than England and Wales as an appropriate forum. There was no section dealing with full and frank disclosure. Jones Day had referred to certain matters that they thought should be disclosed by way of full and frank disclosure in earlier correspondence but that was not followed through. 32. 33. 34. The Law regarding orders for service of proceedings out of the Jurisdiction 35. 36. The relevant law was largely agreed, subject to the question of emphases. The general position regarding the obtaining of an order for service of English legal proceedings on a defendant out of the jurisdiction is summarised by Lord Collins, giving the judgment of the board, in *AK Investment v Kyrgyz Mobil Tel Limited*

[2011] UKPC 7; [2012] 1 WLR 1804 (PC) at paragraph 71. The case was actually an Isle of Man case, heard in the Privy Council, but Lord Collins referred to the position under English law and the jurisdictional requirements, as set out in his paragraph 71, are essentially the same under both legal systems: “[71] On an application for permission to serve a foreign defendant out of the jurisdiction, the claimant... has to satisfy three requirements:

Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran Ltd [1994] 1 AC 438, 453—457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context “good arguable case” connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555—557, per Waller LJ affirmed [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries)* [2007] 1 WLR 12, paras 26—28. Third, the claimant must satisfy the court that in all the circumstances [in this case England] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.” 37. These requirements are now encompassed within CPR r6.36 and PD6B paragraph 3 and CPR r6.37(1) and (3). 38. CPR r 6.36 provides: “6.36 In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court, if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.” It was initially common ground that neither r6.32 nor r6.33 (each dealing with cases where permission of the court is not required) apply in this case. As I shall explain that position has altered in one respect since *Harris* 1st. In particular, r6.33(2B) allows service out of the jurisdiction without the need to obtain court permission in the case of claims in respect of contracts containing a term conferring jurisdiction on the courts in England and Wales and that provision is now also relied upon. 39. CPR r6.37(1) and (3) provide as follows (so far as material): “6.37

- (1) An application for permission under rule 6.36 must set out-
- (a) which ground in paragraph 3.1 of Practice Direction 6B is relied (b) (c) on; that the claimant believes that the claim has a reasonable prospect of success; the defendant's address or, if not known, in what place the defendant is, or is likely to be found. (2).....
- (3) The court will not give permission unless satisfied that England and Wales is the proper place to bring the claim.” 40. 41. PD 6B paragraph 3.1 sets out a wide range of grounds or jurisdictional gateways: 25 in all. Each is complete in itself and independent of the others. All are concerned to identify some “substantial and not merely casual or adventitious link between the cause of action and England” (*Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 at [28] per Lord Sumption (see also White Book note 6.37.13)). In this case, at the commencement of the hearing before me, the Defendants represented before me expressly accepted certain jurisdictional gateways were available and did not challenge the permission to serve out given in respect of certain causes of action on the

basis that there was no available jurisdictional gateway. I do not express any view about the applicability or otherwise of gateways so far as no gateway issue was raised. However, the same Defendants did submit that the following gateways at PD6B paragraph 3.1 relied upon by the Claimant were not available and that I should set aside permission to bring the related claims on that ground (whether or not I set it aside on other grounds, such as a failure to meet the merits test). The gateways in question were paragraph 3.1(6)(a) and (c) and 3.1(8A) (a). The relevant provisions are as follows: HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors “Service out of the jurisdiction where permission is required 3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where— Claims in relation to contracts

- (6) A claim is made in respect of a contract where the contract—
 - (a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction; (b)...
 - (c) is governed by the law of England and Wales; (8A) A claim for unlawfully causing or assisting in: (a) A breach of contract where the contract falls within one of paragraphs (6)(a) to (6)(c) above or within Rule 6.33(2B); or A breach of contract falling within paragraph (7) above.” 42. 43. The duty of full and fair or frank disclosure arises from the fact that the application is (and was in this case) initially made and dealt with on a without notice basis. I turn to consider each of the three requirements set out in the Kyrgyz Mobile Tel case in more detail.
- (a) Serious issue to be tried 44. 45. As regards a “serious issue to be tried”, the test is, as I have said, the same as the summary judgment test, that is (in context) whether the claim has a “real prospect of success”. This has been referred to as the “merits test”. The burden of showing that the individual cause of action has a “real prospect of success” lies on the claimant seeking permission to serve out of the jurisdiction. In VTB Capital plc v Nutritek International Corp.[2013] UKSC 5; [2013] 2 AC 337 (SC) Lord Neuberger said, at paragraph [90]: “The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. The onus is on the claimant to satisfy the court that there is a serious issue to be tried on the merits of the claim, and not on the defendant to satisfy the court that he has a real prospect of successfully defending it.” 46. The authorities can be summarised as requiring the following:-
 - (1) A statement of case that is coherent and properly particularised and which sets out a claim that, on the assumption that the pleaded facts are supported by evidence, has a real prospect of success.
 - (2) Evidence supporting the pleaded allegations such that they have a real prospect of success.

- (3) If (2) is met but there are defects in the pleading such that (1) is not met, then there may be a question as to whether amendment of the statement of case should be permitted. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (4) (1) and (3) must be met as regards (a) each claim brought and (b) each defendant against whom a claim is sought to be brought. 47. A claim does not raise a serious issue to be tried, that is a claim with a real prospect of success, in a number of identified circumstances: “A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England* (No3) [2003] 2 AC 1.” (*Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at [41]). 48. A slightly different formulation has been set out in *Kawasaki Kisen Kaisha v James Kemball* [2021] EWCA Civ 33 by Popplewell LJ (“Kawasaki”). That was conveniently summarised by Thompsell J in *Playtech Software Ltd v Games Global Ltd* [2024] EWHC 3264 (Ch) (“Playtech”) at [16]-[17]: “[16] The approach to the first requirement, the merits test, was summarised by Popplewell LJ in *Kawasaki* at [18] (which I reproduce below but without the case references supplied by the Judge): “i) It is not enough that the claim is merely arguable; it must carry some degree of conviction. ii) The pleading must be coherent and properly particularised. iii) The pleading must be supported by evidence which establishes a factual basis which meets the merits test: it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct.”
- [17] I will call these principles the “Kawasaki Test”. The test applies where there is an application to amend a statement of case (see *Kawasaki* at [17]) as well as where there is an application to serve out.” 49. 50. (As I have mentioned, the decision of Thompsell J was the subject of a successful appeal but that turned on whether the Judge had correctly identified on the facts that a particular gateway was satisfied (turning on whether he had correctly identified the applicable law to the claim) and does not invalidate his statement of the relevant principles. The Court of Appeal in that case also addressed the question of appropriate forum). Although therefore the evidence itself may be insufficient to raise a case with a real prospect of success, the starting point, and indeed the focus, should be on whether the particulars of the claim have been adequately pleaded. In *Okpabi v Royal Dutch Shell*
- [2021] UKSC 3; [2021] 1 WLR 1294, Lord Hamblen stressed the importance of HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors judicial restraint so as to avoid mini-trials and also the need to focus on the statements of case: “[21] At para 9 of *Vedanta* Lord Briggs JSC emphasised that where, as in this case, the jurisdictional issue is whether there is a triable issue as against a defendant, it is important to observe judicial restraint and to avoid minitrials, in accordance with the well-known guidance set out by Lord Hope of Craighead in *Three Rivers District Council v Governor*

and Company of the Bank of England (No 3) [2003] 2 AC 1.... [22] Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.” 51. I should add that the warnings that I have just cited are warnings to defendants of the risks of seeking to challenge the case put forward by a claimant if such challenge in effect calls for a mini-trial. However, it is important to note that the claimant too should not assume that it can depart from its pleaded case and rely solely on evidence to put forward its case without amending its statement of case. In that respect, Lord Hamblen in the Okpabi case said as follows: at paragraphs [103] to [105]: “The mini-trial

- [103] This was a jurisdiction challenge and concerned whether it was appropriate to grant permission to serve proceedings out of the jurisdiction on a foreign defendant. Those proceedings were meant to be as defined in the particulars of claim for which permission to serve out was sought. In this case the challenge was made on the grounds that the claimants had no arguable case against the anchor defendant. Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case.
- [104] If the issues are addressed by reference to the pleaded case, then the of the inquiry is clearly circumscribed and problems of lack of proportionality should generally be avoided. focus
- [105] In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. We were told that this is because they wanted to avoid producing various iterations of the pleading, but if they wanted to advance a case which was not reflected by their existing pleading then they should have amended it. In that way the proper focus of the inquiry can be maintained. Whilst one can understand that this may not have been possible in relation to documents HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors produced during the appeal hearing, the claimants’ laissez-faire attitude to the pleadings set in long before that.” 52. 53. 54. 55. In this case, the relevant Defendants represented before me make the point that the Claimant’s evidence as it has emerged in relation to the applications before me displays a failure to amend the pleadings (or seek permission to do so) in circumstances where it relies on unpleaded matters by way of witness statement. I shall have to return to this point later in this judgment. I would also make the point though that the necessary starting point of a focus on the pleadings confirms that the manner in which this application was commenced, with no pleadings nor

reference to their details, was unsatisfactory. The next point to note is that, as pleaded, the Claimant's case is largely built upon inference, and in some parts, inference on inference. The main allegation, which is of infringement of the intellectual property rights of Trayport and/or misuse of Trayport's confidential information, relies upon inference from matters set out in paragraph 90 of the PoC. That paragraph pleads a "belief" of Trayport in such infringements/misuse (rather than a positive case that there are such infringements/misuse) which it is pleaded "is properly to be inferred from the following facts and matters". There are then set out some 8 sub-paragraphs lettered from (a) to (g). However, some of those so-called "facts and matters" are themselves only established if further inferences are first drawn. Thus the first matter, in paragraph (a), is that it took a very short time to create an Exxeta/E-Star product akin to Joule compared with the time that it took to develop Joule. But that depends upon an inference that it took this very short time ("Trayport infers the development of the [E-Star product] took less than 2 years"). Similarly, sub-paragraph (g) relies upon the "targeted recruitment" of former employees of Trayport as earlier particularised. However, the earlier particulars pleaded refer to 4 employees having left Trayport following Mr Schmid leaving Trayport and the "understanding" of Trayport being that they are now employed by Exxeta/E-Star. The dates that the employees are said to have commenced employment with E-Star are not known but it is the understanding of Trayport that they perform substantially similar roles to those that they performed when employed by Trayport, "In the premises, Trayport infers that ...one or more of the Defendants encouraged the Trayport leavers to resign" which is said to be properly inferred from the close relationship between Mr Schmid and the employees; the timing of their resignations and the similar nature of their roles at Trayport and at E-Star.

56. I accept the submission of Mr Burgess that in considering whether a particular claim has a real prospect of success, I have to consider the issue of inferences carefully and that as regards a particular inference, I must consider two questions:

- (1) Whether there is a sufficient evidential basis for each of the pleaded facts said to support the inference such that there is a real prospect of each pleaded fact being proven at trial; and
 - (2) As regards those facts where a real prospect of success at trial is made out, is there a real prospect of those facts taken together being sufficient to support the inference that the court is invited to draw.
57. In this respect I was referred to UKIP v Braine & Ors [2020] EWHC 1794 (QB),

[2020] WL 03662051 at [25]. I refer particularly to sub-paragraph (d) on the inference point. Sub-paragraph (e) deals with a separate point, which is the point that the court must, before deciding whether a claim has no real prospect of success, be alive to the evidence that can reasonably be expected to be available at trial whilst not allowing that consideration to act as a charter to plead an unsustainable case but to say that it may become sustainable after disclosure (what used sometime to be referred to as "fishing"). Sub-paragraphs (d) and (e)

are as follows: “(d) Fourth, where a party invites the court to draw inferences of arguable wrongdoing, there must be a sufficient prior pleaded factual foundation supporting such inferences. That foundation might come, for example, from expert evidence in a data breach case, even if in draft form prior to formal permission under CPR 35. The foundation for an inference might also come from the inherent probabilities that certain events would have followed upon other events which have been established as arguable by evidence. Naturally, a court will be less willing to draw an inference that there was arguable serious wrongdoing involving, for example, acts of dishonesty, concealment or bad faith than more neutral conclusions.

- (e) Fifth, in reaching its interlocutory conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment but the evidence that can reasonably be expected to be available at trial (a point specifically emphasised by Counsel for the Claimant). Again, this point only goes so far and should not be interpreted as a charter to plead a factual case which it is said may become sustainable when disclosure is given.” As regards sub-paragraph (e), Saini J made a similar point in the same case at paragraph [99], when determining the application: “[99] ... One cannot plead an unsustainable case and then pray in aid potential disclosure to save it from summary judgment and striking out” 58. 59. As regards the drawing of inferences, I also refer again to *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at [41], which paragraph I have cited earlier in this judgment. At some points in his submissions Mr Moss for Trayport seemed to me to come perilously close to saying that, because Trayport did not know what had happened, matters that gave rise to suspicion were enough to found a case with a real prospect of success and that an absence of pleading or evidence at this stage was quite in order because without disclosure the claimant could not make good its suspicions. This he seemed to say, at least at some point, was a different practice to the norm reflected by HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* e.g. paragraph [99] of Saini J’s judgment in the *UKIP Ltd v Braine* case, cited earlier in this judgment. 60. At the end of the day however, I did not understand him to disagree with what I regard as the orthodox position regarding what is required for an order for service out as regards the merits test. First, that any cause of action must be adequately pleaded and secondly, that the pleading must be sufficiently backed up by evidence so as to raise a case with a real prospect of success. As regards pleading, I understood his position, on analysis, to be no different to what was said by Arnold LJ in *Celgard, LLC v Shenzhen Senior Technology Material Co Ltd* [2020] EWCA Civ 1293; [2021] FSR 1 at [48]: “I do not wish in any way to diminish the importance of proper particulars of trade secrets being provided in cases of this nature. What amounts to sufficient particularisation must depend on the circumstances of the individual case, however. Furthermore, a lesser degree of particularisation may be acceptable at the outset of a case than at later stages of the case. Still further, I accept that it is relevant to take into account the claimant’s ability to provide further particulars, and the extent to which the claimant has been hampered by obstructiveness, or at least non-cooperation, on the part of the defendant. In the

circumstances of the present case, I consider that Celgard has done enough for now, although it will undoubtedly have to give further particulars at a later stage.” 61. 62. In short, mere suspicion is not enough. In the case of inference there must be a belief in the truth of facts that give rise to a pleaded inference, which facts have a real prospect of success of being established and, if established, the inference must have a real prospect of success of being drawn and must be believed as being the appropriate inference. It is not enough simply to plead or say: “we are very suspicious, it may be that the various elements of a cause of action can be made out but it may be that they cannot, we have no idea but once we have disclosure we will find out and the point will either be clear or we will be clear about what inferences we are inviting the court to draw and which have a real prospect of success, and we will then plead our position.” Finally, in this context, I should mention the issue of amendment. I will come back to the point later, but as I see the dispute between the parties it is a dispute as to whether, if the PoC are defective in any way, permission to amend should be given (and leave to serve out left to stand) or whether the Claimant has had opportunities to amend and, not having taken them, it is now too late to allow permission to amend to be granted and to “save” any permission for serve out in relation to a defectively pleaded case. As to this, there are some minor tidying up points that I would allow permission to amend for. However, where it is unclear precisely what amendment should be made to establish a properly pleaded cause of action I would either have to adjourn the questions before me until I had a properly pleaded statement of case on the relevant issue or I would set aside leave and leave it to the claimant to re-apply both to amend and for permission to serve out. Given the history of this matter, I would incline to the latter course. “the appropriate forum” 63. There was no real dispute as to the applicable law and principles. HH JUDGE DAVIS-WHITE KC Approved Judgment 64. In summary: Trayport Ltd v E-Star Trading GmbH & Ors

- (1) The burden is on the Claimant to persuade the court that England is clearly the appropriate forum (*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) at 481D; *Altimo Holdings v Kyrgyz Mobil* [2011] UKPC 7 at [88]. This burden follows the principle that the courts must be “exceedingly careful” in deciding whether it “ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country”.
- (2) The “appropriate forum” is that in which “the case may be tried more suitably for the interests of all the parties and the ends of justice” (*Spiliada* at 476C; *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045 at [66]).
- (3) CPR r6.37(3) puts the test in terms of permission not being granted unless the court is satisfied that England and Wales is “the proper place in which to bring the claim” but this formulation simply encapsulates the “appropriate forum” test (*Lungowe* at [66]).
- (4) In determining what is clearly the appropriate forum, the court conducts a summary examination of connecting factors to determine the forum with the “most real and substantial connection”, including matters of practical convenience (such as accessibility to courts for parties and witnesses and the availability of a common language so as to

minimise the expense and potential for distortion involved in translation of evidence) and also such matters as the system of law which will be applied to decide issues, and the place where the wrongful acts or omissions occurred and the place where the harm occurred (Spiliada at 478A-B; Lungowe at [66]).

- (5) The court's decision is an evaluative one. It is not an exercise of discretion (VTB Capital plc v Nutritek International Corp [2013] 2 AC 337 at [97], [156]). Full and fair disclosure 65. A useful starting point is the judgment of Carr J (as she then was) in Tugushev v Orlov (No 2) [2019] EWHC 2031 (Comm) at [7]-[8]: "[7] The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
- i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case; ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors evidence and arguments which it can reasonably anticipate the absent party would wish to make; iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents; iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;
 - v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction; vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in

all the circumstances its effect was such as to mislead the court in any material respect; vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits; viii) In general terms it is inappropriate to seek to set aside a freezing order for nondisclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself; ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

- x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged; HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties; xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts; xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.

- [8] There is no suggestion that the same principles do not apply to a without notice application for permission to serve out as they do on a without notice application for a freezing order (as confirmed for example in *PJSC Commercial Bank PrivatBank v Kolomoisky and others* (supra) at [169] and *Sloutsker v Romanova* [2015] EWHC 545 (QB) at [52]).” 66. In *Derma Med Ltd v Ally* [2024] EWCA Civ 175, the principles stated by Carr J in the *Tugushev* case were approved. It was noted at paragraph [30] that: “[30] Although this was said in the context of an application for a freezing order, the principles are of general application.” 67. Of course, the principles have to be applied in the particular context in which they arise. For example,

what is material in one context may not be material in another, or may not be as significant; similarly the response of the court will depend on applying the relevant principles to the particular context. As Toulson J (as he then was) said in *MRG v Engelhard Metals Japan* [2003] EWHC 3218 (Comm); [2004] 1 Lloyd's Rep 731 at [25]-[26]: "[25] Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the Judge when hearing it. I was referred to a number of statements on the duty of disclosure in the context of applications for freezing injunctions. In such cases the Court is being asked to make an order of an exceptional kind, prohibiting or restricting a defendant's use of its own assets before any adjudication has been made against it. Because of its draconian nature, it is a jurisdiction which requires great caution and a wide range of factors may have a bearing on the Court's decision.

