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PART A

1)

The compliance deadline for both GB1 and GB2 is the later of 1 year from the first examination report of GB1 or 4.5 years from the filing date (15 Nov 2018).

We don't know when the 1st exam report was but we can expect the compliance deadline was 15 Nov 2018, or not substantially later.

This means both GB1 and GB2 were granted well before the 2021 renewal fee was due so the grant dates won't have an effect on the relevant renewal fee deadlines (for the 2021 fees onwards).

The renewal fees for both GB1 and GB2 are calculated from the filing date of the parent application – 15 May 2014. The 2021 fees (for both) would have been due on the last day of May 2021. This was missed.

✓101

It would have been possible to pay within a further six months (by the last day of Nov 2021) by paying an additional surcharge. This was missed too.

✓102

Provided the deadline was missed unintentionally, there is then a 13 m period (from the grace period deadline) in which to request restoration. The deadline is therefore the last day of December 2022, so there is still time.

✓105

✓103

The request for restoration must be filed in writing, providing a statement that the deadline was missed unintentionally and providing evidence to support the unintentional nature of the missed deadlines.

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As J handles his own renewals, the bar for unintentional will be lower than a law firm or renewals handling agency. The error in the system update causing no reminders to be provided in the UK only seems to be a sufficient reason to support unintentional statement. Provided client can provide good evidence of what happened the restoration should be successful. However, did the client receive any notifications from the UKIPO as to the missed deadlines? If so, why weren't these acted upon? Check with client.

✓107

Restoration will need to be requested separately for both GB1 and GB2.

If successful, client will need to pay the missed renewal fees and surcharges for both GB1 and GB2.

The 2022 fee also needs to be paid with a surcharge for both GB1 and GB2 (as the client had attempted previously) by the last day of November 2022 once the patents have been restored.

From the end of the grace period deadline until the restorations of both patents are published, the patents cannot be infringed as they are not considered to be in force. Further, it is possible for third parties to accumulate valid rights to use the inventions if they are acting in good faith.

✓106

As this is a competitive field, it is possible a competitor has already started to accumulate these rights by starting to sell what would be an infringing article or making serious and effective preparations to do so. If they have done so, the competitor will be allowed to continue doing so, but they may not expand their activity or assign their use rights to others.

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The restorations should be filed ASAP to limit the likelihood of third party rights.

Check client's full patent portfolio for any other fees/actions that need doing, pay particular attention to the GB cases where the system update error appears to have most significant effect.

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2)

UKUDR

In the UK, unregistered design rights will automatically subsist in the **original** design from the date that it was first recorded, which appears to have already happened.

The client is based in the UK so is a qualifying person for UKUDR protection.

This protection will last up to 15 years from the first recording or up to 10 years from first sale if this happens in the first 5 years of protection term.

Hence, this protection will readily cover the length of time required.

However, this protection does not cover surface decoration so, if any aspect of the design relies on surface decoration, this will not be protected.

This protection is also limited to the UK.

Supplemental UKUDR & Community UDR

If the design is novel and has individual character (providing a different overall impression to the informed user over the state of the art) then supplemental UKUDR will subsist in the design automatically from the date that the design is first disclosed in the UK or EU. Similarly, Community UDR will subsist in the design automatically from the date that the design is first disclosed in the EU.

The launch event, which is being streamed to retail customers in **both** the UK and EU will trigger this automatic protection in both jurisdictions, provided no earlier disclosure is made.

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✓204 206

✓205

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This protection will last for 3 years from the launch event and should therefore **just** cover the client's intended use of the design.

The two unregistered rights will, in combination, cover both the UK and EU, as the client requires. Surface decoration is also protected by these rights.

However, copying of the design is required for infringement.

Registered UK/Community rights

If the design is novel and has individual character (explained above), it can also be registered for broader protection not limited to protecting against direct copies.

✓210

Although there is a cost associated, the initial term lasts 5 years, so **safely** covers the client's intended use of the design. After the first 5 years, the registrations can then be allowed to lapse to avoid further costs.

Also, broader protection can be obtained by filing the applications for registered designs in both the UK and EU by using line drawings. This will provide protection for the shape, irrespective of colours, etc.

