



Neutral Citation Number: [2011] EWHC 3376 (QB)

Case No: HQ 11 X 04040

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2011

Before:

MR. JUSTICE POPPLEWELL

Between:

(1) CLEAR EDGE - UK LIMITED
(2) CLEAR EDGE GROUP LIMITED

Claimants

- and -

(1) GARY ELLIOT
(2) COLIN BEATTIE
(3) ANDREW STARTIN

Defendants

CHARLES BÉAR QC and **AKHLAQ CHOUDHURY** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
MR. PEARCE-SMITH (instructed by **Burgess Salmon LLP**) for the **Defendants**

Approved Judgment

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MR. JUSTICE POPPLEWELL:

1. This is the Claimants' application for a speedy trial and/or injunctive relief pending trial of a kind which has become known as springboard relief. Both parties desire a speedy trial and, in my judgment, it is appropriate in this case to order a speedy trial. I will order that the trial is to take place at the earliest available opportunity on or after Monday, 16 January 2012 with an estimate of five days.
2. What is controversial is the Claimants' application for injunctive relief. The Claimants also seek an order for disclosure and delivery up of certain documents and electronic devices and e-mails. I will come to that application separately in due course.
3. The Claimants are two companies within the Clear Edge group, Clear Edge designs, manufactures and sells industrial process filtration products. One of its product ranges is the Cerafil line. The Defendants say that the Cerafil line amounts to roughly 2% to 3% of Clear Edge's business. Cerafil products are gas filtration products comprising ceramic tubes impregnated with a catalyst. A leading product in the range is Cerafil "Topkat". That product has generated orders of over €3 million worth in the first nine months of 2011. Topkat was first manufactured and brought to the market in about 2005. It had a relatively long gestation period but it is common ground between the parties that it has recently taken off in terms of its success. The catalyst with which the tubes in Topkat are impregnated is manufactured by a Danish company, Haldor Topsoe AS, to whom I shall refer as Topsoe.
4. The Defendants are relatively senior employees of Clear Edge who have worked together as a team for many years at Clear Edge and its predecessor developing and marketing the Cerafil range. They have worked together for about twenty years. According to Mr. Jordan, a director of the claimant, they effectively comprised the entirety of what he describes as the Cerafil team. They had access to a high degree of confidential information as to the technical and financial aspects of the Cerafil business and in relation to end customers. They were not statutory directors of the companies. Mr. Elliot and Mr. Startin were on the sales side. Mr. Beattie was on the technical side. The Claimants describe the team as effectively being and running a business within a business.
5. Between 1998 and 2007 each Defendant worked from home. Mr. Elliot was technically the line manager of the other two but the evidence is that they worked as a small non-hierarchical team. They got on very well both professionally and privately. In 2007 Mr. Beattie was given a research and development job which meant that he ceased to be part of a dedicated Cerafil team and a significant part of his time was spent at the Clear Edge premises in Germany with the rest of his time spent at home.
6. Between 2007 and 2010 Mr. Elliot and Mr. Startin worked from an office in the West Midlands. Thereafter they continued to work from home. In 2011 Mr. Elliot's title was business development manager of the Cerafil division. His role as a senior employee is described in Mr. Jordan's first witness statement at paragraph 29 and I do not need to recite it. Mr. Startin reported to Mr. Elliot. He had the title of product manager. He is also described by Mr. Jordan at paragraph 31 of his witness statement as a senior employee and Mr. Elliot's right-hand man.

7. By 2011 Mr. Beattie was by now the head of R&D in Germany. He was, however, still working essentially from England although it was intended that he should re-locate to Germany in March 2012. He is described by Mr. Jordan at paragraph 34 of his first witness statement as leading the technical development for the Cerafil product line. By contrast the evidence of Mr. Elliot and also of Mr. Beattie is that by 2010 the Cerafil technical development was being led by the R&D manager, Mr. Richard Allen, and that Mr. Beattie had some, but very limited, input in technical terms in relation to the Cerafil product line.
8. All three were described by Mr. Jordan as being included in high level decision-making within the group in relation to the Cerafil business including, in particular, that of Topkat.
9. As I have said the catalyst for Topkat was supplied by Topsoe. Clear Edge were, therefore, dependent upon that supply and upon Topsoe for that supply. In that respect they were dependent upon maintaining the goodwill of Topsoe. In an e-mail of 14 June 2011 Mr. Elliot described the need which Clear Edge had for Topsoe in these terms:

"Topsoe are crucial to the future development of our catalytic filter for supply of catalyst, technical support and underwriting guarantees. It is not impossible to find an alternative supplier but it will take time."
10. That reflects the fact that Topsoe's value to Clear Edge was not only as a supplier but also in providing technical support. Topkat products were incorporated into other machinery by manufacturers and because Topsoe were required to give warranties in relation to the performance of the filters Clear Edge were also dependent on Topsoe to that extent.
11. The relationship was, however, symbiotic. Topsoe needed, or at least had a significant interest in, sales of the catalyst to Clear Edge. As I have said the evidence is that at this stage the product was taking off: that appears not only from an e-mail which Mr. Elliot sent to his superiors on 5 April 2011 but is the expression used in the Defendants' skeleton argument.
12. Topsoe had no capacity themselves to manufacture an equivalent to Topkat without the assistance of these Defendants. The evidence before me suggests that in order to develop a product of this nature it would require a substantial lead time for its development (through to the point when it could be sold) of something between two and four years. One of the reasons is that it would not only be necessary to develop the manufacturing process which would take perhaps up to a year or more; this is a product which to some extent proves itself by its use by clients and by the results and the analysis of its performance in operation being available to persuade clients of its efficacy. That too takes time before the product can achieve success in the market. For Clear Edge it had been the breakthrough of getting performance data from a major customer, Maguin, which had enabled increasingly successful marketing of this product. Part of Mr. Elliot's and Mr. Startin's jobs, and an important part of them, was to acquire this performance data and to use it in marketing the product. They were, in Mr. Jordan's words, the eyes and ears of the Cerafil division in this respect.

13. It also appears from the evidence before me that Topsoe do not have the business expertise to manufacture a similar product themselves. In 2008 Topsoe entered into a confidentiality agreement with Clear Edge for the purposes of Topsoe exploring a possible acquisition of the Cerafil business. Mr. Jordan explains that the reason why such an acquisition did not go ahead was because Topsoe did not have the business expertise to run such a business. As recently as 3 March 2011 Topsoe renewed their interest in exploring the possibility of acquiring the Cerafil business but Clear Edge said they were not interested.
14. Topsoe does not have a directly equivalent product; but that is not to say that it does not have a competitive product. Topsoe has a ceramic filter called SCR which it sells in the same market. Mr. Elliot described its competitive status in these terms at paragraph 105 of his first witness statement:

"Currently one of Topsoe's standard products is the SCR which uses this type of catalyst. Topkat is proving to be a very effective competitor for this product in the market place. It has edged out the SCR/standard filtration system combination in a few applications and shows promise to become the technology of choice for some specialist applications such as for glass furnaces."

At the end of paragraph 106 he said:

"Both products are existing rival products which stand or fall on their merits on a case by case basis."

15. Mr. Pearce-Smith, counsel for the Defendants, said in submission that they were not really comparable products because SCR was cheaper and Cerafil was more expensive and that they were not the same products. I accept that that may be so, but the fact that one is cheap and one is expensive or that they are not exactly the same does not mean that they are not competitive products. Mr. Elliot's evidence suggests that they are.
16. On 15, 16 and 19 September 2011 respectively each of the Defendants gave notice of termination of their contracts of employment by e-mail. As far as Clear Edge were concerned Mr. Jordan says that these resignations came out of the blue without him having had any prior notice of any dissatisfaction on the part of the Defendants with whom he had had a review as recently as July this year. Mr. Elliot's notice of termination gave six months' notice to expire on 15 March 2012. Mr. Beattie's and Mr. Startin's notices of resignation announced a termination date of 31 October 2011.
17. The Defendants revealed in those notices that they were going to work at Topsoe. According to Mr. Jordan what they told him was that they were going to work in a ceramic filtration division which Topsoe was going to open. Again according to Mr. Jordan, Clear Edge's chief executive officer was told by Topsoe's chief executive that the three Defendants had sought out Topsoe for the employment. According to the Defendants their employment with Topsoe was not specifically for a ceramic filtration division but was to be in a general filtration division, although it might be that in due course ceramic filters would form a part of that division.