- [26] An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* whether the Court should assume jurisdiction over a dispute. The Court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the Court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the Court is not concerned with the merits of the case." (see also *Payabi v Amstel Shipping Corporation* [1992] QB 907 at 918). 68. 69. 70. Before me, Mr Mountford, having relied in his skeleton argument upon Toulson J's statement in paragraph [26] that I have just cited, to the effect that the general principles are the same but that they have to be applied in the particular context, submitted orally that Toulson J had said that the principles differed as between freezing injunction applications and service out applications. I do not read Toulson J as saying that, quite the contrary. However, if there was any doubt about the correct position that has since been clarified by cases referred to and as summarised in *Tugashev* and by the Court of Appeal in the *Derma Med* case. I was also referred to a number of the cases illustrating the application of the relevant principles. In particular I was referred to *Crossroads Corporate Finance (UK) LLP v Ontario Management Ltd* [2025] EWHC 1011 (Comm); *Almegha, v Al-Sanea* [2025] EWHC 322 (Ch) and *Marinkakis v Karipidis* [2025] EWHC 13 (KB) in particular showing the need for paper applications to clearly flag matters up (and that doing so in a Skeleton argument will do) and not bury them in the papers. Finally, in the context of the differences in type and consequence of innocent and non-innocent non-disclosure and, even where innocent, serious and non-serious non-disclosure, and the issue of the court's overall approach, as dealt with in paragraph 7(ix) to (xiii) of the *Tugashev* case, I was referred to *Borelli v Otaibi* [2024] ILPr 31, *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm), *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm), *Wragg v Opel Automobile GmbH* [2024] EWHC 1138 (KB). In addition I was referred to paragraph 34(1) of the *Banca Turco* case where it was said that "if an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, it is incumbent upon it to explain how it came about." Possibly in light of the latter point, at the break in the

hearing I made an order permitting the Claimant to file and serve further evidence dealing with limited topics, one of which was the allegation of breach of the duty of full and frank disclosure regarding the Employment Agreement and Termination Agreement. Mr Harris' fourth witness statement dealt with that (among other matters). Particular Agreements relied upon by the Claimant 71. 72. Before I turn to the individual claims that are brought I need to say more about the PoC. The PoC assert breaches of certain agreements entered into by Trayport and I need to explain those. First, before being granted access to Joule, customers are required to enter into Trayport's standard form "Software as a service Agreement" ("SaaS Agreement"). This agreement governs use of an "off the shelf" Joule package under which users download and install Joule software and access the Joule platform directly. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 73. 74. 75. 76. 77. 78. 79. 80. 81. Secondly, customers are also able to connect internal or third party software and applications to Joule via Joule's API ("Chained Applications"). To do so, clients must first enter into a further ancillary agreement with Trayport described by Trayport as a "Chained Application Agreement" ("CAA"). The CAA does not permit any third party software provider to access Joule. The Joule API can also be used to provide access to Joule for customers who develop and integrate their own applications, such as desktop tools (e.g. analysis tools, data warehousing, surveillance, regulatory reporting and the like) which may be built internally by the customer or developed by a third party software provider. Use of such applications will be governed by a combination of the SaaS Agreement and the CAA. Thirdly, when an end-user (usually an authorised employee of a Trayport customer) first uses Joule, they are required to agree to the terms of a "clickthrough" end user licence agreement (the "Clickthrough Agreement"). If a client uses a third party software provider as outlined above, the customer must enter into an agreement with that third party on terms that are equivalent to the relevant SaaS Agreement. Fourthly, where a third party software provider provides services to multiple Trayport customers, the third party will be encouraged to enter into a standard form "Certified Solutions Provider Agreement" or "CSP Agreement". The PoC refer to this as a "requirement" on such third parties but I agree with Mr Mountford's submission that that may go too far. Trayport's customers pay for access to Joule (under the SaaS model) on a per-user basis, the users becoming "Authorised Users". User accounts may be read-only or read-write accounts, the latter allowing users to communicate with various venues (e.g. to place trades) for which Trayport charges double the read-only subscription fee. I turn to the terms of a non-disclosure agreement dated 9 April 2021 and entered into by Trayport and Exxeta (the "NDA"). The NDA was entered into prior to the parties entering into discussions for the purpose of identifying potential business opportunities and/or areas of co-operation. In the course of those discussions, Trayport is said to have disclosed to Exxeta confidential information about Trayport's network including information about how Joule worked. In this respect, the parties were negotiating with a view to Exxeta entering into a CSP Agreement. However, these discussions broke down in about June 2022 because the parties were unable to agree the terms of a CSP Agreement. The NDA contains covenants by Exxeta regarding the communication and disclosure and use of "Confidential Information" of

Trayport as defined. The Confidential Information is, for these purposes, relevant information disclosed by Trayport or otherwise obtained by Exxeta after the date of the NDA. 82. I will deal with the employment related contracts between Mr Schmid and Trayport later in this judgment. HH JUDGE DAVIS-WHITE KC Approved Judgment The Claims Trayport Ltd v E-Star Trading GmbH & Ors 83. 84. 85. 86. One oddity in this case is that the application for service out was issued on 10 January

2024. At that point there was simply an amended claim form issued on 4 January 2024 and a witness statement in support of the application. The PoC are dated 16 February 2024. Having received the application without the PoC on 10 January 2024, the Court emailed Deloitte (on behalf of Trayport) requesting provision of a copy of the PoC for consideration. The draft PoC were provided to the Court on 19 January 2024 and was considered by the Court in granting Trayport's application. I was initially told, or at least it was implied, that the draft PoC submitted to the Court were in the same form as those eventually formally served and filed. However, it only became clear to me from Harris 4th that what was in fact provided to the court was a copy of a "near final" draft PoC. Whether or not there were any differences between the "near final" and the "final" versions was not explained nor, if there were, what such differences were. One significant difference seems to have been that the Master did not have copies of the confidential Joule logs which were annexed to the final draft by way of confidential schedule. It is disappointing that the position was not properly explained in evidence, at least when the applications challenging jurisdiction were served. The causes of action are set out or rather summarised in paragraphs 124 onwards of the PoC under the heading "Causes of action". In many cases these are simply statements of causes of action with references back to earlier paragraphs of the PoC. Key paragraphs cited are 89-90 and 113 PoC. It is necessary to see what factual matters are pleaded there, what inferences the court is invited to make as regards those matters and whether those matters establish the elements that make up the separate causes of action set out in paragraphs 124 onwards of the PoC. By way of a broad analysis, I agree with the analysis of Mr Burgess and use his, and Mr Mountford's, descriptive language of the two main allegations made in connection with breach of intellectual property rights. The first main allegation made by the PoC is a (mis-)use of Trayport intellectual and confidential property so as to create E-Star Products. That case was described by Mr Burgess as the "copying case". I have so defined it for the purposes of this judgment as the "Copying Case". It is the case articulated at paragraphs 89-91 PoC and is based on inference (and in some respects upon inference on inference). The second main allegation centres around allegations that access has been gained to the Trayport Joule platform (both back- and front-ends) in a manner that is not authorised. In that connection heavy reliance has been placed upon certain selected print-outs of data from Joule, referred to as the "Joule Logs", which apparently record access to the Joule platform from IP addresses particular to Exxeta/E-Star but using account access granted by Trayport to certain of its customers. That access is said to be unlicensed and not authorised. This has been referred to as the "technical fall-back case". The technical fall-back case is also relied

upon as something on which to base the inference that the copying case has a real prospect of success. The technical fall-back case underlies not only the claims of intellectual property misuse but also related claims such as procuring breaches by Trayport's customers of their contracts with Trayport. 87. In fact, standing back from the detail, the technical fall-back case, which I shall call the "Access Case", is really the first case. It is a case alleging unauthorised access to HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors and downloading of Trayport's intellectual and confidential property. The Copying Claim is secondary infringement in terms of using the information obtained to create E-Star products. 88. I turn to the paragraphs of the PoC forming the basis of many of the individually formulated causes of action. Paragraphs 89 to 90, PoC 89. Paragraph 89, PoC commences with a statement of Trayport's belief. Technically it seems to me that this is a misguided form of pleading. It is for Trayport positively to plead relevant matters (be it fact and/or inference). Its belief in the truth of the same is provided by the Statement of Truth required as part of the Statement of Case. Technically, a defendant would be entitled to plead in defence of a claim asserting the claimant's belief that it, the defendant, does not know what the state of the claimant's belief is. Nevertheless, the matter can be cured by a simple deletion of the first few words of the paragraph. This is the sort of amendment I would allow at this stage, if needed.

90. What is left is a rolled up allegation that the Defendants have copied/adopted or reverse engineered Joule and/or its component parts; and/or they have copied/extracted/reutilised one or more of the Joule databases and/or have misused Trayport Confidential Information and/or have otherwise accessed information confidential to Trayport and/or in the nature of a trade secret for the commercial benefit of E-Star and/or Exxeta. This has to be read with paragraph 91 PoC, which I will deal with after dealing with paragraph 90, PoC. 91. 92. Paragraph 90, PoC continues with a statement of Trayport's belief. I have already dealt with this type of pleading as a point of principle. It then goes on to say that the infringement of intellectual property rights of Trayport (including copyright in the Trayport Copyright Works and database rights in the Joule Database and/or misuse of the Trayport Confidential Information) is properly to be inferred from facts and matters then set out in sub-paragraphs a-h. Before turning to the individual causes of action relied upon, and the necessary elements of each of such causes of action, it is necessary to consider the facts and matters set out in paragraph 90(a)-(h). In effect, the bulk of the Claimant's case is based on inference. Paragraph 90(a), PoC 93. Paragraph 90(a) PoC asserts that the speed/timing in which the E-Star Platform has been created (which the Court is asked to infer is less than two years compared with the approximately 25 years it is said it took to develop Joule), considered against the timing of the breakdown of discussions between the parties pursuant to the NDA, is a factor pointing to a misuse of information belonging to Trayport. The NDA, it will be recalled, was entered into on 9 April 2021. It is said that in the course of discussions (to identify potential business opportunities and/or areas of co-operation) following entry into the NDA, Trayport disclosed to Exxeta information constituting Trayport Confidential Information about how Trayport's network, including Joule, worked. The discussions, it is

said, broke down in about June 2022. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 94. The evidence of the creation of a new platform which is relied upon is set out in PoC paragraphs 80 and 81, PoC. First it is said that, following Mr Schmid's departure from Trayport and in June 2022 his joining E-Star, E-Star made an announcement of such a new platform on 17 June 2022 on the LinkedIn platform, shortly before and aimed particularly at potential visitors to the E-World Expo (a global energy trade fair) at Essen in June 2022. The key part of the announcement is as follows: "e-star is the new star in the energy trading sky: An innovative Software as a Service company that provides flexible trading opportunities for companies of all sizes-in the way that suits them best. From out of the box application to advanced integration, from standard products to bespoke instruments, from domestic to global markets: e-star enables companies to trade directly with all market participants and increase reach and liquidity for trading success. e-star is not a newcomer to the sector. Behind the startup is a lot of experience. It was founded by #Exxeta a digital consultancy with a specialisation in energy. With a clear focus on #saas the new company now offers this powerful product for energy trading. And aims to continue setting new benchmarks for the industry in the future" I cannot see that this announcement gives rise to any inference that E-Star has developed some new software package fundamentally different from offerings that it (and, before it, Exxeta) had had. The focus is on E-Star as a new company not some new product. Secondly, reliance is placed upon an article of 20 June 2022 in energate messenger (said to be Germany's largest energy news desk). The article is titled: "Estar wants to challenge Trayport" and contains a number of quotations Dr Kamper. The development of the markets is said to provide E-Star with the opportunity "to represent the market with direct access to the exchanges and selected brokers". Reference is made to Trayport having an "unavoidable position" in the broker market and a trading expert is reported as commenting: "It would be great if the Trayport monopoly were finally broken up". Mr Schmid and Dr Kamper are said "currently to see a new openness for this: "Why should I pay for an expensive broker umbrella if there are no offers on the umbrella anyway?" explained Karsten." The article refers to E-Star launching its marketing activities (not new products) at the E-World Trade Fair 2022. The complete interview with Dr Kamper and Mr Schmid is referred to in the article as being available on the next issue of energate/Gasmarkt but a copy has not been produced in evidence. 95.

96. Mr Mountford makes a number of points about paragraph 90(a) PoC. 97. 98. First, he says that the underlying assumption or inference, that some new platform has been developed by E-Star in the two years or so following the breakdown of the discussions for the purposes of which the NDA were entered into is demonstrably wrong. Trayport pleads (PoC paragraph 82) that its understanding is that the E-Star platform includes a number of features which compete with Joule features, including E-Star Market Place; E-Star's Market Adapter; E-Star Algorithmic Trading and E-Star Customer Hub, each of which is said to offer similar functionality to specific Joule HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors features. However, the uncontested evidence of Mr Thomas on this point is that these features were first released by Exxeta between 2003 and

2013. The changes made between 2020 and 2023 are said to have been essentially cosmetic, consisting of minor changes to the visual appearance of E-Star's graphical interface. There is no evidence from the Claimant condescending to any detail as to what changes have been made to what is "on offer" from the alleged new E-Star platform. 99. I had been concerned at one point that the E-Star offering had been purely an "add-on" to the Joule platform and that a new element was the possibility of direct trading. However, in this respect it appears that the interaction between the E-Star AGI and Joule is one where the AGI is an "add-on". It is clear that Exxeta (and now E-Star) products have included one or more products that enable direct trading since well before 2022. Mr Thomas gives uncontested evidence that Trayport has previously made representations to the Competition and Markets Authority ("CMA") describing the development and functionality of Exxeta's energy trading technology, as well as that of its own software, and that, in its October 2016 report on Trayport's acquisition by Intercontinental Exchange ("ICE"), the CMA recorded Trayport's representations in the following terms: 7.97: "[Trayport and ICE] said there was nothing unique about Trayport's software in terms of functionality and equivalent software was available from a wide range of other ISVs. These included Exxeta, Trading Technologies, and SunGard among others." 7.99: "[Trayport and ICE] also said that customers exert considerable buyer power and that they can and do sponsor entry. For example, they said that the major German utility firms RWEST and E. ON had sponsored Exxeta's development of its trading software for European utilities since 2007 and that Exxeta now provides aggregated access to the same marketplaces as those available via Trading Gateway." 9.4: "Trayport told us that, from a software perspective, there was nothing unique about Trayport's core offering in terms of functionality, ie software with equivalent functionality was available from a wide range of other ISVs (eg Exxeta, Trading Technologies and SunGard, among many others) and also exchange groups which (unlike ICE) supplied their technology on a standalone 'ISV' basis (eg Nasdaq, LSE and EEX). As set out below, third parties generally supported this."

100. Mr Moss relied upon the statement in the energate article that for smaller market participants that do not necessarily trade themselves but use market access from partners, "E-Star will develop standardised solutions that can be used via market access". Again, it seems to me the inference is not one that has a real prospect of success. Any company selling software is likely to be continually developing its products to face technology and market changes. The statement does not suggest that there is about to be launched a new product let alone one which has been developed over a very short period. In short, Mr Moss's submissions seem close to raising the spectre that if a competitor has access to a party's platform and it infers that access was not legal then it can assert that the products the competitor is creating are created using its intellectual property because this is to be inferred from the mere fact it is in that market and that it is developing products. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 101. The LinkedIn announcement and the article relied upon by the Claimant show an intention on the part of E-Star to compete with Trayport but they do not, in my judgment, by inference or otherwise of themselves point to any sudden or fundamental new developments in terms of

what the E-Star products offer or comprise such that it can be inferred the products have been developed by improper use of intellectual property belonging to Trayport in a 2 year period prior to (about) Summer/Winter 2022 (or even a 2 year period after then). 102. In short, and in my judgment, there is nothing in the paragraph 90(a), PoC point relied upon by the Claimant and it does not provide a basis for the inferences sought to be drawn of misuse of Trayport's intellectual and/or confidential property rights. Paragraph 90(b), PoC 103. 104. 105. 106. Paragraph 90(b) relies upon what is said to be the "high degree of visual and functional similarity" between the front-end of the E-Star Platform compared with Joule. In this respect, (confidential) screenshots from the Joule platform and the E-Star platform have been produced. The first point made by Mr Mountford that I deal with is that a comparison of the E-Star Energy Trader Version 11 (dating from 2022-2022) and Version 12 (the current version) demonstrates that the visual appearance of the E-Star Products has remained consistent and over a period which stretches back before the time when it is alleged that misuse and copying of Joule has taken place. I note as regards copyright that mere similarity is insufficient to found a copying claim (see *Designers Guild Ltd v Russell Williams (Textiles) Limited* [2000] 1 WLR 2416 (HL) at 2425C-F1). Here there is likely to be similarity in graphical user interfaces delivering the functions of Joule or the E-Star Products but this is because of the limited ways in which the required functionality can be delivered. Trayport accepts that other graphical user interfaces of other providers in the area are also similar to the Joule GUI but that just demonstrates the point. The suggestion of Trayport that these other entities are also in breach of Trayport's copyright seems to me to be fanciful. I should add that the passage from the *Designers Guild* case that I have set out by way of footnote is also, in my judgment, of assistance in considering whether a case based on inference regarding misuse of intellectual property other than breach of copyright has been established that has a real prospect of success. In other words, one way of looking at the matter is to ask not so much whether there are similarities between the relevant visual appearance of the two programmes but whether that similarity suggests that it is more likely the result of misuse of Trayport's confidential/intellectual property than coincidence. Here the similarities relied upon seem to me to be "commonplace, unoriginal or consist of general ideas" and do not of themselves raise a case with a real prospect of success. 1 In particular: "The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas." HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* 107. 108. 109. The second point is that, as regards similar functionality, there is nothing in the point. I have already addressed Trayport's submissions to the CMA as reported by the CMA in its October 2016 report and, in particular, that there was nothing unique in the functionality of Trayport's software in terms of functionality and that other providers had the same functionality. Mere similarity of functionality does not therefore of itself point to copying or

other misuse of Trayport's intellectual/confidential property. I also note that copyright protection does not extend to the functionality of a computer programme (see *SAS Institute v World Programming* [2010] ECDR 15 (ChD) at [232]2). This is an area where Mr Moss submits that the whole question of whether in fact there is a copying of the design has to be considered once there has been disclosure. In my judgment, however, it is necessary to establish a case with a real prospect of success and mere similarity of functionality by itself and in the circumstances of this case does not raise such a case. I do not consider that a case of sufficient similarity is made out that, combined with opportunity to copy, gives rise to an inference with a real prospect of success that there has been relevant copying in and about the creation of a new software platform by E-Star/Exxeta. Paragraph 90(c), PoC 110.

Paragraph 90(c) refers to the targeted recruitment of the Trayport Leavers as set out in paragraphs 85-88, PoC. In breach of his contract with Trayport, Mr Schmid is said to have solicited the relevant employees away from Trayport to work for E-Star. Further, it is alleged that it is to be inferred that E-Star (and/or Exxeta and/or Dr Kamper) encouraged the leavers to resign their employment with the Claimant. I deal later in this judgment with the issue of whether there is a case with a real prospect of success that Mr Schmid encouraged such resignations and if he did whether it was in breach of contract. For present purposes the issue is whether there is a real prospect of success of an inference that one or more of the Defendants encouraged the resignations in question and if so whether that in turn supports an inference of improper use of intellectual/confidential property of Trayport, supporting the Copying Claim, by any of the Defendants.

111. Mr Thomas addresses the circumstances in which the leavers came to be employed by E-Star/Exxeta. I do not consider that the circumstances there set out negative the inference sought to be relied upon, such that there can be said to be no real prospect of success in a case that the 4 leavers were encouraged to leave Trayport by one or more of the Defendants (whether or not that was a legal wrong by any of them). Mr Thomas' evidence is something that the Claimant is entitled to test by way of cross-examination and following disclosure.
112. The more difficult issue is whether or not solicitation of employees of Trayport can give rise to an inference of wrongful use of intellectual/confidential property. In my judgment, assuming that some form of solicitation by one or more the Defendants were made out, and even assuming that one of those involved was Mr Schmid and that his conduct in this respect amounted to a breach of his contract with Trayport, it 2 "But there is a distinction between protecting the design of the program and protecting its functionality. It is perfectly possible to create a computer program which replicates the functionality of an existing program, yet whose design is quite different." HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* does not seem to me that that by itself is enough to give rise to a case with a real prospect of success that the Defendants (or any of them) have misused Trayport's confidential/intellectual property in a manner supporting the Copying Claim.
113. In particular, the general allegation is that Trayport's intellectual property was wrongly used in developing a brand new system in only 2 years that is by the Summer/Winter of 2022, but of the 4 employees of Trayport identified as being solicited to work for E-

Star, one resigned on 20 April 2023 and two in September 2022 (one of whom was required to work his notice period, the employment contract terminating on 22 November 2022, and on terms restricting his access to the Trayport systems to projects unconnected with Joule). On termination each was subject to restrictive covenants for 6 months and there is no suggestion of breach of those by any of them. The fourth resigned on 16 March 2022: the employment contract ended on 15 June 2022 and there was then a 6 month restrictive covenant for 6 months ending on or about 06 November 2022. There is no suggestion that that restrictive covenant was broken. Paragraph 90(d), PoC 114. 115. 116. Paragraph 90(d), PoC refers to an alleged misuse of Joule as particularised in paragraphs 95-112, PoC. This is what I have referred to as the technical fall- back case or “Access Case”. Mr Mountford helpfully broke these paragraphs down into seven sub-heads, to which I now turn. I deal with what seems to be the overarching key point, whether the access was permitted under contracts with the relevant Trayport Customers, separately.