✓202

If advantageous, it is further possible to cover different aspects of the design individually and cost effectively using a multiple application in each of the UK and EU.

Surface decoration will also be protected.

Further, direct copying of the design is not required for infringement.

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If possible, I recommend this approach as it provides the most robust protection and will definitely cover the intended use of the design (where as unregistered protection particularly in the EU is cutting it fine).

The applications should be filed before the launch event to reduce likelihood of a competitor accruing prior use rights, but a 12 m grace period is available after first disclosing the designs to validly file the applications.

✓207

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3)

EP1

EP1 revoked and appeal deadline has passed so EP1 can no longer be recovered.

The effect of central revocation is retroactive so EP1 is deemed never to have granted and therefore cannot be enforced.

Therefore, Alex will be unable to prevent C's activity in small outlets in Germany, Spain and Italy.

✓301

GB1

GB1 is granted, is currently in force? Meaning, are all of the renewal fees paid up to date? Check this and instruct Alex to pay any unpaid fees (or pay on his behalf as anyone can pay).

GB1 filed Aug 2017. Therefore, EPX is s2(3) (novelty only) prior art for GB1 because it was filed earlier but published later. (We know it published because the EP1 revocation proceedings were based on EPX as Art 54(3) prior art.)

✓302

Accordingly, claim of GB1 is currently invalid.

However, GB1 contains examples of dimmable long-life light bulbs. There is therefore basis to make a post-grant amendment to limit the scope of the claim to dimmable long-life light bulbs.

✓304

✓305

We should request the post-grant amendment ASAP (to accelerate being able to enforce it against C). We will need to request the post-grant amendment in

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writing, providing a copy of the amendment requested and a reason for requiring the amendment – we will refer to the existence of EPX prior art.

The post grant amendment will result in a valid (novel and inventive) claim because EPX does not disclose dimmable lightbulbs and may only be considered against the novelty of GB1 (not inventive step).

Provided GB1 is in force, it can then be enforced because it is granted for a valid claim.

The amended claim will cover the activities of C in the UK only. However, as the market potential in the UK is vast, this is positive.

Once everything is in order following the above actions, Alex should approach C to offer a licence for GB1, allowing Alex to gain royalties from that vast potential market.

✓308

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4)

An invention and the rights therein are owned by the inventor unless the invention was devised while under employment during normal duties or those specifically assigned and where an invention could reasonably be expected, or where the employee has a special obligation to further the interests of the employer.

In this case, Drew is a research scientist (for both Skyline and Horizon) so if he made the invention during normal or specifically assigned duties then an invention would have been reasonably expected and the rights in the invention would belong to the employer (the employer at the time the invention was devised).

The special obligation aspect won't be relevant in this case because Drew is not a director or similar of either company.

Article contains "full disclosure" of Concept X and was submitted on 31 May, before Drew joined Horizon. This suggests the invention was entirely devised by Drew before his time at Horizon. However, need to double check with Drew whether any aspects of GB1 were devised during time at Horizon as this could give rise to joint entitlement to ownership of GB1.

✓401

✓402

✓403

Was Drew working for Skyline right up until 31 May, or at least for the full period of time during which the invention was devised? Again, the fact that the article was a full disclosure and submitted by Skyline suggests that the invention was

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fully devised by Drew as an employee of Skyline. However, need to check with Drew whether the invention was made in the course of normal/specifically assigned duties? If he devised the invention outside of those duties, then Drew is entitled to ownership of the invention.

✓404

Maybe he devised some or all of the invention as described in GB1 between his time at Skyline and Horizon, in which case Drew would be entitled to at least joint ownership of the invention.

Need to check who is listed as inventor and applicant on GB1. Assume the inventor is listed as Drew and the applicant as Horizon, but need to check.

On balance, from the information we have, it seems likely that Skyline are entitled to either full ownership of GB1 or possibly joint ownership with one or both of Drew and Horizon.

Horizon are therefore vulnerable to s8 entitlement proceedings being raised against them by Skyline.

✓405

I recommend that Horizon approach Skyline to enquire about assignment of their rights in the invention to Horizon, or at least joint ownership terms.