18. Clear Edge then asked the Defendants for a return of all its, Clear Edge's, property including laptops and mobile phones. For that purpose an employee, John Catalano, was sent to collect those electronic devices and any other paper company property from the Defendants on 20 September 2011. He found all three Defendants were at the house of Mr. Startin. He was told that the Defendants could not put their hands on everything immediately and the Defendants asked for 24 hours within which to collect things together. That was agreed.
19. 24 hours later some but not all of the company's property was returned. What was returned on that occasion included a substantial volume of documentation. Mr. Jordan describes it as a greater volume than he would have expected to have been kept at home, even for those who were working from home. The Defendants on the other hand say that it was no greater in quantity or in nature than would have been expected from those who had been working predominantly from home over a long period of time. I do not attach any significance to the volume of documentation that was produced on that occasion.
20. However, in due course it emerged that there had been substantial file deletion applied to the laptops during the 24-hour interval resulting in the permanent deletion of a large number of files. I shall have to return to the nature of that deletion later in this judgment. The mobile phones which were returned had in two cases been completely wiped clean of communication data and in the third case largely wiped clean although some small element of data remained. In Mr. Elliot's case his BlackBerry was returned without the SIM card. The Defendants say that the mobile phones had their data wiped because they contained a good deal of personal data and there had been insufficient time within the 24 hours, given the other things they also had to do, to delete individually those aspects which were personal so as to leave those aspects which related to the company. Mr. Elliot says that the reason he retained his SIM card was that the telephone number was one that he had had for a long time and he did not want to go to the trouble of having to get a new number by surrendering the SIM card.
21. Instructions were then given to the Defendants to attend work in Germany but these were refused on the grounds that the requests were unreasonable and contrary to the terms of their contracts of employment. It seems to me that those objections were well founded. However that may be, none of the Defendants have attended work since their notices.
22. On 7 October 2011 Clear Edge sought undertakings from the Defendants. They sought a warranty that they had not disclosed confidential information to Topsoe and sought undertakings not to engage in any competitive activity or to breach duties of fidelity prior to the termination dates and an undertaking to comply with the post termination conditions in their contracts of employment.
23. It is a convenient moment to refer to the terms of their contracts of employment. Each of their contracts was headed Senior Staff Contract. Mr. Elliot's contract of employment provided for a six-month notice period. Paragraph 9.3 provided:

"If the Company requires you to remain away from work during your notice period (whether you or the Company has given notice) you will be required to comply with any

reasonable conditions laid down by the Company and whilst on full pay during that time you will not be permitted to work for any other person, firm, client, corporation or on your own behalf without the Company's prior written permission."

24. Such a clause entitling the employer to require an employee to serve out his notice without working and not to work for himself or anyone else in the meantime is commonly referred to, and has been referred to in this case, as a garden leave clause. Clause 11 was headed confidentiality and I must read it in full:

"11.1 During the course of your employment you may have access to, gain knowledge of, or be entrusted with information of a confidential nature. You must not, whether during your employment with the Company or after the termination of your employment for whatever reason, disclose to any unauthorized person or use any confidential information relating to the business affairs or trade secrets of the Company.

This may include policy, organisation, research and development of new products, technical data, future plans, financial information not publicly available, details of customers or employees (past or present), or any other information of a confidential nature.

11.2 You must not make any copy, abstract, summary or précis of the whole or part of any document belonging to Company except where expressly authorised to do so or in the proper performance of your duties.

11.3. You will be required to return to the Company on the termination of your employment or at any time at the Company's request all papers, documents and copies thereof, computer disks, keys, credit cards and all property properly belonging to the Company. You may be required to sign an undertaking that all such property has been duly returned."

25. The reference in clause 11.1 to the restriction continuing after the termination of the employment is one which it was conceded on behalf of the Claimants did not impose any effective restriction which could be regarded as more extensive than such obligation as would in any event be implied in a post employment context in any contract of employment.
26. The contracts of employment of Mr. Beattie and Mr. Startin were in materially identical form, save that they did not provide for six-months' notice, but rather provided for a period of notice of not less than four weeks.
27. The undertakings having been sought on 7 October 2011, a response came in a solicitor's letter sent on behalf of the Defendants on 17 October 2011. The Defendants, through that letter, said that they were not prepared to give the warranties because they went beyond the terms of their contracts of employment. The main reason which was identified in that letter for refusing to sign the undertakings was:

"They [that means the undertakings] also incorrectly state that Haldor Topsoe is a direct competitor of your client."

That was not true and is now belied by the evidence which is put forward by Mr. Elliot. The last paragraph went on to say:

"However, we have been instructed to provide an assurance on behalf of our clients that they intend to comply with the obligations contained at clause 11 of their respective contracts of employment."

28. On 25 October 2011 Clear Edge received a preliminary report from an IT company called Kroll Ontrack who had been asked to examine the returned mobile phones. It was that report which indicated that apart from a few files the phones had been wiped clear with no user data available. It did not report on the laptops. That was, so Mr. Jordan says, the trigger for the Claimants deciding to commence proceedings.
29. On 27 October 2010 the Claimants made a without notice application to Mackay J in order to secure a hearing of an application on notice for injunctive relief on Monday, 31 October: Mackay J made such an order. On Sunday 30 October, the day before the proposed hearing and at a time at which, as I understand it, the Defendants were not legally represented, the parties agreed to the terms of a consent order. The terms of the consent order closely mirror, although are not exactly the same as, the form of the order which I am asked to make and essentially restrained the Defendants from taking up their employment with Topsoe pending the return date and from using or disclosing any confidential information until the return date. In addition they imposed an obligation to deliver up information and documentation which constituted the Claimants' property. That had to be delivered up by 4 November 2011. The upshot was that further material was delivered up pursuant to the consent order, comprising a considerable body of further documentation including some electronic back up devices.
30. The order which is sought has been the subject of some refinement in the course of the hearing but, as I understand it, the order which is now sought is in the following terms:., "that until the hearing of the speedy trial or further order whichever is the earlier:
 - (1) The First Defendant shall not directly or indirectly, whether by himself, his servants or agents or otherwise howsoever:
 - (a) carry on, be employed or otherwise engaged, concerned, or interested in any capacity (whether for reward or otherwise) in or provide any technical, commercial or professional advice to, and/or in any way assist Haldor Topsoe A/S or any associated company thereof or any other company owning, operating, or engaged in the business of industrial process filtration products and associated services other than the First Claimant or its associated companies. ...
 - (c) use or disclose or permit to be used or disclosed any of the Claimants' confidential information for any purpose other than

the performance of his specific obligations under his contract of employment with the First Claimant."

31. Confidential information is to be a defined term whose definition is to be taken from the headings in paragraph 42 of Mr. Jordan's second witness statement with possibly some refinement in relation to some of the headings in order so comply with the necessary degree of clarity and particularity. The exact extent to which there might need to be some adjustment to the headings has been left for further discussion and resolution should it arise.
32. The order goes on to seek an order against the second Defendant:

"The Second Defendant shall not directly or indirectly, whether any himself, his servants or agents or otherwise howsoever:

 - (a) carry on, be employed or otherwise engaged, concerned, or interested in any capacity (whether for reward or otherwise) in or provide any technical, commercial or professional advice to, and/or in any way assist Haldor Topsoe A/S or any associated company thereof;
 - (b) use or disclose or permit to be used or disclosed any of the Claimants' confidential information for any purpose other than the performance of his specific obligations under his contract of employment with the First Claimant."
33. Paragraph 3 seeks an order against the third Defendant in the same terms as against the second Defendant; save that the contract of employment being referred to is a contract of employment with the first claimant rather than the second claimant.
34. I note that the final relief which is sought in the Particulars of Claim which is equivalent to the injunctive relief preventing the Defendants from taking up employment with Topsoe is only to prevent them doing so until 15th March 2012. The interim relief which I am asked to grant envisages that the trial will take place before then because of my order in relation to a speedy trial.
35. It is worth observing at this stage that there are obvious and important differences between the claim against Mr. Elliot on the one hand and the claim against Mr. Beattie and Mr. Startin on the other. So far as Mr. Elliot is concerned his contract of employment continues. He is presently serving his notice which will not expire until March of next year. The claim against him can be based upon the obligations which he owes as a continuing employee. They include the employee's duty to act in good faith and with loyalty to the employer, the duty of fidelity.
36. By contrast in Mr. Beattie's and Mr. Startin's case their period of notice has expired and their employment has come to an end. Prima facie they are free to work elsewhere. Their obligations of confidentiality are not the same as the obligations of confidentiality they owed when they were still employed. The obligations of confidentiality which the law generally implies into a contract of employment as applying during the currency of the employment are not exactly the same as those which the law implies in relation to employees once the employment has come to an

end. The claim against Mr. Beattie and Mr. Startin, therefore, can only be based on, first, such obligations as are implied obligations surviving the termination of their contracts of employment; or, second, such springboard relief as can properly be granted against them arising from any pre termination breaches by them or Mr. Elliot or threatened post termination breaches by them or Mr. Elliot.

