Neutral Citation Number: [2022] EWHC 1509 (Comm)

Case No: CC-2020-LDS-000022
And CC-2020-LDS-000027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT (QBD)

1 Oxford Row, Leeds LS1 3BG
16 June 2022

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

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Between :

HENRY WILLIAMS LIMITED	**Claimant**
- and –	
(1) STEVEN ADRIAN COTTON **(2) RUBICON CONSULTANTS LIMITED**	**Defendants**
And Between:	
HENRY WILLIAMS LIMITED	**Claimant**
- and –	
ALAN HERRON	**Defendant**

- -

Mr Edward Cohen (instructed by **Greene & Greene, Solicitors**) for the **Claimant**
Mr Sean Kelly (instructed by J**ohn Howe & Co, Solicitors**) for the **Defendants**

Hearing dates: 25, 26, 27 and 28 October 2021

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APPROVED JUDGMENT

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

Her Honour Judge Kelly

Background

1. This judgment follows the trial of two separate but closely related claims brought by the Claimant. The Claimant is a company carrying on business as a manufacturer of forged components and sheet metal enclosures. Previously, the Claimant was the main supplier of treadles to railway companies in the UK and Ireland. The treadles were manufactured in France by a French company called Idemia and then sold to the Claimant. The Claimant then sold and distributed the treadles in the UK and Ireland.

2. In October 2019, the business of manufacturing and supplying the treadles was acquired from Idemia by another French company called SNIC Rail SAS ("SNIC SAS"). SNIC SAS decided that they wanted to distribute the treadles themselves and a related company was set up in the UK for this purpose called SNIC Rail UK Limited ("SNIC UK").

3. Mr Steven Adrian Cotton ("Mr Cotton") was a director and senior employee of the Claimant and was latterly the managing director of the Claimant's Mechanical and Electrical ("M & E") division, until he was summarily dismissed and required to resign as a director on 16 January 2020 following a disciplinary hearing. After being dismissed, Mr Cotton was employed by SNIC UK. As part of his remuneration package, he was to receive a 40% shareholding in SNIC UK. Mr Cotton used the company Rubicon Consultants Limited ("Rubicon") as his nominee to hold the 40% shareholding of which he was the beneficial owner.

4. Mr Alan Herron ("Mr Herron") was also a director and senior employee of the Claimant and was latterly production director of the Claimant's M & E division. He was placed on gardening leave by the Claimant on 18 March 2020 and was required to resign as a director on 31 March 2020. He also then took up employment with SNIC UK.

5. The claims against the Defendants allege breach of fiduciary duty and breach of contract against the two individual Defendants, conspiracy between Mr Cotton and Rubicon and/or between Mr Cotton and Mr Herron to use unlawful means to cause loss to the Claimant and dishonest assistance by Rubicon in the breach of duty of Mr Cotton and Mr Herron.

6. Initially, injunctive relief was claimed to prevent further misuse of the Claimant's confidential information. That is no longer pursued. What is pursued is the option either to seek damages or an account of profits, the Claimant having the option to elect what relief it seeks after judgment on liability has been delivered.

7. Each of the Defendants deny any breach of duty, any breach of contract and any wrongdoing at all.

8. The Claimant was represented by Mr Edward Cohen of counsel and the Defendants by Mr Sean Kelly of counsel. I had the great assistance of both opening and closing skeleton arguments from both counsel.

The Issues

9. The parties agreed the issues to be determined in each case. Some of those issues related to quantum and do not fall to be determined during the course of this judgment. The liability issues in broad terms were as follows:

(1) whether either Mr Cotton or Mr Herron or both passed on confidential information of the Claimant to SNIC;

(2) to what extent were Mr Cotton and Mr Herron involved in the decision made by SNIC SAS to terminate the status of the Claimant as the UK distributor for treadles and did any such involvement constitute a breach of fiduciary duty or breach of contract or both;

(3) did Mr Cotton and Mr Herron conspire together either to procure the termination of the status of the Claimant as UK distributor for treadles or alternatively prevent the negotiation between the Claimant and SNIC SAS to prevent the loss of the treadle business;

(4) were either Mr Cotton or Mr Herron or both involved in the acquisition by SNIC of the Babcock order and did any such involvements constitute a breach of fiduciary duty or breach of contract?

(5) to what extent was Mr Cotton involved in the incorporation of and the decision to use SNIC UK as the sole distributor in the UK for treadles after 30 April 2020 and did that involvement constitute a breach of fiduciary duty or breach of contract?

(6) did Mr Cotton misuse or improperly retain any of the Claimant's confidential information?

(7) did Rubicon dishonestly assist or conspire with Mr Cotton in the alleged breaches of duty?

(8) did the Claimant commit a repudiatory breach of the service agreement of Mr Cotton and if so was it accepted by Mr Cotton?

10. An issue was raised by the Defendants as to the ambit of the trial. Her Honour Judge Claire Jackson had made an order on 25 March 2021 setting out that this would be a liability only trial on all matters claimed and relief sought, save only in respect of the taking of an account and/or the calculation of damages. At the start of the trial, this matter was raised by counsel for the Defendants and I ruled on it, giving a short judgment on the issue which I do not propose to repeat. The matter was raised again in the written closing submissions by counsel for the Defendants. I do not accept that it is appropriate to reopen this matter. I determined at the start of the trial that it related to liability only and not to matters of quantum. I therefore do not propose to deal with those arguments raised again concerning the ambit of the hearing as set out by counsel for the Defendants.

The Law

11. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.

12. Mr Cotton and Mr Herron accept that they owe duties to the Claimant while they remained directors of the Claimant pursuant to the Companies Act 2006. Those duties included:

(1) Section 171(b) only to exercise powers for the purposes for which they were conferred, that is to say proper purposes only;
(2) Section 172(1) to act in the way the director considers, in good faith, would be the most likely to promote the success of the company for the benefit of its members as a whole;
(3) Section 175(1) to avoid a situation in which the director has or could have a direct or indirect interest which conflicts or may possibly conflict with the interests of the company;
(4) Section 175(2) clarifies that this applies in particular to the exploitation of any property, information or opportunity regardless of whether or not the company could in fact take advantage of the property, information or opportunity itself;
(5) Section 176 a duty not to accept benefits from third parties conferred by reason of the person being a director or by doing (or not doing) anything as a director. The duty is not infringed if acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest;

(6) Section 177 requires that if a director of a company is in any way directly or indirectly interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors. He need not declare an interest if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
(7) Section 178 provides that the consequences of breach or threatened breach of sections 171 to 177 inclusive of the Act are the same as would apply if the corresponding common law rule or equitable principles applied.

13. In addition to the Companies Act 2006, I was also directed to the following cases and principles from those cases:

(1) *Industrial Development Consultants Limited v Cooley* [1972] 1 WLR 443 and *Phipps v Boardman* [1967] 2 AC 46:
   (a) a person in a fiduciary capacity must not place himself in a position where his duty and his interest may conflict;
   (b) if information comes to a person whilst a director which is of concern to his company and relevant for the company to know, it is the director's duty to pass on the information to the company because of that fiduciary relationship. It is no defence to say that the information was received in a purely private capacity (see also the case of *Hilton v Barker, Booth & Eastwood* [2005] 1 WLR 567);
   (c) directors are bound to disregard their own private interests whenever regard to them conflicts with the proper discharge of their fiduciary duty;
   (d) whether the benefit obtained by the director as a result of his breach of fidiciary duty would have been obtained by the company but for the breach is irrelevant;
   (e) if a director has made or will make a profit from his breach of duty, an account of profits will be ordered;
   (f) an honest fiduciary should be given a "liberal" allowance for the work and skill shown which lead to the profit.
(2) *British Midland Tool Limited v Midland International Tooling Limited* [2003]EWHC 466 (Ch):
   (a) a director's duty is to act to promote the best interests of his company including the duty to inform the company of any activity, actual or threatened, which would damage those interests. Where the activity involves both himself and others, there is nothing in the authorities which excuses him from that duty and whether or not the activity in itself would constitute a breach of any relevant duty;

(b) a director who wishes to engage in a competing business and not to disclose his intentions to the company should resign his office as soon as his intention has become irrevocably formed and he has launched himself into taking preparatory steps;

(c) a director's duties require him to take active steps to thwart a process potentially damaging to the company including alerting fellow directors to what is going on rather than keeping them in the dark.

(3) *Kingsley IT Consulting Ltd v McIntosh* [2006] EWHC 1288 (Ch) - a director cannot set the groundwork for diverting a corporate opportunity whilst a director then take it for himself after he ceases to be a director. He becomes a constructive trustee of the fruits of his abuse of property acquired in the circumstances where he knowingly had a conflict of interest and exploited it by resigning from the company. It is irrelevant whether the company would have been in a position to exploit the opportunity which the director was bound to exploit for the benefit of his company.

(4) *Personal Representatives of Tang Man Sit v Capacious Investments Limited* [1996] AC 514 - although a Claimant must choose between an account of profits and a claim for equitable compensation or damages as alternate remedies, he need not elect between the remedies until judgment is given in his favour and the court is asked to make orders. Occasionally, it may be unreasonable to require a Claimant to choose which remedy to pursue without further information or disclosure. The court may therefore make disclosure and other orders designed to give the Claimant the information he needs and in fairness ought to have before deciding on the appropriate remedy sought.

(5) *Re Mumtaz Properties Limited* [2011] EWCA Civ 610 - if contemporaneous documentation is likely to have existed if the oral evidence were correct, and the party adducing that oral evidence is responsible for its non-production, the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

14. In addition to the express terms of the contracts of Mr Cotton and Mr Heron, each of them also owed an implied duty to serve the Claimant with fidelity and in good faith (see Chitty on Contracts 34th edition volume II at 42-064).

15. The claim against Rubicon is twofold. Firstly it is a claim of conspiracy with Mr Cotton to use unlawful means to cause loss to the Claimant by loss of the treadle business and/or the loss of the opportunity to negotiate with SNIC SAS in respect of the same. A conspiracy is committed where two or more people combine and take action which is unlawful in itself with the intention of causing damage to a third party who does in fact incur the intended damage. It is not necessary for the injured party to prove that causing the damage was the main or predominant purpose but the purpose must be part of the conspirator's intentions. Further, it is not a defence for the conspirators to show that their primary purpose was to further or protect their own interests. It is sufficient to make their action tortious that the means used were unlawful. In those cases, an intention to injure the Claimant, rather than a predominant purpose to injure, suffices. Further, a defendant will be held to have the necessary intention if damage to the Claimant was a necessary corollary of the defendant's goal or means that the defendant had selected to achieve a goal. In addition, a person can be liable for conspiracy to break a contract to which he was not a party where he merely conspired, with a common design, together with the party committing the breach (see Clerk & Lindsell 23rd edition and First Supplement 23-105 to 23-107 and 23-115 to 23-117).

16. The second claim against Rubicon is for dishonest assistance in Mr Cotton's breach of fiduciary duties and/or knowing receipt of benefits, assets and/or profits obtained as a result. The general requirements of liability for knowing receipt are that there is property subject to a trust, the property is transferred, the transfer is in breach of trust, the property is received by the defendant, the receipt is for the defendant's own benefit and the defendant receives the property with knowledge that the property is trust property which has been transferred in breach of trust. Property legally and beneficially owned by a company, but which is subject to the fiduciary duties of the directors or others, is trust property for these purposes. The general rule is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt. It is not necessary to show that he is dishonest (see Lewin on Trusts 20th edition Volume II at 42-023, 42-036 and 42-073).

The Evidence

17. I do not propose to set out all of the evidence which I read and heard, nor the contents of all of the witness statements. It is not necessary to do so.

18. I have had the benefit of reading all of the witness statements contained within the bundles, together with the various documents to which I was taken during the course of the trial and directed to in skeleton arguments.

19. The witness statements for the Claimant are:

(a) Mr Dilley dated 7 September 2021,

(b) Mr Derek Neil dated 6 September 2021,

(c) Mr Michael Dodds dated 1 September 2021,

(d) Mr Andrew Sewell dated 1 September 2021,

(e) Ms Gillian Cartwright dated 3 September 2021, and

(f) Mr Andrew Mark Burdon dated 1 September 2021.

20. The witness statements for the Defendants are:

(a) Mr Steven Adrian Cotton dated 6 September 2021,

(b) Mr Alan Herron dated 6 September 2021,

(c) Mr Xavier Payet dated 7 September 2021,

(d) Mr Christopher Stuart Brown dated 6 September 2021 and

(e) Mr Ethan Heanue dated 6 September 2021.

21. During the trial, I had the benefit of hearing oral evidence from Mr Robert Howard Stapleton Dilley ("Mr Dilley"), Mr Derek Neil ("Mr Neil"), Ms Gillian Cartwright ("Ms Cartwright"), Mr Mark Burdon ("Mr Burdon"), Mr Michael Dodds ("Mr Dodds") and Mr Andrew Sewell ("Mr Sewell") for the Claimant and Mr Cotton, Mr Herron, Mr Xavier Payet ("Mr Payet") and Mr Christopher Stuart Brown ("Mr Brown") for the Defendants.

22. This is a case which turns both on the credibility of the oral evidence and also on the documentary evidence contained within the trial bundles. I do not propose to rehearse all of the arguments raised by counsel, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as the various documents within the trial bundles to which my attention was drawn, in addition to all those arguments before making findings of fact and decisions on the liability issues on the balance of probabilities.

Mr Dilley

23. I first heard evidence from Mr Dilley who is the Chairman of the Claimant company and other associated companies. In his witness statement, he explained the history of the company and the work done by the company concerning treadles. There were two types of treadle, the Cautor and the Forfex. There were then different variants of those two overarching types of treadle. The treadles were supplied to the Claimant by Idemia until Idemia sold that part of its business to SNIC SAS in autumn 2019.

24. At that time, the Claimant was the only approved distributor of the treadle product to Network Rail and others. The Claimant had been the only direct distributor of treadles in the UK for the manufacturer since before 1989. The Claimant had a framework agreement with Network Rail which meant in reality that the Claimant was Network Rail's sole supplier of treadles, although in theory they could place orders elsewhere. The Claimant also sold treadles to other entities such as private railways in docks, power stations etc. On occasions, they repaired treadles.

25. Delivery time from the manufacturer Idemia was usually around five months. It was usual to have to order minimum quantities so orders would be placed for the amount needed for a particular order, but there may well be some free stock kept as a result of the minimum quantity order. The Claimant did not inform the manufacturer what its prices for resale to customers in the UK were. There were different prices to different customers. It would depend on the customer and the quantity of treadles purchased.

26. As far as Mr Dilley was concerned, it was confidential information about who the Claimant's customers were and what free stocks were being held, as well as its pricing information. The Claimant company had also developed a treadle gauge to assist in setting the treadles in the correct position. It was developed by Mr Herron. The intellectual property of the gauge design belongs to the Claimant company.

27. In 2003, the previous production director of the M & E division retired and Mr Herron was appointed in his place as production manager. At that time he was not a director. However, his employment contract contained provisions regarding confidential information and post-

termination restrictions. The statement of terms and conditions of employment included the following clauses:

(a) Clause 12 Termination of Employment

"…The Company has the right to terminate your employment without notice in the event of gross misconduct or some other fundamental breach of contract on your part".

(b) Clause 13 Return of Company Property

"Upon termination of employment with the Company or otherwise at our request you must immediately return all property belonging to the Company which may be in your possession or control. This includes company vehicles, computer equipment, mobile phone, keys and personal protective equipment. You must also inform us of any computer passwords."

(c) Clause 14 Electronic Communications

"The Company's computers including laptops, are to be used solely for business purposes, subject to the following exceptions:

You may make reasonable use of the Company's computer system for sending personal emails and Internet usages outside of your normal working hours or during your lunch break…"

(d) Clause 16 Employee Handbook

"Henry Williams maintain a Company Handbook which contains information concerning the day-to-day operation of the company and its employees. All employees are expected to comply with the defined procedures."

(e) Clause 20 Security of Information Clause

"Henry Williams Limited is part of CON MECH GROUP LIMITED.

CON MECH GROUP LIMITED and its associated companies have agreements with other companies enabling them to use the designs and systems of these other companies and that as a condition of the agreements CON MECH GROUP and its associated companies have undertaken to take all reasonable steps to safeguard the rights and technical knowledge of these companies.

It must be understood that in the course of your work with CON MECH GROUP and its associated companies you may acquire knowledge of the technical methods and new methods being developed by these companies or CON MECH GROUP and its associated companies themselves and that you might also obtain information on the design or use of equipment which may be subject to National Security Regulations.

It is therefore a condition of your employment that you will not divulge to any third party information which may prejudice the safeguarding of the industrial rights, designs and design methods, patents, copyrights and technical and commercial secrets of CON MECH GROUP and

its associated companies or the companies with whom they have made design agreements or which would in any way affect National Security.
In the course of your employment you will only divulge to clients or prospective clients of the Company such secret information as you are instructed by the Directors or Management of CON MECH GROUP and its associated companies.
These obligations continue after you leave the service of CON MECH GROUP for any reason whatsoever and no such information should be divulged without written permission of the Directors of CON MECH GROUP and its associated companies."

28. By letter dated 20 July 2018, with effect from 1 August 2018, Mr Herron was appointed as the production director of the Claimant. He reported directly to Mr Cotton. Mr Herron received some additional benefits as part of his remuneration package after being appointed as a director.

