

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV 2021-404-002270
[2022] NZHC 574**

BETWEEN	INTECH INC First Plaintiff
AND	WAREHAM STEAMSHIP CORPORATION Second Plaintiff
AND	ACRA-CUT INC Third Plaintiff
AND	ANURA LIMITED (formerly named ORION MARINE LIMITED) First Defendant
AND	ZHANG YUN Second Defendant

continued overleaf...

Hearing: 11 February 2022 & 18 February 2022

Appearances: C Elliott QC & K Crossland for the Plaintiff
G Illingworth QC & A Hyde for the First, Second, Third & Fourth
Defendants

Judgment: 25 March 2022

JUDGMENT OF VAN BOHEMEN J

*This judgment was delivered by me on 25 March 2022 at 3.00pm and
re-delivered by me 28 March 2022 in accordance with High Court Rules 2016, r 11.10*

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Registrar/Deputy Registrar

Solicitors/Counsel:
C Elliott QC, Auckland
G M Illingworth QC, Auckland
Shieff Angland Lawyers, Auckland
Heritage Law, Auckland
Keegan Alexander, Auckland

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AND DARREN PAUL LEYBOURNE
Third Defendant

AND VLADAN ZUBCIC
Fourth Defendant

AND STRYDA MARINE LIMITED
Fifth Defendant

AND WARREN FARR
Sixth Defendant

Introduction

[1] The plaintiffs are companies incorporated in the United States of America. John (Jack) Baker, who is resident in Massachusetts, says the three companies form a family enterprise which he controls. The plaintiffs have brought a proceeding against the defendants, who are engaged in the design, manufacture and sales of amphibious systems for boats, in relation to work the plaintiffs say they commissioned from the defendants between 2018 and 2021.

[2] The plaintiffs plead six causes of action alleging breach of contract, breach of express trust, breach of institutional constructive trust, misuse of confidential information, breach of copyright, and inducement to breach contract.

[3] In their substantive claim, the plaintiffs seek a series of orders against the defendants, including permanent injunctions restraining the defendants from using the intellectual property in amphibious systems designed, manufactured and sold by the defendants, as well as other orders and damages.

[4] Pending determination of their substantive claim, the plaintiffs seek interim orders requiring the defendants:

- (a) to deliver to them the intellectual property in systems designed by the defendants at the plaintiffs' instruction; and
- (b) to set aside a notional royalty on the sales of the principal amphibious system sold by the first defendant.

[5] The plaintiffs also seek preservation and inspection orders to ensure the effectiveness of the above orders.

Plaintiffs' allegations

[6] The plaintiffs allege that:

- (a) In a contact made with the defendants between 2016 and 2018, the first to fourth defendants agreed to design, test and manufacture:

- (i) a next generation of the first defendant's existing S25 amphibious system, which the plaintiffs call the Modified S25; and
 - (ii) new amphibious systems for larger vessels, which are called the S65, S80 and S95 systems.¹
- (b) In a variation to the above agreement made in March 2018, the first to fourth defendants agreed to transfer all of the first defendant's remaining rights in the S25 and Modified S25 systems in return for Mr Baker providing the defendants the sum of NZD200,000 to meet the fees of senior counsel in an appeal the defendants wished to bring against a judgment of the High Court.
- (c) In April 2021, the plaintiffs terminated their commercial relationship with the defendants following a failure by the defendants to fulfil orders for two Modified S25 systems and nine S95 systems. As a result, the second plaintiff was unable to provide vessels to two customers, which has resulted in damage to the plaintiffs' reputation and standing.
- (d) Between 2018 and 2021, five boats fitted with amphibious systems and supplied by the fifth defendant failed or required repair within their warranty period.
- (e) Following the termination of the relationship, the defendants failed to provide the plaintiffs with:
 - (i) information and parts to remedy defects in previously supplied S25 and Modified S25 systems;
 - (ii) complete details for the S25, S65, S80 and S95 systems; and

¹ While the S80 and S95 are sometimes referred to as distinct systems, insofar as these descriptions refer to systems designed by the defendants, the S95 is a continuation of the system that was initially called the S80.

- (iii) all intellectual property, including copyright works, and related parts and other information with respect to the S65, S80 and S95 systems.

- (f) The defendants interfered in the contractual relationship between the plaintiffs and a customer of the plaintiffs. They encouraged the customer not to pay the plaintiffs the amount previously paid for amphibious systems supplied by the first defendant, but invoiced to the plaintiffs, and agreed to supply those systems directly to the customer.

Application for interim orders

[7] The plaintiffs seek interim orders restraining the defendants from using, manufacturing or distributing selling or offering for sale:

- (a) the S65, S80 and S95 systems and vessels incorporating such systems, and any drawings, prototypes and parts and other material associated with such systems; and

- (b) the S25 system and Modified S25 system and vessels incorporating such systems, unless the defendants undertake to pay a notional royalty on the ex-factory wholesale price of all such systems and vessels.

[8] The plaintiffs also seek orders:

- (a) requiring the defendants to file affidavits identifying particulars with respect to every sale or offer for sale of the S25 and Modified S25 since 1 January 2016;

- (b) for the preservation of all physical manifestations of the confidential information and copyright works asserted by the plaintiffs with respect to all of the systems in contention;

- (c) for access to the defendants' premises to inspect and photograph and video the confidential information and copyright works asserted by the

plaintiffs and to dismantle the S25, Modified S25, S65, S80, S95 or any parts thereof;

(d) for the inspection and creation of forensic copies of the defendants' computers, hard-drives and other storage devices and cloud storage repository; and

(e) for the production of a stocktake of relevant property and documents.

[9] The plaintiffs make various allegations of dishonesty against the defendants and, through their counsel, call attention to adverse findings as to the defendants' credibility made in a separate proceeding between the defendants and a third party.

Defendants' position²

[10] The defendants admit that they agreed to design and manufacture the S65 system and to produce a prototype of that system. They also admit that they agreed to design and manufacture the S80 system, which Mr Baker later asked to be called the S95, and to produce a prototype of that system. They say they have sent the plaintiffs all property that they held in relation to those systems except for a set of CAD/CAM³ files which were withheld pending payment by the plaintiffs of an outstanding debt of approximately \$94,900.00.

[11] The defendants also admit that Mr Baker loaned \$200,000 to the first defendant for the purposes of meeting the fees of senior counsel in an appeal to the Court of Appeal. They say Mr Baker was repaid in full and with interest after the appeal succeeded, as the second defendant had undertaken to Mr Baker.

² Only the first to the fourth defendants have filed a defence to the plaintiffs' statement of claim and a notice of opposition to the plaintiffs' application and only the first to the fourth defendants were represented at the hearing of the application for interim orders. However, since the interim orders sought by the plaintiffs are directed at the rights and actions of the first to fourth defendants, it would appear that the absence of the fifth and sixth defendants is of little consequence. In this judgment, reference to the positions of the defendants is to the positions of the first to fourth defendants in particular.

³ Computer Aided Design / Computer Aided Machining.

[12] The defendants deny that they agreed, on Mr Baker's instruction, to undertake a series of modifications to the S25 or that there is any Modified S25 system as such. They also deny that they agreed to transfer rights to the intellectual property in the S25, whether in the context of instructions to make improvements to the S25 or in return for Mr Baker agreeing to loan the first defendant \$200,000.

[13] The defendants say that Mr Baker and his associate in the United States, Daniel Willis, have fabricated their evidence concerning the alleged agreement to transfer the first defendant's intellectual property in the S25 system.

[14] The defendants deny failing to fulfil orders for the S25 system and deny the plaintiffs' allegations regarding the failure of or defects in systems they supplied. With the exception of the CAD/CAM files retained as security for unpaid invoices, they also deny failing to send to the plaintiffs any components of or intellectual property in the S65, S80 and S95 systems commissioned by the plaintiffs.