- (1) E-Actors allegedly accessing Joule through Customer A’s account for long periods of time, paragraphs 95-97 PoC In or about June 2022, Trayport began a review of the Joule access logs for the period from around mid-June 2021 to June 2022 (the “Joule Logs”). A selection of these are in evidence before me by way of a confidential annex. As Mr Mountford pointed out in reply, Mr Moss began by submitting that the Joule Logs were clear evidence of wrongdoing. However neither the pleading nor the evidence really explain what one gets from the Joule Logs before the court. In fact what appears to be obtained is details of access from particular IP addresses on particular days using particular user accounts. The length of access and other matters relied upon are not, as far as I can see, extracted from the Joule Logs before the court. The allegation is that employees of Exxeta and/or E-Star (including Dr Kamper) (“E Actors”) are shown to have been accessing Joule, via Trayport clients’ accounts from IP addresses which are Exxeta locations. It was clarified orally that the definition of E-Actors is intended to include Mr Schmid, although it is accepted that an amendment to the PoC needs to be made in that respect. This is the sort of amendment I would not have allowed without seeing it and without the Third Defendant having an opportunity to make further submissions regarding service out.
117. As regards the first sub-head of paragraph 90(d) PoC, an allegation is made that Customer A’s account has been so accessed from multiple Exxeta locations which access is said to show extremely unusual and excessive activity, extending beyond what could reasonably be required for either consulting services or ensuring the HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors interoperability of Joule and E-Star’s Energy Trader Platform or E-Star Market Place. In June 2022 alone, one username is said to have been connected to Joule via Customer A’s account for over 220 hours.
118. Mr Mountford makes the point that the Joule Logs annexed to the PoC do not of themselves show how long connections were made for. Nevertheless, it seems to me that the evidence given by way of witness statement, just about scrapes through as sufficient evidence to raise the factual case asserted.

119. Mr Thomas, in his evidence, asserts that the access in question was all a matter of routine maintenance and checks and that such work was billed to E-Star/Exxeta's clients and that some of the time is explained as E-Actors being logged in but inactive and where a connection was inadvertently left open. The slight oddity is that Trayport accepts (see PoC, paragraph 93(c)) that any legitimate use of Joule within the terms of the CAAs in place between Trayport, its customers and Exxeta/E-Star is excluded from its claim but does not begin to identify cases falling either side of this line.
120. However, and in my judgment, there is a factual dispute that I cannot resolve on this application as to whether or not there has been a misuse of Joule (or rather wrongful access to Joule) as alleged. I accept Mr Mountford's submission that the corporate Defendants have put forward various explanations (as regards all of the complaints on the technical fall-back claim, not just this one) and that it is wrong to suggest they have put forward no explanation at all. However, I consider that there remains a factual dispute which I cannot resolve on this application. Disclosure and cross examination will be required. However, it seems to me that the alleged misuse does not of itself show anything more than an opportunity to download/copy aspects of Joule for the purposes of creating/copying/reverse engineering the Trayport platform and I do not consider that a case has been raised with a real prospect of success that such misuse as is alleged gives rise to an inference that the misuse extends to the matters set out in paragraph 91, PoC as regards the Copying Case.
- (2) E-Actors allegedly accessing Joule through other Trayport Customer accounts, paragraph 98 PoC 121. This raises the same point as sub-head (1) but in relation to other customers. My conclusions are broadly the same. Again, the relevant Defendants say that such access was in connection with testing and putting right any glitches in the interface between Joule and the add-on E-Star Products in question. There is also the question of whether and to what extent this activity was known about and agreed to by Trayport. However, these matters seem to me all a matter for disclosure and trial and it may in any event go more to damage than to breach of Trayport's licences. However, as with sub-head (1), it does not seem to me to be a strong indicator of a wider misuse of using the access and information obtained to create the E-Star Platform.
- (3) E-Actors using Trayport Customer accounts to access other customers' accounts, paragraphs 99-104 PoC HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 122. The Joule Logs (although whether this is demonstrable from the extracts in evidence is not clear to me) indicate that E-Actors have used some Trayport customers' accounts to connect to or access other Trayport customers' accounts. By way of example, Customer A's account is said to have been connected to Customer B's account, Customer F's account and Customer C's account at least 29 times in all. Similarly, an E-Actor apparently connected Customer D's account to Customer B's account at least twice, in August and September 2022. Trayport's case is that this activity enables Exxeta/E-Star access to the commercially sensitive and confidential trading data of those other Trayport Customers and that there is no justifiable reason for establishing such connections either at all or for the

prolonged and systematic periods indicated in the Joule Logs.

123. Again, Mr Thomas asserts in his evidence that these matters may be capable of explanation. He suggests that there might have been a need to test and remedy Joule's performance affecting multiple customers or in other instances there may have been a failure to log out of a particular customer's account. Again, it seems to me that there is in effect a factual dispute as to whether the conduct is explainable or not and I cannot resolve that on this application. However, whilst an opportunity to download/copy/reverse-engineer may be presented by this evidence, it does not seem to me to give rise to an inference beyond that. My conclusion is broadly the same as regards sub-head (1).
- (4) E-Actors using Trayport Customer accounts to test the First/Second Defendants' applications: paragraphs 105-106, PoC 124. There is evidence from the Joule Logs (again whether or not from those in evidence is not clear to me) that E-Actors have used Trayport customers' Joule accounts to test Exxeta/E-Star applications. A number of examples are given.
- (1) First, apparently four customers' respective Joule accounts were used to run or test a third party application called "EET E-Word E-Star Energy Trader". At least 10 occasions in July 2022 have been identified.
- (2) Secondly, Java development kits have been run on Trayport productions systems on multiple occasions, including over 150 instances between January 2021 and November 2022.
- (3) Access of Joule for 107 hours between April and October 2022 using Customer B's account. 125. Paragraph 105(b), PoC at the end, asserts that the use of Java developments kits could have compromised the security of Java and the wider Trayport network and could have impacted on Trayport's platform to the detriment of other Trayport customers. This appears to be a separate complaint which does not relate to the inferences being asked to be drawn as regards the causes of action pleaded such as infringement of copyright etc. as in paragraph 91 (and 89), PoC.
126. Mr Thomas suggests that if there was a breach or impropriety in some way that no loss is shown but that rather misses the point. The question (for present purposes) is what inference can or should be drawn. Further, he says that any testing was at the relevant customer's request to check details or maintain customer connection to the HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors Trayport platform. He also says that the connections in question were effected with Trayport's knowledge/consent. These further points, however, all raise questions of disputed fact that I cannot begin to resolve.

127. At the end of the day it seems to me that again I cannot at this stage determine that there is no conduct as alleged or that it did not amount to misconduct supporting the Access Case. Whilst I consider that this factual case may support the case set out in paragraph 113, I do not consider that it strongly supports the Copying Case or the general case set out in paragraphs 90 and 91 (except possibly to the extent that paragraph 91 may overlap with paragraph 113 and contain elements of the Access Claim).
- (5) Misuse of the Deltix API, paragraphs 107-109, PoC
128. As I understand the factual basis of this sub-head, it is said that Customer A is permitted by Trayport to use a third party entity, Deltix Inc, but that it has been misused in connection with E-Star/Exxeta products.
129. Mr Thomas explains in his evidence that E-Star acted on the understanding based on discussions with the relevant customer that it was authorised to act in the manner that it did.
130. As regards the defence, this is something that I cannot resolve on this sort of hearing. In my judgment there is a clear dispute of fact that I cannot resolve.
131. However, whilst I consider that there is a real prospect of success in a case that Joule has been misused by E-Star I do not consider that this sub-head gives rise to a case with a real prospect of success that the misuse has involved the creation of the E-Star Platform, and thus the Copying Case, as alleged in paragraph 91, PoC. My conclusions are broadly the same as regards sub-head (1).
- (6) E-Actors using Trayport Customer accounts to access the Joule front end, paragraphs 110-111 PoC 132. I am told in evidence that the Joule Logs (though whether those in evidence is not clear to me) show that, between July-October 2022, E-Actors have accessed the front end of Joule from Exxeta locations through several Trayport Customer Joule accounts. Four examples are pleaded. One involves Customer B's account being used on at least 61 occasions between April and October 2022. The second involves Customer A's account being used on at least 5 occasions between 21 July 2022 and 15 August 2022. The third involves Customer E's account being used on at least 65 occasions between 18 January 2021 and 30 September 2022. The fourth involves Customer A's account being used by a different username, on one occasion on 15 August 2022.
133. Access to the front end is said to require the user to download and install the Joule front-end locally on their desktop (see paragraph 111, PoC). The user is then required to read and agree to the Clickthrough Agreement before access is granted. Access by E-Actors in the way set out is also said to be a breach of the Clickthrough Agreement. (It is important to note that no case of breach of the Clickthrough Agreement is brought against any person, other than by way of vicarious liability). HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors

134. Mr Thomas says that the use was innocent and that customers gave access to E-Star for the purposes of configuring instances in Joule (for example customising certain functionalities for particular customers) and remedying technical performance issues (such as those relating to Trayport ICE disconnects). He goes on to confirm which user ID was granted by which customer for which purpose.
135. Again, I consider that I cannot determine on this application whether or not the inference of wrongful use (and therefore in this respect, the Access Case) is made out. In my judgment, there is a case with a real prospect of success on the point. However, as pleaded I do not consider that it strongly supports the Copying Case inferred in paragraph 91 PoC (except and insofar as that paragraph overlaps with the Access Case under paragraph 113). It is unclear to me why the particular use that is said to be unauthorised gives rise to the inference set out in paragraph 91 (and 89). I will deal with allegations in relation to the Clickthrough Agreement separately.
- (7) Multiplexing data from single accounts, paragraph 112 POC 136. The allegation is that Exxeta has been attempting to enable customers to set up implementations whereby its Exxeta Internal Market application acts as a proxy, connecting to Joule via the Joule API using a single user account but then the Exxeta Internal Market Application is used to multiply out data to multiple users. This allegedly circumvents Trayport's ability to identify users and charge the client on a per user basis.
137. As I understand it, Exxeta accepts that its product can be used in this way but says that it informs any Customer that it is for the Customer to ensure that the correct contractual terms are in place with Trayport to enable its use in the manner identified.
138. Again, it seems to me that there is a case with a real prospect of success that there has been wrongdoing as alleged (again supporting the Access Case) but I do not consider that it gives rise to a case with a real prospect of success that the inference should be drawn as set out in paragraph 91 (and 89), PoC so far as concerns the Copying Case. 139. I will deal with the question of consent in the context of the Access Case in more detail later in this judgment when considering the causes of action. Paragraph 90(e), PoC 140. Paragraph 90(e), PoC alleges that because Mr Schmid worked locally on personal devices when working for Trayport he had the opportunity to retain local copies of the Joule codebase.
141. Of course, opportunity does not of itself mean that the opportunity was taken up. 142. In evidence (but not pleaded), Trayport asserts that Mr Schmid retained a copy of Exxeta's database when moving to Trayport some years earlier. However, Trayport's own case is that neither Mr Schmid nor Trayport used Exxeta's codebase. It is difficult to see how this strengthens, to any significant extent (if at all), the case for the drawing of the inference that there is a good Copying Case which Trayport asks the court to draw. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 143. I do not consider that on its own it gives rise to a case with a real prospect of success that the inferences pleaded in paragraph 91 (and 89) should be drawn to the extent that they raise

the Copying Case. Paragraph 90(f), PoC 144. 145. 146. 147. 148. Paragraph 90(f), PoC refers to disclosures of confidential information made to Exxeta pursuant to the NDA in the course of discussions referred to in paragraphs 76-77. Those paragraphs simply refer to disclosure of information about how Trayport's network worked which is said to have been confidential information. It is not further identified. In evidence, Mr Thomas asserted that the only information disclosed under the NDA was a draft CSP agreement and questionnaire (neither of which contained any operational information relating to the Trayport network or Joule). In response, Mr Harris asserted that Trayport provided licensing guidelines to Exxeta under the 2021 NDA "via Simmons & Simmons LLP, Exxeta's legal advisers at the time", and that the "licensing guidelines effectively disclose the structure and mechanism of Trayport's licensing practices". Mr Thomas then pointed out in his subsequent witness statement that Simmons & Simmons LLP have not acted for Exxeta since approximately 2013 and that the disclosure in question was pursuant to a 2012 NDA, breach of which has not been alleged. In my judgment, there not having been an answer to Mr Thomas' evidence that I have just summarised nor any proper identification of information that has passed under the NDA, I do not see that this sub-paragraph takes the case for the inferences alleged any further forward. I consider that there is a claim with a real prospect of success of breach of the NDA but that is on the basis that the NDA captures not just confidential information based under it but confidential information of Trayport subsequently acquired. Paragraph 90(g), PoC Paragraph 90(g), PoC refers to "suspicious activity involving Joule customer subscriptions". This is unparticularised save for one specific example and one general assertion. The example given is that Customer A has asked for fewer new users than normal. The general assertion is that customers (unspecified) have switched to read- only accounts rather than read-write accounts. I do not see how these assertions can give rise to any inference as is sought to be drawn regarding creation of the E-Star platform and the Copying Case. Paragraph 90(h), PoC Paragraph 90(h), PoC refers to "statements made in relation to unauthorised use of API in correspondence" as set out in paragraph 123, PoC. Paragraph 123 PoC sets out that, in correspondence after a letter of claim, the Defendants confirmed that they would refrain from using the Deltix API to access Joule and that steps had been taken to prevent unauthorised access to Joule (including communicating to customers that it was investigating instances of unauthorised access). HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 149. The short point made on behalf of the corporate Defendants by Mr Thomas is that these confirmations do not support any inference of wrongdoing. Rather, they reflect responsible precautions taken by a company put on notice of alleged breaches of law in using software.

150. Mr Harris' response is that the statements amount to a tacit acceptance of wrongdoing on the part of the Defendants which supports the claims of infringement and misuse of confidential information made in the PoC.

151. On this point I prefer the analysis of Mr Thomas. I do not see that the statements amount to an acceptance, whether tacit or otherwise, of wrongdoing by any Defendant. I will deal later in this judgment with the issue of whether, if I am incorrect and there is such a tacit acceptance of wrongdoing as alleged by Mr Harris, they support the Access Case. I do not consider that they support the Copying Case. The accounts from which access obtained
152. Annex 7 to the PoC identified the IP addresses used by E-Actors to access the Trayport Network. Apart from one, they are all addresses situated in Germany (mainly Frankfurt and Karlsruhe but also Nuremburg and Dusseldorf). Only one address is in London. Paragraph 91, PoC 153. Paragraph 91 is another omnibus rolled up pleading. It says that, for the reasons “particularised above”, Trayport believes (which I think means asserts) that the Defendants (a) have misused Trayport confidential information in the creation of the E-Star Platform; (b) owed and have breached an equitable duty of confidence to Trayport and under the Trades Secrets (Enforcement, etc) Regulations and (c) Exxeta has additionally breached the NDA and (d) Mr Schmid has breached his contractual and equitable duties set out at paragraphs 66-74, PoC. I deal with Mr Schmid’s position separately below. Paragraph 113, PoC 154. This is another repetitious, rolled up pleading. It asserts that there is no contractual basis for “this activity” as set out in paragraph 114, PoC. “This activity” on the face of it is the multiplexing data from a single account (paragraph 112, PoC which with paragraph 113, PoC appears under this heading).
155. As a result of the misuse of Joule, as particularised “above” (it is unclear if this is limited to paragraph 112, PoC but probably covers everything from paragraph 92 onwards, which continue under the heading “Misuse of Joule”), the Defendants are said to have infringed the intellectual property rights of Trayport, including copyright in elements of the Trayport Copyright Works relevant to the Joule front end and sui generis database rights in the Joule database and misused the Trayport Confidential Information. In the premises, it is said that the Defendants have each breached their equitable duties of confidence to Trayport and the Trade Secrets (Enforcement, etc) Regulations and that Exxeta has additionally breached the NDA and Mr Schmid has additionally breached his contractual and equitable duties at paragraphs 66-74 PoC. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
156. A major point, justifiably made, by Mr Mountford (and adopted by Mr Burgess) was that the underlying agreements with customers have not been produced or pleaded and the specific clauses breached, and the facts said to amount to such breach, have not been clearly identified in either the PoC or the evidence filed by Trayport. However, I consider that the pleading and evidence just about passes muster on this point for the purposes of the merits test for service out in demonstrating a real prospect of success of that element of the underlying legal claims that relevant acts have been without consent. Although it is unfortunate that the underlying agreements with Trayport Customers have not been produced I can, in my judgment, rely on Mr Harris’ evidence and the pleading regarding lack of authorisation. 157. In summary, as regards the Copying Case, I have considered all

the matters relied upon which are said to give rise to a claim with a real prospect of success that (in broad terms) Trayport's intellectual property and/or confidential information has been used (and copied) in and about the creation of a new E-Star platform. I do not consider that individually or collectively they give rise to such a case with a real prospect of success.

158. As regards the narrower Access Case, I consider that the PoC and supporting evidence just about reveals a factual case with a real prospect of success. I now turn to the causes of action relied upon to see to what extent the matters that I have said have a real prospect of success of being established (broadly access without consent) can be said to meet the elements required for the legal causes of action relied upon. Claim 1: Infringement of copyright (paragraph 124, PoC); Claim 2: Infringement of sui generis database rights (paragraph 125, PoC); Claim 3: breach of the NDA (breach of contract) by Exxeta (paragraph 126, PoC); Claim 7 (breach of equitable duties of confidence) (paragraph 130, PoC) and Claim 8 (breach of Trade Secrets (Enforcement, etc.) Regulations) (paragraph 131, PoC).
159. As in the argument before me, I group the various causes of action together and first as regards E-Star and Exxeta.
160. Claim 1 : Although not in terms identified in the PoC, I take the infringement of copyright that is alleged to be one of copying or adaptation under sections 17 and 21 respectively of the Copyright, Designs and Patents Act 1988. (Harris 1 st in fact referred to section 16). In the document put before me by Counsel as representing the summary of Trayport's claims (the "Summary of Claims Document"), the Defendants before me attempted to identify which sections of the 1988 Act were in issue (suggesting sections 16 and 17) but Trayport's representatives simply relied on the entire Act.
161. At its base however, the issue before me is a short one. Is there a real prospect of success in the case that there has been unlawful copyright infringement (by copying and/or adaptation) as regards what is said to be the misuse of Joule (see paragraph 113, in fact concluding paragraphs 92 to 112)? I note that paragraph 91 is not referred to in terms in paragraph 124 PoC nor are paragraphs 92 to 112 PoC, but the former omission, at the least, is clearly an oversight and so far as necessary or convenient permission to amend can be given. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 162. 163. For present purposes, the focus is whether there is a case with a real prospect of success of establishing relevant acts of infringement flowing from the Access Case. Other elements of the cause of action, such as whether there is an original work and whether there is an absence of licence, are either not in dispute for present purposes only or are matters that I have decided are in play in the sense that the Claimant has a real prospect of success in establishing the relevant factual case on that element. There was a dispute, as I understood it, as to whether the copying or adaptation must be in the UK3 (as asserted by the Defendants before me) or not (as asserted by Trayport, at least in the Summary of Claims Document). However, before me, Mr Moss accepted that the statutory claims did require, as an element of the cause of action, that it be shown that infringement took place within the jurisdiction.