29. In 2007, Mr Cotton was appointed as sales and marketing director. By written agreement dated 13 August 2007, Mr Cotton was initially to complete a six month trial period and thereafter, the position would be confirmed as permanent. Mr Cotton's contract included additional terms to those which bound Mr Herron about confidential information and restrictive covenants as follows:

(1) Clause 14 Confidentiality
"14.1 The Executive is aware that in the course of employment under this Agreement, he will have access to and be entrusted with information in respect of the business and finances of the Company and its dealings, transactions and affairs and likewise in relation to its Associated Companies, all of which information is or may be confidential.
14.2 The Executive shall not (except in the proper course of his duties) during or after the period of his employment under the Agreement, use for his own purpose (or for any other purpose than those of the Company) or divulge to any person, corporation, company or other organisation whatsoever, any confidential information belonging to the Company, Associated Company and/or Subsidiary and relating to its or their affairs or dealings which may come to the Executive's knowledge during his employment and the Executive shall use his best endeavours to prevent the publication or disclosure of such information taking place. This restriction shall cease to apply to any information or knowledge, which may come into the public domain after the termination of the Executive's employment, other than as a result of unauthorised by the Executive or any third party (sic).
14.3 Confidential Information shall include (but shall not be limited to) the following:
(a) Any trade secret or secret manufacturing processes or any information concerning the business or finances or the Company or the services offered or provided by the Company or any Subsidiary or Associated Company including the names of any persons, companies or other

organisations to whom such services are provided, their requirements and the terms upon which the services are provided to them;
(b) The Company's marketing strategies and business plans or those of any Associated Company or any Subsidiary;
(c) Any information related to a proposed reorganisation, expansion, or contraction of the Company's activities (or those of any Associated Company or Subsidiary) including any such proposal which also involves the activities of any other Company organisation;
(d) Financial Information relating to the Companies or any Associated Company or Subsidiary (save to the extent that such information is included and (sic) published audited accounts);
(e) Details of employees of the Company or any other Associated Company or Subsidiary, the remuneration or any other benefits paid to them and their experience, skills and aptitudes;
(f) Any information, which you have been told is confidential, or which you might reasonably expect to be confidential.
14.4 All notes and memoranda and copies thereof of any trade secret or confidential information concerning the business of the Company and the Associated Company or any Subsidiary or any of its or their suppliers, Agents, distributors or customers that shall be acquired, received or made by the Executive during the course of his employment, shall be the property of the Company and shall be surrendered by the Executive to someone duly authorised in that behalf at the termination of his employment or at the request of the Board or Managing Director at any time during the course of his employment.
14.5 This clause shall be without prejudice to any other duty of confidentiality whether express or implied which is owed by the Executive to the Company. These obligations under his (sic) clause shall survive the termination of the Executive's employment under this Agreement.

(2) Clause 15 Termination of Employment
15.2 The Company may terminate the Executive's employment without notice if the Executive is found guilty of gross misconduct, negligence or gross incompetence or any misconduct in connection with or affecting the business of the Company or in the event of any breach or non observation by the Executive of any stipulations contained in this Agreement which is materially detrimental to the Company's interests…
(3) Clause 16 Non Solicitation
16.1 The Executive covenants with the Company that he will not for the period of 6 months after ceasing to be employed under this Agreement, without the prior written consent of the Board or the Managing Director, in connection with the carrying on of any business, similar to or in connection with the business of forging, fabrication or electrical engineering on his own, firm or company directly or indirectly:
16.2 Seek to procure orders from or do business with any person, firm or company who has at any time during the 12 months immediately preceding such cesser, done business with the Company or an Associated Company and with whom he had dealings, contact with or responsibility for during the course of his employment; or
16.3 Endeavour to entice away from the Company, any person who has at any time during the 12 months immediately preceding such cesser, been employed by the Company or any Associated Companies in the capacity of manager or supervisor and with whom the Executive had material contact or dealings with during the course of his employment…
(4) Clause 17 Non Competition

17.1 The Executive covenants the (sic) Company that he will not for a period of 6 months after ceasing to be employed under this Agreement… either alone or jointly with or as Manager, Agent, Consultant or employee of any person, firm or company directly or indirectly carry on or be engaged in any activity or business which shall be in competition with the business of the Company or any Group Company.
(5) Clause 28 Exclusivity of Service
28.1 You are required to devote your full time, attention and abilities to your duties during the working hours and to act in the best interests of the Company at all times. Accordingly, you must not without the written consent of the Board or Managing Director, undertake any employment or engagement whether paid or unpaid which might interfere with the performance of your duties or conflict with the interests of the Company.
28.2 It follows that you are required to notify the Board and/or Managing Director and/or Company Secretary of any employment or engagement which you intend to undertake whilst in the employment of the Company. The Board, Managing Director and/or Company Secretary will then notify you within 10 working days whether such employment or engagement is prohibited by paragraph 25.1 above.
(6) Clause 31 Electronic Communications
31.1 The Company's computers including laptops, are to be used solely for business purposes, subject to the following exceptions:
31.2 You make (sic) reasonable use of the Company's computer system for sending personal e-mails and Internet usage outside your normal working hours or during your lunch break."

30. Mr Cotton had been reporting to the then production director, Andrew Nelson, from June 2010. When Mr Nelson left the Claimant, Mr Cotton was appointed as the managing director of the M&E division with additional benefits with effect from 1 August 2018. From that date, Mr Cotton reported directly to Mr Dilley. As a managing director, Mr Cotton had access to all of the company's financial information and confidential information. It was at the same time that Mr Herron was appointed as production director and began to report directly to Mr Cotton.

31. Mr Dilley described the treadle business as the "jewel in the crown" of the Claimant's business and was central to the profitability of the company. Mr Herron made a number of technical visits to the manufacturers Idemia over the years and Mr Cotton was in charge of the electrical contracts including the contract with Idemia.

32. Mr Cotton visited Idemia in September 2019 in France. On his return, Mr Dilley said that Mr Cotton told him that Idemia were going to increase their prices by around 20%. Mr Dilley was very concerned about this as the agreement with Network Rail only allowed for increases in line with the consumer price index. Mr Cotton advised Mr Dilley that the company should give notice to end the agreement with Network Rail or there would be a 20% price increase from

Idemia and only a modest increase in income from Network Rail which would significantly erode the profit margin on treadle sales. Mr Cotton suggested that if the Network Rail framework agreement were terminated, the full price of the treadle could be passed onto the customer and margins maintained. Mr Dilley said he knew this would upset Network Rail but the company was still the only distributor for treadles in the UK. At no time during this conversation did Mr Cotton say that Idemia was selling their treadle business. Based on what Mr Cotton had said to him, Mr Dilley terminated the agreement with Network Rail. Prices were then increased by SNIC SAS in December 2019 with effect from 1 January 2020.

33. On 2 October 2019, Mr Cotton sent Mr Dilley an email, forwarding an email dated 30 September 2019 from his contact at Idemia, Sylvain Charollais, which email indicated that the railway activity of the business which included the manufacture and supply of treadles was to be sold. Before Mr Cotton forwarded the email, he deleted from it the identity of the buyer of Idemia's business by deleting the words "called SNIC". Mr Dilley asked Mr Cotton whether the company should rescind the notice sent a few days earlier to Network Rail terminating the agreement. Mr Cotton stated he would speak with Network Rail but did not report back to Mr Dilley on this point and the notice was not rescinded.

34. Thereafter, Mr Cotton and Mr Herron met with Mr Dilley in October 2019 (at a time Mr Dilley still did not know who the treadle business was being sold to) in order to discuss what to do if the new company would not supply the Claimant with treadles. It was decided to purchase a number of treadles without order in order to keep them to sell at a later date as an insurance policy. Both Mr Cotton and Mr Herron appeared hesitant to agree to this to Mr Dilley but did not give any coherent reason why. He decided to purchase additional treadles and that was done.

35. On 5 November 2019, Mr Cotton received an email with a letter dated 4 November from Xavier Payet as Chief Executive Officer of SNIC SAS stating that they were taking over the manufacture of treadles and that the Claimant company could only place orders up to the end of April 2020. After that date, no further orders would be accepted. Any treadles ordered would be delivered by September 2020.

36. By November 2019, both Mr Cotton and Mr Herron had met with Mr Payet and both had been offered jobs dealing with treadles for SNIC UK. Neither Mr Cotton nor Mr Herron

mentioned this to Mr Dilley as Mr Dilley started to try to enter into negotiations with Mr Payet. Mr Dilley made various attempts to introduce himself to Mr Payet and eventually managed to have a meeting with him on 5 March 2020 (with the Claimant's sales director Mike Wilson) at Charles de Gaulle airport in Paris. Mr Dilley described the meeting as polite but vague and noncommittal from Mr Payet's end. Mr Dilley expressed the view that had he been aware about SNIC SAS purchasing the rights to manufacture treadles before Mr Cotton and Mr Herron themselves had job offers from SNIC UK, the Claimant would have had an excellent opportunity to set up a joint venture with SNIC SAS as the Claimant would not have terminated the framework agreement with Network Rail and there would have been other opportunities bringing advantage to both the company and SNIC SAS.

37. By letter dated 2 December 2019, Mr Cotton handed Mr Dilley a written resignation letter. Shortly afterwards he stated that he was going to work for a development company and build some houses on a site which he had acquired in Pudsey through his company CC UK Developments Limited. Mr Dilley observed that under his employment contract, Mr Cotton should have requested permission to be involved in other business activities and he had not asked for such permission. Mr Cotton did not disagree but said the company had not done much. He made no mention of meetings or possible employment by SNIC UK and Mr Dilley had no idea that he was going to work for a company which was going to deal with treadles and which he viewed as a direct competitor. It was agreed initially that Mr Cotton would leave after three months instead of the six months required by his contract. Mr Dilley had formed the view that as Mr Cotton was not working properly anyway, the company may as well save some money. Had he known Mr Cotton was going to work for a competitor, Mr Dilley would have put Mr Cotton on gardening leave for the full six months.

38. There was a board meeting on 18 December 2019, at which both Mr Cotton and Mr Herron were present, and again they made no mention of what was happening with SNIC UK. This was despite the fact that in giving the M & E report, the "treadle situation regarding SNIC was discussed. M & E Management were asked to update us but they gave us no further news".

39. After that meeting, the company's IT manager came to see Mr Dilley stating that he had been doing checks on company computers and had found a number of documents on Mr Cotton's company computer about which he thought Mr Dilley should be aware. He stated that

the email account of Mr Cotton had been left open. He had not used any password to access it and he showed Mr Dilley a number of screenshots which appeared to indicate that Mr Cotton had been involved in setting up SNIC UK and that there was a profit-sharing agreement which existed between SNIC SAS, Mr Cotton and Mr Herron.

40. The documents discovered included a profit-sharing agreement between Mr Cotton, Mr Herron and SNIC SAS relating to the profits of the recently established SNIC UK, email correspondence with a surveyor which appeared to be relating to SNIC UK's new premises, a receipt from Companies House regarding the incorporation of SNIC UK, an email to a web designer concerning the website for SNIC UK, an email which attached a spreadsheet of all of the treadle sales prices which Mr Cotton sent to himself, and an employment contract between Mr Herron and SNIC UK.

41. After discovering these documents on Mr Cotton's computer, Mr Dilley spoke with Mr Herron to ask if there was anything which could be done to keep him employed with the Claimant company. Mr Herron said that he had not made his mind up yet and Mr Dilley understood that Mr Herron had not spoken with SNIC SAS except over the phone.

42. By letter dated 23 December 2019, Mr Cotton was suspended pending an investigation into alleged gross misconduct and asked to come back on Thursday, 2 January 2020 to return his laptop and mobile phone. Personal service of the letter was attempted (as well as the letter being sent by email) given the situation. The process server had difficulties locating Mr Cotton as he had left the address he had given to the Claimant company (and which address he had used when handing in his resignation letter) five years earlier. The letter included a specific warning to Mr Cotton that he must not "use and/or access" his laptop or mobile phone and he was warned that a breach of the instruction would be considered a serious breach of management instructions and in itself may constitute gross misconduct. He was required to attend an investigatory meeting on 6 January 2020.

43. When Mr Cotton returned the laptop, he had had the hard disk of the laptop professionally wiped. When the IT manager looked at the laptop, he could tell that the hard drive had been wiped on 24 December 2019, that is the day after Mr Cotton received the email

suspending him from the company. He returned the mobile phone but had destroyed the Sim card.

44. The initial investigation meeting took place on 6 January 2020. That meeting was followed by a disciplinary hearing on 16 January 2020. At the end of the disciplinary hearing, Mr Cotton was dismissed for gross misconduct. As well as Mr Cotton, Mr Dilley was present at the investigation meeting along with an HR representative, Keith Gibson and Wendy Mallett who was a notetaker. Mr Cotton was asked if he was happy to continue by himself and he said he was. During the meeting, Mr Cotton stated that he had done no work for either CC UK Developments Ltd nor for SNIC UK during the last six months. Mr Cotton accepted that being a director of CC UK Developments Ltd meant that he was in breach of contract. He accepted that he had given an old address. He maintained that he had been speaking with Mr Payet of SNIC SAS on behalf of the Claimant company. However, he said Mr Payet was not interested in speaking with Mr Dilley at all. Mr Cotton accepted that he had met Mr Payet in London on 11 October 2019 but he did not think he should have told Mr Dilley about it. Indeed, he stated that Mr Payet had asked him not to say anything about the meeting. He had also spoken to Mr Payet about a week before that meeting.

45. Mr Cotton did not accept that he had any involvement in setting up SNIC UK. He stated that he would be joining them in September 2020. This was despite the fact Mr Cotton's solicitor had stated in correspondence that he would be starting on 1 May 2020. He was asked about the shareholding held by Rubicon. Mr Cotton stated that SNIC's accountants had placed the shares into Rubicon and he would not hold any shares until September 2020. Mr Cotton denied knowing the director of Rubicon, Christopher Brown. He continued to deny knowing Mr Brown and when asked if Mr Brown's contact details were in Mr Cotton's contact list on his company phone, Mr Cotton said he wasn't. When presented with a printout to show that Mr Brown was on those contacts, Mr Cotton said he had over 4000 contacts but he could not remember if he had spoken to Mr Brown. Mr Cotton said he first told Mr Herron that he (Mr Cotton) was going to be employed by SNIC UK in the last week of October. Mr Cotton said that Mr Herron had told him at the same time that he too was going to be employed by SNIC UK.

46. Mr Cotton accepted that he had been asked to look at premises but all he had done was forwarded some information. He stated he had signed a contract with SNIC UK on 2 December

2019 after he resigned. Mr Cotton sought to justify not telling Mr Dilley about what was happening because he was not going directly to SNIC UK but only in September 2020. Mr Cotton accepted that he had wiped the company laptop before returning it. He stated that it had some pictures of his partner and he decided to delete it because he asserted Mr Dilley had hacked into it. He asserted that he had started the process of wiping the computer before he had received the suspension letter. Mr Cotton accepted sending himself a copy of Mr Herron's contract with SNIC UK and a copy of the treadle comparison prices by email. After the hearing on 16 January 2020, Mr Cotton was dismissed for gross misconduct.

47. After the meeting, Mr Cotton accepted that he did in fact know Mr Brown having been introduced through a friend. However, he asserted it was years ago and he had never used Mr Brown's services.

48. On 2 January 2020, Mr Herron handed in his notice. When asked whether he had committed to working for SNIC UK before handing in his notice, Mr Herron stated that he had been given an employment contract to sign dated January 2020. Mr Herron never mentioned having a treadle gauge engraved in French. Mr Dilley did not ask him about it because he was unaware of that at the time[1].

49. On 12 March 2020, it became apparent that an order from Babcock's for which the Claimant company had quoted, worth approximately £200,000, was not going to be given to the Claimant. On investigating that with Mr Jim Christie (who was the procurement and performance lead at Babcock's) Mr Dilley was told that SNIC SAS had informed Babcock that it was the sole supplier in the UK for treadles from 30 April 2020. This was untrue because the Claimant company was able to order treadles from SNIC SAS until 30 April 2020 and therefore could supply stocks which they had bought after that date to third parties.

50. In cross-examination, Mr Dilley accepted that he did not have a signed contract with Idemia. Mr Dilley was asked about the termination of the framework agreement with Network Rail. The framework agreement was terminated by letter dated 27 September 2019 with effect from 10 October 2019. When it was suggested that Mr Cotton and Mr Herron did not have any

[1] For the significance of the French wording engraving, see the evidence of Mr Dodds below.

contact with SNIC SAS before that date, Mr Dilley stated that there was a lot of indirect evidence that they might well have done, although he did not personally know whether they did or not. He maintained he was never happy with the decision to terminate the agreement with Network Rail, but it was the best thing at the time because the prices were going up by 20%. Mr Dilley accepted that the email sent by Idemia dated 30 September 2019 to Mr Cotton stating that Idemia had decided to sell the business was forwarded to him. However, he demonstrated that Mr Cotton had removed the identity of the purchasing company from the forwarded email in which Idemia had told Mr Cotton that they were selling to SNIC.

51. In his email dated 2 October 2019, forwarding the Idemia email, Mr Cotton said that he had asked Sylvain Charollais if he could facilitate a meeting with the purchaser and that Mr Charollais had stated that the purchasers do not want to meet us. Mr Cotton then told Mr Dilley that "I think the treadle business may be under threat". Mr Dilley stated that he had told Mr Cotton that he wanted to be at a meeting with the purchaser as soon as possible. Mr Dilley accepted that Mr Payet had written a letter to the company dated 4 November 2019 and forwarded under an email of 5 November 2019 stating that as part of the commercial strategy, SNIC SAS intended to market the treadles directly to end-users and were offering a transition period of six months so orders can be placed until 30 April 2020 and delivery would take place before 30 September 2020.

52. Mr Dilley accepted that he had not responded to that letter in terms of either accepting or refusing it but rather he had tried to get a meeting with Mr Payet to discuss it. That meeting did not take place until March 2020. Mr Dilley accepted that he had bought 150 treadles so that he could supply them after the transition period. When it was suggested that the Claimant company did not have any prospect of dissuading SNIC SAS from their decision, Mr Dilley accepted that that was probably the position in the long term but he thought he might be able to extend the period of change over or put them off changing the situation for a few years. Mr Dilley remained of the view that the position would have been different had he known what was happening in early October rather than November after SNIC SAS had made offers of employment to both Mr Cotton and Mr Herron.