[15] The defendants say that Mr Baker's decision to terminate their commercial relationship, and the complaints and allegations made by Mr Baker after terminating the relationship, are not the result of any failure to provide equipment or services to the plaintiffs. They say Mr Baker terminated the relationship after he learned of the unwillingness of the third defendant to deny services to another company which, with Mr Baker's assistance, has purchased S25 systems for installation on its boats and was in dispute with Mr Baker over repayment arrangements.

[16] The defendants say the interim orders sought by the plaintiffs are oppressive and, if granted, would cause financial hardship to the first defendant and to others who use the first defendant's S25 system in the development and sale of their products. They adduce evidence of Mr Baker's litigation history in the United States where, in some decisions, Courts have made adverse comment concerning Mr Baker's inappropriate use of litigation processes to pursue his commercial objectives.

Efforts to resolve application for orders with respect to the S65, S80 and S95

[17] Following the hearing of the plaintiffs' application for interim orders on 11 and 18 February 2022, counsel for the plaintiffs and for the defendants together and

separately advised on steps taken and progress made towards resolving the issues between them with respect to the S65, S80 and S95 systems.

[18] In particular:

- (a) counsel for the plaintiffs advised that the plaintiffs had deposited \$94,985 into the trust account of the plaintiffs' solicitors and counsel undertook that such funds would not be released until further order of this Court;
- (b) counsel for both sets of parties advised that:
 - (i) the defendants had delivered to the plaintiffs' solicitors a set of CAD/CAM files relating to the S65, S80 and S95 projects and various other electronic files relating to those projects;
 - (ii) the parties had agreed a process for review of the electronic files by the plaintiffs' expert;
 - (iii) the plaintiffs would be sending the defendants a list of items connected with the S65, S80 and S95 projects which they say:
 1. have been paid for but have not been delivered or are otherwise unaccounted for; and
 2. have been sent to the defendants but have not been returned; and
 - (iv) they would report back to the Court with a position statement as soon as possible after this process had been carried out.

[19] In a memorandum dated 2 March 2022, I said I would issue a single judgment on the plaintiffs' application for interim orders, rather than issue a results decision on the application as it relates to the S25 with reasons to follow as had been requested by counsel for the defendants and opposed by counsel for the plaintiffs. I also asked that

memoranda updating me on progress with respect to the S65, S80 and S95 projects be filed by 10 March 2022.

[20] In a memorandum dated 10 March 2022, counsel for the defendants advised that the parties had not been able to resolve their disagreements with respect to the S65, S80 and S95 projects. They requested that I issue a judgment dealing with all aspects of the plaintiffs' application for interim orders. They also provided a copy of information still sought by the plaintiffs and made various undertakings to the Court which I discuss later in this judgment.

[21] In a memorandum dated 11 March 2022, counsel for the plaintiffs took issue with aspects of the memorandum from counsel for the defendants. They provided further information on the matters still in dispute with respect to the S65, S80 and S95 projects. They agreed, however, that I should issue a judgment dealing with all aspects of the plaintiffs' application for interim orders.

Relevant background

[22] There is considerable dispute between the parties about the nature of their relationship and what took place during that relationship. Ascertaining the relevant facts was complicated by Mr Baker filing two affidavits in which his account of events appeared to change in response to the affidavits filed by the second, third and fourth defendants. Those defendants were not able to respond to Mr Baker's later affidavits which were filed the week before the hearing. Further difficulty was caused by the fact that the exhibits to Mr Baker's affidavits were not organised chronologically and did not always include all messages in the chains of emails.

[23] What follows is based principally on my analysis of the documentary evidence filed by or on behalf of the parties, with some reference to the accounts in the affidavits.

The parties

[24] The first plaintiff, Intech Inc, is a manufacturer and supplier of precision machinery and parts. The second plaintiff, Wareham Steamship Corporation

(Wareham) sells amphibious vehicles and hovercraft.⁴ The third plaintiff, Acra-Cut Inc, specialises in the design, manufacture and sale of disposable cranial perforators (devices to penetrate the skull for various medical procedures).

[25] As already noted, the plaintiffs are controlled by Mr Baker who is, apparently, a wealthy businessman.⁵

[26] The first to sixth defendants are:

- (a) Anura Ltd, formerly Orion Marine Ltd (Orion), a company which designs, manufactures and sells amphibious systems for boats;
- (b) Zhang Yun, who is the sole shareholder in Orion and a director of Stryda Marine Ltd (Stryda);
- (c) Darren Leybourne, who is the sole director of Orion and is an automotive engineer with expertise in hydraulics;
- (d) Vladan Zubcic, who is employed by Orion and is a specialist in CAD/CAM; and
- (e) Stryda, which manufactures and sells boats using Orion's systems;
- (f) Warren Farr, who, with Mr Zhang, is a director of Stryda.

[27] The shareholding of Stryda is held by Orion and Mr Zhang.

⁴ There is no evidence to suggest that the amphibious vessels currently sold by Wareham use systems similar to those designed and made by the first defendant.

⁵ Although there is no evidence of Mr Baker's overall means before the Court, his counsel informed the Court that Mr Baker is wealthier than former President Trump. As discussed in this judgment, Mr Baker had the means to advance \$200,000 to the defendants in 2018 and to deposit \$95,900 into the plaintiffs' solicitors' trust account. He has also offered to match dollar for dollar any royalty that the defendants may be ordered to set aside.

Parties' prior engagements with Sealegs International Ltd

[28] Prior to the establishment of Orion, Mr Leybourne and Mr Zubcic worked for Sealegs International Ltd, a company which, like Orion, manufactures and sells amphibious systems for small boats. Sealegs and Orion both use systems of motorised hydraulic wheels which are bolted to the hull of the boat. The motorised wheels enable the boat to be driven on land to the water. The wheels are retracted against the hull of the boat when the boat is in the water.

[29] Mr Baker says that, between 2009 and 2015, his companies had a business relationship with Sealegs that involved the purchase of multiple amphibious systems. In 2016, Wareham entered into a five year agreement with Sealegs for the non-exclusive right to represent Sealegs' products in the United States and Canada and to develop and sell its own amphibious products worldwide without claim by Sealegs in the products or in the intellectual property.

Orion and Stryda established

[30] In September 2012, Mr Zhang established Orion with the assistance of Mr Leybourne, who had resigned from Sealegs in May 2011. In February 2013, Mr Zubcic resigned from Sealegs and joined Orion.

[31] In the period 2013 – 2016, Orion developed four-wheel drive and three-wheel drive versions of the S25.

[32] In February 2016, Mr Zhang established Stryda to manufacture and sell vessels fitted with Orion's S25 systems.

Contact between plaintiffs and defendants

[33] In July 2016, Mr Baker was in contact with Mr Pringle, the owner of Smuggler Marine Ltd, and Mr Leybourne over delays in the purchase by Mr Baker of a Smuggler vessel fitted with a Sealegs system. In the course of those communications, Mr Baker made clear his dislike of Sealegs. As a result of those communications, Mr Baker ordered two Smuggler vessels fitted with Orion's S25 system. Those vessels were sent to Mr Baker in late 2016.

The Sealegs litigation begins

[34] In September 2016, Sealegs brought proceedings against Mr Zhang, Orion, Smuggler, Mr Leybourne, Mr Zubcic, Mr Farr, and Stryda for breach of copyright. In December 2016, Peters J granted Sealegs an interim injunction restraining Orion and the other defendants in that proceeding from performing any acts that would infringe Sealegs' claimed copyright.⁶

Further engagements between Mr Baker and Orion

[35] In February 2017, Mr Pringle, Mr Leybourne and Mr Zhang travelled to Massachusetts for the purpose of showing Mr Baker and his two sons, Jeff Baker and Paul Baker, how to operate the Orion system fitted to the Smuggler vessels and to discuss further opportunities to work together.