164. My conclusions as to copyright infringement are as follows. 165. First, I return to say a little more about my rejection of the Copying Case (compared with the narrower, fall-back claim). I have been referred to Copinger and Skone James on Copyright, 19th Edn especially at paragraph 24-394 regarding the fact that direct evidence of copying is rarely available and reliance frequently has to be placed on inference drawn from circumstantial evidence. Normally the basis of secondary evidence of copying lies in the establishment of similarities between the claimant's and the defendant's work combined with the proof of the possibility of access by the author to the defendant's work. I accept that similarity in the context of software programmes and platforms may not be easy to establish without disclosure and expert evidence. However, I do not consider that that means that opportunity to infringe is enough. Here the Claimant seeks to rely on other circumstantial evidence but I do not consider that taken individually or together it is enough to establish much more than opportunity and, as regards the claim that access was used to create a brand new platform, it is simply not there. There is suspicion but that is not enough. As I have said, I have considered the individual matters in relation to which copyright infringement is alleged and do not consider that there is a real prospect of success in a claim of such infringement as regards the creation of a new E-Star Platform (the Copying Case). As regards the Access case, I accept that there is a case with a real prospect of success as regards infringement, subject to the territoriality issue. If the Access Case proceeds then doubtless there will be disclosure as to causal loss flowing from the relevant alleged infringement and that might of course open up an ability to amend to plead the Copying Case.
166. As regards territoriality, however, Mr Moss (ultimately) accepted that relevant acts of infringement had to be established within the jurisdiction, which included not just copying in the UK but bringing the copied product into the UK from abroad. The difficulty is that the relevant persons said to have wrongly accessed the Joule platform are all based in Germany and all but one of the relevant IP addresses identified in the PoC as addresses through or from which access to the Trayport system was accessed are outside the UK. Mr Moss suggested that possibly the servers of the Trayport customers were used in the accessing process and that in that process unlawful copies were placed on those customers' servers, which might be in the UK. He also suggested that copies might be made on the corporate Defendants' servers which 3 For present purposes the parties referred to the UK, there being no need on the facts to distinguish between the UK and England and Wales. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors servers might be in the UK. A further alternative was that copies might have been created on the Claimant's servers. A final suggestion was that copies might have been brought back into the UK (perhaps on a screen in the UK "depending on the technical means of the computers").
167. My problem with all of this is that, as Mr Moss himself said, this was entirely speculation. Furthermore, none of it was pleaded nor evidenced. Instead I was being asked to rely on Mr Moss's thoughts off the top of his head as to how it was possible for infringing acts to have occurred in the UK (but it was equally possible that they did not apply). Further, and by way of example, section 20 1988 Act infringement was not pleaded and section 20 of the 1984 Act

was not in the authorities bundle. I appreciate that there are difficulties in being sure of the position but it seems to me that if infringing acts within the UK are being alleged, at least in a case like this, then what is said to be the infringement needs to be pleaded in a manner that also sufficiently ties the infringing acts to ones occurring in the UK. On this basis I do not consider that a case with a real prospect of success under the 1988 Act is made out. This point is a further reason why, in relation to a claim under the 1988 Act, the wider Copying Case also fails to meet the merits threshold as well as the reason why the Access Case as currently pleaded and evidenced fails to do so. 168. It should be noted that it is accepted that the claims pleaded are limited to claims under English law.

169. As regards Mr Schmid, there is no relevant allegation of involvement by him in the Access Case. The merits test is not met as regards him.
170. Claim 2 : Turning to infringement of database rights (see paragraph 125, PoC) again in the Summary of Claims Document, there is a dispute as to whether the relevant acts must take place in the UK. Further, the Defendants before me have identified regulation 16 of The Copyright and Rights in Databases Regulations 1997 as being the basis of alleged liability whereas the Claimant simply wishes to rely upon the entirety of the Regulations. This is even though Harris 1st put the case fairly and squarely under regulation 16. That regulation homes in upon extraction or re- utilisation of all or a substantial part of the contents of a database.
171. Again, for present purposes, the focus is whether there is a case with a real prospect of success in terms of establishing infringement of database rights. Other elements of the cause of action, such as establishing that the Claimant has made the relevant substantial investment, whether it is the maker of the database, and whether there is a licence to use do not arise at this stage. 172. Further, the questions are whether a case of infringement of database rights is made out regarding the (a) alleged creation and use of what is referred to as the E-Star Platform (see paragraph 91 PoC, concluding paragraphs 89 & 90 PoC) (the Copying Case) and (b) what is said to be the misuse of Joule (see paragraph 113 PoC, in fact concluding paragraphs 92 to 112, PoC, the Access Case). The pleading points that I have made in relation to the infringement of copyright claim also apply here again (eg paragraph 91 is not in terms referred to in paragraph 125 PoC).
173. On the face of it, it seems to me that as I have found that there is a real prospect of success of the Claimant establishing the factual elements as pleaded in relation to the HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors Access Case, then there is a real prospect of success as regards this legal basis of claim, subject to the territoriality point.
174. As I understood it, Mr Moss ultimately accepted that acts within the jurisdiction were required to be established. However he says that is satisfied in this case because the inferred extraction took place in the UK because it was extraction of data situated in the UK. It was not suggested by the Defendants before me that the Claimant's databases were not situated

in the UK. However it seems to me that it needs to be shown where the extraction took place: there is no pleading as to that. If extraction was done from Germany then I consider that the claim has no real prospect of success on the grounds of territoriality.

175. As regards Mr Schmid there is no pleaded case against him personally as regards the Access Case. The merits test is not met.
176. Claim 3 As regards breach of the NDA, the focus before me is on whether a breach is made out. The breach is alleged to be by Exxeta (as contracting party) again by reference to the creation of the E-Star Platform (paragraphs 90-91, PoC) (the Copying Case) and by reference to the misuse of Joule (Paragraph 113, PoC, see also paragraph 126 PoC) (the Access Case).
177. I have rejected the Copying case as having a real prospect of success. As regards the Access Case, I consider that the claim is made out to pass the merits test. Although I do not consider that the Claimant has very adequately pleaded what precise confidential information was provided under the NDA it has pleaded in broad terms that some has passed and there is a factual dispute on that point. In any event there is also a real prospect of success on the argument that the NDA also bites on confidential information subsequently or otherwise acquired. This claim passes the merits test but only as regards Exxeta, the contracting party (and not E-Star or Mr Schmid).
178. Claim 7: As regards breach of equitable duties of confidence, reliance is again placed upon (a) creation of the E-Star Platform (paragraph 89-91, PoC) , the Copying Case and (b) misuse of Joule (paragraph 113 PoC), the Access Case. It is whether such matters give rise to a case with a real prospect of success of breach of confidence that is in issue before me. 179. 180. The equitable duties of confidence said to be owed by Mr Schmid are said to mirror certain of those under his employment contract and the termination agreement (paragraph 73, PoC). These include duties not to disclose, make use of or exploit relevant confidential information (see paragraph 66.b, PoC); to keep all trade and business secrets of Trayport confidential even after 31 December 2021 (paragraph 69.b, PoC) and not to use or disclose to another, Trayport confidential information (paragraph 72.b, PoC). The equitable duties of confidence of other Defendants (and of Mr Schmid) are said to arise in paragraph 91, PoC “in the premises” (i.e. most widely referring back to the preceding 90 paragraphs, PoC). I assume that more particularly, they are said to arise from the circumstances of the NDA (where relevant) and/or from that fact that the Trayport Confidential Information is “of a nature and type that is obviously HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors confidential to Trayport and that anyone coming into possession of it and being aware of its source would understand it to be such” (see paragraph 59 PoC). 181. The clearest statement of the elements necessary to found an action for breach of confidence are summarised by Arnold LJ in the Celgard case by reference to the formulation of Megarry J (as he then was) in *Coco v AN Clark (engineers) Ltd* [1969] RPC 41 at 47 (and subsequently cited with approval at the highest level, as also set out by Arnold LJ): “First, the information itself ...must ‘have the necessary quality of confidence about it’. Secondly, that information must have been communicated in circumstances importing an

obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it.” As Arnold LJ also pointed out, a fifth, further, element is that the unauthorised use must have been without lawful excuse. 182. 183. 184. 185. 186. In any event that there is a case with a real prospect of success that duties of confidentiality are owed by each of the Defendants before me was not challenged. That there is a case with a real prospect of success that there is confidential information (identified in the widest of terms in paragraphs 55-59, PoC) belonging to Trayport is not in issue for present purposes. Further, in light of my findings regarding the Access Case, there is, in my judgment a claim with a real prospect of success against the corporate Defendants or breach of equitable duties of confidentiality. There is however no case or evidence of personal involvement of Mr Schmid personally. The claim against him does not pass the merits threshold. I should add that all parties argued the case on the basis that English law applied and so the merits test was gauged against English law. In this context of the merits test I was not taken to Celgard and did not hear argument as to whether or not the claims regarding breach of confidentiality fell within the scope of the Rome II Regulation and the applicable law was other than English law (as regards this claim in whole or part). As I explain later in this judgment, it appears that the applicable law may in fact be German law. However, no evidence was led as to German law as to whether it was in any way different from English law. The assumption is that, absent evidence to the contrary, foreign law will be assumed to be the same as English law so I would not hold that the Claimant failed to pass the merits test on the basis that the merits test was gauged solely against English law.

187. Claim 8: As regards breach of the Trades Secret (Enforcement, etc) Regulations 2018, it is regulations 2 (which is a definition section) and 3 that are relied upon. In essence regulation 3 protects a trade secret holder against the acquisition, use or disclosure of a trade secret by third parties provided the acquisition, use or disclosure constitutes a breach of confidence in confidential information. It is therefore highly tied to claim 7. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 188. I understood Mr Moss to accept that all of the relevant statutory provisions relied upon (including this one) had a territorial aspect. Given the analysis of the position regarding copyright, I am unable to identify a pleading or evidence showing a case that any acquisition, use or disclosure occurred in the UK. Accordingly, I consider that the merits test is not met as regards this legal cause of action.
189. As regards Mr Schmid, there is no case or evidence linking him personally to this matter. The case against him does not meet the merits test on both that ground and the territorial ground. Amendment of pleading? Mr Schmid’s position regarding claims 1, 2, 3, 7 and 8 190. So far I have been considering the claims, in terms of the element of breach of duty, from the perspective primarily of the corporate Defendants. I turn to Mr Schmid’s position.
191. As regards Mr Schmid, it is accepted that an amendment would need to be made to bring him within the category of E-Actors. There is currently no pleading relied upon raising a case that he himself directly engaged in any relevant acts in respect of the copying case or

the narrower back up technical case such as to make him personally liable under the causes of action asserted as, in effect, a primary infringer of the intellectual property rights. As I have said, I would not at this stage simply give permission to amend on this point. 192. If it is said that Mr Schmid is liable as joint tortfeasor then, as Mr Burgess submitted, it is necessary that the Claimant plead (and produce evidence in support of) a claim with a real prospect of success. As regards joint liability, I accept Mr Burgess' submissions that a relevant case is neither pleaded nor evidenced. In short, the Claimant would have to plead and produce evidence supporting a case either that he has knowingly procured one or both of the corporate defendants to commit the relevant wrong or that he has assisted one or both corporate defendants to commit a relevant wrong pursuant to a common design. Each basis also requires, as an element to establish liability as a joint tortfeasor, knowledge of (or that the accessory had turned a blind eye to), the essential facts necessary to establish their liabilities as accessories (see *Lifestyle Equities CV v Ahmed & ors* [2024] UKSC 17; [2025] AC 1). Claim 4: Breach of contract claim against Mr Schmid (a) covenants/duties arising from Employment Agreement (b) breach of non-compete covenant (c) wrongful solicitation of employees (para 127 PoC). 193. There are a number of contractual provisions pleaded as arising from Mr Schmid's Employment Agreement and the Termination Agreement. I deal first with the issue of the effect of the Termination Agreement upon the Employment Agreement and any potential liability in respect of the matters summarised at paragraphs 91/113 PoC, then turn to two specific matters: allegations that Mr Schmid broke relevant contractual terms by entering into employment with E-Star on within what is said to be a restricted period ending on 30 June 2022 and that in further breach of relevant contractual terms within the same period he assisted, encouraged and enticed employees of Trayport to leave that firm and work for E-Star. HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* Breach of express or implied contractual or equitable duties in connection with employment and arising from involvement in creation of E-Star Platform and/or Misuse of Joule (paras 91 & 113, PoC)

194. As a general matter, I note that the PoC spend quite a bit of ink on pleading specific express or implied duties said to arise under Mr Schmid's Employment Agreement with Trayport. However, the Termination Agreement clause 10 contains a general release of claims "arising from the employment relationship, its termination" and so on in the widest of terms, save so far as the Termination Agreement itself provides otherwise. For present purposes that leaves alive claims under clause 31 of the Employment Agreement (which is to remain in full force and effect) and otherwise specific claims under the Termination Agreement, such as arise from the secrecy obligations (in relation to keeping trade and business secrets confidential under clause 7). Further, the Termination Agreement describes itself as being complete with no collateral agreements nor any further agreements other than those set out in the Termination Agreement as applying. Accordingly, the implied terms set out in clause 71, PoC can also not be relied upon. The equitable duties of confidence set out in paragraph 73, PoC appear to be said to arise from the employment relationship and if they did apply, claims in respect of them are ended under the Termination Agreement. I should expressly

say that I consider that no breach of an alleged equitable duty mirroring clause 7 of the Termination Agreement has a real prospect of success. Although clause 7 of the Termination Agreement clearly continues to apply, the Termination Agreement restricted liability to contractual liability under the Termination Agreement. Further, on the facts here, no equitable duty as employee can arise from the Termination Agreement, which ended that relationship. 195. 196. 197. 198. Paragraph 73, PoC has a heading referring to “statutory duties of confidence” as well as equitable duties, but no statutory duties are identified in that paragraph. Paragraph 91 asserts a breach by Mr Schmid of his contractual and equitable duties apparently in connection with what is said to be the wrongful use of Trayport confidential information to create the E-Star Platform. The only possible relevant remaining obligation is under Clause 7 of the Termination Agreement. That clause is limited to keeping confidential relevant secrets and confidential matters that have become known to him in the course of his employment. None are identified in the pleading or in the evidence as having become so known and not being kept confidential. In light of what I have said I do not consider that any claim under this head has a real prospect of success. In paragraph 113, PoC, it is said that Mr Schmid breached his contractual and equitable duties set out in paragraphs 66-74, PoC. In light of what I have said (including about clause 7 of the Termination Agreement) I do not consider that this claim has a real prospect of success. In my judgment, in respect of this matter the Claimant should be amending its Particulars of Claim by deleting references to express or implied duties arising under the Employment Agreement other than clause 31 and leaving solely the relevant duties relied upon under the Termination Agreement. Breach of non-compete covenant HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 199. 200. 201. Paragraph 64, PoC sets out the gist of the complaint, that Mr Schmid took up employment at E-Star on 1 June 2022 and that this was a breach of the restrictive covenant in his Employment Agreement as ended by the Termination Agreement dated 7 December 2021. The allegation of breach is repeated by reference at paragraph 127, PoC. The specific contractual provisions said to have been breached are not immediately identified in PoC with precision. However, paragraph 69, PoC pleads that by Clause 8 of the Termination Agreement, Mr Schmid agreed to comply with the restrictive covenants contained at clause 31 of his Employment Agreement. The relevant provisions of Clause 31 appear to be set out at paragraph 66e(i) and (ii), PoC being clauses 31.2.1 and 31.2.2 of the employment contract. In broad terms, during a restrictive period of 6 months counted from the earlier of start of gardening leave or termination of the Employment Agreement, Mr Schmid was prevented from competing with Trayport e.g. by taking up employment with a competitor, such as E-Star. The issue raised by Mr Schmid about this is that he says that the relevant 6 month period began on 30 November 2021 (and ended on 31 May 2022) whereas the Claimant says that the 6 month period commenced on 31 December 2021 and ended on 30 June 2022. The 6 month period commences under clause 31 of the Employment Agreement from the “Relevant Date” which is defined as being the earlier of the date on which garden leave is started in accordance with clause 21 of the Employment Agreement and the date of termination of Mr Schmid’s employment. The Termination Agreement provides that Mr

Schmid's employment relationship ended on 31 December 2021. However, the issue of garden leave is more complicated.

202. Clause 21.1 of the Employment Agreement refers to what is in effect garden leave which arises "during any period of notice of termination" (whether given by Mr Schmid or by the employer). Clause 21.2 appears to deal with a different matter, the right of the employer to suspend Mr Schmid. 203. 204. In his witness statement dated 20 December 2024, Mr Thomas confirmed that he had been told by Mr Schmid that he, Mr Schmid, was "released of all duties" on 30 November 2021 and "effectively" placed on gardening leave. Mr Thomas then refers to correspondence between the respective German lawyers for the Claimant and E-Star in which E-Star's lawyers informed Trayport's lawyers that a proposed new employer of Mr Schmid (E-Star, though the prospective employer's name was not disclosed) regarded the 6 month restrictive covenants as ending on 31 May 2022 by reason of the period starting with gardening leave effective on 30 November 2021. In his second witness statement dated 14 March 2025, Mr Harris took the timing point, as to when the 6 month period began, no further but made an allegation that Trayport "believed" that during his restricted period, Mr Schmid took part in a promotional video and gave press releases on behalf of E-Star. These matters are not pleaded and not further particularised. No permission to amend has been sought. They can be ignored for present purposes. 205. Subsequently, in Mr Weare's first witness statement dated 17 April 2025, Mr Weare referred to and exhibited the correspondence between the German lawyers referred to HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors by Mr Thomas. In effect, the German lawyers disagreed as to the position. The lawyers for E-Star took the view that garden leave commenced on 31 November
2021. The lawyers for the Claimant took the view that the Termination Agreement ended and superseded any earlier agreements (e.g. including as to garden leave) and that the parties agreed that the Employment Agreement terminated on 31 December 2021.
206. On the face of it, I do not agree with the position that the Claimant's German lawyers took at the time. No-one has suggested that German law is different to English law or produced any expert evidence on the point. In any event the point is not pleaded. No challenge is made in the evidence to the position put forward by Mr Thomas, and adopted by Mr Weare, that in fact Mr Schmid was placed on gardening leave on 30 November 2021. No proper evidence of German law has been put forward by the Claimant (the Termination Agreement is governed by German law and the Termination Agreement also changes the law governing the Employment Agreement to German law by way of amendment; see clause 11 of the Termination Agreement). Assuming that German law is the same as English law on the point, in my judgment if garden leave begins, the fact that the parties then negotiate a termination date, including a clause releasing claims arising under the earlier Employment Agreement or arising from that employment (save for clause 31), does not, without more, prevent or change the character of the gardening leave earlier set and the effect of clause 31 of the Employment Agreement. Nothing in clauses 1, 8 or 10 of the Termination Agreement

further change the ordinary operation of clause 31 of the employment contract. Clause 2 of the Termination Agreement (relied upon in this context by the Claimant's German lawyers) also fails to take matters further. Clause 21 of the Employment Agreement provided for full payment of salary during any period of garden leave in any event. That specific entitlement has been replaced (and/or reiterated, in whole or part) by clause 2 of the Termination Agreement but that does not change the fact that a relevant period of garden leave commenced on 30 November 2021.