53. Although the cancellation of the Network Rail framework agreement was done in September 2019, Mr Dilley did not accept that October 2019 was the first contact made between

Mr Cotton and Mr Herron and SNIC. He accepted that was the first occasion which Mr Cotton and Mr Herron had admitted to. Mr Dilley asserted that the Claimant company was in a very difficult position in terms of knowing exactly what had happened because Mr Cotton had destroyed all of the evidence on his computer. Mr Dilley accepted that SNIC SAS had stated that it did not want an independent distributor. However, Mr Dilley felt that the joint venture might well have been good enough for SNIC SAS for a few years, given the Claimant's expertise in the UK market and their electrical repair shop and the fact that they had a lot of people with good knowledge about treadles.

54. Mr Dilley accepted that the profits previously made by the Claimant company would go down and he suspected they would go down by half. Mr Dilley accepted that he could have threatened Mr Cotton with injunctive proceedings to prevent him from working for a competitor. He also accepted that could potentially have been used in discussions with Mr Payet in trying to establish a joint venture. That being said, Mr Dilley stated that if you wanted a long-term relationship with somebody, you would not start off by threatening them.

55. As to the reasons which Mr Cotton gave for leaving his employment with the Claimant, Mr Dilley was adamant that Mr Cotton had told him why he was leaving and the reason given was that he was going to go and run his own construction company and save £50,000 by not having a project manager. Mr Dilley also accepted that in Mr Cotton's solicitor's letter dated 31 December 2019 (in response to the letter of suspension dated 23 December 2012) the solicitor had set out in some detail what happened at the meeting on 11 October 2019 and that it was asserted that SNIC SAS did not intend to work in the future with the Claimant company. Despite that, Mr Dilley maintained that had he been aware of what was happening at the time, he may well have been able to do something about that and persuade Mr Payet that it was in the best interests of SNIC SAS to work with the Claimant company, at least for a period of time.

56. Mr Dilley did not accept that the investigation process carried out by the Claimant company was done simply to humiliate Mr Cotton. Mr Dilley set out a number of things which Mr Cotton appeared to have done which were improper including wiping the hard drive of his computer and Sim card and apparently working for SNIC SAS/UK before handing his notice in. Mr Dilley accepted that up to 30 April 2020, any orders were dealt with by SNIC SAS in France because SNIC UK did not have any premises in the UK.

57. Mr Dilley accepted that by letter dated 1 May 2020, SNIC SAS had instructed the Claimant company to remove the treadle products from the Claimant company's literature and website and to return all technical and operational material, manuals, test procedures etc. Mr Dilley also accepted that the Claimant company had refused to do that until the stock which they had purchased had been sold. Mr Dilley stated it was basic common sense that any company would purchase stock to be able to continue selling for a period of time. Mr Dilley accepted that the fact the Claimant company had continued to sell treadles had led to an intellectual property dispute between the Claimant company and SNIC SAS. Mr Dilley felt that it was dishonest to assert or imply to Babcock and Network Rail that the Claimant company were not permitted to sell the treadles which they had in stock. Mr Dilley referred to an email dated 12 March 2020 from Mr Burdon who had spoken to Babcock. Someone at Babcock had informed Mr Burdon that SNIC UK had contacted Babcock directly and informed Babcock that the Claimant was no longer the UK agent and would not be able to supply the product. They were also given a lower undisclosed price and a shorter three month lead time. A later conversation between Mr Burdon and Jim Christie from Babcock took place where Babcock were concerned that they had been misled by SNIC UK as to the position before the order was placed. The order had only been placed by Babcock after "some effort" getting information because SNIC UK was a new company with no credit history, guarantees etc. and because Babcock understood that the Claimant could not supply the order any longer.

Derek Neil

58. Mr Neil had joined the Claimant company in approximately 1990. He joined as a systems accountant and was appointed as the group finance director in 2000. He described that the Claimant company had two divisions, forging and the M & E division. The profit and loss accounts in the business were divided into four areas being forge, M & E, merchanted goods (including treadles) and the test house. Mr Neil described the structure in relation to the treadle business and described that in essence, Mr Cotton and Mr Herron were left to run it themselves.

59. Mr Neil produced a treadle sales and profitability document. Because treadles were purchased and brought into a pool of stock and then sold from the pool, it was not possible to know the exact purchase price of each individual item. This was because purchase cost changed frequently with the sterling to euro exchange rate, so average cost prices were therefore used. In

2020, the customer pricing structure was changed to be a standard price per customer and the customer pricing was split into three different tiers. There were therefore different margins depending upon the customer. Between 4 November 2019 and 30 April 2020, Mr Neil calculated a gross profit for treadle sales of £346,700.00.

60. Mr Neil explained that details of the profitability figures were not shared with the French manufacturers. However, Mr Cotton and Mr Herron were very aware of the profitability of the treadle business and the fact that treadle sales had been critical for many years to the fortunes of the Claimant company.

61. Mr Neil was the director responsible for conducting Mr Cotton's disciplinary hearing. Mr Neil shared Mr Dilley's belief that had Mr Cotton and Mr Herron disclosed the approach from Mr Payet at the time it occurred, the Claimant company had a good chance of reaching a joint venture agreement.

62. In cross-examination, Mr Neil agreed that most treadles were purchased to order and that the free stock was generally very limited. After 30 April 2020, Mr Neil was aware that orders for treadles had been taken but not from Network Rail. Mr Neil accepted that he had not spoken to Mr Payet himself and had not seen any of the correspondence between the Claimant company and Mr Payet. He was aware of it because of conversations with Mr Dilley and others, but probably mainly from Mr Cotton.

Gillian Cartwright

63. Ms Cartwright was employed in the M & E administration team as an administrator from 22 January 2018 and as the team leader from 1 April 2019. She reported to Mr Cotton. She would send quotations for treadle sales but she did not deal with pricing. She also placed orders for treadles with the French manufacturers, although the decision on how many treadles to purchase was made by senior management and sometimes dictated by minimum order quantities by the supplier.

64. Network Rail accounted for the majority of sales but other contractors did purchase from the Claimant company including Babcock. Her relationship with Babcock was that they would email or occasionally telephone call to request a quotation. On 20 June 2019, Suzanne Wise of

Babcock contacted her by email asking for her best cost and lead time for 100 treadles to be delivered to Northern Ireland. She referred the order to Mr Cotton by email and copied in Mr Herron. They agreed the price and she was instructed to respond to Suzanne Wise which she did by email dated 24 June. Babcock then asked for a price reduction and she referred the matter to Mr Cotton.

65. On Mr Cotton's instructions, the price of each treadle was confirmed as £1,480 and the price of each treadle base as £428.90. Nothing further was heard from Babcock in response to the quotation until Suzanne Wise sent an email on 24 October 2019 confirming that Babcock intended to place the order and requesting an up-to-date quote with a validity of 60 days. Ms Cartwright referred this to Mr Cotton by email and copied in Mr Herron. Four days later, on Mr Cotton's instruction, Ms Cartwright confirmed that the price of each treadle had increased to £1,535.41 and the price of each base would be the same at £428.90. The lead time for the products would be 26 working weeks from receipt of order.

66. Nothing further was heard from Babcock until 2 December 2019 when Adrian McKenna from Babcock emailed Mr Burdon seeking a quotation for 102 treadles and brackets. On instruction from Mr Burdon and Mr Cotton, Ms Cartwright emailed the quotation for those products that day, copying in Mr Burdon, Mr Cotton and Mr Herron.

67. In cross-examination, Ms Cartwright accepted that had the Babcock order been placed with the Claimant company in 2019 or 2020, that order for treadles would have been much larger than any of the other individual orders, as could be seen from the sales breakdowns between 2017 and 2019. In addition, Ms Cartwright was aware of the Claimant accepting orders for treadles after 30 April 2020 but she thought it would have been a small number. Ms Cartwright also accepted that it would be easy at any given day to know how many of each individual treadle was in stock. Ms Cartwright recalled ordering 150 treadles for stock after SNIC SAS became the manufacturer. They were delivered five or six months later.

68. In relation to the Babcock quote, Ms Cartwright said that it was normal for her not to hear anything in response from a quote given on 28 October until 2 December because she did not follow up quotes. That was done by either Mr Cotton or Mr Burdon. Her job was administrative.

Mark Burdon

69. Mr Burdon was employed by the Claimant company as a national sales manager. He worked with Mr Herron and reported directly to Mr Cotton. Within the sales team was also Gillian Cartwright who dealt with enquiries about merchantable goods including treadles. The majority of the sales were to Network Rail but other large contractors including Babcock purchased from the Claimant company. Mr Burdon described that sales of treadles were driven by whatever railway projects were underway at the time.

70. The team would not call clients speculatively asking for orders but they would keep tabs on their contacts at firms such as Babcock. If those firms wanted to buy treadles, they would usually email Gillian Cartwright and asked for a quote. Contractors such as Babcock would not normally advertise or go out to the market because there was not an equivalent product that they could source.

71. The procurement team at Babcock dealing with treadles was Adrian McKenna, a project engineer, and Suzanne Wise who sought quotes and placed orders. Jim Christie was Suzanne's manager. Those were the individuals who might know what treadle orders were being placed or were coming up. If a significant order came in from Network Rail or another source, Ms Cartwright would refer that up to Mr Cotton and copying Mr Herron and Mr Burdon. Those orders were then discussed between Mr Burdon and Mr Cotton.

72. The request for a quote from Babcock in July 2019 was a talking point between Mr Burdon and Mr Cotton because it was such a large order. Usually, a typical order for treadles might be possibly half a dozen treadles or bases so this potential order was significant. Mr Burdon described hearing nothing further after Mr Cotton had sent the quotation on 28 October until 2 December 2019 when Mr McKenna requested that the October quotation be re-validated. Mr Burdon telephoned Adrian McKenna on 12 March 2020 about another project and mentioned the order for 102 treadles. Mr McKenna informed Mr Burdon that they had placed their order direct with the manufacturer in France. Mr Burdon was told that Babcock had been contacted directly by the manufacturer who informed Babcock that the Claimant company were no longer the UK agents and would therefore not be able to supply the product.

73. Mr McKenna informed Mr Burdon that the price was lower and there was a shorter lead time of three months. He also said that there may be an issue with product acceptance as the manufacturer had not been able to provide it so far. Mr McKenna did not say that he had been called directly by the manufacturer asking for details of the project and what treadles might be needed and when. Mr Burdon felt that if such a call had been received by Mr McKenna, Mr McKenna would have mentioned that fact to him.

74. Following that conversation, Mr Burdon sent an email to Mr Dilley copying in various others expressing concern about the manufacturer having approached Babcock directly. He also queried how the manufacturer had the exact details to be able to quote for the order. Mr Burdon later spoke to Suzanne Wise. She mentioned that Mr McKenna had called her and was worried he had overstepped the mark in giving information about the quotes that they had received directly from the manufacturer. She was more relaxed about the situation and said that she had received an unsolicited email from SNIC SAS on 27 October 2019 offering to supply treadles for the Northern Ireland project. She was quite surprised because they knew all the details including the quantities required. It was clear that the manufacturer had not spoken to her before submitting the quote. As they were not on her approved buyers list, Suzanne Wise did not want to proceed. However, she described that SNIC SAS pursued her quite aggressively and Babcock were told that there was no alternative but to order with them as the Claimant company would no longer be able to supply the goods. An account was then set up and the order placed.

75. Thereafter, Mr Burdon spoke with Jim Christie who rang him to express concern that Babcock may have been misled by SNIC SAS. There was concern because SNIC UK was a new company with no credit history and therefore guarantees were required by Babcock from SNIC UK’s parent company, SNIC SAS.

76. At the end of June or early July 2020, Mr Burdon decided to try to research on the internet to see if he could find information to identify the precise number of treadles that Babcock would require for the next stage of their project. Having done that research, Mr Burdon stated that he felt it would be a huge jump for someone to go from finding an article (which mentioned completion of an upgrade and mentioned Translink) through to contacting Babcock. You would have to assume that treadles were being used in the project.

77. From his experience, Mr Burdon thought that two or possibly three and at the absolute most four people at Babcock would know the exact number of treadles required for a particular project and the number of bases and when the treadles were likely to be needed. From conversations he had had with Suzanne Wise, Adrian McKenna and Jim Christie, Mr Burdon did not have the impression that any of them had given the information needed to enable SNIC SAS to quote accurately for the order. Cold calling a large organisation like Babcock and finding the right person to speak to he felt would be "unbelievably lucky". He described that in his experience, getting through to the person you wish to speak to at Babcock even when you knew their name was not easy.

78. In cross-examination, Mr Burdon was asked about how he would keep tabs on his contacts such as Babcock. Mr Burdon described that ordinarily it would be through phone calls or emails or possibly letters or by visiting physically. He had visited Babcock on several occasions. When there, he would ask about work that was in the pipeline and about any existing quotations or anything that may be due to be priced. He also described that he had gone through the exercise of trying to work out from published materials on the internet or trade press what was likely to be coming up. Mr Burdon accepted that a large capital investment would carry interest in the trade press. He accepted that generally speaking, a contractor doing the work would be announced once the work had been awarded. However, the nature of the work that they would be doing would normally be generally described rather than being in more detail.

79. Mr Burdon described that having got hold of some of this information, if you wanted to speak to somebody at the contractor doing that work, it could be very difficult getting hold of the correct person or project team.

80. Mr Burdon agreed that when he had spoken to Mr McKenna in December, he had not asked if there was a competitor for the order. The reason for this was that at that stage, there was no reason to suspect that there was a competitor. Mr Burdon was sure that Mr McKenna had told him that the manufacturer had contacted Babcock directly and informed them that the Claimant was no longer an agent and not able to supply the product. In talking about the manufacturer, Mr Burdon assumed he was talking about the manufacturer in France. Mr Burdon was aware that SNIC SAS had purchased the right to manufacture treadles from October 2019. Mr Burdon acknowledged that Mr McKenna had not stated that he had been in contact with anybody in

England. Mr Burdon had not chased the order between December 2019 and March 2020 because it was not unusual in the railway industry for it to take months or even years for a purchase order to be raised.

81. Mr Burdon was questioned about his research and why it would be a huge jump to identify Babcock. Mr Burdon stated that he could find no mention of Babcock at all nor of treadles. He stated you would have to know what the project was doing to know that treadles would be involved in any particular upgrade. Treadles were not required in all signalling projects.

Michael Dodds

82. Mr Dodds was employed as an artwork team leader and his role included applying vinyl lettering, spray painting as well as engraving. Based on a date that the file was last saved on the system, Mr Dodds believed it was 20 November 2019 that he was instructed by Alan Herron to make four stainless steel heads required for a treadle gauge. However, he wanted the wording on the treadle gauge engraving in French.

83. Mr Dodds could not remember if Mr Herron also instructed him to remove the Claimant's logo which he would usually engrave on the heads. Mr Dodds was provided with the drawings to execute by Mr Herron and those drawings had been annotated by Mr Herron. Mr Dodds did not recall ever being asked to engrave in French before, nor in any other language other than English. Mr Dodds understood that Mr Sewell was then instructed to build the treadle gauges. Mr Dodds did not see the finished product. Mr Dodds did not know what happened to the gauge. He assumed that Mr Herron must have taken it because despite a careful search, the gauge could not be found at the factory and Mr Dodd could not think what else could have happened to it. It would not have been thrown away.

84. In cross-examination, Mr Dodds stated that he was not aware of Mr Herron arranging for a treadle gauge with French lettering in 2018. He was asked in some detail about the search conducted for the missing treadle gauge engraved in French. Mr Dodds thought everywhere in the factory had been searched. He personally searched in the artwork department, the electrical project stores, the electrical projects shop floor where a lot of them are kept under the archives. He was not sure if it could have been used as a spare part for an alteration to a treadle gauge sold

by the Claimant company in 2020. However, if anything was thrown away, that was a decision made by upper management.

Andrew Sewell

85. Mr Sewell was employed as a supervisor for electrical projects and before that as a team leader in the same department. His role included organising the shop floor and building treadle gauges. In late November 2019, he was instructed by Mr Herron to build a specific treadle gauge. Michael Dodds had already done the engraving and the engraving was in French. Mr Sewell then built the treadle gauge.

86. Because the treadles were manufactured in France, he and Mr Dodds joked about building a gauge to be used in France as being like selling coals to Newcastle. There was no customer order for this treadle gauge so when additional parts were needed to build it, Mr Sewell referenced the parts as unplanned issues on the system. Those parts were taken from the store on 20 November 2019.

87. Mr Sewell did not recall specifically what he did with the treadle gauge but thought he probably left it in Mr Herron's office. Mr Sewell was asked specifically about Mr Herron's statement when Mr Herron stated that the treadle gauge was placed on a shelf in the treadle area. Mr Sewell did not recall it being put on the shelf. He thought that either Mr Herron had picked it up when walking past or that he had put the treadle gauge on Mr Herron's desk. Treadle gauges were not generally placed on a shelf in the treadle area. When they were made for an order, there was a dedicated trolley with all the parts on it and it was made in that area. The treadle gauges then stayed in that area until they were shipped to customers.

88. Mr Herron went on holiday shortly after the French engraving was done on a treadle gauge. Mr Sewell said he had a vague recollection that Mr Herron was going on holiday to France. After the gauge was built, it was never mentioned to him again by Mr Herron and he never saw it again. Like Mr Dodds, Mr Sewell assumed that Mr Herron had taken the gauge because he had been involved in the careful search for it around the factory. Mr Sewell described that we "looked literally everywhere". He also described that very little was thrown away at the Claimant company. It is not an easy thing to lose because the gauge is over 4 feet wide, has a white nylon tube and on one end is a black rod and the white tube is covered in orange vinyl.