37. The grounds for an injunction in the terms of paragraph 1(a) against Mr. Elliot can most simply be advanced on the basis of his continuing contractual duty of fidelity whilst serving his notice, what Mr. Charles Béar QC, on behalf of the Claimants, described as the garden leave basis for the injunction. Mr. Béar QC did not however put the garden leave basis at the forefront of his argument. He sought to support the relief by addressing his argument firstly and primarily towards a basis for injunctions against all three Defendants on the grounds of entitlement to springboard relief with the garden leave basis for the injunction against Mr. Elliot simply added as a further and subsidiary ground. It is convenient to address the issues and the argument in that form and on that basis.
38. I must now say something about the law as it applies to the obligations of employees and the nature of springboard relief. In *Helmet Integrated Systems Limited v. Tunnard and others* [2006] EWCA Civ. 1735, [2007] IRLR 126, Moses LJ said this at paragraph 26:

"26. ... An employee must act with good faith towards his employer (see e.g. *Robb v Green* [1895] 2 QB 315 at 317). An employee must receive and obey the instructions of his employer, and devote his time and talents to his employer's business. But whilst he must not compete with his employer during the course of his employment, the duty of fidelity imposes no inhibition on his competing against his former employer once he has left. He is entitled to take the skill he has acquired and developed during the course of his employment and apply it for his own benefit once he has left, even if that involves competing against his former employer. He may also take with him and use knowledge and information which he has acquired, provided he does not use or disclose information properly described as a trade secret (see e.g. *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 136).

27. This freedom to compete, once an employee has left, unrestrained by any enforceable covenant, carries with it a freedom to prepare for future activities, which the employee plans to undertake, once he has left. In *Robb v Green* (q.v. supra) Hawkins J concluded that a manager who had copied a list of customers was liable in damages for breach of an implied term not to use such information to the detriment of his employer. But he observed, in words echoed frequently thereafter, that each case would depend upon its own circumstances and there will be cases where an employee may legitimately canvass, issue circulars, have a place of business ready and hire employees (see page 15). The Court of Appeal

made no observation suggesting disagreement when it affirmed Hawkins J's conclusion.

The Legitimacy of Preparatory Activity

28. The battle between employer and former employee, who has entered into competition with his former employer, is often concerned with where the line is to be drawn between legitimate preparation for future competition and competitive activity undertaken before the employee has left. This case has proved no exception. But in deciding on which side of the line Mr Tunnard's activities fall, it is important not to be beguiled into thinking that the mere fact that activities are preparatory to future competition will conclude the issue in a former employee's favour. The authorities establish that no such clear line can be drawn between that which is legitimate and that which breaches an employee's obligations."

39. He then went on to explain that preparations for competition may more easily be characterised as a breach of an implied term of the contract of employment where an employee owes not only the ordinary duty of fidelity but also fiduciary obligations, whether those fiduciary obligations are regarded as an incident of the contract or arise independently of it. At paragraph 33 he said:

"That HISL [the Claimants] should concentrate its efforts on establishing that Mr Tunnard owed an obligation as fiduciary and acted in breach of his obligation is not surprising. Since the essence of the obligation of an employee as fiduciary is that the employee must act solely or exclusively in the interest of his employer, it will be easier for an employer to establish that activities in preparation for competition were themselves in breach of a fiduciary obligation."

40. He then went on to set out what is the clearest recent authoritative statement of the law as to when an employee will owe a fiduciary obligation drawing heavily on the clear and helpful decision of Elias J in *University of Nottingham v Fishel & Anr* [2000] ICR 1462. Moses LJ said at paragraph 36:

"36. It is commonplace to observe that not every employee owes obligations as a fiduciary to his employer. An employee owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not in his own, which is the hallmark of any fiduciary duty owed by an employee to his employer. The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty. The decision of Elias J in *University of Nottingham v Fishel & Anr* [2000] ICR 1462 provides the clearest analysis of the distinction between the duty of fidelity which every employee owes and a fiduciary duty which

requires an employee to act solely in the interest of his employer and not in his own interest, still less the interests of anyone else. Care, as Elias J remarks, must be taken not to equate the duty of good faith and loyalty owed by every employee with a fiduciary obligation (see page 22). Unless that distinction is maintained common law rules of causation and remoteness of damages may be:-

'Miraculously sidestepped by intoning the magic formula (breach of fiduciary duty)' (see Lord Millett in *'Equity's Place in the Law of Commerce'* (1998) 114 LQR 214 at 217).

37. Elias J's decision is not only of importance in distinguishing between an employee's implied duty of loyalty and a fiduciary obligation but also in identifying how a fiduciary relationship might be established. I can do no better than recite Elias J's statement of principle:-

'... in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interest of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached' (Para 1494, page 22)."

41. Although the existence of fiduciary obligations will make it easier to characterise the preparation for competitive activity as a breach of implied obligations it by no means follows that such preparations will not amount to a breach of the duty of fidelity; they may well do so in the particular circumstances of particular cases,
42. In *Sanders v. Parry* [1967] 1 WLR 753, Havers J had to consider a case where a solicitor had defected from the firm he was previously working for, a firm in fact comprising a single partner, in order to set up on his own to service a particular client, a Mr. Tully whose business it had been his job to service for the firm. He had made an agreement to do so before he had left. Havers J at page 765B to E expressed the duties which he owed in these terms:

"Now in my view there was a duty on the Defendant at all times during the subsistence of that agreement to protect his master's interests, especially to do his best to retain Mr. Tully as a client of his master, and in regard to the letter to which I have referred, there was a duty on the Defendant to look after and protect Tully's interests on behalf of his principal, the plaintiff. Now, in accepting this offer the Defendant was not protecting his master's interests. He made no effort to try and retain Mr. Tully as a client of his master. The Defendant was placing himself in a position in which there was a conflict of interests between him and his principal and he was looking after his own interests to the detriment of his master's interests.

He was knowingly, deliberately and secretly acting, setting out to do something which would inevitably inflict great harm on his principal."

43. At page 765 H he concludes that he was satisfied that in accepting the offer the Defendant was guilty of a breach of duty in regard to his contract of employment that the Defendant would serve the plaintiff with good faith and fidelity.
44. The duty to disclose a threat to the business which falls on somebody with a sufficiently senior position of responsibility in relation to an aspect of the business which is threatened, was the subject matter of decision of the Court of Appeal in *Sybron Corporation and another v. Rochem* [1984] 1 (Ch) 112. In that case Fox LJ said at page 129:

"I am not at all saying that an employee has in every case a duty to disclose to his employers any information that he has about breaches of duty by his fellow employees. I can see that ordinary usage is in many respects against such a rule. The matter must depend, I think, upon all the circumstances of the case. The important circumstances in the present case are that Mr Roques was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware."

45. Kerr LJ said at page 130:

"... the issue is whether or not Mr. Roques was in breach of a duty to his employers which induced the mistake on their part. As to this, it seems to me there can only be one answer. Mr. Roques was throughout in fraudulent breach of a clear duty owed to his employers to put an end to activities of Mr. Bove and the other conspirators, who were engaged in seek to destroy the employers' business for their own purposes, and this continuing breach of his duty induced the mistake. His duty was to report activities of the conspirators in any event, and to dismiss them forthwith in so far as it lay within his powers to do so. Covering up and deliberately concealing their activities, which is what he was doing throughout, was the clearest possible breach of duty for a person in his position, and equally clearly it induced the mistakes in question."

46. In *Helmet v. Tunnard* at paragraph 31 Moses LJ cited with approval a decision of Etherton J in these terms:

"This approach was followed by Etherton J in *Shepherd Investments Limited and Anr v Walters & Anr* [2006] EWHC 836 (Ch). He held that when former directors and employee set up a competing business, diverting business opportunities and misusing confidential information, they had acted in breach not only of their fiduciary obligations but their implied obligation of fidelity the moment that they procured the services of

attorneys in the Cayman Islands to set up the rival business. On the facts of that case, he held that a former employee was also in breach of obligations as a fiduciary, whether or not he was to be regarded as a director, and that he was in breach of his duty of fidelity. The case affords an example, on its facts, of work of preparation which constituted breaches of both the implied duty of fidelity and fiduciary duties."