207. Accordingly, I find that the claim that Mr Schmid is in breach of clause 31 of his Employment Agreement in accepting employment in June 2022 has no real prospect of success on the evidence before me. This is on the following cumulative bases which I summarise:
- (1) The apparent case of the Claimant's German lawyers that, as a matter of law, gardening leave is rendered irrelevant to the operation of clause 31 of the Employment Agreement is neither pleaded nor (on the current evidence) has a real prospect of success;
 - (2) The factual case that Mr Schmid was not placed on gardening leave on 30 November 2021 is not raised by the evidence put in by the Claimant nor is it pleaded.
 - (3) Mr Moss submitted that the Claimant had pleaded its case that the start date of the relevant period was on termination of the Employment Agreement as agreed by clause 1 of the Termination Agreement and that it was for the Defendants to plead otherwise. Assuming that to be correct, the question remains whether there is a real prospect of success of the pleaded case on the evidence before me and, as I have held, there is not. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 208. For completeness, I should add that I am against Mr Burgess in his further submission that no contractual loss is pleaded and that this too means that the claim has no real prospect of success. In my judgment, there is a sufficient pleading of loss at paragraph 145 PoC, even if not particularised.
209. Accordingly, I consider that this aspect of the claim fails to meet the merits test for service out. Wrongful solicitation 210. 211. 212. 213. Paragraph 85, PoC asserts that four Trayport employees have resigned and are understood by Trayport to have commenced employment with E-Star (the "Trayport Leavers"). The dates on which they commenced employment with E-Star are said not to be within Trayport's knowledge but that its understanding is that they are now performing similar roles to those performed by them during their employment by Trayport (paragraph 86, PoC). Paragraph 86, PoC asserts that Trayport infers that "one or more of the Defendants" encouraged the Trayport Leavers to resign and that this is to be inferred from (a) the close working relationship between Mr Schmid and the Trayport Leavers; (b) the timing of the resignations of the Trayport Leavers and (c) the similar nature of the Trayport Leavers' roles in connection with Joule and now the E-Star Platform. To the extent that the solicitation was performed by Mr Schmid within the period of 6 months following termination of his employment on 31 December 2021, this is said to be a breach of

his Express Duties (as defined) (paragraph 88 PoC). The “Express Duties” set out in paragraphs 66 to 70 cover a number of separate duties. It is regrettable that paragraph 88, PoC is not more precise in identifying the specific Express Duties relied upon in this context. It appears that reliance is in fact placed upon the Termination Agreement entered into and signed by Mr Schmid on 7 December 2021 in conjunction with his Employment Agreement dated 30 April 2013.

- (1) By clause 8 of the Termination Agreement, the parties agreed that the post- contractual non-competition clause 31 of Mr Schmid’s Employment Agreement of 30 April 2013 would remain in full force and effect (see PoC, paragraph 69.c.).
- (2) By clause 31 of his Employment Agreement, Mr Schmid agreed, for a period of 6 months from the earlier of starting garden leave or the date on which his employment ended: (a) not to solicit or entice or endeavour to entice away from Trayport any “Protected Person” (see clause 31.1.5: covering persons such as employees, directors, consultants etc who regularly worked with Mr Schmid in the 12 months prior to the earlier of the date he started garden leave or on which his employment ended and which have: significant knowledge of, regular contact with or influence over clients; detailed knowledge of confidential information of the claimant or any group company and/or would otherwise be a significant loss to the claimant or any group company) (clause 31.2.5) and HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors (b) not to aid or assist in or procure the employment of a Protected Person by any other person, firm, company or other organisation (clause 31.2.6) (PoC paragraph 66,e.v & vi). 214. Mr Schmid’s Employment Agreement with Trayport is said to have ended on 31 December 2021, as provided for by the Termination Agreement. The restrictive covenant (though not specifically identified) is said to have ended on 30 June 2022 (PoC paragraph 64). I have dealt earlier in this judgment with the dispute between the parties as to whether the 6 month period commenced on 30 November 2021 (as alleged by Mr Schmid) or 31 December 2021 (as alleged by the Claimant). For present purposes, i.e. whether there is a case with a real prospect of success that factually Mr Schmid solicited relevant persons, I do not think anything much turns factually on the difference of a month. 215. To make its case, the Claimant must prove that Mr Schmid solicited or enticed or endeavoured to entice away relevant employees or that he aided or assisted or procured their employment within the relevant 6 month period. 216. In summary, Mr Burgess submits that:
 - (1) There is no pleading that Mr Schmid carried out any of the relevant prohibited acts in the relevant period. All that is pleaded is that, “to the extent that he did”, he would be in breach of contract.
 - (2) The inference of solicitation is based on three facts which do not support the inference sought to be drawn.

217. As regards the allegation that the pleading is insufficient, I am against that submission. In relation to the key allegation regarding carrying out the relevant matter (said to be encouragement of the Trayport Leavers to resign, see paragraph 87 PoC), it is said that the acts/conduct in question are/is that of one or more of the Defendants: that therefore includes the Third Defendant. The pleading is undoubtedly capable of improvement. Thus, Trayport is, as I understand it, inviting the Court to make the relevant inference in paragraph 87. Whether it, Trayport, itself makes the inference, which is what is pleaded, is strictly not sufficient. Further, it seems to me that the Claimant in terms should (as regards Mr Schmid) plead something more positive, such as that “Mr Schmid, alternatively, he with one or more of the other Defendants, further or alternatively, one of or more of the other Defendants, encouraged etc.”. Nevertheless, I consider that the pleading as it is just about squeaks by. If I am wrong about that I would grant permission to amend the pleading to a form which makes clear that the court is invited to infer that Mr Schmid himself (alone or with other Defendants) carried out the relevant act/conduct. In that respect, I view any amendment as tidying up rather than being more fundamental.
218. As regards the facts alleged to support the inference, Mr Burgess submits first that the close working relationship between Mr Schmid and the Trayport Leavers and secondly the similar nature of their roles at Trayport and E-Star are equally consistent with a narrative of workers moving employers and continuing in the same sort of jobs without any encouragement by, enticement or aid of, in particular, Mr Schmid. In my judgment, the issue is whether those two factors taken in conjunction with the factor HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 219. of the timing of the resignations sufficiently raises a case with a real prospect of success of wrongful solicitation in the relevant period. Although some factors may be consistent with a narrative of workers moving without solicitation etc. that is not enough to demonstrate that there is no real prospect of establishing the opposite. As to other factors, Mr Burgess submits that only one of the four Trayport Leavers actually resigned from Trayport during the contractual period within which Mr Schmid was subject to restrictions on soliciting etc. of relevant employees of Trayport (Mr Meyer, said to have resigned on 16 March 2022). The others are said to have resigned respectively on 20 and 26 September 2022 and 20 April 2023. This, submits Mr Burgess, is “long after” Mr Schmid’s relevant restrictive covenant expired. I am against Mr Burgess on this point. In my judgment the three matters taken together do give rise to a case with a real prospect of success based upon inference. I accept that it may be that at trial no encouragement. enticement etc by Mr Schmid is made out as having taken place in the relevant prohibited period. I also accept that the longer after expiry of a relevant restrictive non-encouragement clause that an employee moves jobs, the less likely it is that the employee moved as a result of encouragement etc which took place within that restricted period and/or the more difficult it may be to show causation as regards the encouragement/ enticement and the relevant employee having acted upon the same. However, the timings of the resignations are not, in my judgment, so clearly “long after” expiry of the relevant restrictive covenant period that it is fanciful to suggest that there was relevant

encouragement within that period. This is especially so given the other two factors and the overall connection between the relevant area of operation of E-Star and Trayport and the role of Mr Schmid at both companies and his working relationship with the Trayport employees when working at Trayport. I note, in this context the definition of “Protected Person” in Mr Schmid’s employment contract and the elements (a) that the person must have worked regularly with Mr Schmid in the relevant 12 month period prior to Mr Schmid’s departure from Trayport and (b) be a person of significance to the business of Trayport (including by relevant knowledge of confidential information and in relation to clients). 220. In summary, as regards the merits test I consider that the only claim of breach of the Termination Agreement/Employment Agreement that has a real prospect of success is the allegation in relation to soliciting etc ex-employees. Claim 6: Procuring breach by Mr Schmid of his Employment/Termination Agreements (paragraph 129, PoC).

221. Claim 6 involves a claim that E-Star and Exxeta have procured the breaches of contract by Mr Schmid of his Employment Agreement/the Termination Agreement that I have dealt with under the heading of Claim 4. 222. The elements of the tort of inducing a breach of contract have been restated by the House of Lords in *OBG v Allan* [2007] UKHL 21; [2009] 1 AC 1. In summary they are:

- (1) Breach of a valid and subsisting contract by B;
- (2) A must induce B to break his contract with C by persuading, encouraging or assisting him to do so; HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors*
- (3) A must know of the contract and know his conduct will have that effect;
- (4) A must intend to procure the breach of contract either as an end in itself or as the means by which he achieves some further end;
- (5) If A has a lawful justification for inducing B to induce his contract with C that may provide a defence against liability. (see summary of *Popplewell LJ in Kawasaki Kisen Kaisha Ltd v James Kimball Ltd* [2021] EWCA Civ 33; [2021] 3 All ER 978 at [21], summarising Lord Hodge (then sitting in the Outer House) in *Global Resources Group v Mackay* [2008] SLT 104).

223. As regards breach, I have already found that:

- (1) As regards clause 31 of the Employment Agreement, preserved by the Termination Agreement, there is no real prospect of success of a claim that there was breach of the non-compete covenant but there is a claim with a real prospect of success as regards the non-solicitation element of that clause.
- (2) There is no other relevant claim of breach of the Employment or Termination Agreements with a real prospect of success. There is no specific plea of knowledge of the Termination Agreement on the part of E-Star or Exxeta. I note that there is evidence of such knowledge on the part of E-Star in that its lawyers wrote to set out their position to Trayport on the

effect of clause 31 of his Employment Agreement in the events that had occurred by letter dated 10 May 2022. There is no such evidence or pleading of knowledge on the part of Exxeta. There is also no adequate pleading or evidence of any procurement on the part of Exxeta of any matters said to amount to a breach by Mr Schmid of his Employment Agreement or Termination Agreement. There is it seems to me sufficient pleading (and evidence) of procurement of the alleged breach of the non-compete covenant on the part of E-Star, by its employment of Mr Schmid. However, as I have said, the case that there is in fact a relevant breach has no real prospect of success. There is evidence of relevant intention on the part of E-Star in this respect but no express pleading of the same, but it is inherent in the PoC and I would be minded to allow an appropriate amendment. 224. 225. 226. 227. There is no adequate pleading nor evidence of procurement by E-Star of other alleged breaches by Mr Schmid of clause 31 of his Employment Agreement nor the Termination Agreement nor of the relevant required intention. 228. In summary,

- (1) there is no real prospect of success of showing breach of any term other than clause 31 of the Employment Agreement dealing with (broadly) the solicitation of other employees; HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (2) there is no real prospect of success of showing procurement of the things said to amount to a breach, nor of the relevant required intention, in relation to the “solicitation of other employees” allegation;
- (3) no case with a real prospect of success is made out under Claim 6. Claim 5: (inducement/ procurement of breach of contract by Trayport customers in relation to SaaS Agreements, CAAs and Clickthrough Agreements (paragraph 128, PoC) 229. Paragraph 128, PoC summarises this claim in terms of referring back to paragraphs 114-118, PoC. The Confidential Annex makes clear that this allegation relates to Customers A, B, C, D, E and F. Their names and the dates of relevant SaaS agreements and CAAs (other than Customer E who is not identified as being party to a CAA) are set out in a confidential annexure to the PoC. The terms of the actual agreements (as opposed to a pro forma agreement which also leaves blank a crucial box to relevant permitted activities or the scope of the permission to use) are neither pleaded nor in evidence. 230. I have already described the elements required to establish an actionable procurement of a breach of contract when considering Claim 6. In summary they are:
 - (1) Breach of a valid and subsisting contract by B;
 - (2) A must induce B to break his contract with C by persuading, encouraging or assisting him to do so;
 - (3) A must know of the contract and know his conduct will have that effect;
 - (4) A must intend to procure the breach of contract either as an end in itself or as the means by which he achieves some further end;

- (5) If A has a lawful justification for inducing B to induce his contract with C that may provide a defence against liability. 231. The alleged breaches of contract alleged in this case depend upon which of a myriad of pleaded clauses of the SaaS agreements and CAAs are being relied upon for in respect of specific facts. It is apparently implied from paragraph 114, PoC that the particular covenants relied upon and the relevant breaches are as follows (the references to paragraph numbers in the PoC may not be complete: it is not easy to follow the various repeated re-iterations of the case on breach by Trayport customers of their agreements with Trayport).
- (1) Access in fact granted to Joule back end to E-Star and/or Exxeta (or its employees by way of user accounts) by the customer, when the relevant customer agreements limit access to the Trayport customer and do not authorise such access to third parties (such as E-Star or Exxeta): see paragraphs 94-98, 114(a) 117(a), PoC (allegations currently relate to Customer A);
- (2) Access in fact granted by Customers A and D to E-Star/Exxeta (or its employees) and such access being wrongly used to connect to other HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors customers' accounts when not authorised by any relevant agreement (see paragraphs 94-104, 114(b); 118(a), PoC);
- (3) Access wrongly granted by Customer A used to test Exxeta/E-Star applications when not permitted under any relevant agreement (see paragraphs 114(c), 118(b), PoC);
- (4) Access used for use of Deltix API in manner not authorised by relevant agreements (paragraphs 107-109, 114(d), 117(b) PoC);
- (5) Access to Joule front end granted by customers to E-Star and/or Exxeta (or its employees by way of user accounts) when not permitted by customer agreements (paragraphs 110, 114(e) and 118(c), PoC).
- (6) Specific breaches of the Clickthrough Agreements by customers are also alleged. There may be issues as to whether the customers have agreed to these agreements if in fact the case is that the individuals "clicking through" were employees of E-Star/Exxeta.
- (7) Separately there is an allegation that the E-Actors who accepted the Clickthrough Agreement are also in breach of that agreement (paragraphs 119- 120, PoC). This is relied upon under a vicarious liability claim (Claim 9) which I will come back to. 232. For present purposes I am satisfied that there is a real prospect of success in the assertion that there has been breach of the relevant agreements by Trayport customers. I have referred earlier in this judgment to the submissions on behalf of the corporate Defendants that there is inadequate identification of the precise clauses and contracts in issue, whether by way of pleading or supporting evidence to the application to serve out, but as I have said I consider that what is pleaded is sufficiently clear, at least at this stage, and is supported by the evidence. 233. Turning to knowledge and intention regarding the terms and breach of them, it is pleaded that:

- (1) the E-Actors/Exxeta are aware of Trayport's contractual terms by reason of three matters (see paragraph 115, PoC): (a) (b) previous dealings between Exxeta and Trayport described at paragraph 75, PoC including previous allegations of infringement and failed negotiations to enter into a CSP; Exxeta/E-Star's dealings with Trayport's customers over many years including in relation to customers' negotiation of CAAs and Exxeta/E-Star's provision of TKYC (Technical Know Your Client information, submitted by a customer when entering a CAA: see paragraph 20(c) PoC) in relation to the same;
- (c) Mr Schmid being Trayport's former Chief Technology Officer and his knowledge of Trayport's contractual frameworks summarised at paragraphs 20-27, PoC. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (2) The E-Actors and other Exxeta/E-Star personnel are aware that the activities complained of are not permitted pursuant to an Trayport agreement and that the E-Actors have on behalf of Exxeta and E-Star procured/induced Trayport's customers to breach the terms of their relevant SaaS agreements/CAAs for the benefit of Exxeta/E-Star and to the detriment of Trayport (paragraph 116, PoC).
- (3) However, notwithstanding the allegation of knowledge of terms of the relevant Trayport Customer agreements being limited to E-Actors and other Exxeta/E-Star personnel, the allegations of procurement are said to be by "the Defendants" (see paragraph 128, PoC). 234. The allegations in paragraph 75, PoC refer to various dealings between Trayport and Exxeta between 2013 and 2017 regarding then alleged misuses of Trayport's intellectual property (and/or in 2017, the possible grant by Trayport to Exxeta of rights to use Trayport's APIs (including the Joule API) in which "the licensing model" was discussed between the parties via email). Various of the communications are then set out or summarised over two pages of the PoC.
235. At the moment, I consider that the PoC needs clarification and tidying up. In particular, it is not clear to me whether it is being said that each individual E-Actor who directly accessed Joule via (in effect) a Trayport Customer's access in a manner that was outwith the scope of the authority/licence given to such Customer and in breach of that Customer's relevant agreement(s) with Trayport, is liable for the tort of inducement of breach of that customers agreement(s) (as principal or accessory) (and whether they had knowledge of the relevant term of the contract) or whether it is simply said that E-Star and/or Exxeta (alone) committed the tort, the act of procurement being the acts of E-Actors (and/or others personnel) acting (as pleaded) as agents of E-Star/Exxeta and the relevant knowledge and intention was that of the two corporate mpany Defendants (which knowledge may in whole or part to be imputed to them). If both are alleged then that would need to be made clear. I would also need to see a clear pleading regarding knowledge and intention. 236. I should add that Harris 1st stated that all the Defendants were liable as joint tortfeasors as respects (among others) Claim 5. However, in the context of jurisdictional gateways for service out, he then went on to say that the E-Actors were responsible for the inducing of breaches by Trayport customers of their relevant agreements with Trayport.

237. Mr Mountford's first submission is that both knowledge of the relevant contractual terms that are said to be breached and that the relevant acts of procurement amounted to such a breach are necessary and these are not pleaded (see e.g. Lord Hoffmann in *OBG Ltd v Allen* [2008] 1 AC 1 at [39]: "It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract is a breach. You must actually realise that it will have this effect."). His second submission is that the matters relied upon go nowhere near enough to plead such a case. 238. The pleading point was raised in evidence. Mr Thomas pointed to *Lifestyle Equities CV v Ahmed* [2025] AC 1 (especially at [85]). That passage makes clear that a person whose act causes another person to commit a tort cannot be held liable jointly liable as accessory if they were acting in good faith and without knowledge (or wilful blindness) of facts which made the act of the other person tortious. Of course, to be HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* made liable as principal, knowledge is a *sine qua non*. In the context of the current case, that means that an employee/director of E-Star/Exxeta who is said to have acted as agent of E-Star/Exxeta in acting such as to make either of those two companies liable for the tort of unlawful procurement of a breach of contract, cannot themselves be liable for the same tort unless it is sufficiently pleaded and evidenced that that person has relevant knowledge. As matters stand paragraph 115 is limited to knowledge of the two companies (and in addition Mr Schmid). It seems to me that the case against E-Actors for liability for procurement therefore falls outside what has been pleaded in that their personal knowledge has not been pleaded (I note the only E- Actor who appears to have a legal claim brought against him in the proceedings on this basis is the Fourth Defendant). However the liability of the E-Actors may be relevant to a vicarious liability claim. 239. 240. I note that paragraph 115(c) dealing with Mr Schmid's knowledge might also be pleaded as not only knowledge known to him but also as knowledge to be attributed to E-Star. I do however consider, in line with Mr Mountford's submission, that whilst (contrary to his submission) the three matters pleaded in paragraph 115 are a sufficient pleading of knowledge of the corporate Defendants as to the general terms within the Trayport Customer agreements, they are not adequate to show knowledge of the terms in their entirety such that they would have known that there was not a relevant permission in place under the Trayport Customer agreements. 241. Subject to that, my comments on Mr Mountford's submissions on the three heads are as follows.
- (1) Mr Mountford submits that the matters set out at paragraph 75, PoC referring to earlier interactions do not refer or relate to the relevant agreements. However, they do relate to agreements between Trayport and Customers C and E (see e.g. paragraph 75(b)) and generally relate to complaints of unlawful accessing of Trayport's platforms (which can only have been through Trayport Customers' accounts and therefore it can be inferred in breach of the terms of relevant Trayport Customer agreements). The matters set out include discussions regarding the licensing model (see paragraph 75(g)). If the Defendants say that they did not in fact have the relevant knowledge and that they were ignorant then there may be questions of blind eye knowledge which would suffice (see e.g. *OBG v Allen* at [42]-[43])

and [192], referred to by Lord Leggatt in the Lifestyle Equities case at [101]). In conclusion, it seems to me that there is sufficient pleading to raise a case with real prospects of success that E-Star and Exxeta did have relevant knowledge of the general terms of Trayport Customer agreements.