89. Mr Sewell was also asked about Mr Herron's evidence when he said that there were a lot of gauges to make up in November and December 2019 and that there were not enough components to complete those orders. Mr Sewell said that that was not his recollection. He had checked and only two gauges were made to order in November and two in December 2019. Sufficient parts were in stock to complete those orders.

90. In cross-examination, Mr Sewell also stated that he did not recall Mr Herron having a treadle gauge made up with French markings in 2018. He would have been a party to it being made up but he did not recall it. Mr Sewell was also asked about the extent of the search for the missing treadle gauge. Mr Sewell described looking all over the factory, in the stores, in the archives, in all of the meeting rooms, in Mr Herron's old office, he generally looked around the factory including in places where it should never have been such as the forge area or the fabrication department but he looked there anyway. He accepted that he did not search every nook and cranny but he said he had searched every area of the factory.

Steven Cotton

91. In his witness statement, Mr Cotton set out that he joined the Claimant company in 2007. He soon became involved in the treadle side of the business. At the time, the director in charge of treadles would not leave his office to travel for work. Because the treadles were manufactured in France, it was necessary to go to France and Mr Cotton would go periodically with the managing director. Initially, a company called Sagem manufactured the treadles. They then sold to a company called Morpho.

92. Morpho initially manufactured the treadles themselves but then sold the factory that made the treadles to a different company whilst retaining the intellectual property and rights to the treadles. During this time, Mr Cotton, Mr Herron, the production manager and Andrew Nelson, the managing director at the time met with Morpho as the Claimant company was trying to agree a binding distribution agreement. At that stage, the Claimant company had nothing in writing with Morpho about the treadles.

93. In 2013, Idemia bought Morpho. The Claimant company was still importing the treadles, now from Idemia. Alan Puddick, a director of the Claimant company, wrote a distribution

agreement for a period of five years beginning September 2013. Idemia were not happy with the proposed agreement and so did not sign it. The draft agreement did not progress any further.

94. In September 2019, Mr Cotton went over to Idemia as he did each year. Normally, someone else would go with Mr Cotton to France but that did not happen on this occasion. He met with Sylvain Charollais. Mr Charollais told Mr Cotton that Idemia had sold off the rail product business to a new company. Mr Cotton stated he thought it would be like it had been before with previous sales. Mr Charollais said that they were no longer going to be dealing with treadles at all because it did not fit with their business model. Mr Cotton asked who the new company was, but was told that because it was still going through legal and the contract had not been finalised, Mr Charollais was not able to tell Mr Cotton who the buyer was. He said it would be completed by the end of October 2019 and that the UK position had been discussed with new owners and they would be in touch with the Claimant company.

95. No one from Idemia was being transferred across as part of the sale so Mr Cotton did not have a contact any longer. On behalf of the Claimant company therefore he asked if there could be a meeting with the new buyer. Mr Cotton stated that towards the end of September 2019, Mr Charollais told him that the company which had bought the treadles was "rail industries". He stated he googled rail industries but could not find anything on them.

96. Mr Cotton described that the Claimant company was not doing anything in relation to selling treadles: "There was no active selling – we just waited for people to send in an enquiry". The Claimant company had network approval with Network Rail and so the treadles had to come from the Claimant company. Only one supplier could have approval and that supplier was the Claimant company. He described that most of the Claimant's turnover from the sales of treadles was Network Rail and the remaining sales were to heritage railways. The profit margins were about 45%. There was a delay of about six months whenever treadles were ordered for a specific job.

97. On 4 October 2019, Mr Cotton said he received a telephone call from Mr Charollais saying that the purchasers wanted to meet him in London. Mr Cotton said he was told on that date that the purchasers did not want to publicise the meeting but did want to talk to him. He said he was in London on 11 October if that was any use. On 11 October 2019, Mr Cotton met Mr

Charollais, Mr Payet and Mr Menudier at St Pancras station. Mr Cotton learned that the purchaser was SNIC SAS.

98. Mr Cotton stated he asked at this meeting whether it was their intention to continue using the Claimant company as the UK distributor. He was told it was not. SNIC SAS were taking everything in-house from the manufacture of treadles to selling and supply. Using the Claimant did not meet their business model and it did not make sense for the selling activities and selling prices to be outside their control. They have also had some new products they wished to market in the UK and some existing products which were being sold through a wholesaler (Unipart Rail) which they had bought a couple of years earlier. They confirmed they were taking legal advice about how to notify the Claimant company. Mr Cotton says he was told that they were doing him a favour by telling him but he was to keep it to himself until they had things in place.

99. One of the new products which SNIC SAS bought from Idemia was an electric replacement to a treadle which was already being marketed in Europe. The new product could also tell the speed of the train when it passed in addition to the features already available on the treadle, namely that a train had passed and in which direction. Mr Cotton said he observed during the meeting that if that was the position, the Claimant company would not be able to sell treadles as they would become obsolete in any event.

100. Mr Cotton said he was also told that SNIC SAS were going to set up a UK subsidiary to sell products but they also wanted to manufacture products too. They said there was no market feedback from the Claimant company, no sales reports, no sales activity and it was a black hole. They knew the Claimant company was making a decent profit but not doing anything for it. During the meeting, Mr Payet and Mr Menudier asked if Mr Cotton would like to be their sales and marketing manager for the UK operation. They wanted him to join them, they would give him a good package, pay him what he earnt with the Claimant company, give him shares and they would look after him.

101. Mr Cotton said he told them he needed to think about it because he described himself as being very loyal to the Claimant company having been there 13 years with no plans to move. He says he explained he was on a service agreement and could do nothing for six months after resigning that would be in competition with the Claimant company. He was asked to send a copy

of the agreement to SNIC SAS's solicitors in London. Mr Cotton described thinking that it would be a risk for him to leave the Claimant company to go to a company with no assets or value. He said it did not sound real and sounded too good to be true.

102. Mr Cotton stated that after this meeting, he had a discussion with Mr Dilley and explained that he thought the new buyers were going to "do their own thing" and he had a feeling that they were not going to use the Claimant company when the sale went through. On 15 October 2019, four days after the initial meeting, Mr Payet telephoned Mr Cotton and outlined the offer. That was a salary match of £78,000. Mr Cotton would get 40% of the shares in the UK subsidiary. Mr Cotton said that was problematic. Mr Payet did not think it would be because SNIC SAS were going to give the Claimant company six months' notice so he did not think the restrictive covenant in the service agreement would be a problem as there would be no competition. Mr Payet wanted Mr Cotton to resign immediately so that everything would be in place at the end of the six-month period. Mr Cotton felt a little unsure. He did not tell the Claimant company about it at the time because he said he would have been sacked and he wanted to have all his plans in place before he told the Claimant company formally.

103. It was during this telephone call that Mr Cotton told Mr Payet that he knew of an accountant that could form the company for SNIC SAS and to ask about how to deal with Mr Cotton's shareholding until the expiry of his covenants. Mr Cotton says that he rang Christopher Brown to ask how matters could be dealt with. Mr Brown stated that he had a shelf company which he had had for years called Rubicon Consultants Limited. Mr Brown offered Mr Cotton the use of this company. Mr Cotton stated that he only needed to keep the shares under the radar for six months and Mr Brown said that was fine we could do it that way.

104. It was then discovered that the voting rights on the shares needed to be dealt with. A power of attorney was put in place. That was one of the emails which Mr Cotton described as being "hacked" from his personal email address on his work computer by the Claimant company. It was around the same time that Mr Payet asked Mr Cotton if he knew anyone who could do some research for SNIC SAS into the market. Mr Cotton said he had a guy to help and passed on the details of his girlfriend's son, Ethan Heanue. Mr Cotton said he telephoned Ethan to say that two French guys wanted him to do some research. That conversation was the end of Mr Cotton's involvement with Mr Heanue's work for SNIC SAS.

105. Around the end of October 2019, Mr Cotton says he became aware that Mr Herron was also involved with SNIC UK. Mr Cotton said he did not know if Mr Herron was aware of Mr Cotton's involvement. Mr Payet then emailed the Claimant company enclosing a letter dated 4 November 2019. That letter terminated the distribution arrangement with the Claimant. Mr Cotton stated he was still worried at this point that he did not have a contract in place with SNIC UK. Mr Dilley had asked Mr Cotton to review a letter which Mr Dilley was going to send in response to the letter terminating the distribution arrangement.

106. Mr Cotton accepted that before his resignation, he emailed himself a blank copy of the Claimant's staff employment agreement for future use. He did that on 30 November 2019. He described this as a mistake and being lazy but he said it did not have any information in it and he deleted it. On 2 December 2019, Mr Payet sent Mr Cotton a contract and when he received it, Mr Cotton resigned from the Claimant company and signed the contract the same day. Mr Cotton described the situation as being amicable at first when Mr Dilley came to see him asking if there was anything the Claimant could do to keep him. Mr Cotton then received a letter accepting his resignation. Mr Cotton intended to work there until February 2020 and then was going to leave. His intention was to start working for SNIC UK in March 2020 to help them get geared up in a non-sales role and to help with the premises.

107. On 16 December 2019, Mr Cotton accepted he emailed a copy of the Claimant's price comparison to himself, which he said was solely for product identification purposes because SNIC SAS used different product numbers to Network Rail and he wanted to be able to reconcile the different product numbers accurately when he returned to this business after his restrictive period ended. He stated he did not do this for the prices which were irrelevant as SNIC UK would not sell their product in England until after 30 April 2020 and they would sell their own product at a price which they were happy with and which they would set.

108. On 17 December 2019, Mr Cotton says he was asked to agree a lease on a commercial unit for SNIC UK. He contacted an estate agent through his personal lycos email account. In the end, Mr Cotton could not secure the lease because it had to be signed for by a company director and so he had no more involvement with that. Mr Cotton was suspended on 22 December 2019.

He said he found out that after this the Claimant had hacked into his personal lycos email account and found various emails.

109. After his suspension, Mr Cotton said he rang Mr Payet and told him that he did not know if he was going to come to SNIC UK at all and he was not going to come when he said he would in March. He said he wanted to withdraw from the whole thing. Mr Payet responded to say that was fine, but it was all about the intent at the time and the intent was to come to work for them. Because Mr Cotton had the intention to be involved with SNIC UK, the Claimant company could still proceed with a claim against him and therefore it would make no difference to Mr Cotton other than he would be unemployed. Mr Cotton said he understood what Mr Payet was saying but nonetheless that he was not going to come while there were accusations about competing with the Claimant company. He would come at the end of April when the Claimant no longer had products to sell in the marketplace. Mr Cotton was then dismissed on 16 January 2020.

110. Mr Cotton described that he did not go to work for SNIC UK straightaway. He said he was scared and paranoid about being hacked. He only had a burner phone and used library computers. He said he had perhaps two phone calls with SNIC SAS, both about the legal threats from the Claimant company and when he would start.

111. Mr Cotton started with SNIC UK on 27 April 2020. By this time, they had sorted out premises, insurance and a bank account in the UK. Mr Cotton said the Claimant's grace period ended on 30 April 2020 but they still had treadles in stock. Mr Cotton said he had no knowledge of SNIC SAS talking to Babcock during this time. It was not until he joined SNIC UK that he became aware that they had secured an order with Babcock for a project in Ireland. Mr Cotton asserted he was earning the same salary as when he was with the Claimant. He had not received any dividend or profit share and, because of these proceedings, had waived any right to do so.

112. In cross-examination, Mr Cotton accepted that he did not always tell the truth by saying that nobody told the truth all the time. He was taken to the minutes of the meeting held on 6 January 2020 between him and Mr Dilley when others were also present. Mr Cotton said he had never bothered to read the minutes of the meeting because Mr Dilley had decided to sack him anyway.

113. Mr Cotton was then taken through a number of the statements which he had made during the course of that meeting. Mr Cotton asserted in the meeting that he had not helped in setting up SNIC UK. Mr Cotton was then taken to an email chain between himself and Mr Brown. By email dated 24 October 2019, Mr Cotton emailed Mr Brown to ask if he had everything he needed to form the company now. Mr Cotton set out what the company name was to be and importantly that the shareholding for the company would be "60% owned by SNIC France, 40% owned by me via your shell company. Two directors for the moment, Xavier and Vincent". Mr Cotton then stated that the formation of the shell company at that point in time meant nothing. Mr Cotton accepted that he had lied to Mr Dilley. He said he had no problem with that because Mr Dilley lied to him all the time. He said he was not in a court of law during the meeting. He knew that Mr Dilley was a litigious person and he was trying to avoid any issues. He said he could not see the point of the questions about his lying.

114. It was suggested to Mr Cotton that his involvement was more than just setting up the shell company. He was liaising with Emma Langton, the assistant to Mr Brown, who was asking for further details to incorporate the company and Mr Cotton was then liaising with Mr Payet to get the details necessary for the company to be incorporated. Mr Cotton would not accept that he was doing more to set up the company. He said that Mr Payet could have liaised directly with the accountants. Mr Cotton wanted to avoid any litigation and "did not want to show that I had a shareholding until my restrictive covenant was over. That is why I was involved at this stage". Mr Cotton did then accept that he did everything necessary to instruct Mr Brown to set up the company and Mr Payet just provided information. Mr Cotton again accepted that he had lied to Mr Dilley stating that that was at a "kangaroo court". He then said he was in a real court now and that he was telling the truth. Mr Cotton did not see anything wrong in lying to Mr Dilley when Mr Dilley was investigating what had been going on because by this time, Mr Cotton stated that Mr Dilley had hacked into his emails illegally.

115. Mr Cotton also later accepted that he had done more for SNIC UK as in December 2019, he was involved in trying to arrange premises. The only reason he was unable to complete the tenancy agreement on behalf of the company was because the landlord required a director to sign and he was not yet a director. Mr Cotton would have been prepared to sign the tenancy personally but that was not acceptable to the landlord.

116. When asked whether he lied to conceal what he had been doing, Mr Cotton effectively accepted that by saying that he did not want to end up in court. He did not want to be sued and so he lied to Mr Dilley. Mr Cotton said he lied to Mr Dilley because he did not really want to talk to him and that he should not have gone to the meeting in January 2020. When it was suggested that Mr Cotton lied to Mr Dilley because he knew what he had been doing was wrong, he would not accept that what he had done was wrong. He said it was business and SNIC UK would have been set up with or without him.

117. Mr Cotton was next asked about Rubicon and whether he knew the individual directors of Rubicon, namely Mr Brown and Mr Barley. He was asked whether he knew who the shareholders were. Mr Cotton said that the shareholders were Mr Payet and their accountant TCS. He would not accept that that was not true at that point. When asked what was the purpose of the shares not being held in his name but being held on his behalf by a nominee company, Rubicon, Mr Cotton answered "so that after six months they could be transferred into my name". He accepted the purpose was conceal the true ownership until after that period had expired.

118. He would not accept that he was intending to deceive his employer and the company of which he was a director but accepted that he did not put the shares into his name. He said "I had a very onerous restrictive covenant, as you are aware, and Mr Dilley would have had me not work for a year. I am sorry but I have a family to keep and I needed to work. So yes, I was going to go and work for this company. I have always said that the value of the shares is nominal". Mr Cotton did not see anything wrong in the way he had acted. He had done what Mr Payet had suggested even though he was still working for the Claimant. Mr Cotton justified his actions by saying "you see, if you worked in the commercial environment you would understand that you actually secure a new job before you leave your old one. Everybody does that, and I did it when I joined Henry Williams… Everybody who is in a commercial situation does not resign until he has somewhere to go to".

119. Mr Cotton accepted that he had repeatedly lied through the January 2020 interview. However, he maintained that he lied because Mr Dilley was litigious and had been known to sue people for very minor things. Mr Cotton would not accept that he had done anything wrong despite accepting telling lies. He did not accept any conspiracy. He accepted lying about

knowing Mr Brown. Mr Cotton did not accept that he had lied about being general manager at SNIC UK and not the managing director. He was taken to the contract which he signed on 2 December 2019 which provided for him to be managing director and Mr Cotton stated that after he had received the letter before action from the Claimant solicitors, he had stated to Mr Payet that he wanted to walk away from the whole thing. He was persuaded not to do that but Mr Cotton said things had changed by the time of the meeting in January. Mr Cotton accepted that he had said during the meeting he was not going to start with SNIC UK until September 2020 but in fact had started on 22 April 2020. He said he did that because he had no income, Mr Dilley held back £600 of his expenses and he needed to work because he had a family. Mr Cotton then said that in fact he had not started until after 30 April 2020 and therefore was not in competition with the Claimant because after 30 April 2020, SNIC SAS would not take orders from the Claimant and therefore the Claimant would have no treadle business.

120. Mr Cotton said he continued to lie after that January meeting because he didn't want to get sued. He would not accept that he was trying to conceal what he had done. He said he just did not want to be sued. He would not accept that he knew that what he had done was a gross breach of the duties to which he owed the company. He said he would not have done it had he known it was a gross breach. He said he was "silly" and "naive". He said his initial mistake caused him to be in a the situation which he did not want to be in. He did not appreciate that he should have stayed away from it, let SNIC SAS form their UK company and then gone to work for them six months later. He asserted the outcome would have been the same. Mr Cotton said that if he could wind back the clock, he would just leave Mr Payet to sort it out. He was going to do it anyway. Mr Cotton asserted that his part was not "instrumental" and that he was "a fool".