47. Those authorities suggest that a person in a sufficiently responsible position may be in breach of his duties of fidelity in making preparations for competitive activity and in failing to disclose such activities of his fellow employees or employees for whom he is responsible if that competitive activity constitutes a threat to the business which falls within the sphere of his responsibilities. That is so irrespective of whether he owes fiduciary duties
48. As to duties of confidentiality the seminal judgment of *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 identifies the scope of the implied duty of confidentiality which exists during the currency of the contract of employment and that which subsists after termination. I do not need to recite the distinction, which is well-known and set out at pages 135 to 137 in the judgment of Neill LJ, between on the one hand information which attracts confidentiality during the currency of the contract of employment (categorised in that case as class 2 information) which whilst confidential during the employment does not attract any restriction after the employment has come to an end; and on the other hand information (in that case was designated class 3) which is information which is in the nature of being a trade secret or something akin to it which continues to attract protection after the employment has come to an end by virtue of an implied term in the contract of employment.
49. What is, however, clear is that the mere fact that an employee can carry information in his head is not of itself something which takes it out of the category of class 3 confidential information which is protected by the implied term after the termination of the employment. That appears from the decision of the Court of Appeal in *Johnson & Bloy (Holdings) Limited and another v Wolstonenholme Rink Plc and another* [1989] 1 FLR 135. To similar effect is a dictum of Gouling J in the *Faccenda* case itself which was cited with approval by Neill LJ at page 134C.
50. So far as springboard relief is concerned, the jurisdiction to grant such relief appears from the decision of the Court of Appeal in *Roger Bullivant Ltd. v. Ellis* [1987] 1 ICR 464. In that case an employee resigned and took with him, among other things, a card index showing the names and addresses of the plaintiff's former customers. The Defendant started a competing business and there was a strong prima facie case that the former employee had contacted the customers who were identified on the card index.
51. An injunction was granted by Falconer J, the relevant part of which was a restriction on the Defendants from entering into or fulfilling any of the contracts with customers which had been made with or through any person whose name appeared on the card index which had been removed from the possession of the plaintiffs. Nourse LJ observed at page 473 H that the card index information was not a trade secret or an equivalent within the *Faccenda Chicken* categorisation but fell within class 2 in that

categorisation; but there had been a breach of the duty of good faith in copying the card index. He went on to say at page 474 H:

"The value of the card index to the Defendants was that it contained a ready and finite compilation of the names and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to them. Most of the cards carried the name or names of particular individuals to be contacted. While I recognise that it would have been possible for the first Defendant to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs' property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of *Robb v. Green* [1895] 2 Q.B. 315 which, let it be said, is one of no more than fair and honourable dealing, should be steadfastly maintained."

52. On that basis at page 476G he described the purpose of Falconer J in granting the injunction as being:

"... to prevent the Defendants from taking unfair advantage of the springboard which he considered they must have built up by their misuse of the information in the card index."

53. There have been a number of examples where breaches of obligations of confidentiality, both prior breaches and threatened breaches, have justified springboard injunctions. A question arises whether breaches of other obligations might also justify springboard relief. The earliest example of their doing so which has been drawn to my attention was a decision of Blackburn J in *Midas IT Services v. Opus Portfolio Limited* 21st December 1999 unreported.

54. A more recent example is the case of *UBS Wealth Management (UK) Ltd & anor v Vestra Wealth LLP and others*. That involved a mass defection of a team of those involved in the financial services industry from UBS which, as Openshaw J found, had arguably occurred by orchestrated activities by a number of employees including a number of senior managers who had thereby committed breaches of their duties of fidelity and, indeed, the torts of inducing breach of contract and unlawful means conspiracy. Openshaw J said at paragraph 4:

"In my judgment, springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage, an 'unfair start', of any serious breaches of their contract of employment (or if they are acting

in concert with others, of any breach by any of those others). That unfair advantage must still exist at the time that the injunction is sought, and it must be shown that it would continue unless restrained. I accept that injunctions are to protect against and to prevent future and further losses and must not be used merely to punish past breaches of contract."

55. I agree with Openshaw J.
56. So far as the principles to be applied on this application for interlocutory relief are concerned I apply the principles laid down in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396. The well-known principles can be expressed in the briefest summary by saying that the claimant must show, first, a serious issue to be tried on the merits, second, that damages would be an inadequate remedy if the relief sought were refused and, third, that the balance of convenience favours the relief sought.
57. On behalf of the Defendants it is agreed that I should apply the principles in *American Cyanamid* but they say that the first element, the requirement of a serious issue to be tried, needs to be addressed in a more nuanced way in the present context. The Defendants submit that because the application is in part for interim springboard relief, the court should consider the merits of the parties' cases and should only grant springboard relief if it is satisfied that a greater degree of merit is shown merely than a serious issue to be tried.
58. In support of that proposition Mr. Pearce-Smith on behalf of the Defendant cite to me a passage in the judgment of Laddie J in *Series 5 Software v. Clarke* [1996] 1 All E R 853 at 865 where Laddie J said:
- "Accordingly, it appears to me that in deciding whether to grant interlocutory relief, the court should bear the following matters in mind. (1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to whether an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve come election issues of disputed fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) [this is the passage that is emphasised by Mr. Pearce-Smith] any clear view the court may reach as to the relevant strength of the parties' cases."
59. I bear those principles in mind but in a case of this nature, where there are complex issues of disputed fact or law, the court is often not able to reach a clear view as to the relative strength of the parties' cases and if it cannot do so then it must address the position on the basis of whether the Claimants have shown a serious issue to be tried.

60. It is also said on behalf of the Defendants that the court should only grant relief in the form of an injunction which is likely to expire before or shortly after the trial if the court can conclude that the Claimants' claim is likely to succeed on merits and that in those circumstances it is not enough for the Claimants merely to establish that there is a serious issue to be tried. In that respect reliance is placed on what Staughton LJ said in *Lansing Linde v. Kerr* [1991] 1 WLR 251 at 258. I accept that if the interlocutory relief which is sought is likely to be largely dispositive of the claim as a whole because the relief, if granted, will last for the entirety or almost the entirety of the period for which final relief is sought in the action, then there is an imperative on the court to do its very best to investigate the merits of the Claimants' claim and a higher standard may be imposed in relation to those merits. However, this is not such a case. I have ordered a speedy trial and the injunctive relief, if granted, would only last for a period of approximately two months. This is therefore a case in which the ordinary *Cyanamid* principles in my judgment apply.
61. I turn to the argument advanced on behalf of the Claimants for springboard relief. The Claimants advance the claim for springboard relief on two bases, first it is said that there was here a coordinated campaign to leave and to join Topsoe taking the entirety of the team which was most closely associated and concerned with the Topkat product line. This was a concerted and coordinated effort. It is said it left the Claimants unprotected in relation to the critical business relationship on which the business depended, namely the relationship with Topsoe. It put Topsoe in a position to take over the benefit of the pre-existing relationship between these Defendants and Clear Edge, it is said that all that was kept secret and undisclosed until it was disclosed, and then only in part, by the resignation letters. In particular what was kept quiet was Topsoe's intention to move into production of an equivalent product and its ability to do so which would arise by virtue of the recruitment of the team. That is said to have been a breach of the duties of fidelity and the fiduciary duties which it is contended each of the Defendants owed. The solicitation and encouragement each of the other, it is said, would have been a breach of those duties.
62. The second basis for springboard relief is said by the Claimants to be that there have already been breaches of obligations in relation to confidential information; those breaches have involved the copying and retention and destruction of confidential information; the Claimants say there are also threatened future breaches of the obligations in relation to confidential information. The Claimants say that all that activity, both the coordinated departure which was kept secret and the past and threatened misuse of confidential information, has damaged and threatens to continue to damage Clear Edge's relationship with Topsoe and has given and would give Topsoe an unfair advantage if the team were allowed to join Topsoe.
63. In seeking to make that case good the Claimants rely by way of foundation on the suggestion that these three Defendants constitute essentially the entirety of the Cerafil team. They describe them as being or running a business within a business. They point to the fact that they all have between them collectively the know-how to enable Topsoe to start manufacturing in competition and that what has happened has been a resignation at which they have all resigned at the same time. That the Defendants say is that whilst Mr. Elliot and Mr. Startin could be described as a team, Mr. Beattie has not been part of that team since 2007 or at least not since 2010. However, this is notable when Mr. Jordan had a review to review the conduct of the Cerafil business in

July of this year, Mr. Beattie was part of the team who was consulted for those purposes and to discuss the future of the business. To my mind the Claimants have made out to a sufficiently arguable standard that throughout 2011 the three constituted essentially the Cerafil team. If further support for that were required it is to be found in Mr. Beattie's involvement together with Mr. Elliot in the management buyout, the subsequent proposal for the independent running of the Cerafil business, which I shall come to in a moment, and by his leaving to join Topsoe at the same time as the other two.