[36] Following that visit, Paul Baker sent an email to Mr Leybourne in which he asked if Orion would be interested in assisting with the development of a "System 80 hydraulic system" (S80).

[37] Mr Leybourne met with Mr Baker and Jeff Baker in Boston again at the end of March 2017, after Mr Leybourne and his wife had been holidaying in Utah.

[38] Mr Leybourne says the purpose of the meeting was to discuss options for Orion and the Baker interests to work together, including the possibility of Orion working on the S80 system. Mr Leybourne also says that Mr Baker made it clear that he wished to keep Orion in the fight against Sealegs and that one way of doing that could be for Mr Baker to fund developments in the S25. In return, Mr Baker wanted Wareham to own those developments. Mr Leybourne says he told Mr Baker he would think about his offer.

Email exchanges on 27 March 2017

[39] There were a number of email exchanges between Mr Leybourne and the Baker interests on 27 March 2017.

⁶ *Sealegs International Ltd v Zhang* [2016] NZHC 3143.

[40] In one exchange, Mr Leybourne emailed Mr Willis saying that he had ‘tabled’ Wareham’s offer to fund changes to the current design of the S25-4W to a new generation design in return for owning the design. The email stated that among the points raised at Orion was the fact that the new generation system used both existing parts of the S25, as well as new parts, and that as a result Wareham would acquire ownership of the complete system while funding only the changes. The email noted that the value of Orion would be diminished. It put forward alternative options for Wareham that did not entail Orion transferring ownership to Wareham. Mr Baker declined those options.

[41] Subsequently, Mr Baker emailed Mr Leybourne and asked if Orion could sell the ownership / design for Orion’s complete wheel-kit systems to Wareham which could modify those systems into the S80 and sell to New Zealand under its agreement with Sealegs. Mr Leybourne replied saying that they had been advised that trying to operate under Wareham’s agreement would not work for Orion or Smuggler, and that they would end up with Sealegs taking additional litigation against them.

[42] In another exchange that day, Mr Baker emailed Mr Leybourne saying they had enjoyed his visit and had decided to continue forward with the S80. He asked for Mr Leybourne’s help in designing and building Orion’s hydraulic kit system, apparently for the S80, less the front and rear wheels so as not to conflict with the Court rulings. In reply, Mr Leybourne said he would make a start the next week and would submit a couple of design concepts.⁷

Mr Baker and Orion discuss litigation funding

[43] On 18 May 2017, Mr Baker emailed Mr Leybourne asking for a proposal identifying the amount of money that Orion would wish to borrow and how those funds would be repaid if Orion won, lost or settled the case with Sealegs, how the loan would be secured and by whom, how his interests would benefit and amounts and dates when payment was needed.

⁷ In the event, work by Orion on the S80 did not proceed at that time.

[44] On 24 May 2017, Mr Leybourne sent a detailed response to Mr Baker's questions. Among other things, Mr Leybourne said that he, Mr Pringle and Mr Zhang would provide personal guarantees to cover a loan of up to \$750,000 and, with more time, further guarantees for a further \$250,000. Mr Leybourne said the benefits to Wareham could include transferring the design rights in a flood rescue boat of JRTD, Mr Zhang's entity in China, giving Wareham exclusive distribution rights for Orion systems and Smuggler and Stryda vessels in the United States, and Orion undertaking to design a hydraulic system for the S80 at no cost and to build prototype and production hydraulic systems for the S80 at cost. The benefits did not include transferring ownership of the S25.

[45] On 29 May 2017, Mr Baker asked Mr Leybourne and others copied on Mr Leybourne's email of 24 May 2017 how the loan would be repaid if Orion lost to Sealegs, its business was controlled by Sealegs and it had no income.

[46] On 6 June 2017, Orion's solicitors sent Mr Baker draft loan documentation for a loan of \$1,000,000 to Mr Leybourne, Mr Zhang and Mr Pringle. The security offered included mortgages over properties owned by Mr Leybourne and Mr Zhang. The email said that, from a litigation standpoint, they needed to progress the loan as soon as possible so they could launch into the litigation.

[47] There is no evidence of any reply to this message. It is common ground that no loan agreement was made as a result of these exchanges.

Mr Baker sends design for S80 to Orion

[48] On 18 December 2017, Mr Baker forwarded to Mr Leybourne, Mr Zubcic and Mr Zhang an email headed "New front leg" to which was attached drawings of a front leg assembly for an S80 system designed in the United States for Mr Baker. Mr Zubcic says he told Mr Baker he considered the system visually unappealing because it entailed the use of three very large wheels. He says he suggested to Mr Baker that Orion design a system with two wheels, rather than a single wheel, on each leg.

Mr Baker commissions work on S65

[49] On 28 December 2017, Mr Baker asked Orion to design up a front wheel drive assembly for single and dual wheels for a 6,000 kg system. Mr Baker also enclosed further “Boat Schematic Drawings” which he said might be useful.

[50] That email marked the start of work on what became known as the S65 system.

[51] On 18 January 2018, Mr Baker forwarded to Mr Leybourne, Mr Zubcic and Mr Zhang an email headed “New front images” to which was attached images of a front leg. Mr Baker’s covering email stated, “We are getting there ... System 80-2”. Mr Zubcic says these were images of the US-designed S80.

[52] Work on the S65 continued through the first half of 2018. In February 2018, Mr Zubcic sent Mr Baker concept drawings for three wheel and six wheel versions of the S65.

[53] In March 2018, Mr Leybourne sent Mr Baker an email with an invoice for the hours he and Mr Zubcic had worked on the S65 in January and February 2018 and said he would send monthly invoices from then on. The email also stated:

Given the events of last year we want to ensure there is a clear trail that shows S65 is a [Wareham] product and that Orion are just providing contract services.

[54] Orion sent invoices on a monthly basis from that point. The invoices stated that they were for contract labour for the design or the design and testing of the S65. The invoices also included costs for parts and outwork by third parties.

Mr Leybourne proposes arrangements to test S65

[55] On 8 July 2018, Mr Leybourne emailed Mr Baker advising that it was time to consider testing the S65, either by fitting it to a Smuggler craft or by fabricating a test frame that would allow the full system to be installed and run. Mr Baker replied on 10 July 2018 to say he thought it best to fabricate a frame and run the full system before installing it on a boat.

High Court makes permanent injunction against Orion and others

[56] On 12 July 2018, the High Court (Davison J) issued its judgment on the substantive Sealegs' proceeding.⁸ The High Court found that Orion, Smuggler, Mr Zhang, Mr Leybourne, Mr Zubcic, Stryda and other defendants had infringed Sealegs' copyright works in various respects and ordered that the defendants were restrained from manufacturing, displaying, offering for sale, or completing the sale of the external amphibious assemblies of the S25 in its four wheel or three wheel configurations. The High Court also made an order for an inquiry into damages suffered by Sealegs.

[57] In its judgment, the High Court made findings that were critical of the reliability and credibility of aspects of the evidence of Mr Zhang, Mr Leybourne and Mr Zubcic.⁹

[58] Mr Leybourne sent Mr Baker a copy of the High Court's judgment the day it was received. The email said Orion would be considering its options and he would call Mr Baker to discuss.

Orion people travel to Massachusetts to see Mr Baker

[59] In late July 2018, Mr Zhang, Mr Leybourne and Mr Zubcic arranged to travel to Massachusetts to meet with Mr Baker. Mr Leybourne says Mr Baker invited the Orion people to come to the United States. Mr Baker says Mr Leybourne asked for the meeting.