121. Mr Cotton was next taken to some emails sent at the end of September and early October 2019. Mr Cotton had received an email from Mr Charollais dated 30 September 2019 informing him that Idemia had decided to sell its railway activities to a French company. Mr Cotton had forwarded that email to Mr Dilley. However, in the email forwarded by Mr Cotton to Mr Dilley, the identity of the French company purchasing the railway activity had been deleted from the original email when it was forwarded by deletion of the words "called SNIC". Initially, Mr Cotton would not accept that deletion of those words was significant because Mr Payet owned a number of companies within the group railway industries. When pressed further on that point, Mr Cotton then asserted that he did not change the email and did not delete the words which can

be seen in the original email. He said he had no motive to do so. When it was suggested the motive was to conceal from Mr Dilley the true identity of the purchaser, Mr Cotton did not really answer the question. He was then asked about doing the Google search of railway industries and finding nothing. He said he had found nothing. He did not find anything on SNIC SAS. He then said if he had deleted it, which he denied, he would have been doing a favour because Mr Payet is the one who owns railway industries. He then said that he did not know about SNIC SAS until 11 October 2019. He was taken to the email of 30 September sent directly to him which identified SNIC and he asserted it had been doctored by someone for the Claimant because he did not get that one.

122. Mr Cotton was then asked about the September meeting with Idemia where Idemia told Mr Cotton that the treadle business would be sold. Although it was not in his statement, Mr Cotton asserted that he had told Mr Dilley about the meeting including that the treadle business would be sold. He did not accept that all he had told Mr Dilley was that Idemia were going to put their prices up by 20%. Mr Cotton accepted that it was important for Mr Dilley to know if Idemia were about to sell the business. He asserted that not only had he told Mr Dilley, he had told Mr Herron and all the other directors. Mr Cotton accepted that there had been a conversation about the sale when he visited Idemia and Mr Charollais, but he had been told, when he asked the question about whether he could have some sort of association with the purchase company, that Mr Charollais could not tell him at that point in time.

123. Mr Cotton was then asked about the conversation where Mr Cotton advised Mr Dilley to terminate the Network agreement with Network Rail. Mr Cotton said that he had told Mr Dilley that if we did not terminate the agreement, we could not increase the price. If you wanted to increase prices you would have to terminate the contract and that contract was coming to an end anyway so it made sense. He then said Network Rail would only buy from the person who had product acceptance and that was why you should not buy stock. When it was suggested that by terminating the framework agreement, that would help SNIC UK to obtain its own agreement with Network Rail, Mr Cotton suggested it did not matter whether there was a framework agreement or not because you would only be able to buy from SNIC UK.

124. Mr Cotton accepted that he had been offered good terms to join SNIC UK in October 2019, which terms he accepted and that by the end of October, he was already instructing Mr

Brown to incorporate SNIC UK. Mr Cotton also accepted that at the board meeting on 16 October 2019 where both he and Mr Herron were present, he had received an offer of employment from SNIC UK but he did not mention it to his codirectors at all because he did not have a contract and the UK company did not exist yet. Once he had received the contract on 2 December 2019, he said he resigned within two hours of receiving that offer. Until that time he said "I worked my socks off" for the Claimant as he really cared about the company.

125. Mr Cotton accepted that by October 2019, he knew what SNIC SAS was planning to do in the UK. When asked why he did not tell his codirectors what SNIC SAS were planning if he cared about the company, Mr Cotton said that he did tell Mr Dilley what was being planned. He said he put that in his witness statement. He identified in his witness statement where at paragraph 22 Mr Cotton says "I thought that the new buyers were going to do their thing and I have the feeling that they were not going to use HW when the sale went through". He accepted that was not explaining the full position as he understood it after his meeting with Mr Payet, but Mr Cotton justified his action by saying he was giving a broad hint as to the way it was going. He said he could not disclose anything further because there was nothing to disclose. He said he could not say "I'm going to work for a company that doesn't exist" to Mr Dilley because Mr Dilley would have sacked him and then what would have happened to him if the SNIC UK company did not go forward?

126. It had been put to Mr Dilley in cross examination that it was untrue that Mr Cotton had said to Mr Dilley that he was resigning in order to work for a development company and to build some houses in Pudsey. When asked about this, Mr Cotton agreed that in fact Mr Dilley's evidence was true because he was building some houses and he had given that reason to Mr Dilley. He would not accept that he had left to join SNIC UK because that was not going to happen until later and he did not join until April 2020.

127. Mr Cotton further accepted that at the board meeting on 18 December 2019 which he attended with Mr Herron, he had not given any further information about the setting up of SNIC UK and the fact that he was a shareholder, even though he had resigned and signed his contract of employment with SNIC UK. Similarly, he could have told the meeting that Mr Herron was also going to work for SNIC UK but he did not. Mr Cotton maintained that there was no more

news because the Claimant had already received the termination letter dated 4 November 2019 from SNIC SAS.

128. Mr Cotton also accepted that he had lied to his solicitors when giving instructions to enable them to respond to the letter before action on his behalf in their letter dated 31 December 2019. The letter asserted that Mr Cotton had not been involved in the setting up of SNIC UK. Mr Cotton said he just made a phone call and did not feel that he was really involved. He then accepted that he had made some enquiries and sent those by email. He described himself as being just a facilitator. Mr Cotton did not think there was anything wrong with the assertion made in his solicitors' letter that SNIC UK did not employ anybody "at present" when Mr Herron was fully aware by that time that both he and Mr Herron had signed contracts of employment.

129. Mr Cotton was next asked about the Babcock order. He would not accept that they were an important customer as they might just buy say £1000 worth of kit. Mr Cotton was asked about the quote sent on 3 July 2019 on behalf of the Claimant for 100 Cautor treadles and 100 treadle bases which was worth about £200,000. Mr Cotton agreed it would be important if it ever happened but said they had been quoting since 2015 and he said that often quotes came to nothing. He accepted that this one had come to fruition in the end but he said the Claimant had no idea when it was going to come about.

130. Mr Cotton accepted that when Babcock came back seeking an updated quote by email dated 24 October 2019, he was already involved in setting up SNIC UK. He also accepted that he had copied Alan Herron into his reply to Ms Cartwright about the pricing level for the large order. He said he did that because Mr Herron was the other director of the business. That enquiry led to a quote being made by the Claimant to Babcock which was signed by Mr Cotton.

131. Mr Cotton was then taken to an email dated 27 October 2019. The email was sent by Mr Heanue (on behalf of SNIC SAS and describing himself as "UK sales manager") to Suzanne Wise at Babcock. Mr Heanue is the son of Mr Cotton's partner and was 19 years of age at the time the email was sent and was away at university studying. The email reads as follows:

> "Dear Ms. Wise,
>
> Please let me introduce myself, I represent SNIC in the UK. SNIC will from 1st November be the owner of the IP and manufacturing facility for Silac Treadles. We are supporting HW in continuing to supply them Treadles already on order for 6 months. However any non Network Rail new orders can be place with us after 1st November.
>
> We understand that you have a requirement for some 100 off Cautor type treadles for delivery in Northern Ireland in May 2020 and we would be happy to supply this order to you directly.
>
> Our offer is as listed below:
> 100 off Cautor Treadles £1,404.00 ea
> 100 off Treadle bases £398.00 ea
> We will offer a 24 month warranty from date of delivery.
>
> Please treat this offer in the strictest confidence."

132. Mr Cotton was asked about the startling coincidence of SNIC SAS managing to email its quote for the correct number of treadles and bases required by Babcock and at a lower price than would be offered the following day by the Claimant, managing to send that introductory email to exactly the person dealing with the quote on behalf of Babcock with the Claimant. Mr Cotton said that he knew nothing about it and had nothing to do with it. He said it was Mr Burdon's job to speak to Babcock. He maintained that he had nothing to do with the Babcock order from SNIC SAS and was not even told about it, despite the fact that he was already involved in setting up SNIC UK and that he was to be effectively in charge of what was to be the UK subsidiary of SNIC SAS. Mr Cotton stated that if he had anything further to do with it, that would have been identified by Mr Dilley when Mr Dilley hacked into Mr Cotton's emails. He would not accept that he was the person who provided the details of the Babcock order to enable the quotation by SNIC. Mr Cotton accepted that he knew what Babcock's requirements were.

133. Mr Cotton was asked about how Mr Heanue became involved with SNIC SAS. Mr Cotton said that he did not know Mr Heanue very well. He saw him maybe two or three times a year. Mr Cotton accepted that Mr Heanue knew nothing about railways but said he did know quite a lot about aerospace and engineering and was not stupid. Mr Cotton could not explain what qualified Mr Heanue to be the UK sales manager of the UK operation of SNIC SAS which had spent over 26 million Euros buying the treadle business from Idemia. Mr Cotton said that he simply put Mr Heanue's name forward for online research because he was brilliant at it. Further,

he said that there were no discussions with Mr Heanue about Mr Heanue describing himself as UK sales manager. Mr Cotton said that he had simply told Mr Heanue that he had put his name forward to do some research and that was the end of it. He did not speak to him further about his role. He said he did not speak to his partner nor to Mr Payet about it either. Mr Cotton would not acknowledge any benefit to him as a result of the order obtained by Mr Heanue as the order was going to SNIC SAS and therefore he would not get any benefit.

134. Mr Cotton could not explain the role Mr Heanue was performing, why he was required to perform that role, nor where he got his information and instructions from. Mr Cotton suggested that Mr Payet should be asked. Mr Cotton would not accept that just because you did not have a qualification, you could not be a salesperson. He said he had no qualifications to sell and that was what he did.

135. Mr Cotton accepted that he had emailed to his own personal email a copy of the Claimant's staff contract of employment before he resigned. However, his main reaction to being asked about this was to complain about his private email accounts being hacked into and screenshots of the hacked emails being in the bundle. He said he did not see anything wrong with sending himself the contract. He accepted that it was silly and he should not have done it but he said he deleted it without using it. He maintained that he had not used it despite the contract being very similar to his contract signed on 2 December 2019 with SNIC UK. He said you could just get one off the internet which would be the same. He denied that taking the document was a breach of trust. Mr Cotton was then taken to some specific wording in both contracts concerning the employee handbook which were identical. He then accepted that he "might have pinched" the wording from the Claimant's contract. He said he did not remember doing it but he could not see that there was a problem even if he had.

136. Mr Cotton would not accept that the Claimant was legitimately entitled to access his laptop as a result of the procedure set out in the employee handbook. He maintained it was illegal hacking. Despite the report from Mr Wilde setting out why he had accessed Mr Cotton's laptop and the fact that it was unlocked and therefore accessible without any passwords, Mr Cotton described the report as being a pack of lies.

137. Mr Cotton also accepted that he had emailed to his private email address the treadle comparison prices document. He said he did that so he could identify the different part numbers for the product. However, he maintained that as SNIC UK did not make any sales until May 2020, by which time he asserted the Claimant should not have been trading against SNIC UK, there was no problem as the document would be obsolete. He would not accept that in taking the document while he was still an employee and director of the Claimant, it was used for the benefit of SNIC UK. He maintained it was just to help him match the product numbers up. Mr Cotton accepted that the document contained amongst other things the 2020 pricings for the Claimant for the relevant products. However, he asserted that because the Claimant could only trade until 30 April and he was not joining SNIC UK until 1 May 2020, it had no impact. He did not accept it was wrong to email the document to himself. He said he already knew the prices. Mr Cotton then accepted that it looked as though SNIC SAS were selling their products before 30 April including to Babcock. Mr Cotton remained adamant that even if the Claimant had stocks of treadles, they would not be able to sell them after 30 April 2020. Mr Cotton said that he advised Mr Dilley not to buy 150 treadles for stock after receiving notification of the termination of the distribution agreement from SNIC SAS precisely because the Claimant would not be able to sell them.

138. Mr Cotton maintained that he and Mr Herron had not spoken to each other about being offered employment with SNIC UK. Mr Cotton knew that Mr Payet had been talking to a production guy and he suspected that it was Mr Herron but he had not been told specifically that it was Mr Herron. He did not ask Mr Herron about it. Mr Cotton would not agree that once he and Mr Herron did know about each other that they agreed to keep it secret from the Claimant. He did however accept that they each knew the other was going to leave and did not say anything because they each knew that Mr Dilley would not be happy. Although Mr Cotton accepted he was Mr Herron's line manager, he would not accept that he had access to Mr Herron's contract or personnel file.

139. Mr Cotton maintained that he did not know that in late November 2019, Mr Herron gave instructions for a treadle gauge to be built with French wording on the heads. This was despite the fact they were both about to join SNIC UK. When it was suggested that Mr Herron must have at least told him what he was proposing to do in instructing manufacture with French wording, Mr Cotton's response was that it would not have made any odds because the product

acceptance was with the Claimant and that type of gauge was not used in Europe so there was no win.

140. Mr Cotton accepted that he had deleted content from his computer after he had received the letter before action specifically warning him not to. Mr Cotton maintained that not all of the information was deleted and that information was recoverable. He said he had taken his computer to an expert and asked for his personal content including saved passwords to be deleted. He did this because he felt "violated" after his computer had been accessed by the Claimant. He said he had bank details etc on there so he was being prudent in deleting material. Mr Cotton then accepted that he had given instructions for the entirety of his laptop to be deleted irrespective of whether it contained relevant information for the Claimant. Mr Cotton maintained that the Claimant had backups of their documents so there was no damage to the Claimant. Mr Cotton also accepted that he could have retained the Sim card from his mobile phone so as to only make available relevant information rather than personal information. He maintained it was destroyed because the Sim card only contained personal information. He would not accept that he had destroyed information because he knew that the computer and/or phone contained information relating to his dealings with SNIC whilst he was an employee and director.

Mr Payet

141. Mr Payet was a director of SNIC SAS and SNIC UK. He described how he and his business partner, Vincent Menudier were partners in SNIC SAS and their business was providing rail signalling components. Before acquiring Idemia's rail activities, they were producing connectors for safety relays. They wanted to purchase the treadles to enable them to offer wider components and subsystems. They felt that would not be possible with external distributors and they wanted their own people involved.

142. Mr Payet described having looked at the business the Claimant did with Idemia before purchasing the treadles. He described that the Claimant was not doing a lot of work and selling the product on for much higher prices - fat margins for doing very little. Mr Payet felt the UK market was interesting and he was looking to expand outside of France. He discovered there was no contract between the Claimant and Idemia. Mr Payet felt that Network Rail as a customer had a lot of potential and that, along with the profit margins being made by the Claimant which could be brought in house, was the main reason for wanting to keep all of the business in house.

143. Mr Payet had been told that the two people in charge of the treadle business were Mr Cotton and Mr Herron. Mr Cotton was the commercial guy and Mr Herron was the technical guy. Mr Payet decided to ask if they wanted to join the new business when it became operational. Mr Payet first met with Mr Cotton in October in London. Mr Payet decided that he could work with Mr Cotton and wanted to provide an incentive for him to work for SNIC UK. Thereafter, Mr Payet had a telephone conversation with Mr Herron and explained what SNIC SAS wanted to do. Mr Payet felt that Mr Cotton and Mr Herron might like to have a share in the operational profit of the UK company.

144. Mr Payet described that in October 2019, he had an accountant set up the UK company. That was done because there were difficulties setting up the company directly because they were not in the UK. Whilst he described intending to keep supplying the Claimant with treadles, he stated that did not prevent SNIC UK from trying to build business as there was no exclusivity with the Claimant. He said he was looking to find ways in the interim to establish a presence for SNIC UK and ensure they were a presence in the market.

145. In order to do this, SNIC wanted to employ someone "to do some preliminary commercial work to explore business opportunities, skim through information and make phone calls". Mr Cotton gave Mr Payet the details of Mr Heanue to do this work.

146. A few days after closing the deal with Idemia, Mr Payet described sending a letter to the Claimant terminating their relationship giving six months' notice and agreeing to deliver the product for 12 months. Mr Payet felt he was giving the Claimant plenty of time to reorganise. He described the Claimant as not being happy but not complaining. After the termination of the contract, Mr Dilley and Mr Wilson flew to France to speak with Mr Payet in about March 2020. Mr Payet explained that Mr Dilley wanted to try to convince him to do business with the Claimant but that was not something that he would consider.

147. Mr Payet obtained the product numbers, in order to deal with Network Rail, from the lady dealing with matters at Network Rail. Mr Payet said he explained to her that SNIC SAS were the product manufacturer and were bringing distribution in house. He also told her there

would be no other distributors for the products in the UK following the end of the grace period for the Claimant. SNIC UK became operational after the bank account opened in April 2020.

148. In cross-examination, Mr Payet was first asked about Mr Heanue. Mr Payet said that Mr Heanue had been employed on an oral contract. He was described as the UK sales manager because he managed sales. He did not have any subordinates but that was a good title for customers to see. Mr Payet accepted that he had not given this description of the job in his witness statement. At the time Mr Heanue sent the email in October 2019 to Babcock, Mr Payet said he was the only person dealing with customers in the UK. Mr Heanue had not shown the email to Mr Payet. Mr Payet had given Mr Heanue authority to write the email after they agreed on the price.

149. Mr Payet said that Mr Heanue's role was to research work on commercial opportunities, to make contact with customers and make offers if needed based on the instructions he was given about price. Mr Payet accepted that in fact there were no other customers who Mr Heanue dealt with apart from Babcock.

150. Mr Payet was asked why there was no documentation between himself and Mr Heanue at all about the work he was doing. Mr Payet said that it was very straightforward and it was simple to identify where products would be needed because they were used in most level crossing systems so all that was needed was to agree a price, delivery terms and shipping costs which was all very simple. Mr Payet was not aware of any other sales being made apart from to Babcock. He described that most sales were made to Network Rail and it was rare to sell to other customers.

151. Mr Heanue was paid £20 an hour. Mr Payet could not say how he was paid, how much work he did for SNIC SAS but he thought it was at most a few hours a week. Mr Heanue was employed until Mr Herron joined in March or April 2020. Mr Payet accepted that Mr Heanue was a university student who knew nothing about railways but he stated that there was not much to be known to be able to sell. An hour of explanation and anyone could do it.

152. When asked about the opportunities which Mr Heanue had identified, Mr Payet described that Mr Heanue had skimmed through press releases mainly, possibly making phone

calls. He presumed he was doing basic research if reading the press was not enough to get information, Mr Heanue would have identified a project and then made phone calls to get the person who is organising the tender. Mr Payet said that Mr Heanue had stated that he had made enquiries of Babcock about their need for treadles and that was the only information given to Mr Payet. Mr Payet later said that Mr Heanue had also told him the number of treadles and bases which Babcock required. Again, Mr Payet said there was no email communication at all, nor any notes of the conversations which he had had with Mr Heanue.