64. As to the question of whether fiduciary duties were owed, the Claimants say that all three Defendants owed fiduciary duties or at least arguably so. It is accepted on behalf of the Defendants that there is a serious issue to be tried that Mr. Elliot owed fiduciary duties by virtue of his management role in relation to Mr. Startin, but only duties in relation to Mr. Startin's employment.
65. The Defendants deny that Mr. Beattie or Mr. Startin themselves owed fiduciary duties. They rely upon the fact that Mr. Startin had no responsibility for any other employees and that Mr. Beattie did not have any responsibilities for any employees whose defection has occurred in this case and the Defendants say that it is relevant that Mr. Beattie did not have responsibilities in 2011 on the research and development side which were exclusive to Cerafil or even by that stage were primarily focused upon it.
66. In my judgment the Claimants have made out a case to a sufficiently arguable standard that each of the three Defendants owed fiduciary duties in relation to a coordinated defection and in relation to the use by themselves and others of confidential information. They were senior staff, as their contracts of employment describe them. They had access to information which had a very high degree of confidentiality and their contracts of employment imposed specific and express restrictions in relation to that information. Their role together as a team involved handling all aspects of the Topkat business and, in particular, handling those aspects of that business which involved liaising with Topsoe and maintaining the goodwill of Topsoe. It is, at the lowest, arguable, in my judgment, that there would be a breach of fiduciary obligations in failing to report to Clear Edge any threat to Clear Edge's relationship with Topsoe in the context of the Topkat business and any threat to that business itself.
67. In the final analysis, however, my conclusion that it is arguable that they each owed fiduciary duties is not critical to my decision. That is because the activities which are complained of, if they are made out to a sufficiently arguable standard, would in my judgment at least arguably be a breach of the duties of fidelity quite apart from the question of whether these Defendants owed, in addition, fiduciary duties.
68. Moreover, if what is alleged against Mr. Elliot is a breach of his fiduciary duties, as it is accepted it arguably is, and if the factual allegations of acting jointly and in concert are made out against Mr. Startin and Mr. Beattie to an arguable standard, then it does not, to my mind, matter whether they are also and independently in breach of any fiduciary duties themselves. Mr. Elliot was arguably in such breach (on the hypothesis, of course, which I have yet to address, that there is a sufficiently arguable case that the activities put him in breach of those duties). If there is a sufficiently arguable case that Mr. Startin and Mr. Beattie were assisting Mr. Elliot as part of a

concerted and coordinated action then in my judgment the springboard jurisdiction would exist to deprive Mr. Elliot and Mr. Topsoe from enjoying the benefit of his, that is Mr. Elliot's breaches of fiduciary duty, by imposing restraints on those who acted in concert with him whether or not those others were acting in breach of fiduciary duties.

69. I turn then to the evidence upon which the Claimants rely on the question of whether there was a coordinated defection. The decision to leave and to join Topsoe, say the Claimants, was a concerted action in which each solicited and encouraged the others and planned the defection over several months and at the same time keeping Clear Edge in the dark. The Claimants point in particular to the fact that all three resigned at the same time to go to Topsoe and on the fact that the same end date was given in Mr. Beattie and Mr. Startin's letters.
70. The Defendants say that they had each independently and for different reasons been becoming dissatisfied with their position at Clear Edge and that they had each independently sought alternative employment. There are some documented examples of the Defendants approaching other potential employers from the turn of last year. Mr. Elliot's account of how it came about that they all resigned at about the same time is given in his witness statement at paragraphs 85 through to 98. He says that he began looking for a new job around Christmas and New Year and says that in about April 2011 he had a telephone conversation with Joakim Thorgesen of Topsoe, during the course of which he mentioned his frustration with Clear Edge and the fact that he had applied for a job elsewhere. He says that a few days later he was contacted by Mr. Thorgesen who said that Topsoe would potentially be interested in taking him on.
71. He goes on at paragraph 90 to say that he mentioned that fact to Mr. Startin and that Mr. Startin told him that he, Mr. Startin, would also be interested in joining Topsoe and that in the meantime in about April or May he saw Mr. Beattie at a training day and he told Mr. Beattie on that occasion about his situation. He says in paragraph 91 that when he, Mr. Elliot, told Mr. Beattie about Topsoe Mr. Beattie immediately said that that sounded like an interesting opportunity.
72. Mr. Elliot says that he did not tell or pressure or even encourage either Mr. Beattie or Mr. Startin to make applications to Topsoe. He then says that during the summer he waited to hear further from Topsoe and eventually that Joakim Thorgesen arranged a meeting with Mr. Beattie and himself in June at which Mr. Thorgesen was essentially selling to them the idea of joining Topsoe.
73. Mr. Elliot says that shortly after that, towards the end of June, he received a call from Mr. Thorgesen inviting him to make an application. Mr. Elliot says that he discussed that invitation with Mr. Beattie and Mr. Startin and that he does not know if they had any direct contact with Mr. Thorgesen but that he made his application via the website and they also made their applications via the website.
74. They were then all three called for interview by Topsoe which took place in Denmark in late July. They all three attended for interview on the same day and they were all interviewed together in which there were group discussions in which the role that they might play at Topsoe was discussed. The discussion, according to Mr. Elliot's evidence, was clearly of what they could do together at Topsoe as a team.

75. There was then a further meeting between Mr. Thorgesen and Mr. Beattie and Mr. Startin in about August which Mr. Elliot joined, at least for part of the meeting, by Skype, again discussing the roles that the three would play as a team at Topsoe.
76. According to Mr. Elliot it was a few weeks later that Topsoe contacted the Defendants separately to tell them that they were interested in them and would offer them contracts of employment.
77. The Defendants say that there was nothing improper in any of that because there was no question of any of them encouraging or soliciting the others. They say that it is perfectly natural that they should have discussed it between them because they were very close friends. I agree that there would be nothing surprising about them having discussed their plans as close friends and indeed close business colleagues, but it seems to me that there is a strong inference to be drawn that if, as close friends, they had discussed it there would have been at least some degree of mutual encouragement and solicitation. This is suggested by their making contemporaneous applications, their joint and their joint recruitment as a team who left Clear Edge at the same time to join Topsoe.
78. There has been recovered from their laptops an e-mail of the 11 September 2011 from Mr. Elliot to Topsoe which makes it clear that Mr. Elliot is negotiating on behalf of all three the terms of their future employment and envisages them joining as a team.
79. There seems to me to be from that material alone a serious issue to be tried that the decision to leave and join Topsoe was a carefully concerted and coordinated defection of the three of them as a team.
80. The Claimants are able to rely on a considerable body of additional evidence to support an arguable case of coordinated and planned joint defection. On 24 May 2011 Mr. Niels Fisscher, who was in the position essentially of managing director of a division of the group in Germany, presented to the Claimants a proposal for a management buyout of the Cerafil business. That was instantly rejected. The documentation which was put forward, which described the project as Project Green, did not reveal any significant involvement on the part of these Defendants in the initiative. The Defendants in their evidence were keen to downplay any knowledge and involvement in that initiative.
81. However, there have recently been recovered documents dating from April 2011 which are communications between Mr. Elliot and Mr. Beattie and Niels Fisscher and/or his girlfriend. They attach a document which is headed Banson which appears to be a proposal for a structure for attracting investment for the purposes of the management buyout. That document suggests that Mr. Elliot and Mr. Beattie would have been expected to have had a significant part in putting together the management buyout and they were both identified as potential shareholders.
82. Moreover, the further material which has come forward suggests that shortly after the rejection of the management buyout on 24 May 2011 there were meetings on the 6 and/or 7 June 2011 to discuss continuing an independent operation running the Cerafil division separately from the Claimants. Those involved communications which were

sent to the private e-mail addresses of Mr. Elliot, Mr. Beattie and Mr. Startin and indicated again that all three were intended to have significant input.