- (2) So far as the “negotiation” of CAAs is concerned, again, I think it can be inferred that negotiation of the CAAs would be likely in practice to involve some knowledge on the part of the corporate Defendants of the limits on the Trayport Customers’ authority to use the system and that to use it otherwise would be in breach. Similarly, it seems to me that it can be inferred that the CAA terms are likely to have come to the corporate Defendants’ attention and knowledge. However, the point is pleaded as a generality not in relation to the particular Trayport customers who are said to have breached their contracts. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (3) As regards Mr Schmid’s knowledge, it is said that he was sometimes involved with contracts whilst at Trayport. Mr Mountford points to evidence from Mr Thomas to the effect that his role did not involve negotiating or discussing customer contracts. That is a dispute of evidence which I cannot resolve. However, again the matter is pleaded as a generality: there is no pleading as to knowledge regarding the particular Trayport customers who are said to have breached their contracts by virtue of the access to Joule given to the corporate Defendants (or either of them). 242. For completeness, I should deal with the point that Mr Harris made in one of his witness statements which was that the PoC were finalised prior to the Supreme Court judgments in Lifestyle Equities and that therefore Trayport did not need to comply with that decision on the point. As regards that, I agree with Mr Mountford’s submission which was that in the context of inducing breach of contract nothing about knowledge was new or decided for the first time in Lifestyle Equities and that in any event, once the Lifestyle Equities decision was made it declared the current law which the court must thereafter apply. If pleadings needed to be amended as a result they should have been.
243. Mr Mountford’s next submission was that the acts of procurement/inducement are inadequately pleaded at paragraph 116, PoC. However, this whole section of the PoC refers back to the activities particularised above. Those activities involve the E- Actors (and other personnel) directly accessing the Joule Platform in a manner that caused the Trayport Customers to be in breach of contract. I am against Mr Mountford on this point. I do however agree that the inadequacy does apply to Mr Schmid. 244. In summary, I am not satisfied that a case with a real prospect of success has been pleaded that Mr Schmid or the corporate Defendants are liable for the tort of inducing breach of Trayport customers’ contracts. There are no acts of procurement pleaded against Mr Schmid and no pleading of relevant knowledge. As regards the corporate Defendants there is no adequate pleading of the element of knowledge. Claim 9: Infringement of trade mark: Trade Marks Act 1994 and passing off (paragraphs 134-139, PoC) 245. 246. 247. The factual and legal allegation regarding infringement of trade mark appears now to be limited to the First Defendant, E-Star, though the PoC sometimes refers to E-Star and sometimes refers to the Defendants. If

the claim survives, the PoC should be amended to make clear that the actor and the person against whom the claim is brought is limited to E-Star. In response to a specific question from Mr Burgess on Day 2 of the hearing before me Mr Moss accepted that the allegation was not made against Mr Schmid. The registration of Trayport as proprietor of the word mark “TRAYPORT” is set out in paragraph 18, PoC. The factual basis of the infringement claim is pleaded as being that on 17 August 2022, E-Star published a post on the internet networking platform LinkedIn. That post included a 26-second video. It has since been removed. In evidence is a screenshot of the video. The screenshot is itself showing a digital display on a computer screen HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors which is said to be that of the E-Star Platform. On part of the screen is a large box with the legend “Trade the way you want”. There are then listed a number of matters the third of which is “Trayport”. It is said that the use of the mark in this way suggested that customers can link to Joule via E-Star Products, presumably without having to get contractual permission from Trayport, despite E-Star having no contractual basis to be able to offer this. 248. The pleaded case of infringement is that the mark has been used in the course of a trade either in relation to goods or services identical with those for which it is registered (in breach of s10(1) Trade Marks Act 1994 (“TMA 1994”)) or in circumstances where the mark has a reputation in the UK and the use without due cause takes unfair advantage of the repute of the mark, contrary to section 10(3) TMA 1994 (see paragraphs 134-139, PoC).

249. As regards paragraph 136, PoC there is an oddity. Paragraph 136(b) focusses on unfair advantage and talks in terms of a benefit to E-Star. Paragraph 136(c) refers to the likelihood of “such damage” being increased but the “damage” can only be the unfair advantage i.e. the alleged unfair benefit to E-Star.
250. However paragraphs 137 to 138 do allege damage to Trayport from such infringing use, being engendering of a belief that the services provided by E-Star are connected with Trayport or the subject of a commercial arrangement involving Trayport and that such is liable to damage the goodwill Trayport has generated under the mark.
251. On this application, Mr Mountford takes the following points on behalf of E-Star:
- (1) Infringing use has to be in the UK (s9(1) TMA 1994). Where a trade mark appears on a website, territoriality is satisfied only where the website is targeted at the UK (EasyGroup Ltd v Easyfly SA [2020] ETMR 23 at [38]). The PoC do not in terms plead the infringement was in the UK or targeted at the UK. Mr Harris in his second witness statement suggested that the mark was targeted at all 200 countries in which LinkedIn operates including the UK. That is insufficient to engage the 1994 Act’s territorial effect.
 - (2) The trademark was illegible to the human eye. As such it was not “used”. What is shown are illegible pixels.
 - (3) Any infringement must “cause detriment” to functions of the mark. None is identified.

- (4) There is no infringement anyway because s11(2)(c) TMA 1994 provides that a use of a mark for the purposes of identifying or referring to goods or services as those of the proprietor of the mark, in particular where that use is necessary to indicate the intended purpose of a product or service (in particular as accessories or spare parts) provided that the use is in accordance with honest practices in industrial or commercial matters.
252. As regards the territoriality point, it seems to me that there is clearly a case with a real prospect of success that the video, placed on LinkedIn, was targeted at the UK (whether or not it was targeted elsewhere). Mr Mountford accepted that this was not his strongest point. So far as necessary I would allow an amendment to the PoC. HH JUDGE DAVIS-WHITE KC
Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
253. As regards “use” I do not accept that the mark is not visible. How visible it is (and indeed what if any relevant consequences flow from such visibility) seem to me matters for trial (where the focus will in any event be on the video and no doubt include matters such as what if anything was being said on the video and how long what was shown in the screenshot that is in evidence was on display). I cannot say that there is not a case with a real prospect of success.
254. As regards “detriment” or damage, I consider that that is adequately pleaded and there is an evidential basis for that element of the claim.
255. As regards the point raised under s11 TMA 1994, again it seems to me that that is a matter for disclosure and trial. It is not quite consistent to say that the mark was not visible and not intended to be relied upon by anyone but then to say that it was shown as being necessary to indicate the intended purpose of the Trayport product. Further, there is the question of whether it was in accord with “honest practices” in industrial/commercial matters and that seems to me to depend heavily upon (among other things no doubt) precisely what the video content was.
256. Accordingly I consider that the Trade Mark claim as against E-Star passes the merits test for service out.
257. However, there is in my judgment no adequate pleading nor evidence supporting any liability of Exxeta or Mr Schmid.
258. As regards passing off, there is a close connection with trade mark infringement. 259. The elements of passing off usually encompass the “classical trinity” of (1) a reputation (or goodwill) acquired by the claimant in its good, name, mark etc. (2) a misrepresentation by the defendant leading to confusion (or deception) causing (3) damage to the claimant (see *Consorzio Del Proscutto I Parma v Marks & Spencer plc* [1991] RPC 351 at 368 per Nourse LJ). In this context, a misrepresentation that the defendant’s and the claimant’s businesses are in some way connected may be enough (see e.g. paragraph 24-19 of Clerk & Lindsell on Torts 24th Edition).

260. Nevertheless, I cannot see that there is any proper or adequate pleading or evidence that Exxeta or Mr Schmid are responsible for the alleged passing off.
261. On Day 2 of the hearing before me, Mr Moss told me that passing off was not being pursued. The PoC would need to be amended accordingly. Claim 10: Vicarious liability of the First and Second Defendants for the acts of the E- Actors at paragraphs 89-91, 95-120, PoC including breach of the Clickthrough Agreements by the E-Actors (paragraph 132, PoC) 262. 263. 264. There are, again, real difficulties in understanding the Claimant's case set out in the PoC and in Mr Harris' first witness statement. Paragraph 132, PoC summarises the claim and refers to the acts of the E-Actors at paragraphs 89-91 and 95-120 including their breach of the Clickthrough Agreements. Paragraphs 89-91, PoC deal with the allegations summarised at paragraph 91 that "the Defendants" have misused Trayport Confidential Information in the creation of the E- HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 265. 266. Star Platform and have breached equitable duties of confidence owed to Trayport and under the Trade Secrets (Enforcement, etc) Regulations and that Exxeta has additionally breached the NDA and Mr Schmid has additionally breached his contractual and equitable duties earlier set out. First, so far as the Regulations are concerned, if there is a statutory tort (or the statute creates one) then there may be vicarious liability in principle but it is difficult to see how that adds anything to a joint liability claim. Secondly, the E-Actors are not mentioned as having done anything in relation to paragraphs 89 to 91 other than by a reference in paragraph 90(d) which deals with the E-Actors accessing (wrongly and/or misusing) Joule (i.e. the Access Case). In paragraph 90 those facts and matters are relied upon as giving rise to an inference of copying, misusing confidential information, etc. but it is not suggested that the E-Actors are responsible for such matters: the plea is simply against "the Defendants". Although the Fourth Defendant is an E-Actor they are not identified as such in these paragraphs of the PoC. Further and in any event, the relevant paragraphs referred to in paragraph 90(d) are included within the next series of paragraphs relied upon: paragraphs 95-120 PoC. 267. Paragraphs 95-120, PoC deal with the E-Actors accessing Joule (it is said wrongly and putting Trayport Customers in breach of their contracts with Trayport). Those paragraphs also include (at 119-120) alleged breach of the Clickthrough Agreement by E-Actors.
268. As regards breach of the Clickthrough Agreement, the allegation is that the E-Actors essentially made representations and warranties as to their legal identity as an employee of the Trayport Customer and their authority to bind that customer and that they would prevent unauthorised access. Those representations and warranties are said to have been false. Accordingly, it is said, each E-Actor accessing Joule as described breached the Clickthrough Agreement (but no breach of contract claims are made in this respect, whether against the E-Actors or against either corporate Defendant on the basis that the E-Actors were acting as their agents). It is unclear to me whether what is being said is that the E-Actors were procuring breaches of contract by the relevant Customer and there is vicarious liability for that or not. 269. In Mr Thomas' first witness statement, he asserted that an employer cannot be vicariously liable for an act of his employee in breach of a

contract between the employee and a third party and that assertions of vicarious liability for breaches of contract accordingly had no real prospect of success.

270. Mr Harris, in his second witness statement, asserted that Mr Thomas' argument about vicarious liability not applying to breaches of contracts was predicated upon the employers being secondary wrongdoers. He said that Trayport's position was that that was incorrect and that as managing directors of E-Star (and, in the case of Dr Kamper, previously managing director of Exxeta), both Mr Schmid and Dr Kamper's activities were attributable to the corporate Defendants as primary wrongdoers. He did not deal with the E-Actors as a class. 271. In his skeleton argument, Mr Mountford submitted that a party cannot be a "primary wrongdoer" in respect of breach of contract between two third parties. If not a party HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors to the contract, there can be no primary liability for breach of the contract. I agree. 272. In his skeleton argument, Mr Moss said that as regards vicarious liability for breach of the Clickthrough Agreements, in respect of which there was a substantive question of law as to primary wrongdoing, and thus a serious issue to be tried, the claim was founded on other causes of action and so, provided there was a serious issue to be tried on one or more of the claims to which Claim 10 applied, there was a serious issue to be tried on vicarious liability.
273. At the hearing Mr Moss decided not to develop his submissions on vicarious liability any further than his skeleton argument. However, he did tell me that the E-Actors, who had accessed the Clickthrough Agreement, had accepted the same on behalf of their clients who must be one or other of E-Star or Exxeta. I asked if this was a direct liability of either corporate Defendant rather than vicarious liability and he said, "we would say both, one or the other". However, as I have said there is no claim for breach of contract by the corporate Defendants as regards the Clickthrough Agreements. As far as I can judge there seems to have been a confusion on the one hand between acts of individuals that are said to be attributable to either corporate Defendant on the basis of agency and liability that is said to be attributable to either corporate Defendant on the strict liability basis of vicarious liability, whereby the liability of an individual is attributed to a company because the individual was acting as employee/agent of the company and in the course of his employment. 274. My conclusions are as follows:
- (1) There is no claim in contract for breach of the Clickthrough Agreements asserted against either corporate Defendant. The only liability of theirs which is asserted is one of vicarious liability, that liability being asserted as flowing from the liability for alleged breach of the Clickthrough Agreements by the E-Actors.
 - (2) It seems to me, although unusual (normally vicarious liability is relied upon in the field of torts and statutory torts or equivalent), there is at least an argument with a real prospect of success that vicarious liability can apply to breaches of contract made between employee and third party, at least as here, if the contract is made and allegedly breached in the course of the employee's employment. I do note however that normally the analysis that I would expect is that in such circumstances the employer would be a party to the contract (or

treated as being such) and that the employee's acts in breaching the contract would in law be attributable to the employer on the basis that the employee was acting as the employer's agent in breaking the contract.

- (3) As regards other liability of the E-Actors, the only relevant liability asserted against them is one of procuring breach by Trayport customers of the relevant Trayport Customer's contracts with Trayport. However, I have found that there is no adequate pleading of knowledge on the part of the E-Actors to found a claim in this respect with a real prospect of success.
- (4) Even if I am wrong about the scope of the pleading, the corporate Defendants are said to be primarily liable for the main complaints of breach of copyright etc. and it is difficult to see what a vicarious liability claim adds. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (5) I do not consider that it is pleaded, but Mr Mountford noted that the only claim pleaded against the Third and Fourth Defendant which was not pleaded against the First or Second Defendant was Claim 4. In respect of any possible vicarious liability with regard to Claim 4 and the alleged breach by Mr Schmid of his Employment and Termination Agreements made with Trayport, I conclude as follows. To the extent that I have found that any such claims have a real prospect of success, and that is only the solicitation claim, there is no pleading that any solicitation was done by Mr Schmid in the course of his employment with E-Star, so the claim in any event would not have a real prospect of success.
- (6) As a generality, I find the vicarious liability claim to be so unclear that I consider that it does not currently pass the merits test. Claim 11: Unlawful means conspiracy 275. 276. The PoC are somewhat light on this allegation. Without reference to any particular earlier paragraphs, paragraph 133, PoC simply asserts that "each of the Defendants is liable for unlawful means conspiracy for the reasons particularised above". It is said that this is to be inferred from the employment of each of Dr Kamper and Mr Schmid by Exxeta and/or E-star, their respective seniority within those firms, the incorporation history of E-Star and co-location of their head offices and the misuse of Joule by the E-Actors commencing in July 2022 before separation of the businesses into the two companies. In my judgment there is considerable force in the submission of the Defendants before me that the PoC is wholly inadequate to meet the heavy burden of ensuring that such a serious claim is "clearly pleaded and clearly proved [at least to the serious issue to be tried standard] by convincing evidence." (see Mackenzie v Rosenblatt Solicitors
- [2023] EWHC 331 (Ch) at [230]-[241]. Neither the combination, the common design to injure, the actions taken pursuant to the alleged common design nor that they were unlawful, are clearly identified in the PoC and the evidence in support.
277. As regards Mr Schmid the position is even worse. In principle a director can as a matter of law conspire with the company of which he is a director (as is asserted to have occurred in this case). However, it would appear that, rather like the position where it is sought to make

a director jointly liable for a tort committed by the company of which he is a director, there must be some joint act done in pursuance of a common purpose or some procurement or inducing of the company to commit the tort. At the end of the day, some degree of involvement in the tort on the part of the director and that his acts (and intention, where relevant) are sufficiently bound up in the company's acts to make him personally liable in conspiracy are required, and required to be pleaded (see *Palmer Birch v Lloyd* [2018] EWHC 2316 (TCC) at [213]- [215]). I do not think it can be enough to say that because someone is managing director that is enough to infer a case, with a real prospect of success, of conspiracy between them and the company of which they were managing director. 278. In his skeleton argument, Mr Moss submitted that an inferential case was made out. However, such inferential case in respect of each of the relevant elements of the tort is simply not pleaded. HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors*

279. On the third day of the hearing before me and in the course of his submissions, Mr Moss announced, on instructions, that the Claimant "at present" was no longer pursuing unlawful means conspiracy and did not persist in seeking permission to serve out on that claim. However, Trayport does not accept that it has discontinued this claim. If it is not pursuing the claim and is deleting it from its PoC then it seems to me that it is discontinuing it. 280. I made an Order on 16 June 2025, giving permission for the Claimant to file further witness evidence (if so advised), among other things dealing with its conspiracy claim and how the court was invited to deal with the same and on what basis.
281. By letter dated 19 June 2025, Pinsent Masons LLP for the Claimant confirmed that it consented to the Court setting aside its permission for the Claimant to serve its claim for unlawful means conspiracy out of the jurisdiction and said that the Claimant would amend its PoC to remove all references to this cause of action. However the letter confirmed that the Claimant did not accept its claim for unlawful means conspiracy did not surmount the test for service out and reserved the right to amend the PoC accordingly "if any evidence comes to light in due course which supports such claim". As I read it the letter confirms that Trayport is not pursuing or continuing with the claim and therefore it is discontinuing the same even if it refuses to accept this terminology. The reservation to reactivate the claim is only if further evidence comes to light and Trayport is then successful in an application to amend to bring in such a claim, the amendment being a properly pleaded and particularised claim in conspiracy supported by evidence which gives rise to a claim with a real prospect of success.
282. Mr Mountford invites me to cut through the dissembling about discontinuance by setting aside permission to serve out in regard to this claim not just on the basis of consent but on the basis of findings by me that the conspiracy claim as pleaded (and evidenced) does not meet the merits test for service out. It does not seem to me necessary to do that. Whether on Mr Mountford's basis, or on the basis of consent, the result is the same: the setting aside of permission to serve out. However, Trayport goes further which is also to agree to delete the

conspiracy allegation from its pleading. The result is clearly a discontinuance in relation to that claim which claim can only be resurrected if permission to amend is given. 283. If I am wrong about the correct approach and Mr Mountford is correct then, for the reasons briefly given that there is considerable force in the relevant Defendants' submissions, I would go further and say that I accept those submissions and conclude that the test for service out is not met in that there is no case pleaded with a real prospect of success with regard to the conspiracy claim. Further, I do not accept that there is a case with a real prospect of success that a conspiracy can be inferred from the matters relied upon as giving rise to such inference as set out in paragraph 133, PoC. The merits test: summary 284. The position regarding the merits test can be summarised as follows:

- (1) The merits test is not met as regards the Copying Case. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
- (2) The merits test is not met as regards the corporate Defendants and the statutory claims other than in (12) by reason of territoriality considerations and the fact that relevant acts are not adequately pleaded or evidenced as taking place within the UK (Claims 1, 2 and 8);
- (3) The merits test is not met as regards Mr Schmid and the statutory claims other than in (12) by reason of (a) territoriality considerations and the fact that relevant acts are not adequately pleaded or evidenced as taking place within the UK and
 - (b) there being no adequate pleading (or evidence) of any relevant acts by him personally or any joint liability (Claims 1, 2 and 8);
- (4) The merits claim is met regarding the claim for breach of the NDA, but only as against Exxeta (Claim 3);
- (5) The merits test is met as regards the claim that the corporate Defendants breached equitable duties of confidence (Claim 7);
- (6) The merits test is not met as regards the claim against Mr Schmid that he breached equitable (or contractual) duties of confidence: there is no pleading or evidence of relevant acts by him (Claim 7 and, in part, Claim 4)).
- (7) The merits test is not met as regards breach of any contractual duties by Mr Schmid which apply during the course of his employment (and not after) and which fall other than within clause 31 of the Employment Agreement or within the Termination Agreement (Claim 4, in part).
- (8) The merits test is not met as regards the non-compete claim brought against Mr Schmid (Claim 4, in part).
- (9) The merits test is met as regards breach by Mr Schmid of the non-solicitation clause in his contract (Claim 4, in part).