153. Mr Payet said that he did not know if Mr Cotton was aware of the emails which Mr Heanue was sending to Babcock. He maintained that he did not know what Mr Cotton knew, even though by 25 October 2019 a 40% shareholding had been issued to Rubicon. Mr Payet maintained that he did not know who the end beneficiary of the shareholding was, although he supposed it was Mr Cotton. Mr Payet accepted that Mr Cotton would not be allowed to hold the shares at the time the shareholding was created because he would be competing with his existing employer. That was why the company held the shares for him until Mr Cotton could get them directly. However, Mr Payet asserted that no benefits accrued during that time.

154. Mr Payet was then asked about an email sent by Mr Heanue on 3 December 2019 when he described himself as an accounts manager. When asked when Mr Payet had appointed him accounts manager, Mr Payet replied that SNIC SAS was not a formal organisation. Mr Heanue could have described himself in any way he wanted on a signature provided he did not describe himself as a director. When it was then suggested that Mr Heanue was never in fact either the UK sales manager nor the account manager, Mr Payet agreed that he was not.

155. When it was suggested that the use of Mr Heanue and his various descriptions was a fiction to disguise the fact that Mr Cotton was involved in the quotation to Babcock and the other emails which were sent, Mr Payet stated “well, we decided the price at the level of SNIC, so Mr Cotton had decided the price, we decided the quantity, we decided the warranty period”. Mr Payet was aware that Mr Heanue was the son of Mr Cotton’s partner. Mr Payet would not accept that there was something surprising about Mr Heanue sending emails to his mother’s partner addressing them to “Mr Cotton”.

156. When asked about the wording of the email sent by Mr Heanue dated 27 October 2019, Mr Payet accepted that the email stated that SNIC SAS would only supply the Claimant for six months from 27 October. Mr Payet stated that the request to keep the matter confidential was wording put in by Mr Heanue without any input from Mr Payet. Mr Payet said that they had been very lucky to get the Babcock order. He said it was a complete surprise. All he was trying to do was get the name SNIC UK out as the supplier of treadles as soon as possible because they were going to be taking over the treadle business in approximately May 2020. Mr Payet accepted later that the business had been operational before April 2020 in that offers had been made and the order accepted from Babcock.

157. When asked about information provided to Babcock where SNIC UK had informed Babcock that it would be the sole supplier in the UK for treadles after 30 April 2020, Mr Payet did not accept that was misleading although he did accept it could be misinterpreted. However, he was adamant that as they were the manufacturer, in the end they were the only supplier. He maintained that was the position even though he accepted that SNIC UK had agreed to take orders from the Claimant up to 30 April 2020 and deliver until 30 September 2020.

158. What was important was to have knowledgeable and experienced people in railway signalling installations. That was why Mr Payet had employed Mr Cotton and Mr Herron. They had experience with the Claimant but Mr Payet thought they probably had some other prior experience before working for the Claimant. Mr Payet had offered a shareholding so that SNIC UK would be a joint venture which could be managed by people who had a vested interest in the business.

159. Mr Payet would not accept that they could have had a similar arrangement with the Claimant. Mr Payet wanted his own people on the ground. Mr Payet thought he had more freedom to run his own business if it was run in house than if the Claimant was involved. Otherwise he would have had no control about the amount of time the Claimant spent on the project and the Claimant would have little incentive to work on projects which may not come to fruition for 5 or 10 years down the line. Mr Payet asserted that Mr Cotton had not discussed the existing business being done by the Claimant. That was not necessary because Mr Payet was selling the treadles to the Claimant. He knew what the business was. Mr Payet insisted that

Idemia knew the profit margins that the Claimant was operating, although he did not know how they knew that.

160. As to the meeting with Mr Cotton on 11 October 2019, Mr Payet insisted that although it was discussed bringing the business in house, there was no mention at all of the possibility of Mr Cotton joining the new venture at that meeting. Mr Cotton was contacted a few days later after Mr Payet and his business partner had further discussed matters. Mr Payet thought that he had discussed matters with Mr Herron after the meeting with Mr Cotton. Mr Herron's details were also obtained from Idemia.

Mr Alan Herron

161. Mr Herron was the production director of M & E before he left the Claimant to work for SNIC UK. He had previously worked with the Claimant as production manager on the electrical side only. His role developed over time and he became responsible for the fabrication department. Mr Herron described that whilst he managed both departments, his pay remained the same. When he became the production director, in addition, he got a car allowance. Mr Herron's main responsibility was the treadles. If there was ever any difficulty with any aspect of the treadle business, he was required to sort it out. This may entail going to France.

162. Mr Herron described that he had started going to France in 2008. The treadle business was then initially sold to Morpho, who in turn sold it to Idemia. Much of the work done by Idemia was state-of-the-art including defence work such as manufacturing missiles. Mr Herron says that he told the Claimant that the treadle business did not fit with the rest of the work done by Idemia and they would inevitably get rid of it. He said he was ignored. Mr Herron then describes that in September 2019, Mr Cotton went to visit Idemia. He was told that the treadle business would be sold but he had not been told to whom it was going to be sold.

163. In October 2019, Mr Herron received a telephone call from Mr Charollais. Mr Charollais asked if Mr Herron would be interested in going to work for the new owners of the treadle and meeting the company who bought it. Mr Herron was very interested and agreed to speak to the new owners on a confidential basis. He tried to meet Mr Payet in person but was unable to do so. He therefore spoke to Mr Payet by telephone in early October 2019. Mr Payet described what the plans were for the treadle including opening a UK factory and developing product lines. Mr

Payet also told Mr Herron that he was looking at other people from the Claimant to join SNIC UK.

164. Mr Herron was offered a profit share as well as matching his current salary. Mr Herron said he received the contract a few weeks later and felt that it was too good to be true. He said he did not sign the contract straightaway but moved the start date back a month. At that time, Mr Herron spoke to Mr Cotton and they discussed that each of them were going to hand their notice in to the Claimant. Towards the end of November, Mr Cotton confirmed to Mr Herron that he was going to hand his notice in. Mr Herron said he did not know if he was going to leave or not. Mr Herron was going to be on holiday in the first week of December. Despite not having signed the contract yet, Mr Herron did sign the profit share agreement before he went away.

165. Thereafter, Mr Herron attended a board meeting with the Claimant on 18 December 2019. Mr Dilley then confronted Mr Herron with the profit share agreement which Mr Herron had signed with SNIC UK. Mr Dilley then telephoned Mr Herron on Christmas Eve and informed him that the Claimant was going to take Mr Cotton to court. He asked Mr Herron to speak with him after Christmas. Mr Dilley told Mr Herron that a deal had been struck with Mr Payet. However, when Mr Herron spoke to Mr Payet, Mr Payet said there was no deal and Mr Herron then decided he was going to leave the Claimant. He handed in his notice on 2 January 2020. Mr Herron described that he was then effectively put into solitary confinement with nothing to do for three months.

166. During that time, Mr Dilley frequently came into Mr Herron's office asking questions about the new venture. Mr Dilley asked if Mr Herron had met Mr Payet and Mr Menudier. Mr Herron said he had although he had not. He said that this was during his holidays in October. Mr Dilley also asked lots of questions about Mr Cotton. Mr Herron was to have attended his last board meeting on 18 March 2020. Prior to that meeting, Mr Dilley asserted that Mr Herron had told SNIC about Babcock and Mr Herron said he was marched off the site. Mr Herron denied having any knowledge of the Babcock contract until Mr Dilley spoke to him.

167. Once he got home, Mr Herron deleted all the documents he had relating to the Claimant from his computer. He described also having a memory stick but stated there was nothing on it belonging to the Claimant that had any use at SNIC UK as all the information relevant to the

work being done by Mr Herron came from France. Mr Herron began working for SNIC UK on 31 March 2020. He received the same salary. He said he had not received any profit share or dividend.

168. Before he left the Claimant, Mr Herron accepted that he had instructed that a treadle gauge with French writing on it was produced as well as a height adjuster with French writing on it. He said the unit was made up and then placed on a shelf in the treadle area. As there were a lot of gauges to make up in November and December, and not enough components to complete those orders, Mr Herron thought that the heads would have been removed and fitted with serial numbered heads and sold. He thought that the French writing would have been thrown away in a New Year's cleanout.

169. In cross-examination, Mr Herron stated that despite the contents of his defence which set out that he had attended an in person meeting with Mr Payet and Mr Menudier in early October 2019, in fact he had only had a telephone call with Mr Payet. Mr Herron explained that he had signed the defence with a statement of truth despite that lie because of the pressure put on him by Mr Dilley before he left the Claimant and because that was what he had told Mr Dilley during that time. When challenged about the fact that he had not in fact signed the defence until 15 October 2020, Mr Herron accepted that he was not under pressure from Mr Dilley then, but said he had not expected to end up in court. Now he was in court, he had to tell the truth. He accepted that he had deliberately allowed a false statement to be included in the defence which he signed. He said he did it because of naivety.

170. Mr Herron also asserted that that was a one-off aberration, until being taken to his solicitors' letter dated 15 June 2020 written to the Claimant's solicitors. Mr Herron accepted that his solicitors had written details of a meeting on 2 October 2019 in that letter because that was what Mr Herron had told his solicitors had happened. Mr Herron said that he perpetuated the lie through his solicitors' letter dated 14 July 2020. This was to cover the story he had given to Mr Dilley. It was all down to naivety. He just wanted to get Mr Dilley off his back. He had requested to go on gardening leave and that had been refused. He was treated as a leper as his punishment. He sat for three months in an office seeing nobody. He said that he lied when he was bombarded with questions. He said he was mentally tortured. He would not accept he was

exaggerating somewhat. Mr Herron would not accept that in fact he had attended a meeting with Mr Payet and that was why he said to Mr Dilley there had been a meeting.

171. Mr Herron accepted that he had deleted emails and other documents from his computer. He would not accept that he deleted documents so as to hide any information which related to SNIC UK from Mr Dilley. Mr Herron accepted that he remained a director of the Claimant company until a few days after he was escorted off the premises. He saw nothing wrong with deleting and destroying all the company data on his computer during that time. He said he was "fuming" and just wanted to sever all ties with the Claimant. He said any of the documents he deleted, the Claimant would have copies of as everything was backed up.

172. Mr Herron asserted that he had only had telephone communication with Mr Payet before he formally joined SNIC UK. There was nothing by email or in writing apart from his contract which arrived in the post. He could not remember there being a letter or a covering note with it.

173. Mr Herron accepted that in late November 2019 while still a director of the Claimant company, he gave instructions for a treadle gauge head to be made with French wording. He also accepted that by this stage, he had been offered a position with SNIC UK, although he said he had not actually accepted that offer nor had he handed his notice in. He did accept however that there was an offer on the table. He also accepted that he had signed the profit share agreement in late November 2019 and then he had signed the contract of employment on 7 December 2019.

174. Mr Herron said he had given instructions for the French wording to be put on the treadle gauge because his head was all over the place and he did not know if he was going to leave or stay with the Claimant. He had been with the Claimant 17 years. He said had he stayed with the Claimant, the treadle gauge with French wording could have been something that could have been sold to SNIC SAS. Mr Herron said he had been trying to get the Claimant to get to work with the French railway company, SNCF, for years as it was a huge market in comparison to the UK market. Once it had been made up, he said the treadle gauge was put on the proto-type shelf and that was the last time he saw it. He said he also had height adjusters made with French wording. Mr Herron accepted that Mr Payet has given evidence that SNCF were not interested in treadle gauges but stated that he did not know that at the time. It was pure coincidence that he had given instructions for French wording to be put on a treadle gauge head at the same time as

he signed a profit share agreement tying himself to SNIC UK. He would not accept that he had done it to assist his new employer. He also would not accept that he had discussed the French wording with either his directors or with Mr Cotton. He stated he had not given the treadle gauge to SNIC SAS.

175. Mr Herron was questioned about the fact that the treadle gauge with French wording was missing. He maintained he had left it on his development shelf. He said if he had known that the gauge being made with French writing would have caused him so much grief "I would not have gone through with it". Mr Herron maintained that he thought that the gauge must have been used as it was needed to fulfil an order. He accepted he had not spoken about commissioning the French wording with anybody before he left. Mr Herron would not agree that very little was ever thrown away at the Claimant's factory. He agreed it was a conspicuous piece of equipment being bright orange and very large. Mr Herron was taken to the paperwork for the orders in November and December which showed that only two gauges were required in each month. Mr Herron said his recollection was that there were over 50 but some items needed to be sent back for reworking.

176. Mr Herron was next questioned about the Babcock order. He was shown an email into which he was copied which gave details of the Babcock quotation. He said he could not remember it. He said he was often copied into documentation and emails and if he didn't think it really related to him, he would not read it. He would not have any input into the price. He would worry about any order when in fact it arrived. He accepted that Mr Cotton had copied him into the email when Mr Cotton responded to Ms Cartwright. Mr Herron asserted that he had never seen the email sent by Mr Heanue on behalf of SNIC SAS sending a quote to Babcock. He said Mr Cotton had not told him about it.

177. Mr Herron accepted that he had not told the Claimant at the directors meeting on 18 December 2019 (when both he and Mr Cotton were present) about the job offers with SNIC UK, nor the fact that he had signed a profit share agreement with SNIC UK by this date. He said he was a director of the Claimant only "in name" and had not said anything because he would immediately have been shown the door. Although initially continuing to assert that he did not receive any bonus with the Claimant, when questioned again he did accept that he had received profit share in the form of a bonus although he said that had only been once. Mr Herron was then

taken through various payslips which showed other bonuses and his car allowance. Mr Herron continued to assert that he had taken on other people's responsibility and was not paid as much as others were. He would not accept that he was trying to minimise his remuneration package with the Claimant.

178. Mr Herron continued to assert that in September 2019, Mr Cotton had told the Claimant's directors that Idemia were going to sell the treadle business. He could not identify any meeting at which that was minuted nor any other documents where it was noted that Mr Cotton had given that important information. Mr Herron also accepted that he had taken a deliberate decision not to disclose the discussions which he had had about moving to SNIC UK, despite the fact he was a director of the Claimant company, because he did not want to be sacked from the Claimant company. Mr Herron stated that although he was told that Mr Payet was looking to employ other people from the Claimant, he had not been given any names and it could have been a number of people. Mr Herron did not think it was important to tell the Claimant that other people might be contemplating leaving so that they could try and pre-empt the situation. He said he himself did not decide to leave until Christmas. He continued to state that there had been no discussion between himself and Mr Cotton until the end of November 2019. He said Mr Cotton knew about him before he knew about Mr Cotton.

179. Mr Herron would not accept that he had decided to go to SNIC UK by the time he signed the profit share agreement in November 2019. He also accepted that although he had signed the contract of employment on 7 December, he had not said anything to the Claimant. He would not accept that he had done anything wrong. He was just taking a new job.

Mr Christopher Brown

180. Mr Brown is an accountant and a director of TC East Yorkshire Limited ("TC") and the sole director of Rubicon. Mr Brown described how he had known Mr Cotton for over 20 years. Mr Cotton had telephoned him on around 23 October 2019 and asked him to incorporate a company. Mr Cotton did not want it to be in the public domain that he was a shareholder. Mr Cotton provided the names and addresses of the two French directors. Mr Brown instructed his staff to set up SNIC UK. The company was incorporated on 25 October 2019. Mr Brown said that he did not know what the company did and was not aware of any details to do with the

company. Mr Brown did not charge any money for setting up the company save for the £120 incorporation fee.

181. Rubicon was incorporated in the 1970s. It had previously belonged to one of his clients who died and he then kept it as a dormant company. Mr Brown described holding a number of dormant companies. He had used the company to hold shares on a nominee basis on previous occasions. When Mr Cotton said he did not want his details to be in the public domain, Mr Brown offered the use of Rubicon to enable Mr Cotton to hold the shareholding. Rubicon did not charge for this. Mr Brown stated that Rubicon did not gain any benefit or profit. Mr Brown had offered the service as a favour to a long-term friend.

182. In cross-examination, Mr Brown confirmed that the instructions to incorporate SNIC UK came from Mr Cotton. Mr Cotton provided him with all the necessary information to enable that to happen. Mr Brown was shown the letter of engagement. He confirmed that Mr Cotton had signed the letter of engagement on behalf of SNIC UK on 10 November 2019. Mr Brown confirmed that he had signed on behalf of Rubicon when setting up the holding by Rubicon of the shareholding. He could not remember if Mr Cotton had presented it to him for signature or if someone else had or whether it was sent in an email.

183. Mr Brown agreed that there may be some benefit in the future for his company TC because in the future, TC would be able to charge for accountancy services. Mr Brown agreed that ordinarily, he would have charged for setting up SNIC UK but in the circumstances at the time, he thought he had overlooked it. Mr Brown said his staff should have charged for it even though Mr Cotton was a long-term friend.

Mr Ethan Heanue

184. Mr Heanue did not give oral evidence. A Civil Evidence Act notice was served in respect of his evidence because he was abroad. In his witness statement, he set out that he was an independent sales consultant and Mr Cotton was his mother's boyfriend.

185. He described that Mr Payet had contacted Mr Cotton saying he needed some help with research. The research entailed investigating work potential in Ireland and the Commonwealth. Mr Cotton passed Mr Heanue's telephone number to Mr Payet. Mr Heanue said he had

previously done some research for an estate agency over four or five months. He was provided with a company email to stay in contact with Mr Payet and contact people on behalf of SNIC SAS.