It is also advisable to draw up a confirmatory assignment of any rights that Drew may have in the invention to Horizon, to be safe.

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It is further possible that Skyline (and Drew) have filed their own patent application to concept X, which may have an earlier filing date.

If this is the case Horizon may have to rely on licensing Skyline's rights.

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5)

Patentability

A mathematical function, as such, is excluded subject matter in at least the UK and Europe. Therefore, a claim directed to the maths function alone will not be valid in the UK or Europe. It may be patentable in the US but best to get advice from a local attorney to confirm.

However, the function provides a clear technical effect of providing a hydrofoil that generates a surprising amount of lift with minimal resistance through the water. If this technical effect is conveyed in the claim, the claim should be allowable (not excluded) in the UK and Europe, as well as the US.

✓506

Further, it appears that the invention is new (depending on the analysis of disclosures below) and it also appears inventive by virtue of the surprising result it achieves.

Therefore, the invention appears validly patentable.

Disclosures

The company's **boatyard** is private land and care has been taken to keep the invention away from public passing by. As it is necessary to inspect the invention closely to identify how the invention works, the storage of the invention in the boatyard is not an inherently public **and** enabling disclosure. (The public view is not enabling and the enabling view is not public.)

When in the **water**, care is taken to keep the boat as far from other vessels as possible but when the boat is moving at slow speed, the hydrofoil invention is visible. This use in the water (at slow speeds) therefore seems to be a public

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disclosure but is it enabling? Need to check with client how close people have been and whether they could have worked out how the invention worked. As close inspection is required to understand the mathematical formula, an enabling disclosure seems unlikely.

The published photo from the **drone** appears to be a prejudicial disclosure and, if so, it is excluded from being prior art for a period of time in different jurisdictions.

✓503

In the UK, if the publication of the photo is considered unlawful or as a breach confidence then it is an excluded prejudicial disclosure if a patent application can be filed within 6 months. When keeping the invention in the private boatyard, intentionally away from public view, there is an air of confidence in existence which has been breached by the use of a drone to take a photo and the subsequent publication of that photo. A solicitor's advice on whether the action was also unlawful would also be helpful.

For a European patent application, there needs to have been an evident abuse or intention to harm. The use of the drone appears to be an evident abuse of Go-Sail's intended privacy/confidence, and the publication of the photo with a message to "lookout for" the new yacht, seems like intent to harm Go-Sail.

✓504

SO, in both the UK and Europe, it seems the photo will be considered excluded from prior art if a patent application can be filed within 6 months of the photo being published.

In the US, it is merely necessary for the disclosure to have derived from the inventor in some way. As the photo is of the inventor's prototype, this is clearly the case.

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So patent protection can be obtained in the US if the application is filed up to 12 m from the disclosure. The disclosure also triggers a 12 m grace period in which a US application may be filed without concern for other disclosures/filings.

Actions

I recommend filing at least an EP patent application asap to obtain patent protection in the UK and EU. (ASAP to prevent 3rd party rights accumulating now that the competitor has disclosed the invention, but certainly within 6 m of that disclosure.)

A US/PCT application should be filed claiming priority from the EP within 12 m of the competitor disclosure. However, it may be easiest/cheapest to file a PCT directly if maximum patent term is not a major concern.

Claims should be filed directed to the mathematical function and technical effect. It may be worth claiming the mathematical function as such for the US but obtain local advice.

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6)

Loss of rights notification was issued November 2021. There is a 2 m deadline from that notice for requesting further processing which would have passed in January 2022.

Hence, EP application cannot be revived.

There is a 12 m window for filing a further patent application and claiming priority from the earlier application. In theory, priority could still be claimed from the EP application despite the loss of rights notification because all outstanding rights were not withdrawn (check with client though).

This period ended on 8 September 2022, which has passed.

It is possible to file an application up to 2 later (8 November 2022) and restore the priority claim if the deadline was either unintentionally missed or missed in spite of all due care being taken – depending on jurisdiction.

Europe requires all due care to have been taken, this was clearly not the case in this situation as the client has effectively just changed his mind following the receipt of new information.