[60] On 31 July 2018, Mr Baker emailed Mr Leybourne, Mr Zubcic and Mr Zhang and asked that they provide proposed business plans and proposals in order to make the best of the meeting. He said that would allow decisions to be made before the Orion people left on the Sunday (5 August 2018).

[61] In an email dated 31 July 2018, which was copied to Mr Willis, Mr Baker's associate, Mr Leybourne set out some ideas which he described as "very lightweight"

⁸ *Sealegs International Ltd v Zhang* [2018] NZHC 1724 at [472] and [474].

⁹ For example, at [328] – [337].

but said he would flesh out more details before the visit. In that email, Mr Leybourne set out the challenges that needed to be addressed and three ideas under which the manufacture and sales of the S25 could continue. The email also set out a number of points to note in relation to those ideas. The relevant content of that email is discussed below.

[62] Mr Willis subsequently emailed Mr Baker with comments on Mr Leybourne's email. The content of that email is also discussed below.

[63] On 2 August 2018, prior to departure for the United States, Mr Leybourne reported to Mr Baker by email that he, Mr Zhang and Orion's solicitors had met with senior counsel recommended to Orion and the other defendants to conduct their proposed appeal against the High Court's decision. Mr Leybourne also forwarded an email from Orion's solicitors advising that it would be prudent to budget \$200,000 plus GST for the senior counsel's fee.

[64] On 3 August 2018, Mr Zhang, Mr Leybourne and Mr Zubcic travelled to Plymouth, Massachusetts to meet with Mr Baker. They arrived in Plymouth at around 4 am the same day.

[65] The parties dispute when they met with Mr Baker, who was present, what was discussed and what was agreed while the Orion parties were in Massachusetts. Those questions are discussed more fully below.

[66] It is common ground that, by the end of those discussions, Mr Baker had agreed to advance \$200,000 to Orion so that senior counsel could be instructed to represent Orion at the appeal.

Orion people return to NZ

[67] On 5 August 2018, Mr Zhang, Mr Leybourne and Mr Zubcic left Plymouth to travel back to New Zealand via Boston and San Francisco. They arrived in New Zealand in the early hours of 7 August 2018. In the course of their journey, Mr Leybourne emailed Mr Baker and thanked him for his "hospitality, support and generosity." In the email, Mr Leybourne said, "... we can stay in the fight because

you resource us to stay in the fight.” Mr Leybourne attached to the email an invoice for 50 per cent of the senior counsel’s fee.

[68] Mr Baker replied to Mr Leybourne’s email as follows:

I trust the \$200,000.00 will be refunded
Upon winning the appeal
Please confirm.

[69] On arrival in Auckland on 7 August 2018, Mr Zhang replied to Mr Baker’s email, “Of course we will and with interest.”

[70] It is common ground that Mr Baker or one of his companies advanced Orion \$200,000 in two instalments of \$100,000 after the meetings in Massachusetts.

Mr Zubcic confirms work on further US designs for S80

[71] On 30 August 2018, Mr Zubcic emailed Mr Baker to say he had managed to open Mr Baker’s S80 files and planned to spend some time on them in the next few days. Mr Zubcic asked the weight for which the system had been designed.

[72] In reply Mr Baker, said he looked forward to Mr Zubcic’s evaluation and said the system had been designed for a six ton vessel.

Mr Baker requests assembly drawings of S25

[73] On 26 September 2018, Mr Baker sent Mr Leybourne an email asking him to forward assembly drawings for the S25. Mr Leybourne replied shortly afterwards and provided a hyperlink to top level assembly drawings and asked if Mr Baker wished to have sub-assembly level drawings as well. There is no evidence of any reply to that question.

Mr Baker commissions work on the S80

[74] On 4 September 2018, Mr Zubcic advised Mr Baker that there were significant flaws in the US-designed S80 system. He asked if Mr Baker wished Orion to spend any more time on that project. Mr Baker confirmed that he did.

[75] In December 2018, Mr Zubcic advised Mr Baker that tests had confirmed the US-designed S80 system was not going to work, despite improvements that Orion had made. Later that month, Mr Baker confirmed that Orion should redesign and build the S80 to accommodate a ChrisCraft 34.

[76] Mr Zubcic says that at that time, Orion returned to Mr Baker all prototype parts for the failed US-designed S80 system.

[77] Work on Orion's design of the S80 continued through 2019 and 2020 in parallel with work on the S65. From December 2018, Orion sent Acra-Cut invoices, usually each month, for labour and parts for the design of the S80. Those invoices were usually separate from the invoices sent for the design of the S65.

Court of Appeal sets aside injunction and other orders against Orion

[78] In August 2019, the Court of Appeal upheld Orion's appeal and set aside the orders made by the High Court.¹⁰ In December 2019, the Supreme Court dismissed Sealegs' application for leave to appeal the Court of Appeal's judgment.¹¹

[79] The defendants say that, on 25 June 2020, Orion credited \$200,000 plus interest of \$20,375 against invoices generated by Intech in relation to work on the S65 and S80. The plaintiffs do not dispute that this credit was made in repayment of the advance of \$200,000.

Mr Baker changes name of the S80

[80] On 24 November 2020, Mr Baker sent an email to Mr Zubcic suggesting that the redesigned S80 be named S95. Mr Zubcic replied on 29 November 2020 saying that it was up to Mr Baker what the new system was called.

[81] On 30 November 2020, Mr Baker asked Mr Zubcic how soon he could get two s95 kits. In a reply the same day, Mr Zubcic cautioned Mr Baker that he was struggling to allocate more time to the project. He said he should be at the assembly stage in

¹⁰ *Zhang v Sealegs International Ltd* [2019] NZCA 389, [2020] 2 NZLR 308.

¹¹ *Sealegs International Ltd v Zhang* [2019] NZSC 147.

January 2021 and hoped to complete testing by the end of April 2021 and to produce a second kit by the end of July 2021.

[82] From December 2020, Orion's invoices to Acra-Cut stated that they were for labour and parts for the design of the S95.

Relationship involving Orion, Mr Baker and ASIS Boats LLC

[83] From August 2019 until late 2020 and possibly into 2021, relations between Mr Baker and Orion appear to have been generally positive. During this period, Orion was working on the development of the S65 and S80/S95.

[84] During this period, Orion was also providing S25 systems to ASIS Boats LLC (ASIS), a company headquartered in Dubai. ASIS manufactures and sells rigid hull inflatable boats, including boats fitted with Orion's S25 system.

[85] It appears from the affidavits sworn by Mr Baker, Mr Leybourne and Roy Nouhra, the President and founder of ASIS, that Mr Baker assisted ASIS by financing the purchase of Orion's systems that were fitted to the ASIS boats. Under that arrangement, ASIS ordered S25 systems from Orion, which supplied the systems directly to ASIS but invoiced Mr Baker or one of his companies for the cost of the systems.

[86] On 13 November 2020, Mr Noura emailed Mr Baker proposing an arrangement for payment of monies ASIS owed to Mr Baker. The email stated that the amount owed was USD3,617,000, which Mr Noura proposed should be paid by instalments of USD200,000 per month. Included in the amount to be paid were the costs of 46 S25 systems supplied by Orion at NZD65,000 per system. It appears that Mr Noura based this amount on export invoices from Orion showing the value of the system as being NZD65,000. Mr Noura says Mr Baker wanted ASIS to pay USD65,000 for each system.

[87] Mr Baker replied the following day saying that Mr Noura's proposal was unacceptable and that it was obvious that they could not conduct any future business." Mr Baker asked Mr Noura to forward \$2,534,560.00 within the next five days.¹²

Mr Baker asks Orion about communications with ASIS and about its own works

[88] On 8 December 2020, Mr Baker sent an email to Mr Leybourne and Mr Zubcic asking them to forward "a complete accounting for any and all other costs that I paid Orion for the benefit of ASIS....." The last section of the email was addressed to Mr Leybourne and stated:

Darren

I will appreciate your not getting involved with ASIS until Roy conducts himself in a business like manner and discusses any issues he has with me and for the monies overdue.....