186. Mr Heanue said he had a verbal contract. Mr Payet told him what to do over the phone and he then kept Mr Payet updated through emails. Mr Heanue stated that he had found an article by the Causeway Coast Community the day after it was released. The article discussed the coming upgrade between Coleraine and Londonderry. He sent the article to Mr Payet by email and was asked to follow it up. Mr Heanue then described how he contacted Translink as a contractor for SNIC UK to ask who would be upgrading the level crossings. He said they put him through to Babcock who had won the contract. He then said he rang Babcock and was put through to the project manager straightaway. He asked to quote for the provision of treadles if they needed any. He was told by Adrian or Dougie at Babcock that they needed a quote for 100 treadles and bases.

187. Mr Heanue said he then went back to Mr Payet by email and Mr Payet instructed him to follow it up and get a price quote. As the French company had never quoted for a product, Mr Heanue said he contacted Unipart Rail to ask for a quote for 100 treadles and bases. They gave the quote verbally over the phone straightaway and Mr Heanue said that he and Mr Payet then based the quoted price to Babcock on the basis of the information given by Unipart Rail. Mr Heanue said he was "put onto" Suzanne Wise who was the head of the purchasing team at Babcock and she was the person to whom he sent the quote. Mr Payet and he drew up the email dated 27 October 2019 together introducing SNIC SAS.

188. Mr Heanue then described how he became a postbox between Babcock and Mr Payet. He was asked the various details about bank accounts and he would forward any enquiries onto Mr Payet to deal with. Mr Heanue described himself as being "technically lacking" so he had to refer various matters back to SNIC SAS. Once various guarantees were provided by Mr Payet, Jim Christie of Babcock placed the order with SNIC SAS.

189. Mr Heanue was also asked to contact Network Rail to ask about SNIC UK becoming approved as the provider for treadles and bases. Those matters were then passed to Mr Herron when he joined SNIC.

Assessment of the witnesses and Findings

190. As noted above, the credibility of each of the witnesses is the key factor in determining what is likely, on the balance of probabilities, to have occurred. I shall deal with my assessment of each witness in the order in which they gave their evidence.

Mr Dilley

191. The Defendants seek to persuade me that Mr Dilley was a poor witness as a result of a number of what Mr Kelly described as "unfortunate character traits". Mr Dilley was described as "a conspiracy theorist of the worst kind" because there is no evidence to suggest any dealings between either of the Defendants with SNIC SAS before the meeting in St Pancras in October 2019.

192. It was suggested that Mr Dilley was not reliable because he thought others who held a different point of view to himself were dishonest. He was described as a bully and not an astute businessman. It was suggested he was unreliable because he used cross-examination as a device to advance his case. For example, he repeatedly referred to the Idemia email which appeared to have been doctored by Mr Cotton to remove the reference to SNIC before Mr Cotton forwarded it to inform the Claimant that Idemia was selling the treadle business.

193. I do not accept the Defendants' characterisation of Mr Dilley or his evidence. In my judgment, he gave his evidence in a perfectly straightforward manner. He was plainly irritated on occasions when giving evidence about what had occurred over the past months leading to the loss of the treadle business for the Claimant. That is wholly unsurprising given the actions of and the lies told by Mr Cotton and Mr Herron both before and after they ceased work with the Claimant.

194. The manner in which Mr Dilley gave his evidence and its reliability is, in my judgment, in stark contrast to the evidence in particular of Mr Cotton and Mr Herron. It was not demonstrated that Mr Dilley was lying. Indeed, the only suggestion of specific lying to him put in cross-examination was that Mr Cotton had not given a specific reason to Mr Dilley for his resignation. That assertion was later completely undermined by Mr Cotton's own evidence

where he accepted that what Mr Dilley had said about the reason given for his resignation by Mr Cotton was accurate.

195. It is correct that Mr Dilley had ongoing suspicions about precisely what Mr Cotton and Mr Herron had been up to with Mr Payet and SNIC SAS and he did not accept the evidence which Mr Cotton, Mr Herron and Mr Payet gave about the limited nature of that contact before October 2019. That is wholly unsurprising in my judgment given (a) both Mr Cotton and Mr Herron deliberately destroyed all of the data on their devices provided to them by the Claimant, and (b) Mr Payet had specifically asked each of them to keep the discussions confidential about removing the treadle distribution from the Claimant, offered contracts of employment to Mr Cotton and Mr Herron and they both then agreed to keep those matters confidential and failed to make any report about the matters to the Claimant as they should have done.

196. I do not accept that Mr Dilley automatically thought those who held a contrary view to himself were dishonest. He did characterise as dishonest the way SNIC SAS chose to characterise what the Claimant could or could not do with treadles after 30 April 2020. Again, I do not find that at all surprising. Mr Payet had stated that the Claimant could no longer supply Network Rail and Babcock which was not the position. The email dated 27 October 2019 from Mr Heanue to Babcock (which email was worded in conjunction with Mr Payet) specifically stated that "We are supporting HW in continuing to supply them treadles already on order for six months". The clear implication from that email was that after six months, the Claimant would be unable to supply any treadles. That was not the information which had been given to the Claimant by SNIC SAS where it stated that orders could be placed until 30 April 2020 and they would thereafter be supplied only until 30 September 2020.

197. I do not accept that the only purpose of investigating Mr Cotton once some of these matters started to come to light was to humiliate Mr Cotton. On the face of it, Mr Cotton had deliberately failed to inform the Claimant of important details concerning the lucrative treadle business and had then gone to work for a competitor in apparent breach of his contract and duties as a director of the Claimant. Any astute businessman would instigate an investigation to try to establish what had happened.

198. Insofar as there is any conflict between the evidence of Mr Dilley and Mr Cotton and Mr Herron, I unhesitatingly accept and prefer the evidence of Mr Dilley.

Mr Neil

199. Mr Neil came across as being a witness doing his best to assist the court. He gave his evidence in a straightforward manner, accepting on occasions that he could not answer a question being asked. I do not accept the submission made that he was simply adopting the party line when answering his questions. He made concessions where appropriate. I accept his evidence.

Ms Cartwright

200. Ms Cartwright also came across as being an honest witness trying to do her best to assist the court. She accepted on occasions that she could not answer a question. I also accept her evidence.

Mr Burdon

201. Mr Burdon struck me as a truthful witness. He answered questions in a balanced and appropriate manner. In my judgment, he was plainly trying to do his best to recall accurately conversations which he had had, in particular relating to the Babcock order. I do not accept the submission made that he was speculating about the number of employees at Babcock who were aware of the quantity of treadles required for the Babcock order. He did draw a reasonable inference as a result of conversations he had had with various staff members at Babcock after it had been discovered that SNIC SAS had received the order for treadles instead of the Claimant. I do not find that makes him an unreliable witness.

202. There was some confusion in Mr Burdon's answers in cross-examination. He struggled to understand the difference between

(a) his having inferred (from what Mr McKenna said to him during their telephone conversations) that Mr McKenna had not given any information required for the quote to SNIC SAS; and

(b) Mr McKenna stating to him in terms that he had not given any information required for the quote to SNIC SAS.

However, he was clear that when he spoke to Suzanne Wise, she definitely said that she had been called out of the blue. I accept that he was doing his best to tell me truthfully what he recalled.

Mr Dodds & Mr Sewell

203. Both Mr Dodds and Mr Sewell impressed me as being truthful and doing their best to assist the court. I do not accept the submission that they were simply taking the party line and saying whatever their boss wanted them to say. Each of them made appropriate concessions during cross-examination when there were aspects relating to the missing treadle with French lettering which they could not specifically recall. I do not accept the criticism made on behalf of the Defendants about the inadequacy of the search made for the missing treadle by these gentlemen. In contrast, I found their evidence to be persuasive in setting out the extent of their searches. It was accepted that not "every nook and cranny" was searched but every area of the factory was searched. I accept their evidence.

Mr Cotton

204. Despite trying to make a virtue of it at trial by accepting this to be the position, Mr Cotton was shown to be and accepted that he was a deliberate and persistent liar. Before the Claimant and Mr Dilley discovered Mr Cotton was going to work for SNIC UK, Mr Cotton took numerous deliberate steps to conceal what was going to happen to the treadle business and the fact that Mr Cotton was going to work for SNIC UK.

205. Like Mr Dilley, Mr Cotton became exasperated on a number of occasions when giving his evidence. However, in stark contrast to Mr Dilley, that exasperation appeared to me to come from a position of being irritated by questions being asked about the numerous lies which he accepted he had told in circumstances where Mr Cotton plainly did not think he had really done anything wrong.

206. Although he accepted that he owed duties pursuant to his employment contract and as director of the Claimant, throughout his evidence Mr Cotton plainly saw nothing wrong in lying to protect and promote his own position. Mr Cotton attempted to justify his position by saying for example "Nobody tells the truth all the time", "Please move on. I lied to him, okay… We all lie in different situations" and "I have already admitted I lied. What more do you want?". Mr

Cotton further sought to justify his actions in lying and then deliberately destroying the data on his computer and telephone on the basis that Mr Dilley had "illegally hacked" into his email.

207. I do not accept the assertion of illegal hacking. The Claimant was entitled to monitor emails, computer files, telephone calls or messages etc for the purpose of ensuring the effective operation of their systems but also to investigate allegations of misconduct, breach of contract or to pursue any other legitimate reason relating to the operation of the business. That policy was clearly set out within the electronic communication policy of which Mr Cotton was aware. The only evidence about how the devices were accessed came from the report from the Claimant's IT manager Matt Wilde when he set out what he had done and the documents he had found on Mr Cotton's computer. On making various checks of Mr Cotton's laptop using remote access software, Mr Wilde was taken into the personal Lycos email of Mr Cotton without needing to input any username or password. That email account was the one which contained various emails which clearly showed Mr Cotton was involved in setting up SNIC UK in competition with the Claimant. Mr Cotton's use of the Claimant's equipment and computer plainly went beyond "reasonable use" for his own purposes when Mr Cotton was using the equipment to set up SNIC UK in competition with the Claimant.

208. In addition, I found Mr Cotton to have a very distorted view of what the truth is in any event. This is perhaps best exemplified by Mr Cotton maintaining that it was "the absolute truth" (and that he would not accept it was in any way misleading) to say that he had no shares in SNIC UK when he had deliberately caused the shares (which would ordinarily have been put in his name) to be held by Rubicon specifically to hide the profit share agreement and any involvement by Mr Cotton with SNIC UK when he remained employed by and a director of the Claimant. It was plain from his own evidence that Mr Cotton knew that his own interests were in direct conflict with his duties as director of the Claimant company. He chose not to say anything to Mr Dilley because he wanted to have all his plans in place and thought that if he told Mr Dilley about the job with SNIC UK that he would have been sacked.

209. Mr Cotton's lies were not confined to his dealings with the Claimant and Mr Dilley. Mr Cotton was also prepared to lie both in the run-up to proceedings being issued by the Claimant against him and also once proceedings had been issued. He gave instructions to his solicitors to make assertions in correspondence which were untrue. For example, in his solicitors' letter dated

31 December 2019, it was asserted "Our client was not involved in the incorporation of SNIC UK and was not told about this until later". In his defence, signed by Mr Cotton personally with a statement of truth dated 26 June 2020, Mr Cotton continued to assert that he had not had any discussions with SNIC SAS about forming the UK subsidiary. He also asserted that the only contact which Mr Cotton had had with Mr Brown was in respect of the death of a mutual friend.

210. By the time of his witness statement dated 6 September 2021 and again signed personally with a statement of truth, Mr Cotton's account had changed again. He was now accepting that he had been in touch with Mr Brown and indeed had spoken with Mr Payet about Mr Brown being able to set up SNIC UK. He explained how he had spoken to Mr Brown about hiding his shareholding for a period of time and Mr Brown offered the use of Rubicon. However, Mr Cotton was still giving the clear impression that he had not been actively involved in the setting up of SNIC UK when he asserted "In relation to the setting up of the UK subsidiary, Chris was in contact with Xavier".

211. When cross-examined and when the relevant contemporaneous documents were put to him, after an initial denial, Mr Cotton was forced to accept that he had in fact had a direct role in setting up SNIC UK and that rather than Mr Brown being in direct contact with Mr Payet, it was Mr Cotton who provided Mr Brown with all the information relevant to enable the incorporation of the UK subsidiary. In cross examination, Mr Cotton also accepted that he "had a suspicion" about who the production guy was that Mr Payet had told him SNIC UK hoped to employ. I do not accept Mr Cotton's evidence that he only found out about Mr Herron at the end of October 2019. Both men owed duties to the Claimant and had worked closely together for years. Given Mr Cotton's attitude to his duties and the fact he intended to secure his new position before giving any information to the Claimant, it is highly likely in my judgment that he would have spoken with Mr Herron within a very short time of it becoming apparent that the Claimant's treadle business was in danger in late September 2019 and discussions starting with Mr Payet.

212. In summary, Mr Cotton told numerous lies. These included lies about not setting up SNIC UK, about not using the services or contacting Mr Brown except to do with the death of an old friend, about not holding shares, about not starting with SNIC UK until September 2021 (his contract of employment confirmed a start date of 1 March 2020), using an old home address which he had not lived at for 5 years. In addition to telling lies, Mr Cotton took various actions

which were plainly incompatible with his duties as an employee and director of the Claimant. Those included emailing contracts of employment drawn up by the Claimant to his personal email account. Although Mr Cotton asserted he had not copied those documents, I find that they had in fact been copied and used in drawing up the contacts of employment with SNIC UK. He also emailed the Claimant's treadle price list to his personal email. I reject Mr Cotton's evidence that the sole purpose of sending the Claimant's price list was to enable reconciliation of part numbers. I find that he intended to use the Claimant's price list to enable SNIC UK to undercut quotes given by the Claimant.

213. Mr Cotton also took deliberate steps to conceal his actions. I do not accept that this concealment was simply to avoid being sacked immediately. Although he would not admit any wrongdoing, I find Mr Cotton was fully aware that what he was doing was wrong and that was the reason he took active steps to conceal his actions by not telling Mr Dilley or the Claimant about his meetings and intended employment with SNIC, by deliberately concealing his shareholding using Rubicon as his nominee, by remaining silent at board meetings about what he knew about the imminent demise of the treadle business for the Claimant, by deliberately deleting all of the data from his computer and email accounts, Sim card and phone even after he had been specifically warned not to do so and that adverse inferences may well be drawn against him if he deleted data.

214. I do not accept Mr Cotton's evidence that he did not doctor the email from Idemia from Mr Charollais by deleting SNIC as the company purchasing the treadle business. Although Mr Cotton tried to assert that someone from the Claimant must have deleted the words in order to discredit him, I reject that evidence. I accept the submission made on behalf of the Claimant that the only possible purpose of deleting the words could be to hide the identity of SNIC from the Claimant in order to prevent the Claimant approaching SNIC SAS to try to establish a joint venture or some other analogous arrangement. The doctoring of the email took place at around the same time that Mr Cotton was taking active steps to hide his discussions with Mr Payet.

215. It was submitted that Mr Cotton's evidence was corroborated by Mr Payet for the "most important points". I do not accept that to be the position. Perhaps one of the most important points for Mr Cotton was when he was offered employment with SNIC UK. Mr Cotton was adamant that he was offered the job of sales and marketing manager during the meeting on 11

October 2019. Details of the package he was offered during that meeting were set out in his evidence. Yet Mr Payet was unshakeable in his evidence that no job offer was made at all during that meeting. Mr Payet and his partner simply wanted to see if they thought Mr Cotton was someone they could work with and offers were made by telephone some days after that meeting. On such an important issue, it is difficult to see how there could be two such different accounts of what surely must have been a memorable event for both Mr Cotton and Mr Payet.

216. I accept the submission made on behalf of the Claimant that Mr Cotton's credibility has been destroyed as a consequence of his numerous and repeated lies in change of position. As a consequence, I do not accept any of his evidence unless it is either not in dispute, constitutes an admission of wrongdoing or is clearly supported by contemporaneous documents or other adequate independent evidence.

217. Further, in all the circumstances, in my judgment it is appropriate to draw adverse inferences against Mr Cotton. I accept the assertion made on behalf of the Claimant that it is realistically inconceivable that there were no written communications passing between Mr Cotton and SNIC SAS relating to the actual or proposed activities and the negotiations for the Defendants to go to work for SNIC UK. It is completely unrealistic to expect the court to believe that Mr Cotton had no discussions whatsoever with Mr Heanue, the son of his girlfriend, in relation to the activities concerning treadles. Mr Heanue was working on an area of expertise of Mr Cotton for SNIC SAS on Mr Cotton's recommendation. He was a university student with no background in the rail industry. It is beyond any realistic coincidence that Mr Heanue managed to contact and provide a quote to Suzanne Wise (who just happened to be the person with whom Mr Cotton had been liaising with at Babcock and to whom Mr Cotton had provided a quote) for the exact number of treadles which were required and somehow undercutting the prices quoted by the Claimant without information being given to him by Mr Cotton.

Mr Herron

218. Whilst Mr Herron did not tell as many lies as Mr Cotton, he nonetheless did accept that he had lied to Mr Dilley about his actions. He either lied on four separate occasions about his having had an in person meeting with SNIC SAS (through his witness statement and his solicitors' correspondence) or he lied when giving evidence at trial when he stated that those previous statements were untrue and he had only spoken with Mr Payet by telephone.

219. However, just like Mr Cotton, Mr Herron deliberately concealed from the Claimant, whilst he was an employee and director of the Claimant company, the fact that he was having communications with SNIC SAS about going to work for SNIC UK and about the fact that he knew that Mr Cotton was going to go and work for SNIC UK.

220. In addition, just like Mr Cotton, Mr Herron deliberately deleted data from his computer and from his memory stick which he used for the Claimant's work before documents could be inspected by the Claimant. Mr Herron did this immediately after being accused of passing information to SNIC SAS about the Babcock contract. I do not accept Mr Herron's explanation that he said he did not know he had done anything wrong in deleting the documents. As was the position with Mr Cotton, in my judgment it is inherently very unlikely that there would not have been a single email passing between SNIC SAS and Mr Herron between October 2019 and March 2020 when Mr Herron remained a director and employee of the Claimant.