83. They show, as it seems to me, a strong prima facie case that the Defendants, as a team, were at that stage contemplating defection and setting up a rival business for ceramic filters; and that they knew that that would amount to a breach of their obligations and that they were, therefore, acting clandestinely as appears from the fact that they were using private e-mail addresses. They also recognised, and this appears from the e-mails themselves, that Topsoe's involvement in such a venture was at least a part of such a plan which might be necessary even if not wholly desirable. This was very shortly before their joint interviews with Topsoe.
84. The Defendants' case in relation to these documents was that this initiative never went anywhere. That may be so, but it illustrates a wider picture of these three Defendants acting together to take the ceramic filter business away from their employers and to use their knowledge and expertise, not for the benefit of their employers, Clear Edge, but for the benefit of a separate initiative, an initiative which ultimately came to fruition with them resigning in order to go to be employed by Topsoe. It lends sufficient support to the suggestion that the defection was coordinated over a period of many months.
85. Moreover, the inference that the plan was one to indulge in competitive behaviour derived support from the e-mail of 11 September 2011 which was subsequently recovered from Mr. Elliot's laptop. In that e-mail Mr. Elliot said to Topsoe:
- "3. There is one significant area where we would like advice from you. The manufacturing process used by CE is unique amongst ceramic filter manufacturers. There is no patent cover on this process and in fact it is described in the catalytic filter patent. The plant has been seen by a select number of customers and suppliers over the years. Clearly we intend to use the same principles to manufacture ceramic filters for HTAS [Topsoe]. What is the HTAS [Topsoe]'s view on the use of this knowledge. Would this be classified as business secrets under the terms of 10.5?"
86. That, to my mind, supports a case that there was an intention on the part of Topsoe to indulge in a manufacturing process to make ceramic filters which are akin to and competitive with the Cerafil Topkat product.
87. The Claimants also rely on the failure in the evidence to reveal these aspects of what was going on and suggest that the failure to reveal the circumstances of the Defendants' involvement in the management buyout, their involvement in the subsequent initiatives and the content of this e-mail, renders a good deal of the evidence which the Defendants have put forward unreliable. Indeed, it renders some parts of the evidence which has been put forward as seriously misleading. That is a criticism which, as aimed at paragraph 109 of Mr. Elliot's witness statement, I find to be justified.
88. It seems to me, therefore, that the Claimants have made out a seriously arguable case that these three Defendants solicited each other over a period of many months to carry

out a coordinated departure from Clear Edge to join Topsoe, that they concealed their intention from their employers and that they were thereby in serious breach of their contractual duties, both their duties of fidelity and their arguable fiduciary duties. Of course whether any of that is ultimately established will be a matter for trial and will have to be decided by the trial judge.

89. So far as confidential information is concerned the confidential information to which the Claimants say the Defendants have had access and which they wish to seek to include within the scope of injunctive relief is, as I have said, that which has been identified in paragraph 42 of Mr. Jordan's second witness statement. Mr. Elliot has responded item by item in his second witness statement to those categories and Mr. Startin in his second witness statement says that he agrees with Mr. Elliot's response.
90. There is no need for me to go through item by item each of the categories of confidential information. My conclusion is that most, if not all, at least arguably fall within the third category in *Faccenda Chicken*, that is to say the category of trade secrets or something akin to them or confidential information which, because of the particular circumstances of the Defendants' employment, is to be treated in the same way. That is because of the nature of the information and the high degree of trust which was reposed in these Defendants as senior employees to handle what was obviously sensitive and confidential commercial information. Those all point towards all the categories in paragraph 42 of Mr. Jordan's witness statement, at least arguably coming within category 3.
91. If and in so far as they might not do so, nevertheless there would be justification for an injunction in relation to them; Mr. Elliot's contract of employment continues, so that he is not free to use confidential information whether or not it falls into category 2 or category 3; so far as Mr. Startin and Mr. Beattie are concerned if the Claimants make out arguably a confidential information basis for springboard relief it will be, so far as is relevant, for the past misuse of confidential information including past misuse of confidential information during the currency of their employment which permits springboard relief to remedy an unfair advantage caused thereby in relation to category 2 information as well as category 3 trade secrets. My decision does not therefore depend on whether the categories of information are class 2 or class 3. That is the effect of *Roger Bullivant Ltd. v. Ellis* and other authorities.
92. The Defendants say in relation to these categories or a large number of them, that the information is not in either class; it is not secret because it is in the public domain. That submission is made on two bases. First, it is said that although there is a patent which protects the manufacturing process in relation to Topkat itself, the manufacturing process in relation to ceramic filters generally is not protected by patent and that process is already capable of being understood from the terms of the patent itself. I do not find that argument persuasive. The level of detail in the patent as to the manufacturing process is only at the highest level and it does not follow that someone who is aware of the description of the manufacturing process in the patent would be able to put in place the manufacturing without the much more detailed knowledge of how it is done which reposes within the confidential information which these Defendants have.
93. Moreover, the threat of a competitive product in the form of something which is directly equivalent to Topkat lies in a threat of a manufacturing process which is not

merely the ceramic filter manufacturing process but one which does involve the injection of the catalyst.

94. The second point that is made is that people have seen the manufacturing plant, in particular particular customers have been allowed to see it and Topsoe themselves are aware of the manufacturing process. This does not seem to me to deprive the information of its categorisation as confidential information or a trade secret. It is clear from *Lansing Linde* that the fact of limited dissemination or publication does not necessarily amount to putting matters in the public domain. The fact that Topsoe have seen the manufacturing process does not mean that they can immediately reproduce it. That is the particular facility that the Defendants have to offer, not by virtue of some inherent skill they possess but by virtue of all the detailed confidential information to which they have been privy during the course of their employment.
95. In support of their case the Claimants also rely upon the history in relation to the retention and deletion of documentation and data on the electronic devices which the Defendants had. So far as the mobile phones are concerned the explanation given by the Defendants is that in the time available they wished to protect their personal data and the simplest thing to do was to delete almost everything. That is an explanation which, taken in isolation, I would regard as entirely reasonable. However, in the light of the other evidence of deletion and destruction of data it takes on a potentially more sinister aspect.
96. In relation to the laptops there have been three reports from Kroll, the latest of which came forward today. What that shows is that in relation to all three laptops what has been applied is a piece of deletion software called CCleaner. Kroll record CCleaner as being a file deletion tool that is available for download and purchase from an online retailer. They say that the programme is designed actively to attempt to delete and overwrite target files to make them unrecoverable; that it also attempts to remove existing traces of the target files from file system and operating system records; and finally, that it also attempts to remove traces of its own operation. I have been shown a printout from the website of Piriform who market CCleaner who market it on the basis that what it can do is essentially clean up computers to delete unwanted and unnecessary files and to render the operation of the computers more efficient. It is not marketed as a tool to conceal or overwrite files for the purposes of concealment.
97. What the Kroll report reveals is that in relation to Mr. Elliot's laptop the CCleaner programme was run on 21 September at 9 o'clock in the morning. It will be recalled that that is during the 24-hour interval after Mr. Catalano had asked for return of the property and before the property was returned. The CCleaner programme is recorded to have been run seven times on Mr. Elliot's laptop. The files record that the groups of deletion activity occurred on 21 September from two minutes past nine to twenty-five past ten in the morning, that is to say shortly after CCleaner had been applied. The result was that of the total files on the computer of some 165,000 odd files, 29,192 were deleted on the morning of 21 September. Moreover, between 19 and 21 September there were attached what appear to be eight separate external devices to the laptop.
98. Mr. Elliot's explanation for that activity was given at paragraph 44 of his second witness statement where he said simply:

"As is common with a life on the road I had personal files bank details, home correspondence and personal holiday photographs on my laptop mixed with work information. I removed this personal information using software recommended by Colin Beattie as I wanted it to remain private."

99. He does not say when or how or for what reason he downloaded CCleaner but the inference is that it was for the purposes of deletion. On instructions before me Mr. Pearce-Smith suggested that what Mr. Elliot had done was to do a manual deletion of those files which contained only personal information and then to run CCleaner to remove traces that might have remained of those personal files on the computer. That, however, does not fit with the timing in the Kroll report which records CCleaner as being run and then the deletion of the files, nor does it explain the running of CCleaner on seven occasions.
100. So far as applying external devices is concerned Mr. Elliot's explanation is at paragraphs 42 to 43. He says:

"All my family use data storage for school and work. This could account for the fact that 4 devices were present at 1.37pm on 19 September 2011. This was I note in any event before the visit of Mr. Catalano on 20 September and before I was aware that Clear Edge was seeking the return of company property.

43. After this I did connect memory sticks I had collected from around the house to see what if any data was presented on them."

Then at paragraph 45 he says:

"I deleted any copies of work related information I had on personal memory sticks and thought that I would use these devices for other personal matters. However, on reflection I subsequently thought there might be traces of the information on the sticks and that I might be falsely accused by Clear Edge of misusing the information so I decided to destroy the memory sticks. I have lost significant personal data in this process."