[89] On 29 December 2020, Mr Baker emailed Mr Leybourne asking if he had been in contact with Mr Noura from whom, he said, he had not heard for months.

[90] On 31 December 2020, Mr Leybourne replied saying that he had not spoken with Mr Noura for many months and that he usually communicated with "Pierre and to a lesser extent Toji". Mr Leybourne also made some observations about how he understood the issues between Mr Baker and ASIS could be resolved.

Mr Baker terminates relationship with Orion

[91] On 27 January 2021, Mr Baker asked Mr Leybourne to provide him with total development costs to date for the S65, S80 and S95 systems.

[92] On 14 March 2021, Mr Baker emailed Mr Zubcic and Mr Leybourne asking when the S95 would be completed. The email stated that the system was urgently needed.

¹² After further emails between Mr Noura and Mr Willis, threats of legal proceedings and the payments of some sums by ASIS, it was agreed in July 2021 that ASIS would pay NZD65,000 for the S25 systems supplied to ASIS by Orion.

[93] On 15 March 2021, Mr Baker asked Mr Leybourne whether he had had any communication with ASIS over the past three months. In his reply the same day, Mr Leybourne said he had spoken with “Bob and Toji” to provide technical support/parts and had also spoken to their UK dealer to provide technical support. Mr Leybourne’s email also stated that he considered it important to provide professional support to keep the end user happy. Mr Leybourne made some further observations about how the issues between Mr Baker and ASIS could be resolved.

[94] On 22 March 2021, Mr Leybourne emailed Mr Baker apologising for not following up on Mr Baker’s email of 27 January 2021, said Mr Zubcic was working on a timeline and outstanding tasks / parts and would email or call Mr Baker to discuss. Later that day Mr Leybourne emailed Mr Baker again saying that he had a number of other tasks that were pulling his focus away from the S95 and that Mr Zubcic would take over the project for the next few months.

[95] On 23 March 2021, Mr Baker emailed Mr Leybourne asking if he should consider setting up Intech to manufacture the S95. Mr Leybourne replied that the S95 was Mr Baker’s product and that they would support him if he preferred to manufacture at Intech. The email cautioned that the S95 was not ready for manufacture because the prototype had not been tested and validated.

[96] On 3 April 2021, Mr Baker sent an email to Mr Leybourne, Mr Zubcic, and Mr Zhang terminating their business relationship. The email stated, “We don’t like being used(ASIS).” The email also expressed the hope that the termination could be done amicably and without litigation.

Events following termination of relationship

[97] Later that day, Mr Baker sent a further email to Mr Leybourne, Mr Zubcic, and Mr Zhang putting them on notice for interference in the contractual relations between ASIS and Acra-Cut and Intech. The email stated that the interference had caused ASIS not to pay Acra-Cut and Intech over \$4 million plus interest.

[98] On 5 April 2021, Mr Leybourne sent a lengthy email to Mr Baker headed “Moving On”. The email expressed Mr Leybourne’s disappointment at the breakdown

of their relationship, referred to Mr Leybourne's previous experiences at Sealegs and his concern that Mr Baker's actions may have consequences for others. The email said Mr Zubcic would take over responsibility for communicating with Mr Baker in tidying up the loose ends and indicated that he, Mr Zubcic and Mr Zhang were tired of fights and were done.

[99] From 6 April 2021 onwards, emails were exchanged between Mr Baker and Mr Willis on the one side and Mr Zubcic and then Mr Zhang on the other in relation to requests from the Baker interests for, among other things:

- (a) the S65 and S80/S95 material held by Orion;
- (b) manuals and parts for the S25;
- (c) computer sticks with "complete details" for the S25, S65 and S 95;
- (d) delivery of S25 systems that the Baker interests had paid for but which had not been shipped; and
- (e) information on how Orion was going to repay the investments made in the S65 / S80 and S95 systems.

[100] Because the plaintiffs' application for interim orders turns principally on whether there was a contract in place of the kind alleged by the plaintiffs as set out at [6] above, it is unnecessary to discuss those post termination exchanges except to the extent they bear on that issue, as is discussed below.

Questions for consideration

[101] It is common ground that the questions for consideration on the application for the injunction and related orders are:

- (a) is there was a serious issue to be tried?

- (b) where does the balance of convenience lie and, in that context, what is the relative prejudice to the parties of the Court making or not making the orders sought by the plaintiffs, and whether damages be an adequate remedy; and
- (c) where does the overall justice lie?

[102] I consider these questions separately in relation to the sS65, S80 and S95 systems on the one hand and the S25 system on the other.

Is there a serious issue to be tried in relation to the S65, S80 and S95 systems?

[103] The defendants accept that Orion entered into agreements with Acra-Cut for the design and production of a prototype of the S65 system and for the S80 system which was later renamed the S95. The defendants accept, therefore, that Acra-Cut owns the intellectual property and any copyright in those systems. They say that they have provided the plaintiffs with all material and information they held with respect to those systems, including the CAD/CAM files that had been held back earlier as security for unpaid invoices.

[104] In their memorandum of 10 March 2022, counsel for the defendants submit that all electronic files have been provided to the plaintiffs and that no concerns have been raised by the plaintiffs following their receipt. They also say that the extent and detail of the plaintiffs' request for further information about material supplied by Orion amounts to requiring the defendants to undertake an audit of every item for which Orion has charged the plaintiffs and is unreasonable and oppressive.

[105] In their memorandum of 11 March 2022, counsel for the plaintiffs say that they do not accept that all electronic files have been provided by the defendants. They also say that the plaintiffs' expert has raised some concerns about the information provided by the defendants – although it appears that those concerns had not been raised when counsel for the defendants sent their memorandum of 10 March 2022.

[106] In any event, I am satisfied from the submissions made at the hearing and in the subsequent memoranda that the only issue seriously in contention with regard to

the S65 and S80/S95 systems is whether the defendants have sent the plaintiffs all the electronic files and all of the other material and information they held with respect to those systems. What is not apparent is the scale and seriousness of the remaining items at issue.

[107] As counsel for the defendants say, the information now being sought by the plaintiffs in the post-hearing exchanges comprises a request for proof of receipt of items taken from invoices sent by Orion dating back to May 2018. The list includes consumables, work done by third parties, raw materials and items incorporated into finished systems. I do not consider that that demand accurately reflects the scope of the items really at issue.

[108] For their part, counsel for the plaintiffs say that even if items such as consumables, outwork and raw materials are removed, that does not answer the other questions asked of the defendants, including responding to photographs and documentary evidence of items in the defendants' possession.

Discussion

[109] The scope and detail of the plaintiffs' request are not consistent with a wish only to recover intellectual property that the plaintiffs say should have been returned to them following termination of their commercial relationship with Orion. In that respect, I consider the plaintiffs' request for further information to be disproportionate to the issues at stake. However, that is a consideration more relevant to the balance of convenience which I discuss below. For present purposes, I accept that it is arguable that there is a is an issue to be tried as to whether the defendants have sent the plaintiffs all electronic files and all the other material and information they held with respect to the S65 and S80/S95 systems.

Is there a serious issue to be tried in relation to the S25 system?

[110] Counsel for both sets of parties accept that the first five causes of action alleging breach of contract, breach of express trust, breach of institutional constructive trust, misuse of confidential information, and breach of copyright as they relate to the S25 system are contingent on the existence of the agreement alleged by the plaintiffs

with respect to that system. The principal issues in contention, therefore, are whether there was an agreement between Mr Baker on behalf of the plaintiffs and Mr Leybourne and Mr Zhang on behalf of Orion with respect to the design and manufacture of a next generation of the S25 system, and whether Mr Zhang, on behalf of Orion, agreed to assign the intellectual property in the S25 to Mr Baker to secure the advance of \$200,000.