221. By deleting the data from his computer and memory stick, Mr Herron ensured that nobody could look at what documents or emails had been created and sent or received. I do not accept that his lying was explicable on the basis that he had seen how Mr Dilley treated Mr Cotton. Mr Herron was in a difficult position, but that was a position of his own making when he failed to report matters to the Claimant from as soon as early October 2019 when Mr Payet offered him a job and told him that SNIC SAS was looking at other people from the Claimant company to move to SNIC UK to deal with treadles. Just like Mr Cotton, Mr Herron put his own interests ahead of his fiduciary duties as director. Whilst he may not have signed a contract with SNIC UK until later, I find that he had formed the intention to leave and was taking preparatory steps by the time he signed the share agreement and was preparing the treadle gauge head with French lettering in November 2019 at the latest.

222. I do not accept the evidence of Mr Herron and Mr Cotton that the Claimant's directors were told that Idemia was selling the treadle business. Given the importance of the treadle business to the Claimant, it is inconceivable that this vital information would not have been discussed during at least one meeting and minuted.

223. The clear impression I formed of Mr Herron was that he was attempting to exaggerate the extent to which he was put upon by the Claimant in the way that he was treated, being given extra responsibility without extra remuneration. He asserted he had not received bonuses when it was demonstrated that in fact he had received a bonus of just over £1700 in respect of one six-month period as well as a car allowance.

224. Mr Herron also failed to give any satisfactory explanation as to why he had instructed his staff to create treadle gauge heads with French lettering at the same time as he was signing a profit share agreement shortly before signing his contract of employment with SNIC UK. His explanation for the disappearance of that French lettering treadle gauge head which he accepted he had caused to be created was unconvincing. If it had been put on the shelf as he asserted, it should have still been there. Mr Herron's evidence that it was used for the creation of other treadles and dismantled in November or December 2019 simply did not hold water as the documentation showed that only two treadles had been created in each of those months. I find that Mr Herron gave instructions to create the French lettering treadle head and that he took the treadle head to assist SNIC SAS and/or SNIC UK.

Mr Payet

225. Mr Payet did not impress me as being an accurate or reliable witness. I formed the clear impression during the trial that Mr Payet was not particularly attempting to assist the court, but rather trying to preserve his own position and that of SNIC SAS. Mr Payet was extremely laid-back when giving his evidence and I formed the impression that Mr Payet had no compunction about deliberately misleading people if it suited his purpose. For example, he was perfectly happy for Mr Heanue to describe himself variously as the UK sales manager and account manager in order to create the false impression that Mr Heanue was experienced in the work which he was carrying out for Mr Payet. In addition, when talking about the setting up of SNIC UK, Mr Payet stated "we had an accountant set up a company" when in reality, it was Mr Cotton who set up the company using the accountant.

226. I do not accept his evidence that there was no written correspondence between himself and Mr Heanue. In my judgment, it is highly unlikely that an astute businessman would hire someone to do research for him and to do "preliminary commercial work to explore business opportunities, skim through information and make phone calls in this regard" without there

being something in writing, even if it was just the limit of his work and authority. This is particularly the case where Mr Heanue knew nothing about the railway business. It is also particularly surprising when Mr Heanue himself says that he did email Mr Payet on various occasions about the work he was doing because (in Mr Heanue's own words) he was "technically lacking" and said that he became a "letterbox" between Mr Payet and Babcock.

227. Mr Payet was vague about the work Mr Heanue was instructed to do. He was vague about what Mr Heanue was to be paid saying it was "£20 an hour roughly". I accept the submission made by Mr Cohen that that evidence, along with some of his other evidence, had the appearance of being plucked out of the air. There was no evidence of Mr Heanue actually being paid nor how much he was paid. It is inconceivable that there would be no documentation showing payments made to Mr Heanue when he was working for a company run by an astute businessman. There was no documentation to show what research Mr Heanue actually carried out for SNIC SAS with the exception of the Causeway Coast Community Article which conveniently led (without any satisfactory explanation as to how) to him being aware of the exact requirements for the Babcock quotation shortly after the Claimant had been asked to quote for it. It is also beyond mere coincidence that the sole opportunity that Mr Heanue identified was the Babcock order.

228. It is of note that the first mention of Mr Heanue at all was in the defence of Mr Cotton and Rubicon in July 2020. In the defence, Mr Heanue was described as being a "sales consultant" and instructed to notify Network Rail that a UK subsidiary of SNIC SAS would become distributor for all products from 1 May 2020 as well as investigating all current and potential maintenance projects in the UK and on British built railways excluding Network Rail projects. That description is perhaps surprising given that neither Mr Cotton nor Mr Payet described Mr Heanue as being engaged specifically to notify Network Rail that SNIC UK would become the sole distributor for treadles.

229. In addition, Mr Payet's evidence was not always internally consistent. For example, he justified using an unskilled university student to do research, to start establishing the name SNIC UK in the UK market for treadles and allowed Mr Heanue to be the conduit for the extremely valuable Babcock contract on the basis that anyone could sell treadles with an hour's training.

Yet when he came to justify offering jobs to Mr Cotton and Mr Herron, he said it was important to have people with knowledge and experience.

230. All of the above goes to persuade me, on the balance of probabilities, that the involvement of Mr Heanue was a charade. This affects the assessment of Mr Payet's evidence. The assessment of the evidence as a whole leads me to the conclusion that if Mr Heanue was involved at all, he was in effect a puppet to hide what Mr Cotton was doing with and for SNIC SAS and SNIC UK. That in turn means that Mr Payet lied about the reality of Mr Heanue's involvement to cover up what Mr Cotton was really doing for Mr Payet and SNIC SAS while still being employed by the Claimant.

Mr Heanue

231. I do not accept Mr Heanue's evidence, save where it goes to assist the Claimant's case or undermine the Defendants' case. He did not give oral evidence and therefore could not be cross-examined. Very little, if any, weight could be given to his evidence in those circumstances in any event. In my judgment, it is highly unlikely that Mr Heanue would have been engaged by SNIC SAS to do research into an area about which he knew his mother's boyfriend had expertise and yet did not have a single conversation with Mr Cotton about the work he was doing.

232. It is highly unlikely that Mr Heanue just happened to access the Causeway Coast Community article the day after it was published simply by googling "Railway in Ireland". Whilst he discusses looking at other articles and documents which led to him contacting Translink who then allegedly put him through to Babcock, none of the detail of that research nor those articles and documents are produced. Mr Heanue's evidence is in stark contrast to the evidence of Mr Burdon who had difficulty finding information on the internet even though he was experienced with treadles and railways. Mr Heanue specifically referred to sending this information through to Mr Payet by email and to sending other emails to Mr Payet and Mr Menudier. Mr Heanue does not produce any emails at all and Mr Payet specifically denied that there were any emails asserting that everything was done orally.

233. Mr Heanue's account as to how he managed to identify the exact number of treadles and bases which Babcock required, then contact the exact person at Babcock with whom the

Claimant had been liaising in respect of this order and then happening to undercut the price offered by the Claimant is just not credible and I reject it.

Findings on the issues

Did either Mr Cotton or Mr Herron or both pass on confidential information of the Claimant's to SNIC?

234. I find that both Mr Cotton and Mr Herron passed on confidential information of the Claimant to SNIC.

235. Mr Cotton had sent to himself the Claimant's treadle pricing document. I find that this was intended to assist him in enabling initially SNIC SAS and thereafter SNIC UK in undercutting the Claimant's prices in respect of further treadle sales.

236. I find that both Mr Cotton and Mr Herron passed on confidential information relating to the Babcock order. This was done by Mr Cotton either providing information to Mr Heanue or Mr Payet or both relating to the numbers of treadles required and the price quoted or to be quoted by the Claimant. This was done by Mr Herron passing confidential information to Mr Payet or some other person at SNIC SAS. Mr Herron had been copied into all of the relevant emails regarding the Babcock order, including quantities and costings. There is no other satisfactory reason for Mr Herron deliberately destroying all data immediately upon being accused of passing information in relation to the Babcock order.

237. Further, I find that Mr Herron also passed on the treadle gauge head which had engraved in French with the intention of assisting SNIC SAS and/or SNIC UK.

To what extent were Mr Cotton and Mr Herron involved in the decision made by SNIC SAS to terminate the status of the Claimant as the UK distributor for treadles and did any such involvement constitute a breach of fiduciary duty or breach of contract or both?

238. It is not possible to go so far as to say that Mr Cotton and Mr Herron were directly involved in the decision made by SNIC SAS to terminate the status of the Claimant as a UK distributor.

239. However, the actions of both Mr Cotton and Mr Herron in considering and then taking job offers with SNIC UK, in agreeing to hide the negotiations they each were having with SNIC SAS and then hiding the actions they were taking to support or promote SNIC SAS and or SNIC UK were a breach of each of their fiduciary duties as directors of the Claimant company. Both Mr Cotton and Mr Herron were also in breach of the implied terms of their contract to act in good faith and with fidelity.

240. In addition, but for the actions of Mr Cotton and Mr Herron, whilst it is likely that SNIC SAS would have brought distribution in-house at some point in the future, it is unlikely that that would have been possible to do in the same timeframe. In my judgment, it would inevitably have taken longer had Mr Cotton or Mr Herron reported matters back to the Claimant as they were obliged to do.

Did Mr Cotton and Mr Herron conspire together either to procure the termination of the status of the Claimant as UK distributor for treadles or alternatively prevent the negotiation between the Claimant and SNIC to prevent the loss of the treadle business?

241. I cannot, on the evidence, find that Mr Cotton and Mr Herron conspired to procure the termination of the status of the Claimant as UK distributor. However, I do find that they did conspire together to prevent the negotiation between the Claimant and SNIC SAS to prevent the loss of the treadle business.

242. It is likely in my judgment that the treadle business would have been lost to the Claimant in the future as a result of the intentions of SNIC SAS. However, I find that outcome would not

have taken place as soon as it did but for the actions of Mr Cotton and Mr Herron. I find that their actions were designed to prevent negotiation being a realistic possibility for the Claimant.

243. For example, Mr Cotton advised Mr Dilley to terminate the Framework Agreement which the Claimant company had with Network Rail after being told that Idemia were selling the treadle business. An existing agreement between the Claimant and the main purchaser of treadles in the UK would have been a powerful incentive for SNIC SAS to have entered an agreement with the Claimant for a period of time. Mr Herron was aware that notice had been given on the Framework Agreement with Network Rail. Even if he was unaware of SNIC SAS and its intentions at the date the notice was given, he failed to speak up after he started speaking with Mr Payet about working for SNIC UK. The notice to Network Rail either may not have been given in the first place or in any event may have been rescinded if either Mr Cotton or Mr Herron had informed the Claimant what was going on, as Mr Dilley suggested.

244. Both Mr Cotton and Mr Herron cautioned Mr Dilley against purchasing a stock of treadles so that the Claimant had stock after the last order date of 30 April 2020. Without that stock, the Claimant would not have been in a position to fulfil further orders and if the Claimant was in that position, its negotiating position would have been weaker.

Were either Mr Cotton or Mr Herron or both involved in the acquisition by SNIC SAS of the Babcock order and did any such involvements constitute a breach of fiduciary duty or breach of contract?

245. I find that both Mr Cotton and Mr Herron were involved in the acquisition by SNIC SAS of the Babcock order for the reasons already given.

246. The actions of both Mr Cotton and Mr Herron constituted a breach of their fiduciary duties to the Claimant. In addition, both Mr Cotton and Mr Herron were in breach of the implied duties of good faith and fidelity. Mr Cotton was also in breach of his confidentiality, non-competition and non-solicitation clauses in his contract.

To what extent was Mr Cotton involved in the incorporation of and the decision to use SNIC UK as the sole distributor in the UK for treadles after 30 April 2020 and did that involvement constitute a breach of fiduciary duty or breach of contract?

247. I find that Mr Cotton was significantly involved in the incorporation of SNIC UK. Mr Cotton provided Mr Payet with access to the accountant Mr Brown who could set up the company. Mr Cotton provided Mr Brown with all of the information required for the incorporation of SNIC UK and signed the retainer with Mr Brown's firm TC on behalf of SNIC UK. He tried to arrange premises for SNIC UK and the only reason he was unable to do so was because he was not a director. He was also involved in the web design for SNIC UK.

248. Whilst I cannot find that Mr Cotton was involved in the initial decision of SNIC SAS to use SNIC UK as the sole distributor, all of his actions made the use of SNIC UK rather than the Claimant significantly easier and enabled SNIC UK to be operational more quickly than would otherwise have been the case.

249. All of those actions took place while Mr Cotton remained an employee and director of the Claimant. He was therefore both in breach of his fiduciary and contractual duties.

Did Mr Cotton misuse or improperly retain any of the Claimant's confidential information?

250. I find Mr Cotton did misuse the Claimant's confidential information by (a) forwarding to himself the treadle price comparison document which I find he either used or intended to use to enable SNIC SAS and SNIC UK to compete with the Claimant; and (b) forwarding to himself the contract documents which I find he used to draft contracts of employment on behalf of SNIC UK.

251. In addition, I find that Mr Cotton either provided Mr Payet and Mr Heanue with details of the quote which the Claimant was about to give to Babcock to enable SNIC SAS to quote for that order and to undercut the Claimant, or he used the information directly himself using Mr Heanue as a cover.

Did Rubicon dishonestly assist or conspire with Mr Cotton in the alleged breaches of duty?

252. I find Rubicon did dishonestly assist and conspire with Mr Cotton in his breaches of fiduciary duty and breach of contract. Mr Brown's evidence establishes that he was fully aware as the director of Rubicon that the sole purpose of putting the shares into Rubicon was to keep Mr Cotton's name out of the public domain. Mr Cotton stated that he told Mr Brown that he needed to keep the shareholding "under the radar for six months" and Mr Brown agreed that was fine. Mr Brown then arranged for Rubicon to grant a power of attorney to Mr Cotton.

253. There was, I find, no legitimate reason for concealing the true ownership of the shares and it must have been obvious to Mr Brown that Mr Cotton was using unlawful means to hide the shareholding. If Mr Cotton was not acting in breach of duty and thereby acting unlawfully, there would have been no need to keep his name out of the public domain for six months. Rubicon agreed to help him by secretly holding those shares as nominee and subject to a power of attorney. I accept the submission made by Mr Cohen that Rubicon must have known Mr Cotton to be acting unlawfully after the discussions between Mr Brown and Mr Cotton. The elements for a conspiracy are made out.

254. In addition, I also find that the claim for "knowing receipt" is also made out on the same facts. In those circumstances, the Claimant is entitled to the declaration it seeks that Rubicon holds the shareholding on trust for the Claimant. Any consequences of that declaration are for argument another day.

Did the Claimant commit a repudiatory breach of the service agreement of Mr Cotton and if so, was it accepted by Mr Cotton?

255. No. The Claimant did not commit a repudiatory breach of Mr Cotton's service agreement by viewing emails and documents on his work computer. The Claimant was entitled to access its own computers and the contents thereof pursuant to the terms set out in the employee handbook.

256. I do not accept the Defendant's submission that he was only subject to the contents and terms of the Employee handbook from 2007 when he signed his contract. The nature of documents such as an employee handbook is that they inevitably change and develop over time.

I accept the submission of Mr Cohen that it would be an absurd position if every contract for every employee needed to be changed whenever any minor modification was made to the Employee Handbook.

257. Although reference to the GDPR was made, no submissions were made as to any alleged infringement of those regulations. In any event, I can see no basis for asserting on the facts that there was any invasion of the privacy of Mr Cotton's family. The Claimant accessed its own computer and identified documents demonstrating unreasonable use of the computer by Mr Cotton as he was using the computer to act in breach of his fiduciary and contractual duties.

258. I am very conscious that I have made findings of fact which may have reputational significance to Mr Cotton and Mr Herron and also to Mr Payet. I have sought to limit my findings only to those necessary to dispose of the issues still live in this case. Whilst recognising that the standard of proof is the balance of probabilities, I have worked on the basis that the more serious the finding, the more cogent must be the evidence in support of it. I have had that principle very much in mind in making my findings of fact.

Conclusion

259. Having found that the Claimant has proved its case on liability, the Claimant needs to elect whether it seeks an account of profits or a claim for equitable compensation/damages. Once that election has been made, further directions will be needed for the remainder of the claim.

Final Remarks

260. The hearing to determine the appropriate form of Order following the handing down of Judgment in this matter ("the Form of Order Hearing") is adjourned to the first available date convenient to the parties but no later than 12 August 2022. It is hoped that the same hearing can be used to make directions for the quantum trial. A Form of Order Hearing followed by a separate directions hearing is permitted if that is more convenient to the parties.

261. Such adjournment is an adjournment within paragraph 4.1(a) of Practice Direction 52A and accordingly the time for making any application for permission to appeal is extended until

the Form of Order Hearing and pending that hearing the time for service of any Appellant's Notice shall not run. In addition, the time for making any application under paragraph 4.4 of Practice Direction 40E is also extended until the Form of Order Hearing.

262. If the parties agree a form of order, this can be sent to the Court for the attention of Her Honour Judge Kelly who will cause the consent order to be drawn and sealed. The date of sealing will be the date on which the time for service of any Appellant's Notice shall start to run.

263. I am grateful to counsel for their very able assistance in this matter.

Delay

264. I acknowledge and apologise for the delay in delivering this reserved judgment. Final written submissions were received on 5 January 2022. As is widely known, I have been seriously ill. I conducted this trial during a period of "phased return" to work. I began work on the preparation of this judgment after receipt of the closing submissions but regrettably, as a result of some ongoing health issues, it has taken me significantly longer to complete the judgment than I would have wished. These matters do not necessarily excuse the delay, but I hope they go some way to explaining it.