101. What he therefore appears to be saying is that his motive for destroying the memory sticks was that the memory sticks contained or might have contained information which belonged to Clear Edge. That would have been a clear breach of his obligations in relation to company property. There is also in relation to Mr. Elliot the oddity that a significant number of his diary entries have been ripped out when he delivered up his diaries. Mr. Elliot's evidence is that those all related to personal matters. The Claimants say it is at least arguable that an inference is to be drawn of destruction of incriminating material when taken with the fact that some of the entries are around the time of the April/May/June and July events concerning the MBO and its aftermath.

102. In the case of Mr. Beattie the deletion which is shown by the Kroll report is that the CCleaner programme was run on 20 September at 8.15 in the evening and was run four times in total. This again is during the 24-hour period. The Kroll report also states that the programme, so it appears, was then uninstalled on 21 September. No explanation has been given as to why the programme should be uninstalled and one possible inference which arises is that it was intended to seek to conceal what had been deliberate destruction of relevant material.
103. So far as Mr. Beattie is concerned there were 627,000 odd files on his computer. Of these the Kroll report suggests that 44,000 were deleted in the period between 12 September and 21 September. Mr. Beattie's explanation for what happened in relation to deletion is at paragraphs 7 and 8. He said:

"However, I have used the software known as CCleaner on my laptop for around a year. I first started using it on the advice of Richard Lydon, Head of Group R&D at Clear Edge, who told me that the practice of regularly running CCleaner was recommended by the technical support company used by Clear Edge - UK Limited.

8. I ran CCleaner on 21 September in order to remove personal files from my laptop that I did not want Clear Edge to see for reasons of privacy. These included, from recollection, personal photographs, letters relating to my personal affairs and details of home budgets."

104. So far as devices are concerned the Kroll report shows that four external devices were attached on 20 September. Mr. Beattie gives his explanation for this in paragraph 5 of his witness statement. What he says is:

"(a) Ven_MaxtorProd 3200: this is the company hard drive which I returned on 21 September. I used this on 20 September to backup the laptop files before I removed my own, but I was having problems retrieving information from it and decided not to use it in the end.

(b) Ven_LEXARProd_JD_FIREFLY: this is my personal memory stick, which is why I have not delivered this up. I checked the contents on 20 September 2011 but I did not realise then that it contained Clear Edge information. When I subsequently rechecked it to comply with the Consent Order I transferred any Clear Edge information on to a folder entitled 'Memory Stick' on a hard drive which I delivered up on 4 November 2011."

105. A number of things need to be noted about that. This explanation assumes that the intention at the time of transfer had been only to transfer personal information. That rather undermines the suggestion that there had been no time in the 24-hour period to distinguish between personal and company information and to separate it out. Perhaps most significantly there is no explanation why a second device should be used. The explanation cannot be that which is contained at the end of paragraph 5(a)

that there were problems in retrieving information from it because the timings which are given are that device which is referred to in paragraph 5(a) was used at 1835 but that which was used and is referred to at paragraph 5(b) was used first at 1833.

106. Again of significance, what Mr. Pearce-Smith said on instructions was that the reference to transferring information needed to be clarified and that what in fact had happened was that material had been copied not transferred, so as to disappear from the personal memory stick. He says that the explanation for that was that Mr. Beattie thought he should not be deleting what was on the personal memory stick because it might have had to be the subject of forensic checking to see what he had previously retained.
107. Whether or not that is the true explanation, what that reveals is, first, that copying took place which involved retention of company data, the exact scope of which is undefined and, secondly, that that data has still not been delivered up which is a breach not only of the contractual obligations but of the order of this court made on 31 October.
108. Exactly the same is said of another device which is referred to in paragraph 5(d) as a personal hard disk drive which in the witness statement was described as having had its content transferred on to another hard drive which was delivered up but which again in oral submissions to me Mr. Pearce-Smith identified as having been not a transfer but merely a copying, and that that material has been retained. It remains available to Mr. Beattie and if he so chooses the other Defendants and he is thereby in breach of contract and of the order of this court.
109. In relation to retention and destruction of documents by Mr. Beattie the matter does not stop there. In his first witness statement at paragraph 97 he says:

"I did have some papers relating to the manufacture of Cerafil Topkat which I did not make available for collection on 21 September 2011."

110. He says that they were files which were sent to him in perhaps April or May 2011 and related to the research and development done by Richard Allen on Topkat dated 2006 and before. He says most of the documents were joint reports or communications with Topsoe were not truly confidential but he felt that for him to have Topkat files after having taken a job with Topsoe looked very bad; that in hindsight he should have just handed them in with everything else; and that he did not give these files to Haldor Topsoe and had no intention of doing so. He says that on 20 or 21 October he arranged for the files to be taken to the house of a friend and then on 31 October he retrieved the box from his friend's house and shredded them. Again that retention of information and then destruction of information was not only a breach of his contractual obligations but was a serious breach of the order of this court.
111. So far as Mr. Startin is concerned, the Kroll report again records significant deletions from his laptop and the running of CCleaner on four occasions. He gives his explanation at paragraph 4 of his witness statement in these bald terms:

"Mr. Jordan omits to mention that I returned my laptop with the file structure in tact. All of the project files on the laptop could

be cross referenced with hard copies of project information which I also returned in full along with the index file."

112. He gives no explanation for the application of CCleaner on five occasions. Equally the explanation that was brought forward on his behalf, that there was manual deletion and then application of CCleaner does not sit with the timings in the Kroll report.
113. It is said with some justification on behalf of the Defendants that the Kroll report needs to be treated with considerable caution. There are discrepancies which have not been explained between the report which emerged today and that which was previously in evidence. The discrepancies relate to the number of files, the date of the running of CCleaner and the nature of the deletions. Those are justified criticisms.
114. Nevertheless it seems to me that the history which emerges not just from the Kroll report but from the admitted retention and destruction of judgments lends some support to the Claimant's submission that there is real risk of misuse of confidential information. The Claimants say that this copying, deletion and destruction of data, if indeed the destruction has taken place which the Claimants has no means of verifying, has left the Claimants in a position where they cannot tell what had been retained and in the light of this and the other conduct on behalf of the Defendant there is at least an arguable case that the Defendants retained some important confidential information with a view to using it in conjunction with Topsoe. They and the court cannot tell with any certainty what material the team have withheld or destroyed which is of importance to Clear Edge in continuing to serve its customers and in continuing the Cerafil Topkat business, including, by way of paradigm example, customer production data and performance data upon which the successful marketing of the filter depends. They say there is justification for real concern and an arguable case that the effect of the retention or destruction of such data has damaged Clear Edge's ability to continue to conduct and promote the Cerafil business.
115. The Defendants say by way of response that so far as they are aware all that they had has been returned apart from those instances which Mr. Beattie now accepts are exceptions but they say the significant point is that all the information should be on the company server or on company hard copy files elsewhere in any event so that the Claimants ought not to be caused any difficulty.
116. The Claimants respond, to my mind with some justification, that because the Defendants were the team there is no way of knowing whether that is the case and the conduct of the Defendants gives rise to a reasonable inference that it is not necessarily so.
117. Again those will be matters for trial but to my mind the Claimants have made out an arguable case to the effect identified.
118. Moreover, the Claimants say quite apart from past breaches they can support the springboard injunction in relation to confidential information on two additional grounds. The first is that the Defendants take the stance that they are free, unless restrained, to use the information in all or almost all the categories that are set out in paragraph 42 of Mr. Jordan's second witness statement because it is either not confidential or it is simply part of their skill which they have carried in their heads. I have found that there is an arguable case that that is not so. It is, therefore, the case

that unless an injunction is granted there is for that reason alone a real risk that the Defendant would misuse confidential information and for all the reasons that I have previously identified there is a real risk that that would impose significant damage on Clear Edge.