Submissions of counsel for the plaintiffs

[111] In his principal submissions, Mr Crossland, who argued this aspect of the case for the plaintiffs, submits that central to the agreements alleged by the plaintiffs was the plaintiffs' ownership of the intellectual property in the S65, S80 and S95 systems, which the defendants accept is owned by the plaintiffs.

[112] Mr Crossland says the Varied Agreement allegedly made in March 2018 clarified that the plaintiffs also owned the intellectual property in the S25. Mr Crossland notes that Mr Leybourne had declined to transfer the intellectual property when Mr Baker had previously sought it. However, following the High Court's judgment, the chips were truly down for Orion, Mr Baker's bargaining position was strong, and the defendants' businesses were effectively at an end. Mr Crossland says the defendants' personal livelihoods were in peril without the lifeline offered by Mr Baker. Mr Crossland also says it would not have been logical for Mr Baker to have funded the Sealegs appeal without a guaranteed return, bearing in mind that Mr Zhang's undertaking to repay Mr Baker only applied if the appeal was successful.

[113] After analysing the parties' conduct through the relationship, Mr Crossland submits that it is at least seriously arguable at the current interlocutory stage that the parties reached agreement as to the plaintiffs' ownership of the intellectual property and over the amphibious systems, including the S25.

[114] In response to the submissions of counsel for the defendants that the plaintiffs' allegations regarding the S25 system lack credibility and have been fabricated, Mr Crossland submits that the plaintiffs maintain that their account is correct, and that the orthodox and well-established position as set out by Lord Diplock in *American*

Cyanamid Co v Ethicon Ltd, is that the Court cannot resolve conflicts of evidence on affidavit as to facts on which either party may depend.¹³

Submissions of counsel for the defendants

[115] Mr Illingworth QC, counsel for the defendants, submits that there is no credible evidence to support the claim that Orion or any of the other defendants on its behalf agreed to assigning the intellectual property in the S25 to the Baker interests. For these reasons and in accordance with the approach of Lord Hoffman in the Privy Council's decision in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd*,¹⁴ Mr Illingworth submits that I should conclude that there is no triable issue and should dismiss the application for interim orders.

Discussion

[116] As pleaded in the statement of claim and set out in Mr Baker's affidavit of 24 November 2021, the alleged agreement with regard to the S25 comprised two component parts.

[117] The first part was an agreement that Mr Baker and his companies would acquire the intellectual property in the system by commissioning improvements that would result in the Modified S25. Mr Baker itemises six specific changes that he says were made to the S25 at his instruction or suggestion.

[118] The second part was a variation to that agreement under which Mr Zhang, on behalf of Orion agreed to assign the intellectual property in the S25 system to Mr Baker in order to secure the loan of \$200,000. Mr Baker also says the subsequent behaviour of the defendants, including sending him drawings of the S25, show that the defendants accepted that he had the rights to the S25.

[119] Even taking into account Mr Baker's assertion that he does not usually document commercial agreements, it is remarkable that there is no documentary evidence to support the first component of the alleged agreement. In contrast to the

¹³ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 [HL] at 407 – 408.

¹⁴ *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 WLR 1405.

position with respect to the S65 and S80/S90, there are no emails between Mr Baker and the defendants that show any agreement to that effect. To the contrary, there are emails between Mr Leybourne and Mr Baker in March 2017 showing that Orion specifically considered and did not accept Mr Baker's proposal that he obtain the intellectual property in the S25 in return for funding the improvements that the defendants were proposing to make to that system.

[120] In addition, in his reply affidavit sworn on 3 February 2022, Mr Baker accepts that in 2017, his proposal to obtain ownership of the S25 had not been accepted. He says the situation had changed by the time of the meeting in August 2017.

[121] It appears, therefore, that even Mr Baker now no longer asserts ownership of the S25 on the basis of an asserted agreement in 2016 and 2017. In addition, Mr Zubcic convincingly refutes Mr Baker's claims to have directed specific changes in the S25 by explaining that the modifications that Mr Baker claims to have instructed or suggested show a misunderstanding of the design and construction of the S25 and make no practical sense. Mr Baker's response was to exhibit emails showing his involvement in ordering tyres in late 2021, many months after he had terminated his relationship with the defendants. Those emails have no probative value with respect to an agreement alleged to have been made between 2016 and 2018.

[122] In summary, therefore, the only evidence of an agreement prior to the meeting in August 2018 is what Mr Baker says in his affidavit of 24 November 2021 and he does not maintain that account in his affidavit of 3 February 2022.

[123] For these reasons, I am satisfied that it is not reasonably arguable that there was an agreement between Mr Baker and the defendants in relation to the S25 prior to the meeting in Plymouth in August 2018.

[124] The evidence with respect to the second component part of the alleged agreement is more substantive but no less contentious.

[125] On the one side, Mr Baker and Mr Willis say that, at the meetings at Plymouth on 4 and 5 August 2018, it was agreed that the price of Mr Baker advancing \$200,000

to Orion was that Orion would assign to Mr Baker its rights in the S25. Mr Baker says this arrangement gave effect to one of the suggestions in Mr Leybourne's email of 31 July 2018.

[126] This account is refuted by the defendants who say no such arrangement was made.

Mr Baker's initial account of the meeting

[127] In his affidavit of 24 November 2021, Mr Baker gives few details of what was discussed at the meetings in Plymouth in early August 2018. He says he and Mr Willis met at his residence with Mr Zhang, Mr Leybourne and Mr Zubcic on 3 August 2018, and that after discussing "the matter" at some length, it was agreed that in consideration of the Baker interests lending those parties funds for their appeal:

- (a) the Baker interests would confirm or acquire a full ownership interest in the S25;
- (b) the Baker interests would commission Orion to design and build a test frame or rig;
- (c) Orion would continue to develop design modifications as required by Mr Baker;
- (d) Orion retained manufacturing rights for the modified S25 and other new larger amphibious "craft" and exclusivity for manufacturing and sale of these "craft" in New Zealand;
- (e) the Baker interests retained the rights to sell the defendants "amphibious craft" directly into the New Zealand market and overseas; and
- (f) Orion retained rights to supply manufactured "amphibious craft" to the plaintiffs in New Zealand and outside New Zealand.

[128] Mr Baker also says Mr Leybourne acknowledged the deal in an email he sent to Mr Willis on 5 August 2018. Apart from that email and the email Mr Leybourne sent to Mr Baker on 31 July 2018 in advance of the meeting, Mr Baker produces no other documentation in support of his account.

The accounts of Mr Zhang, Mr Leybourne and Mr Zubcic

[129] Mr Zhang, Mr Leybourne and Mr Zubcic all say they had no meetings with Mr Baker on Friday, 3 August 2018 because Mr Baker and his sons, Jeff and Paul, worked all day and were not available. They say the meetings took place principally on 4 August 2018 and were with Mr Baker and his sons. Mr Zubcic says he has no recollection of Mr Willis being present. They say they discussed Orion's strategy for the Sealegs litigation and the senior counsel they wished to retain.

[130] Mr Zhang says Mr Baker told the defendants that evening that he would loan them \$200,000 to cover the senior counsel's fees and that Mr Baker did not negotiate with them in any way and did not seek to impose conditions. Mr Zhang says he would have refused any request for ownership of the S25 because the reason they were appealing the High Court judgment was to defend Orion's ownership of the S25 against Sealegs.