- (10) The merits test is not met as regards procurement of breach of Mr Schmid's Employment/Termination Agreements (no procurement is alleged) (Claim 6). (11) The merits test is not met as regards procuring breach of contract by the Trayport customers of their agreements with Trayport (knowledge of the terms of the individual contracts is not adequately pleaded or evidenced nor is procurement by Mr Schmid pleaded nor is there any adequate pleading that he is a joint tortfeasor) (Claim 5).
- (12) The Trade Marks Act claim meets the merits test (Claim 9, in part). (13) The passing off claim has been abandoned (Claim 9, in part). (14) The merits test is passed as regards the vicarious liability claim against the corporate Defendants but only as regards alleged breach of the Clickthrough Agreements by the E-Actors, but no more (Claim 10). (15) The unlawful means conspiracy claim has been abandoned (Claim 11). HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors Jurisdictional gateways and alleged non-disclosure in relation to them 285. The Defendants before me have always accepted that, if and to the extent the "merits test" was met or passed as regards a particular claim, then a relevant jurisdictional gateway applied but, originally, with the following exceptions: Claims 4, 6 and 7.
286. By the time of the hearing before me, the Defendants before me no longer disputed that gateways applied and accordingly no longer took a "gateways point". Because of the manner in which this position came about and because it is relevant also to the relevant Defendants' case of an absence of full and frank disclosure by the Claimant on the original application I need to address certain matters. I deal with the relevant claims and gateways in the same order that Mr Burgess addressed them in oral

submissions.

Claim 7: breach of equitable duties of confidence (including those said to arise from the Employment Agreement and Termination Agreement)

287. Originally, and assuming the merits test was passed, the Defendants before me challenged the existence of a jurisdictional gateway as regards this claim so far as it was based on the duty was said to be derived from the Employment/Termination Agreements. In that respect the Claimant had apparently relied upon the choice of English law in the Employment Agreement (subsequently changed to German law by the Termination Agreement, itself governed by German law). 288. In his skeleton argument Mr Moss had suggested a further gateway, in effect detriment suffered within the jurisdiction in respect of claims in breach of confidence or misuse of private information (PD 6B 3.1 (21)). The relevant Defendants did not dispute that gateway as applying to either any breach of equitable duty or breach of any contractual duty of confidence. I pass no comment upon the concession but therefore do not need to deal further with the jurisdictional gateway question as regards Claim 7. Claim 4: contractual claims against Mr Schmid for breach of (a) non-compete and (b) non-solicitation clauses

289. Claim 4 and, so far as the underlying facts give rise to claims against Mr Schmid, Claims 1 and 2, were originally put forward by the Claimant as falling within gateway PD 6B 3.1(6)(c) (claim in respect of a contract governed by English law) and on the basis that the contract was made within the jurisdiction within gateway PD6B 3.1(6) (a)(i) (see Harris 1st paragraphs 57 and 58). Finally, reliance seems also to have been placed upon PD 6B 3.1(4A(c)) (further claim arising out of same or closely connected facts to a claim falling within certain other gateways). As regards the English law gateway, reliance was placed upon the governing law clause of the Employment Agreement as contained in the original document. The change to that law made by the Termination Agreement was not referred to. As regards the contract being made within the jurisdiction, that was simply asserted without more. 290. In Mr Thomas' first witness statement, he identified that both the Employment Agreement and the Termination Agreement were governed by German law, in the former case as a result of an amendment to the governing law made by clause 11 of the Termination Agreement. As regards the making of the Employment Agreement, HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors he gave evidence that the contract was not made within the jurisdiction. The offer was sent to Mr Schmid's German address and he executed it in Germany.
291. Mr Thomas also identified the failure (a) to refer to clause 11 of the Termination Agreement (applying German law both to it and the Employment Agreement) and (b) the failure to identify clause 10 of the Termination Agreement as releasing all mutual claims arising from the employment relationship save for claims arising from this agreement as failures of full and frank disclosure pointing out that the Termination Agreement formed one of the annexures to the PoC and that it was specifically referred to in a number of places in the PoC and yet not referred to at all in Mr Harris' first witness statement. 292. In Harris 2nd, it was accepted that German law applied to both the Employment Agreement and the Termination Agreement. However, reliance was placed on the clause granting exclusive jurisdiction to the English courts in the Employment Agreement and it was said that the same clause was "likely" to apply to the Termination Agreement (which was silent on jurisdiction). Reliance was therefore placed upon CPR PD6B 3.1(4A)(b), that is that there was a gateway under CPR r6.33 and that permission of the court was not needed for service out. In addressing the allegation of a failure of full and frank disclosure in this respect Mr Harris simply referred back to the concession that the Agreements were governed by German law and his position on the exclusive jurisdiction clause in the Employment Agreement. No explanation was made as to the mistaken position that had been taken regarding English law being the governing law of the Employment Agreement. 293. In Thomas 2nd, it was denied that there was any basis for reading the jurisdiction clause in the Employment Agreement into the Termination Agreement. This was because the case had been put on the basis of an implied term.

294. Weare 1st dealt with the execution of the agreements in question as follows. The Employment Agreement was emailed and then also brought in hard copy to Frankfurt. Mr Schmid executed the hard copy and handed it back to the three employees to take back to England. As regards the Termination Agreement, that was negotiated by emails between Frankfurt and the UK and Mr Schmid executed the agreement at his home in Frankfurt.
295. Harris 3rd:
- (1) noted that Mr Weare had provided no evidence that under German law the English jurisdiction agreement clause would not apply to the Termination Agreement (but the burden of proof on the issue was on the Claimant).
 - (2) asserted that Trayport's case was that the Employment Agreement was made within England "when it was returned to Trayport's offices in London" and that the same applied as regards the Termination Agreement, the "implication" being that it was then returned to England at which point the contract was concluded when received by Trayport. He asserted that the court could find that a contract was "made" in two places for the purposes of CPR PD6B 3.1(6)(a)(i).
 - (3) stressed that Trayport was primarily relying upon CPR r6.33(2B)(b) (contract contains term that the English court shall have jurisdiction to determine the claim). HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
296. Weare 2nd made clear that Mr Schmid's position was that the burden of proof was on the Claimant to show that the jurisdiction clause in the Employment Agreement applied to the Termination Agreement, not that the burden was on him to prove the opposite.
297. At the hearing before me, Mr Moss, on instructions, sought to explain why clause 11 of the Termination Agreement had not been brought to the court's attention on the original application but rather, and contrary to it, the court had been told that the Employment Agreement was governed by English law (which was relied upon as a jurisdictional gateway). The explanation at that point was that Mr Harris, when he made his first witness statement, had not been aware of the Termination Agreement. This explanation had not been put into evidence. Further, there were questions as to its accuracy given that Deloitte LLP had written a letter dated 13 November 2023 to Mr Schmid alleging breach of the Termination Agreement with Trayport. I therefore allowed for further evidence to be filed on the point of why the court had been misled. 298. 299. In Harris 4th, Mr Harris asserted that he had not seen the Termination Agreement at the time that he made Harris 1st (10 January 2024). This is difficult to credit. The letter of 13 November 2023 was in effect an updated letter before claim, the original having been sent on 15 December 2022. Further the letter was exhibited to Harris 1st amongst the inter-partes correspondence regarding letters of claim and answers thereto. Further, it seems to me, to put it mildly, somewhat surprising if before a letter before claim such as that of 15 December 2022, alleging specific breach of that agreement as a cause of action, is sent the solicitors writing the letter would not have considered their client's position and the Termination Agreement itself. It is also hard to

credit Mr Harris' statement that, because the document (which he thinks was provided to him between the making of the application for service out and the delivery of the draft PoC to the court on 19 January 2024) had been provided in the context of ascertaining the start/end date of Mr Schmid's employment and the restrictive covenants under the Employment Agreement, he had reviewed only the "relevant clauses" of the Termination Agreement in that context. The Termination Agreement is some 8 pages long with wide spacing. The governing law of the Termination Agreement was obviously key in the context of potential jurisdictional gateways let alone in the terms of any restrictive covenants and how they were to be applied/construed and it is difficult to see how the effect of clauses 10 (settlement and discharge of all claims except those arising under the Termination Agreement) and the last two paragraphs of the Agreement (and of clause 11) dealing with choice of law and the language version of the agreement that prevailed were not read and considered. If Mr Harris is correct, that seems to lend some justification to Mr Mountford's characterisation of the position as being one of, at the least, "a laxity of practice which is redolent of an oppressive approach". The fact that the Termination Agreement was one of the annexes to the PoC highlights its importance and significance. 300. The concern is strengthened by Mr Harris' further explanation that he seems to have been relying upon Mr Pickard, head of Commercial and Legal at Trayport who is also said to have been unaware of clause 11 of the Termination Agreement. It is said that Mr Pickard did not check the position in this regard because what it provided for was "highly unusual" and is not included in other Trayport termination agreements. Such a clause is, it is said, against Trayport policy and would not have been agreed to by HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors Trayport legal if they had been made aware of it. However, as the contract is said not to have been passed through Trayport's legal department but negotiated and handled by its HR department, and given that this must have been known, one would have expected the legal department to consider the agreement in full instead of making assumptions. 301. The "same or closely related fact" gateway was said not to be applicable because there was no relevant claim that met the merits test to which Claim 7 against Mr Schmid could be attached.

302. By the end of the hearing, the position as regards gateways for Claim 4 seems to be as follows:

- (1) The Claimant relies upon the exclusive jurisdiction clause in the Employment Agreement as applying. If it does, then there is an absolute right to serve out and no need for permission. At this stage I could have been asked to rule on the correctness of that position but did not need to do so. It does not affect the issue of whether permission to serve out should be set aside (unless, possibly, on the basis such permission is not necessary but no party advanced that case).

- (2) The Defendants were prepared to concede that if there was any other claim which passed the merits test, then they would not take any jurisdictional point on the permission to serve out that had been granted regarding Claim 4. Claim 6: procuring breach of Mr Schmid's Employment Agreement/Termination Agreement
303. As regards procurement of breach of contract, reliance had been placed upon various gateways originally, including paragraph (8A) regarding procuring breach of contract governed by English law or made in England, and then later, PD 6B 3.1(4A)(b) (falling within CPR r6.33) and CPR r6.33(2B)(c) (claim in respect of contract with relevant jurisdiction clause), and then, put forward in Mr Moss's skeleton argument, PD6B paragraph (9)(a) (claim in tort with damage within the jurisdiction). In the light of the identification of the claimant's reliance on PD6B paragraph (9)(a), the relevant Defendants abandoned their challenge regarding applicable jurisdictional gateways for service out in relation to the procurement claim regarding alleged breaches by Mr Schmidt of his Employment/Termination Agreements, claim 6. I make no comment on the correctness of that concession. Forum conveniens 304. In Harris 1st it was said, in three paragraphs:
- (1) That the claim (meaning all the claims set out in the Claim Form) is most closely connected with England.
- (2) The Claimant is a London headquartered company incorporated in England and Wales and carrying on business in the UK. (It was not pointed out that this factor might be said to be balanced, in whole or part, by the facts that (a) the Corporate Defendants are German headquartered companies, incorporated in Germany and carrying on business there and (b) the individual Defendants are German nationals HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors resident and employed in Germany by German companies (and that Mr Schmid had, when employed by Trayport, been employed as a German resident and carrying out a significant part, if not the majority, of his employment in Germany)).
- (3) The Claimant's witnesses with knowledge of the relevant facts are based in the Claimant's office in London and/or are ordinarily resident in England and Wales (where, and how far from London was not made clear).
- (4) The Third and Fourth Defendants "frequently" travel to England. (How that was known in terms of their current employments and how frequently was not further explained. The position of the E-Actors, potential witnesses, was not mentioned at all. The locations of relevant Trayport customers were not mentioned). The First Defendant instructed and had been represented by Jones Day in pre-action correspondence. (However, the involvement of German lawyers e.g. as regards Mr Schmid's employment position was not mentioned).

-
- (5) The claims were said to raise “a number of complex issues” which were unspecified (even though one might consider that that might be relevant to the merits test) and whether that turned on e.g. difficult question of construction of customer or other contracts or on something else (and if so what) was not made clear.
- (6) All agreements relevant to the dispute were said to be governed by the law of England and Wales and/or were made in the jurisdiction and/or are subject to exclusive jurisdiction clauses favouring England. (It was not explained what the position was as regards Trayport Customers’ agreements nor as to which agreement(s) were said to be made within the jurisdiction (and how strong or otherwise that connecting factor by itself was) nor which agreements were subject to exclusive jurisdiction clauses. Further of course, and as already covered, the point that Mr Schmid’s employment agreements were covered by German law was not mentioned. Nor was it mentioned that contracts between the corporate Defendants (or either of them) with Trayport customers might be relevant to their consent or lack of knowledge of alleged breaches by Trayport customers of their contracts with Trayport, nor that such contract with the corporate Defendants might be governed by German law).
- (7) The damage suffered by the Claimant was said to be within the jurisdiction. The Defendants, it was said, had chosen to “execute their scheme” with the aim of affecting the Claimant’s business located within the jurisdiction.
- (8) The interests of expediency and cost management (and the foregoing matters) made England the “appropriate and natural forum” and there was a real advantage in issues of English law being determined by an English court. 305. In submissions, Mr Moss identified 7 matters that he relied upon:
- (1) The applicable law in all cases was, he said, English law. In particular the contractual and contract-related claims are all governed by English law and there are English jurisdiction clauses in Trayport Customer contracts, the Clickthrough Agreements and the Employment Agreement. (In my judgment this overstated the HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors matter: for example, the Trayport Customer agreements and the clickthrough agreements are not directly sued upon. Procuring breach of them is a tort governed by article 4 of Rome II and the exclusive jurisdiction clauses do not bind third parties).
- (2) The subject matter of the dispute, i.e. the intellectual property is all situated here and most evidence and documents will be in English.
- (3) The parties are domiciled respectively in Germany and England, but English jurisdiction clauses have been accepted. (As noted this is not true of the corporate Defendants other than Exxeta in relation to the NDA. The Clickthrough Agreements are relied upon solely in connection with procuring a breach of contract claim (and/or vicarious liability) and the Trayport customer agreements are relied upon in the context of a procurement of breach claim. The corporate Defendants are not parties to these agreements though Mr Moss tried to ride the horse of saying that the E-Actors were contracting parties on the clickthrough

agreements and at the same time that the corporate Defendants were parties).

- (4) The location of harm is England (this is indirect harm however).
 - (5) The location where the conduct occurred is in England (for reasons that I have given I do not accept this analysis).
 - (6) The witnesses are based in England and Germany: this is a neutral factor at most.
 - (7) The threatened counterclaim is a very weak factor. No proper counterclaim has been articulated, the claim is speculative and the Defendants would want to bring it in the UK.
306. Mr Mountford submits that not only is England not clearly the appropriate forum (which is as far as he has to go) but that in fact clearly the most appropriate forum is Germany. In this respect he says as follows. 307. First, the allegedly wrongful conduct all took place in Germany. None took place in England. The centre of gravity for the claims is Germany.
- (1) The first two Defendants are companies incorporated and based in Germany. E- Star only has a dormant subsidiary in England (and its employees are not involved in any of the conduct alleged in the proceedings). Otherwise there is no presence in England. Neither E-Star nor Exxeta has any UK employees.
 - (2) None of the various E-Star Products were developed in the UK. The vast majority of the development work was carried out in Germany over a 15 year period up to 2024, although some additional work was carried out by developers based in Slovakia. (This may become irrelevant if, as I have held, the Copying Case does not pass the merits threshold).
 - (3) 17 out of 18 of the IP addresses allegedly used by E-Actors in wrongly accessing the Trayport network were located in Germany (the one exception is a London IP address). HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
 - (4) The allegedly wrongful conduct is by employees of either one or other or both of the corporate Defendants. 33 of E-Star's employees (and all of E-Star's employees who carry out consulting activities requiring them to access Joule on behalf of mutual customers) are based in the First and/or Second Defendant's offices in Germany and/or are resident and work in Germany, subject to German labour law. The evidence is uncontested on this point. In Harris 2 nd it was said that it is not asserted by the PoC that relevant acts took place in Germany and that that is a matter for disclosure and evidence at trial. Mr Mountford submits that that approach is wrong as regards the question of forum conveniens that now arises. There is uncontroverted evidence from the Defendants on the point and if the Claimant wishes to rely upon the locus of the wrongful conduct being elsewhere it needs to produce evidence of the same (which it has not done).
 - (5) At all material times, the Third and Fourth Defendants have been resident and working in Germany (and in the case of Mr Schmid, even when he was employed by the Claimant). 308. Secondly, the causes of action are only weakly connected to England:

- (1) The English law contracts, the NDA, the SaaS Agreements, the CAAs and the Clickthrough Agreements are relied upon by the Claimant. Only Exxeta is party to the NDA. E-Star is not a party to any of these agreements (nor of course are Mr Schmid and Dr Kamper). (I note however that there is a claim for inducing breach of the relevant customer contracts).
- (2) The NDA is a somewhat “additional claim” (to Claims 1, 2 and 7). It is ancillary and sets out a different basis of liability in respect of the facts and matters relied upon as establishing misuse of intellectual property in statute and tort. It is a weak claim at this stage because there is no particularisation of what has been passed across under it and that referred to in evidence seems to have been passed under an earlier NDA. (I would also add that there is no identification at this stage of any different recoverable damages under contract (the NDA) rather than statutory, tortious or equitable claims). I also note however my earlier conclusion that the NDA covers not just information acquired under it but any relevant information acquired after its date.
- (3) The Clickthrough Agreement seems to be alleged to be an agreement entered into by Dr Kamper, but breach of the same is not asserted against him (or anyone else in terms of the bringing of a claim for breach of such agreement).
- (4) Claims (4) and (6) (and (7) so far as connected) concern the Employment Agreement and Termination Agreement which are governed by German law (not English law).
- (5) Claim (10) for vicarious liability turns on employment relationships between the Defendants and their employees and those relationships arise under German law. (I would note at this point that although I invited assistance on the point as to how Rome II applied in this context of vicarious liability, this was not taken forward. It seems to me possible that the choice of law rule regarding vicarious liability will be the same law as governs the underlying obligation in respect of which vicarious liability is asserted, although I have not given this much consideration. I HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors also note that procuring breach of contract is something that again I was not addressed on in any detail as regards choice of law. If Rome II applies, the starting point would appear to be the place of direct damage caused.
- (6) Harris 2nd identified the “overarching English law claims” said to be for infringement of copyright and infringement of sui generis database rights. These torts are only connected to England insofar as it is said that the Claimant has sustained damage here. The fact that damage is suffered in the jurisdiction, may be a jurisdictional gateway for service out but does not of itself demonstrate that the claim has a close link within the jurisdiction (see *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995 at [82]). 309. Thirdly, considerations of practical convenience and expense militate against England and in favour of Germany as the more appropriate forum.