119. The second additional ground upon which the Claimants rely is the refusal to provide the undertakings which were sought on 7 October and the false reason put forward in the Burgess Salmon letter of 17 October that Topsoe was not a competitor. Those seem to me to be sound further reasons for a basis for springboard relief.
120. I therefore conclude that the Claimants have made out an arguable case to the effect identified which means that in the case of all three Defendants they have in the past arguably breached their duties of fidelity and, as I find, their arguable fiduciary duties, in copying and retaining confidential information. That occurred during the currency of their contracts of employment which in Mr. Elliot's case continues. Moreover unless restrained there is a real risk that they will in the future breach their duties of fidelity and, as I find, their arguable fiduciary duties, in relation to future misuse of such confidential information.
121. The next question which therefore arises is whether the Defendants have by their coordinated defection and by their past or threatened misuse of confidential information, have given or will give Topsoe and/or themselves an unfair competitive advantage of which there is a real risk that the Defendants and Topsoe will in fact take the benefit if they are not restrained. To my mind the answer is that the Claimants have shown a strong prima facie case to that effect. The effects of the coordinated departure and the ability to deploy the confidential information for the benefit of Topsoe have been twofold. The first effect is seriously to weaken Clear Edge in its ability to pursue the Cerafil Topkat business. The job of these Defendants was to foster for Clear Edge's benefit the goodwill of Topsoe as a supplier of the catalyst and in the other roles that Topsoe had in the symbiotic relationship which furthered Clear Edge's business by promoting and successfully marketing Topkat. What they were doing by their conduct was diverting that goodwill away from Clear Edge and towards themselves. The secrecy with which they organised the defection weakened Clear Edge in its ability to arrange an orderly process of handover and its ability to continue to market the product. There is a real risk that Clear Edge will be further weakened by the destruction or retention of confidential information, a fortiori by the misuse of such confidential information.
122. The second aspect of the unfair advantage which has been created is that it has put the Defendants and Topsoe in a position to take advantage of confidential information and to take advantage of the fact that the coordinated conduct has produced these three individuals as a team with that confidential information. This enables them to compete, and compete directly, with the claimant. The Defendants suggest that it would be a matter of years before Topsoe were effectively able to compete with a directly competitive product. Mr. Jordan's evidence is that they could do so with the benefit of these Defendants misusing the confidential information they have within a matter of months. There is, to my mind, not a conflict between the two. The assertion on behalf of the Defendants that there is no risk of Topsoe manufacturing a competitive product assumes that there is no intention to manufacture a competitive product using the confidential information. The e-mail of 11 September 2011, to which I have referred, gives rise to what is at least a seriously arguable case that there

is such an intention and that there is, therefore, a real risk that unless restrained the unfair advantage of competition would be something which would be brought to fruition in a matter of months rather than years.

123. The next question therefore is this: is the injunctive relief which is sought no greater or more onerous than that which is necessary in order to remedy the unfair advantage? To my mind the answer to that question is yes. The relief is only sought for a short period. The unfair competitive advantage would not have come to an end before the time at which the speedy trial will be concluded and, therefore, before the time which represents the end point for the relief which I am asked to grant.
124. The Defendants say that the injunctive relief is greater than that which is necessary and any injunctive relief should not prevent the second and third Defendant from working for Topsoe and should only curtail it to the extent that they be prevented from working in the sphere of ceramic filters. That would be an impossible matter to police and the collaborative nature of what has previously happened justifies the width of the injunction which would prevent them working for Topsoe at all.
125. There is, therefore, as I find, a serious issue to be tried on the merits that the Defendants have been in breach of their obligations and have threatened a breach of their obligations in a way such as to justify the exercise of the springboard jurisdiction to grant the relief sought.
126. In addition there is the garden leave basis for an injunction against Mr. Elliot. It is accepted on his behalf that he owes fiduciary duties or at least there is a serious issue to that effect. It is clear that the activity which it is sought to restrain by paragraph 1 of the order is activity which would be a breach of duties of fidelity and of duties of loyalty. The Claimants are seeking to enforce the obligations which still subsist under the contract of employment including the negative obligation in clause 9.3, of the garden leave clause. The Claimants are prima facie entitled to do so.
127. It is said on Mr. Elliot's behalf that such an injunction is unnecessary because he has no intention of acting in the manner in which the injunction seeks to restrain him from acting, and that he has not threatened to do so. I disagree. The Claimants have shown that there is a real risk that until restrained Mr. Elliot will act in breach. That is a reasonable inference from all the matters which I have already identified by reference to the concerted action and the use of confidential information. In addition it is an inference which is supported by the fact that his contract of employment with Topsoe identifies 1 November as the starting date.
128. I turn then to the question of whether damages would be an adequate remedy. In the skeleton argument put forward on their behalf the Claimants relied solely on what Mr. Jordan said in paragraphs 58 and 59 of his first witness statement as showing that damages would not be an adequate remedy. There Mr. Jordan focuses on the difficulties which the Claimants have suffered from the fact that there was a sudden departure of the whole team and there was no opportunity to put in place an orderly handover or to consider alternative options; and that there has thereby been caused and is caused a continuing loss to the Cerafil Topsoe business.
129. However, that is not a loss which arises or which would arise from my declining to grant the injunctive relief sought. The injunctive relief sought does not, and quite

understandably does not, seek to force any of these Defendants to continue to assist in relation to the further sales or marketing or manufacture of Cerafil Topkat. If the Claimants have suffered a loss from losing the services of these Defendants that is a loss which they will suffer, they will have suffered and they will continue to suffer, irrespective of the grant or refusal of the injunction which is sought. That loss is, therefore, not a relevant loss in deciding whether damages would or would not be an adequate remedy if the relief sought were refused.

130. However, in argument the damages which are here being relied upon have been identified in a rather different way. What is said is that if these Defendants join Topsoe, or assist them, there is a real risk that Topsoe could become a competitor within a matter of months. That is a matter which, as I have already indicated, I find is seriously arguable. The indications which support that come not just from the 11 September e-mail to which I have referred but from the very fact of recruitment of the Defendants who form a team, they are the team who have the technical, financial and marketing know-how to manufacture a competitive product and they are the team who managed the Cerafil business. They have been poached as a team.
131. I should say that the Claimants also placed some reliance on Topsoe's letter of 14 November giving notice of termination in six months' time of their preparedness to continue to supply on the terms of an existing pricing agreement. I do not attach any particular weight to that in this context.
132. My conclusion, however, is that I am satisfied that unless restrained there is a real risk that the Defendants will take up employment with Topsoe and use the confidential information and expertise they have to inflict serious damage on the Claimants' business. That damage would be substantial. It is difficult to quantify and the prospects of recovering it from the individual Defendants is remote. It was said perfectly frankly on behalf of the Defendants that they barely have the financial resources to conduct their defence of these proceedings and that they would not have the financial resources to meet any substantial damages if they were awarded after an action.
133. Finally, I come to the balance of convenience. It seems to me that this is firmly in favour of granting the injunction. The injunction would be for a relatively short period of about two months. In Mr. Elliot's case it would do no more than give effect to his contractual obligations. So far as he is concerned Topsoe have made clear that his job will remain open for him to take up when his notice period expires. In the meantime the Claimants have undertaken to pay him. It is difficult therefore to see that he suffers any significant prejudice.
134. The position is not the same for Mr. Beattie and Mr. Startin. They have not had any unequivocal indication from Topsoe that their jobs will be held open. They have, as I understand it, both had an indication that their jobs remain open at least pending the outcome of today's hearing. It is said on their behalf that if an injunction were granted and it turned out that it was shown to have been wrongly granted, then they would have suffered considerable financial hardship by virtue of not having been paid; and importantly they risk losing forever the opportunity to work for Topsoe, which the evidence suggests is a highly desirable job for those in the position of these Defendants and with their qualifications.

135. I recognise that there is some risk to that effect. However, to my mind it is mitigated by the fact that Topsoe are to be permitted to pay compensation for the late start, if they remain willing for Mr. Startin and Mr. Beattie to take up their employment if the result of a speedy trial is that they should be allowed to do so. My assessment of the degree of risk of Topsoe withdrawing the job offer is that it is not a high risk. Topsoe have not said that they will withdraw the offer. They have said that they will wait for Mr. Elliot until March and, given that these three are a team, it would be perhaps slightly surprising if they were not prepared to wait for Mr. Startin and Mr. Beattie to come in March and were only prepared to take Mr. Elliot at that stage.
136. That is perhaps reinforced by the fact that the evidence suggests that it is at the lowest arguable that acquiring the Cerafil Topkat team is a prize that Topsoe have had their eye on for some while and at a time when the business has, as the Defendants say, taken off, it would be in Topsoe's interests if they were free to do so, to wait a further two months to see whether they could obtain the benefit of these three Defendants coming as a team. For those reasons it seems to me that the balance of convenience is in favour of granting the order.
137. The Defendants have said that one reason why the discretion should be exercised against granting an order is that the Claimants delayed unduly in commencing the proceedings and in launching their application when they must have known from at least the last week in September that the material which had been returned, at least so far as the phones were concerned, had no significant mobile data on it because that is something that could have been easily checked. It seems to me that the Claimants might have moved with greater expedition than they did, but it is always difficult for Claimants in these circumstances to know exactly when they have sufficient to persuade a court of the risks involved and I would not regard the fact that proceedings were only commenced at the end of October as something which should deprive the Claimants of relief to which they are otherwise entitled or which would otherwise be appropriate.