[131] The accounts of Mr Leybourne and Mr Zubcic are consistent with that of Mr Zhang. Like Mr Zhang, Mr Leybourne says the discussions on the loan arrangements were brief and were over in a matter of minutes and that Mr Baker did not raise the exchange of ownership of the S25. He says Mr Baker was already aware of how much money was needed and why, so little discussion was required.

Mr Baker's later account and Mr Willis's account

[132] In his affidavit of 3 February 2022, Mr Baker takes issue with the defendants' accounts. He says it was clear from the emails exchanged before the meeting that the intention was to discuss arrangements other than a loan or a gift by which the defendants would obtain funding for the appeal. He says what was discussed and agreed was Option C in Mr Leybourne's email of 31 July 2018, under which Wareham would take over ownership and control of the S25. Mr Baker also refers to the email

Mr Willis sent him commenting on Mr Leybourne's email in which Mr Willis had said he struggled to see what was in the proposals for "us" and asked if they could pick up the S25 system as is and sell it in other parts of the world outside of New Zealand under the Wareham agreement with Sealegs. Mr Baker also says he never discussed the litigation funding as a loan and that in the negotiations around funding the appeal, the Baker interests were always concerned with what was in it for them.

[133] Mr Willis agrees he was not present when the defendants met with Mr Baker and his sons during the day of 4 August 2018 but says he was present at the dinner that evening at Jeff Baker's house. He says it was at that dinner that they discussed the options set out in Mr Leybourne's email of 31 July 2018. He says he proposed to Mr Baker that they sleep on it and come to an agreement in the morning. Mr Willis also says he went to Mr Baker's house early in the morning of Sunday, 5 August 2018, collecting donuts and muffins on the way.

[134] Mr Willis says he and Mr Baker had an initial private discussion and agreed that Option C of Mr Leybourne's email was the way to go because it entailed Wareham taking over the operation of Orion and provided collateral, the S25 system. He says he and Mr Baker put this proposal to Mr Leybourne after he had returned from a run and that Mr Leybourne agreed, subject confirmation with Mr Zhang and Mr Zubcic. He says further that confirmation was provided when Mr Zhang and Mr Zubcic joined the other three for coffee. Mr Willis says the conversation focused on the intellectual property in the S25. He says the defendants and agreed explicitly on transferring ownership of the S25 and the associated intellectual property "for the \$200,000" because they had already been advised that setting up a new entity would not provide any additional benefit.

Analysis of the accounts

[135] As Mr Zhang says, it is inherently unlikely Orion would have agreed to transfer the S25 to the Baker interests as the price for an advance to defend its rights to that system in the Sealegs litigation. That would have negated the purpose of the appeal. It is also inherently unlikely that there would be no record at the time or subsequently of Orion's agreement to the transfer. Whatever Mr Baker's predilection for oral

arrangements, the defendants were well aware of the importance of documenting ownership of systems – as Mr Leybourne said in his email to Mr Baker of 18 March 2018 with invoices for the initial work on the S65.

[136] There are aspects of Mr Baker’s accounts that give rise to doubts as to their accuracy and even whether, on his own account, there was a discussion or an agreement to transfer ownership of the S25 system.

[137] It is also curious that in setting out in his initial affidavit what he says was agreed at the August meetings, Mr Baker makes no reference to the ideas or options in Mr Leybourne’s email of 31 July 2018, even though he refers to that email and exhibits it to his affidavit. It is also curious that some of the elements that Mr Baker says in his initial affidavit were agreed at the August 2018 meetings appear to be inconsistent with a transfer of ownership of the S25; in particular, the idea that Orion would retain manufacturing rights for the S25 and exclusivity for manufacturing and sale in New Zealand. It is even more curious that if there had been an agreement to transfer ownership of the S25, there was no reference then or, it would seem at any later point, as to the financial consequences of a transfer of ownership beyond the initial advance, or how that transfer of ownership was to be manifested.

[138] There are other aspects of Mr Baker’s initial account that are less than convincing in the light of the documentary evidence. For example, his assertion that Mr Leybourne acknowledged the deal in his email of 5 August 2018 is not accurate. That email, which was sent to Mr Baker and not to Mr Willis, thanked Mr Baker for his “hospitality, support and generosity” and made no mention of an alleged deal. An email expressing such sentiments would have been unlikely if Mr Baker had extracted ownership of the defendants’ primary asset as the price of his advance. If the defendants had agreed to transfer their rights in the S25 to Mr Baker, it would also have been unlikely both for Mr Baker to have sent a reply asking for repayment of the \$200,000 if they won the appeal and for Mr Zhang to have replied undertaking to do so with interest.

[139] Other discordant aspects in Mr Baker’s initial account are:

- (a) Mr Baker's references to the production of amphibious "craft" when Orion makes amphibious systems that are fitted to vessels (there is no reference to Stryda in the accounts of the alleged agreement); and
- (b) Mr Baker's claim to have discussed and instructed the manufacture of a test frame at the meetings in August when it is clear from the documentary record that the idea for a test frame came from Mr Leybourne in July 2018 in relation to the S65.

[140] There are aspects of Mr Baker's later account and Mr Willis's account that also do not align with the documentary evidence. For example, the "ideas" in Mr Leybourne's email of 31 July 2018 did not necessarily entail a transfer of ownership of the S25. The email began with statement of the challenges that needed to be addressed. These were:

- (a) Keeping the S25 alive;
- (b) Bringing a new system to market to test reactions from Sealegs;
- (c) Litigation funding for the Court of Appeal and for the High Court inquiry into damages; and
- (d) Business funding.

[141] The common theme to the three ideas that Mr Leybourne set out was the setting up of structures to allow the continued manufacture and sale of the S25 while the injunction issued by the High Court was in effect. Litigation funding was one aspect that the ideas sought to address. However, it was far from being the sole or even the primary challenge identified by Mr Leybourne. The much stronger focus was on keeping the S25 alive in the face of the High Court injunction.

[142] It appears that Idea C – Wareham creates an entity in New Zealand and takes over what is currently the operation of Orion – was envisaged as a temporary arrangement. From the "Points to note" that Mr Leybourne set out under the three ideas, it appears that one of the requirements of all three ideas was that funding of the

order of \$68-70,000 per month, and probably more, would be required to cover Orion's overheads. Production costs would be on top of that amount. A one-off advance of \$200,000 to fund the costs of senior counsel would do nothing to address that requirement.

[143] For these reasons, I have doubts as to the veracity of the accounts put forward by Mr Baker and Mr Willis.

[144] On the other hand, Mr Baker and Mr Willis have not been subject to cross-examination. In addition, there are aspects of the accounts of the defendants that give rise to questions. For example, the defendants provide no satisfactory account of the issues that were discussed at the meetings, for which they had undertaken a journey of approximately 14,500 kilometres, with air travel time of approximately 17 hours, at a time when their company was in jeopardy because of the High Court injunction. It would seem unlikely that they would have travelled all that way at that time for a friendly discussion with Mr Baker and his sons about the Sealegs' litigation. It is apparent from Mr Leybourne's email of 31 July 2018 that the defendants were prepared to discuss possible structures for keeping the S25 alive as well as funding the appeal and the High Court inquiry into damages. It would also seem unlikely that they spent only a few minutes discussing funding for the appeal against the High Court's decision, given that they travelled to Massachusetts within a month of that decision, which had major implications for the future of Orion.

[145] For these reasons and for the reason submitted by Mr Crossland, namely, that as held by Lord Diplock in *American Cyanamid*, a court cannot resolve conflicts of evidence on affidavit as to facts on which either party may depend, I am unable to conclude that the accounts put forward by Mr Baker and Mr Willis are inherently incredible as submitted by Mr Illingworth. It follows that I also cannot find that there are no triable issues in the first to the fifth causes of action on the basis that there is no credible evidence to support the plaintiffs' claims.