- (1) As for documents, the Corporate Defendants' relevant documents as well as the majority of its communications are located in Germany with many being in German. No relevant documents are known to have been generated or held by either corporate Defendant in the UK.
- (2) Although the Claimant's documents may be in the UK and in English, the heavier burden of disclosure is likely to be on the corporate Defendants, there having to be disclosure not only of what acts have taken place but of surrounding matters such as reliance on assurances by Trayport Customers, method, nature and extent of copying, recruitment of Trayport leavers and so on.
- (3) Similar points apply to factual witnesses. There will be inconvenience to Trayport witnesses if the proceedings are held in Germany but the inconvenience on balance is less.
- (4) The only Trayport witnesses identified in the PoC are the authors of the component parts of Joule but there is likely to be little dispute as to Joule's creation and the major evidence on Joule is likely to be a matter for expert evidence, comparing it with the relevant E-Star products.
- (5) The corporate Defendant witnesses are likely to include the multiple persons said to be responsible for the alleged wrongdoing including the individual Defendants, the E-Actors and the Trayport Leavers.
- (6) The Claimant's response to these points about witnesses that it is a matter for case management in due course does not address the point. 310. Fourthly, the court is required to take into account the "risk of multiplicity of proceedings giving rise to a risk of inconsistent judgments" as a "very important factor", and in looking at what is the appropriate case for the "claim" that means the entire claim concerning all relevant parties (or I would add, likely prospective parties) or the entire dispute (see *Limbu v Dyson Technology Ltd* [2025] ICR 560; *Vedanta Resources plc v Lungowe* [2019] UKSC 20; [2020] AC 1045 and *Lyle & Scott v American Eagle* [2021] EWHC 90(Ch); [2021] ETMR 23). The claims brought by the Claimant implicate a wide range of persons who are not parties and if parallel HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* claims arise as a result, it is necessary to consider what those claims would be and where they would be expected to be heard.
- (1) The Claimant, submits Mr Mountford, may bring claims against the E-Actors, all of whom are resident and working in Germany and, taking those claims in isolation, they would expect to be heard in Germany and that is a factor weighing in favour of Germany (or at least against England and Wales as the appropriate forum).

- (2) Similarly, the Claimant may bring claims against its customers for breach of contract. In respect of those customers that have been identified as relevant by the Claimant, only two are English companies. Two are German companies and the remainder are from other EU countries. (I note however that there may be exclusive English jurisdiction clauses in those contracts).
- (3) More to the point, as the claims are currently formulated, the corporate Defendants would consider joining mutual customers on the basis that their alleged contractual breaches are in issue which would put the non-UK Further the contractual companies to inconvenience and expense. arrangements of E-Star with mutual customers of Trayport are on the basis that German law applies and the vast majority of the contracts require claims to be brought before the German courts.
- (4) Finally, E-Star has articulated, in correspondence and evidence, a competition counterclaim against Trayport. The most appropriate forum for such claim is Germany proceedings under article 102, Treaty of the Functioning of the EU and ss18-20 of the German Act against Restraints of Competition 2013. Although Mr Harris has suggested that it is for E-Star at this stage to adduce detailed expert evidence from an economist on issues such as market definition in support of the proposed counterclaim prior to determination of the forum question, he does not suggest anything other than that there are properly triable issues of competition law and there is no onus on E-Star to do so in the current context. (In oral submissions, Mr Mountford seemed to accept that it might be relevant to see how closely the counterclaim and the claims in the claim form were connected in law or fact and suggested that abuse of dominant market position might involve the use of such power to bring claims for breach of confidence and so on). 311. In oral submissions Mr Moss placed reliance on the Playtech case at first instance as regards two matters:
- (1) First, the decision that the law applicable to breach of confidence or breach of trade secrets was the law of England and Wales.
- (2) Secondly, the decision that England was clearly the most appropriate forum.
312. Both these findings were overturned on appeal. I deal first with the applicable law point.
313. As regards the applicable law, the Rome II Regulation Article 2 applied. In respect of “direct damage”, the effect was that if that damage (rather than “indirect damage”) HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors was suffered within the jurisdiction then the applicable law was that of the jurisdiction.
314. As described by Arnold LJ on appeal in the Playtech case: “ [19] In Celgard v Senior Celgard advanced a claim, referred to as the “Direct Claim”, that Senior was liable for breach of confidence by importing into, and marketing in, the UK battery separators whose design, characteristics, functioning and/or production benefitted from Celgard’s trade secrets. Celgard also advanced a claim, referred to as the “Vicarious Claim”, that Senior was vicariously liable for the wrongdoing of Dr Zhang (a former employee of Celgard and a

current employee of Senior) in disclosing Celgard's trade secrets to Senior in China in breach of an equitable obligation of confidence and/or regulation 3 of the Regulations.

- [20] This Court held for the reasons I gave at [55]-[64] that, since the act of unfair competition that was the subject of the Direct Claim was the importation into, and marketing in, the UK of infringing goods as defined in Article 2 of the Trade Secrets Directive, it followed that the UK was the market affected by that act of unfair competition and the country where the direct damage was sustained. Thus, applying Article 4(1) of the Rome II Regulation, the law applicable to the Direct Claim was English law.
- [23] By contrast, for the reasons I gave at [68], the law applicable to the Vicarious Claim was Chinese law, because the direct damage caused by Dr Zhang's alleged disclosure of trade secrets to Senior was sustained in China." 315. The key facts in Playtech were summarised by Arnold LJ as follows: "[8] The essence of the Claimants' complaint is that Mr Veliks has, using log-in details provided to him by Euro Live for the purposes of his employment with Euro Live, accessed confidential information on Horizon after the termination of his employment and has thereby provided Realtime with access to confidential information on Horizon. The Claimants further allege that Mr Veliks and Realtime have used confidential information from Horizon in the development of two of Realtime's games, namely Travel Fever and Diamond Rush Roulette ("the Derivative Games"). The Claimants contend that the confidential information misused by Realtime and Mr Veliks constituted trade secrets." [11] Playtech relies on reports of 33 instances of alleged access to Horizon by Mr Veliks or other employees of Realtime. The reports include the IP addresses from which the access is said to have been made. These indicate that, in the vast majority of cases (around 94%), the alleged access took place from Latvia. In no case did the alleged access take place from the UK." 316. In Playtech, at first instance, Thompsell J said as follows: "[106]. Playtech argues that damage has been sustained in the United Kingdom as it is based in the United Kingdom and trades from there and receives the revenues which may be damaged from unfair competition arising from these breaches in the United Kingdom. Whilst it has not identified competing specific imports, as was the case with the Direct Claim in Celgard, this is understandable HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors as it is a different type of business that does not sell physical goods but instead sells intangible products. Nevertheless, it seems to me that it has got close enough to the Direct Claim in Celgard in that it has presented a strong case that it is facing competition to its business, which it conducts in the UK, in relation to its sales from at least one game that has a feature that has relied on its confidential information. This seems to me to be a good argument and a sufficient justification for the direct claims that Playtech is making against Mr Veliks and against Realtime Latvia to pass through this gateway."
317. However, on appeal, and having identified the pleading of damage (which was far more specific than in this case, but which was supplemented by evidence), Arnold LJ went on as follows: "[36] This pleading is entirely concerned with the indirect consequences to Playtech of the acts complained of, and in particular with the reduction in the licensing revenue

received by Playtech in the UK, not the direct damage caused by those acts. The mere fact that Playtech loses revenue in the UK is not sufficient for this purpose: cf. *Kitechnology* (cited above) at 779-780 and *AMT Futures v Marzillier* [2015] EWCA Civ 143, [2015] QB 399 at [31] (Christopher Clarke LJ) (both cases concerning Article 5(3) of the Brussels Convention and of Council Regulation 44/2001/EC, but the point is the same).

- [37] There is no allegation that either of the Derivative Games has been downloaded, or otherwise accessed, by anyone in the UK. It is no answer to this to argue, as counsel for Playtech did, that such acts are encompassed within the scope of Playtech's pleading. The pleading is wholly unspecific as to how and where the alleged loss of licensing revenue arose. Furthermore, the lacuna is not merely one of pleading: as counsel for Playtech accepted, Playtech has not adduced any evidence that either game has been downloaded, or otherwise accessed, by anyone in the UK. It has not even demonstrated that they were made available to consumers in the UK.
- [38] It follows that, contrary to the judge's view, there is no parallel between Playtech's claim for misuse of trade secrets and the Direct Claim in *Celgard v Senior* even if one disregards the potential distinction between physical goods and intangibles when it comes to Article 4(5) of the Trade Secrets Directive. On Playtech's pleaded case, the only direct damage it has suffered was sustained in Latvia. Accordingly the applicable law is Latvian law. It follows that the claim does not satisfy Gateway 21 (and that English law cannot be applied to determine that the claim raises a serious issue to be tried)." 318. The relevant facts in this case are closely similar to those in *Playtech*. (Indeed, the decision at first instance (being the only one then available) was heavily relied upon by Mr Moss in his oral submissions.) The damage asserted is economic loss suffered in the UK but the nature of that loss as expanded upon in evidence, for the purposes of Article 4 of Rome II, is indirect damage. One difference is that a London IP address seems to have been used for gaining access in some cases. However, whilst that may mean that direct damage was suffered within the jurisdiction, that only applies to some of the instances relied upon. The London IP address is simply one among the 18 relevant IP addresses identified (all the others being in Germany). It seems to me that at most it means that some of the breach of confidentiality and breach of trade secrets HH JUDGE DAVIS-WHITE KC Approved Judgment *Trayport Ltd v E-Star Trading GmbH & Ors* claims may be governed by English law but the majority (on current evidence) are governed by German law. I should add that there is no specific pleading of direct damage within the jurisdiction and, in the context of copyright, Mr Moss submitted that it was possible that copies were taken within the jurisdiction in a number of ways (e.g. through the Trayport customers servers in the UK or in other ways) but accepted that none of this was pleaded nor was he really able to do much than speculate about possibilities. 319. I turn to the forum conveniens part of the *Playtech* decision. There were in essence two claims: alleged misuse of trade secrets and copyright infringement. Thompsell J decided at first instance in *Playtech* that the proper forum to litigate the claims was England.

320. On appeal, having held that the misuse of trade secrets claim was governed by Latvian law and that the jurisdictional gateway relied upon did not apply, Arnold LJ considered the remaining copyright claim and, in connection therewith, the need for expert evidence of English law in the Latvian courts and what claims the Latvian court could consider. He concluded that as regards the copyright claim (involving alleged taking, in Latvia, of a screenshot of a logo from the Horizon system) Latvia was an available forum. “Furthermore, even considered on its own, the centre of gravity of the copyright claim is Latvia”. Forum conveniens: Discussion 321. I deal with the position in the round first. There was no issue before me (but also no detailed evidence before me to the effect) that Germany is an available forum to hear all the claims (even those that I have held do not pass the merits test). Further, there was no evidence led by the Claimant, nor any before me, raising any case that there was any disadvantage in terms of legal procedures or the law that the German courts would apply that would create any disadvantages to any party in the claims being litigated in Germany. In broad terms, the main factors relied upon as pointing against the German courts were (a) the need for the German courts to receive evidence of English law and (b) the inconvenience of the Claimant’s English witnesses having to attend court in Germany and the Claimant to produce its documents in Germany and
- (c) translation issues (in connection with factual witness evidence and documents as well as computer programmes).
322. However, the issue of applicable law seems to me finely balanced. There are some aspects of German law involved in the case as well as English law (thus, the contractual claims against Mr Schmid are governed by German law and on my current analysis of the current evidence, large tranches of the claims arising from breach of confidentiality and misuse of trade secrets are governed by German law). Apart from direct wrongdoing in tort/breach of confidence governed by Article 4 of Rome II there is also the issue of what law governs inducing breach of contract. I was not addressed on this issue or on how Article 4 would operate. I was addressed on the basis English law applied and therefore assume that to be the case for present purposes. As regards the claims currently brought under English statute, if, as I have found, damage within the UK is not pleaded or established then the matters are, as submitted by Mr Mountford, likely to be claims under the equivalent German statutory provisions. I was not taken to them but I did not understand Mr Moss to demur on this point. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors
323. As regards documentation and witnesses, the focus of the case is what the Defendants and the E-Actors did and that is all to be found in Germany both in terms of documents and factual witnesses. The evidence of existence and ownership of intellectual property is unlikely to be difficult or complicated to prove. As regards computer language, I suspect that, so far as relevant, English rather than German is the international programming language but whether or not it is the point becomes less significant in light of my finding that the Copying Case (i.e. use of data obtained to create the E-Star products) does not pass

the merits test. Of course, even if I am wrong and the Copying Case does pass the merits test, there would then be to weigh in favour of Germany as a forum the factor that all the relevant development of the E- Star products appears to have been in Germany and Slovakia.

324. As regards witnesses, the vast majority are situated in Germany, and it is unclear that they all speak fluent English. 325. In short, looking at the claims in the round and whether looking at the detail or standing back and looking at the matter in the round, it seems to me that the centre of gravity of the claims is Germany. I am not satisfied that England is the most appropriate forum as a matter of generality.
326. However, I have to consider the matter on the basis of the claims that I have found do pass the merits test. Of these, breach of the NDA is governed by an exclusive jurisdiction clause.
327. Breach of clause 31 of the Employment Agreement (regarding solicitation) is also said to be governed by an exclusive jurisdiction clause. Although I do not have to consider this question from the point of view of gateways, I do have to consider it in this context. I accept that the jurisdiction clause should not be implied into the Termination Agreement or that such an implication would not amount to the required express agreement to such a clause. However I consider that clause 31 of the Employment Agreement, although continued under the Termination Agreement and because the latter refers to it as being “in full force and effect”, that in effect causes the claim under clause 31 to be a claim under the Employment Agreement and therefore under the express exclusive jurisdiction clause in that agreement.
328. As I understand it (though the point was not canvassed before me) forum conveniens cannot effectively apply as a concept preventing the hearing of a claim in the jurisdiction in relation to which there is an exclusive jurisdiction clause and the clause will be given effect to apart from very exceptional circumstances which do not apply here. I note in this context that there is also the question of how the Hague Convention 2005 applies (or does not apply) and if it does not apply what the principles are. As I understand matters it will apply to the Termination Agreement but not the Employment Agreement by reason of their respective dates. 329. If that is correct, then it seems to me that, in addition to the claim under the NDA, the claims for breach of equitable duties of confidence and breach of the Clickthrough Agreement are appropriately tried in England and Wales. My view might have been different if rafts of the other claims had passed the merits test. 330. The Trade Mark claim, taken by itself, and given the claims that pass the merits test and where they are to be tried, is also most conveniently heard in England and Wales. HH JUDGE DAVIS-WHITE KC Approved Judgment Full and frank disclosure Trayport Ltd v E-Star Trading GmbH & Ors 331. The Defendants before me relied upon what they submitted was material non- disclosure in four main subject areas:
- (1) The background history regarding the relationship between Trayport and (originally) Exxeta and then E-Star. In particular, failing to tell about and highlight to the court a close business relationship between the Claimant/corporate Defendants for over a decade which included collaborative work in the servicing of mutual customers who accessed Joule via E-Star

Products and multiple discussions of possible commercial partnerships between Trayport and the corporate Defendants. Mr Moss characterised this as being a complaint that it had not been revealed that the parties had been on good terms over a period of years. It goes far further than that. The good relationship was one where Trayport seems to have co-operated with the relevant corporate Defendant in the latter seeking to assist Trayport customers, and one which involved the corporate Defendant having access to Joule to the knowledge of Trayport and without complaint by Trayport, rather the opposite. The further failures in this context are said to be implying that Exxeta/E-Star Products were newly being created in about June 2022 and not making clear that they had existed for some years before that.

- (2) Failure to identify the existence of key terms of the Termination Agreement regarding (a) choice of law and (b) release of claims under the Employment Agreement.
- (3) Failure to address territoriality of the statutory claims under the 1988 Act, the Trade Marks Act 1994 and the Trades Secrets (Enforcement, etc) Regulations.
- (4) Failure to identify and address any factors pointing against England as the most appropriate forum. 332. In light of my conclusion on forum conveniens, I can deal with these points fairly shortly. I start by considering them one by one and then cumulatively. On an individual basis my starting point would be to set aside the order only as regards those claims to which any non-disclosure related. The question then would be whether taken together the non-disclosures are so serious that permission to serve out should be set aside on a wholesale basis.

333. Mr Moss's first point was that the Defendants before me were making mountains out of molehills. and that there was no non-disclosure that was material or sufficiently serious as to raise any issues.

334. As regards failure to reveal the relationship between the Claimant and the corporate defendants and the long existence of E-Star/Exxeta Products, I consider there was a failure to disclose which was culpable (if not intentional). I also consider that it was material. To assert, as Mr Harris later did that there was "no such relationship" almost flies in the face of the documents (including correspondence drawn to my attention by Mr Mountford showing co-operation between the corporate Defendants and the Claimant in resolving issues facing mutual customers). However, and in any event that is not the point: the point is that the Claimant knew from Jones Day's letter of 12 January 2023 precisely what it was saying in this respect and why it was HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors relevant to the Defendants' case. The letter also set out in detail many of the points made before me, including, for example, the history of the Exxeta/E-Star Products. This letter was not drawn to the court's attention other than by reference to "lengthy and detailed pre-action correspondence" contained in an exhibit.

335. As regards the Employment and Termination Agreements I have dealt with the facts earlier in this judgment. In my judgment the true position was clearly material as was the misrepresentation of the position. There may have been other grounds for jurisdiction but

that is not the point. Although I consider the evidence unsatisfactory and consider that questions are raised that the failures went further than I can properly go, I consider that I can only go so far as to say that the non-disclosure was culpable in the sense of being seriously careless. I consider that permission to serve out should be set aside and not re-granted in relation to the surviving claim. Given my view on the exclusive jurisdiction clause point, this may not have a practical impact.

336. As regards the territoriality point of statutes, I have decided the claims do not meet the merits test other than in relation to the Trade Marks Act claim. I would set aside permission but then re-grant permission.
337. As regards the forum conveniens point, there was a reference in Harris 1st to the fact that in its letter of 11 April 2023, Jones Day had denied that England was the convenient forum. The letter was referenced to the exhibit but no explanation was given of what Jones Day had said or why it was wrong on the point even though that letter had itself referred to the need to address the issues raised by them (including forum conveniens points) “by way of full and frank disclosure when seeking permission to serve out.” 338. In my judgment the failure to disclose was material. I should add that I consider that the submissions of Mr Moss regarding the corporate Defendants being bound in some way by exclusive jurisdiction clauses in the Trayport customer agreements and the Clickthrough Agreements supports my conclusion on this. Those agreements were highly relied upon by Mr Harris with very little explanation and certainly no explanation of how their relevance might be said to be much less.
339. As regards forum conveniens, I would set aside permission but then re-grant it where I am satisfied that the claim passes the merits claim and (for reasons described) I am satisfied that England and Wales is clearly the most appropriate forum. 340. That leaves the need to consider the question of full and frank disclosure in the round. Is it so serious that there should be no re-grant of permission to serve out at all? Very narrowly I am satisfied that that is not necessary. My findings plus an appropriate costs order (namely that the Claimant pays all the costs of the applications and on an indemnity basis) is, in my judgment, sufficient.

Conclusion:

341. Permission to serve out should be set aside but re-granted as regards (1) the NDA claim against Exxeta alone; (2) the breach of equitable duties of confidence by the corporate Defendants alone and (3) the breach of the Trade Marks Act case against E- Star alone. HH JUDGE DAVIS-WHITE KC Approved Judgment Trayport Ltd v E-Star Trading GmbH & Ors 342. 343. There are matters I have identified on which I have not been addressed. If any party considers that the hand down of this judgment should be further delayed because that party wishes to address further argument on such points then I should be notified as soon as possible. The parties should seek to agree an order to give effect to this judgment. This is likely to take time. I therefore order that within 7 days of the formal hand down of this judgment they must lodge an order so far as they can agree one and, if they consider that a

further hearing is necessary, agree and submit a directions order leading to such hearing, alternatively submit a draft order showing in a combined form where the parties agree and disagree and agree a timetable for submissions and determination on the papers. I adjourn all consequential matters over until the final form of order is determined and extend the time for filing a notice of appeal so that the usual 21 day period runs from the determination of the final form of order.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/ch/2026/164>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/CopyrightInfringement-court-unknown--6a3ea5083b1caa912980468a>

Prepared on 22 October 2026 · Esheria