Conclusion on whether there is a serious issue to be tried in relation to S25

[146] I conclude, therefore, that it is arguable that there is a serious issue to be tried in relation to the S25 under the first to fifth causes of action, namely whether Orion or

any of the other defendants on its behalf agreed to assigning the rights to the intellectual property in the S25 to the Baker interests.

[147] Having reached that conclusion, it is unnecessary for me to make any findings with respect to the drawings supplied to Mr Baker to the defendants following the meetings in August 2018.

[148] I also make no finding with respect to the sixth cause of action, inducement to breach contract. That question was not a focus of counsels' submissions and is not relevant to the questions at issue in the interim orders sought by the plaintiffs.

Balance of convenience and overall justice with respect to S65, S80/S95

[149] Mr Crossland submits that the balance of convenience with respect to the orders sought regarding the S65, S80 and S95 strongly favours the plaintiffs. He says the defendants have no right to resist handing over the confidential information relating to those systems, which the defendants acknowledge are owned by the plaintiffs. Mr Crossland also submits that damages would not be an adequate remedy. If they do not have access to the confidential information and copyright works, the plaintiffs would have to redesign the products they wish to manufacture and sell. The delay would risk the plaintiffs losing their nascent position in the market and they would not be able to operate their businesses. He also says that damages would not be an adequate remedy because of the difficulties the plaintiffs would face in proving loss with regard to a business that has yet to be established.

[150] Mr Crossland submits that the overall justice also favours the orders sought because, unless the defendants are restrained, they will continue to infringe the plaintiffs' copyright and misuse the confidential information by incorporating the plaintiffs' intellectual property in their own amphibious systems.

Discussion

[151] As Lord Hoffman said in *National Commercial Bank Jamaica Ltd*, the basic principle is that the Court should take whichever course seems likely to cause the least irredeemable prejudice to one party or the other.¹⁵

[152] Referring to Lord Diplock's observations in *American Cyanamid* that it would be unwise even to list all the various matters that may be taken into consideration in deciding where the balance of convenience, let alone to suggest the relative weight to be attached to them,¹⁶ Lord Hoffman also said:¹⁷

18 Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of [any] cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

[153] I am not persuaded that the plaintiffs would suffer significant prejudice if the orders sought in relation to the S65 and S80/S90 systems are not granted. Nor am I persuaded as to the strength of the plaintiffs' case with respect to the issues still in dispute with respect to those systems.

[154] The evidence to support Mr Crossland's submission that the plaintiffs would be prevented from starting their asserted business in the production of amphibious systems in the United States is far from convincing. It consists of Mr Baker's statements in his reply affidavit that: over the past 10 years he has expanded and invested in the three plaintiffs to "operate within the amphibious boat industry," he is renovating a building for the purpose; he has around 30 staff; and he has established business relationships with a number of boat building companies to which the plaintiffs provide their "unique" amphibious systems. There are no documents of any kind to support these statements. Instead, Mr Baker has supplied photographs and video of the plaintiffs' premises and a picture of the mould of a boat hull which, he

¹⁵ At [17].

¹⁶ *American Cyanamid Co v Ethicon Ltd*, above n 13, at 408.

¹⁷ *National Commercial Bank Jamaica Ltd v Olint Corp Ltd*, above n 14.

says, is to be used for the construction of vessels which can accommodate the S25 as well as the S65, S80 and S95 systems.

[155] Even leaving aside the fact that these systems are intended to be used on vessels of very different sizes and that there is little in the photographs or video to demonstrate that the premises are to be used for the manufacturing of amphibious systems, that evidence falls well short of persuading me that Mr Baker and his companies are about to embark on the construction of amphibious systems using the S65 and S80/S95 designs developed by Orion. The evidence shows that, at the time Mr Baker terminated his companies' relationship with Orion, a prototype of the S65 has been built and been subject to initial testing, and that the design of the S80/S95 was considerably less advanced. It would seem unlikely, therefore, that the manufacture of systems based on those designs is imminent.

[156] In addition, although the plaintiffs seem intent on requiring the defendants to prove that they supplied every item included on invoices dating back to 2018, that exercise says little about whether the defendants have sent the plaintiffs the designs for and all components of the S65 and S80/S95 as the defendants say they have. In those circumstances, I consider that the orders sought by the plaintiffs with respect to those systems are unnecessary and out of proportion to the mischief that the orders are intended to address.

[157] The defendants have sworn affidavits attesting to the fact that, apart from the CAD/CAM files which they have since provided to the plaintiffs, they have sent to the plaintiffs all components of and all intellectual property relating to the S65 and S80/S95 systems. In addition, through their counsels' memorandum dated 10 March 2022, they have undertaken that:

- (a) they have not manufactured for any purposes other than in accordance with the arrangements made with the plaintiffs, either the S65 or the S80/S95 and will not do so in the future; and
- (b) they have not manufactured, reproduced or sold any parts that are specific to the S65 or S80/S95 systems other than in accordance with

the arrangements made with the plaintiffs and will not do so in the future.

[158] Through that memorandum, Orion also undertakes to comply fully with any discovery obligations ordered by the Court with respect to the 65 and S80/95 systems and, subject to any applicable legal exemptions, to answer truthfully and honestly any interrogatories issued by the plaintiffs and approved by the Court.

[159] In these circumstances, I am satisfied that the balance of convenience and the overall interests of justice lie strongly in favour of the defendants.

[160] Accordingly, I decline the plaintiffs' application for interim orders with respect to the S65 and S80/S95 systems.

Balance of convenience and overall justice with respect to S25

[161] At the resumed hearing on 18 February 2022, Mr Elliot QC confirmed that the orders now sought with respect to the S25 is an order that the defendants pay into an independent solicitor's trust account a notional royalty on the ex-factory wholesale price of all S25 systems sold or otherwise supplied by the defendants.

[162] In their application, the plaintiffs proposed that the royalty be set at 20 per cent. At the hearing on 11 February 2022, Mr Crossland said the plaintiffs would be satisfied with a royalty of 15 per cent, having regard to the evidence adduced on behalf of the defendants as to the possible impacts of a 20 per cent royalty. He also advised that the plaintiffs are prepared to match dollar for dollar any money held in trust by the defendants pending hearing of the plaintiffs' substantive claim. At the resumed hearing on 18 February 2022, Mr Crossland submitted that the royalty rate be set at whatever figure the Court considers just.

[163] Both sets of parties adduced evidence as to the potential impact of such an order on Orion's business.

Discussion

[164] I consider the evidence of the potential impact on the Orion's business of an order directing a royalty to be largely irrelevant.

[165] Even on the plaintiffs' account of events, there is no evidence of the plaintiffs asking, or of the defendants agreeing to pay, or of the defendants paying, the plaintiffs a royalty on sales of the S25. Nor is there any evidence of the plaintiffs asking for any accounting on sales of the S25 when Mr Baker terminated the relationship with the defendants.

[166] In these circumstances, I see no case for requiring the defendants to pay a notional royalty of any amount pending determination of the plaintiffs' substantive claim. I do not consider such an order to be appropriate having regard to the balance of convenience and to the overall interests of justice.

[167] For the avoidance of doubt, I record that I would have reached the same conclusion with respect to the balance of the orders sought with respect to the S25.

Result

[168] I dismiss the plaintiffs' application for interim orders.

Costs

[169] The first to the fourth defendants are entitled to costs at least on a 2B basis. I reserve leave to apply for increased costs.

[170] If the parties are unable to agree costs, they may file memoranda of no more than 5 pages.

[171] Any memorandum by the defendants is to be filed by 28 April 2022.

[172] Any memorandum by the plaintiffs is to be filed by 19 May 2022.

G J van Bohemen J