In other jurisdictions, the unintentional requirement is a much lower bar. It is still questionable this bar has been met but it may be worth trying in the relevant jurisdictions.

Accordingly, as there is a global business opportunity I recommend filing a PCT application by 8 November 2022 with a claim to priority from the EP application (assuming all outstanding rights were not withdrawn) and a request to restore the priority claim on the basis of the deadline being missed unintentionally.

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The priority claim will be invalid for Europe (this cannot be helped) but other countries may accept it.

The PCT will allow the client to pursue protection globally (except for non PCT countries – check with client if he would like to file in any of these also).

If there has been any prior art between the EP filing date and the PCT filing date then protection may not be possible in countries such as Europe where all due care is required.

(UK only requires unintentional so may be better to enter UK (and other EU countries) directly via national phase rather than via EP.)

The client may want to include the confidential market analysis data to support the sufficiency and or inventive step arguments for the invention. However, the application would be published and therefore breach the confidentiality of that data.

In order to include that information, we need to obtain the permission of whoever generated that analysis.

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PART B

8)

Initial actions

Check the status of the EP patent.

In particular:

- Has it been opposed?
- Which countries has it been validated in?
- Validation is automatic in some countries, including UK, due to London Agreement.
- Has a renewal fee been due in the time between grant and now?
- If so, has this been paid?
- Even if not, there is a grace period in the UK of 6 m to pay renewal fee with a surcharge. As patent granted only a few months ago, it is unlikely that a renewal fee was due more than 6 months ago, but this is possible.

Ultimately, it seems likely that the patent is at least in force in the London Agreement countries, including the UK.

If the granted European patent is in force in the UK, it can be enforced immediately against the client.

Next, need to check the claims, does the client's product/activity actually infringe the claims, either directly or indirectly (by virtue of being an essential element for putting the invention into effect).

If there is direct infringement, making and selling the product are infringing acts.

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If there is indirect infringement, selling the product in the UK to unentitled persons for putting the invention into effect in the UK could constitute an infringing act, providing the client is not making and selling a staple commercial product (this seems unlikely because an extensive FTO analysis would not be carried out on a staple commercial product).

To summarise, if the client's product infringes, the client's acts could make him vulnerable to infringement proceedings.

The remedies available in such proceedings are:

- An injunction
- A declaration of infringement;
- An order to deliver up or destroy; and
- Damages or account of profits.

✓813

Damages may be backdated to the date that the application was first published.

However, we should also check if the claims that were originally published were also infringed by the client and if the granted claims could reasonably have been expected. If not, then the amount of damages to be paid for acts between publication and grant may be reduced.

✓808

✓809

✓810

It may be the case that the published claims of the application were filed in German or French, we may need to obtain a translation to analyse them properly.

However, are the granted claims valid...

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Validity

When was the EP patent filed?

It is possible that it was filed before the client started making and selling his product in the UK nearly 8 years ago, as there is no compliance deadline in Europe.

However, such a long prosecution of an application is unusual. Further, the fact that the EP patent wasn't found in the pre-launch FTO search also suggests it was filed (or at least published) later. (But remember that the EP application may not have been originally found because of the unusual terminology it uses.)

If the EP patent was filed after the client started selling his product, which would be considered a public and enabling disclosure, then the client's sales could be prior art citable against the EP patent.

Further, if the client's product infringes the claims, it almost certainly destroys the novelty of those claims also. Hence, the claims could be invalid.

We should also perform a further prior art search (perhaps focusing on the time between our original FTO search and the filing date of the EP patent to make the search more economical) to see if there is further prior art we can cite against the EP patent.

We should also review the EP patent to ensure it meets the EPOs sufficiency/added subject matter requirements, i.e., look for any other ways it may be invalid.

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When exactly did the EP patent grant? Was it less than 9 months ago? In which case we can file an opposition against the EP patent.

✓822

If it was longer than 9 months ago, it will be necessary to attack the EP patent nationally with revocation proceedings. The client is UK based so we should attack in the UK.

If the EP patent was filed before the client started his activity (unlikely but possible) the client will be able to use innocent infringement as a defence against liability for damages. I.e., no damages would be available if we can prove innocent infringement – which shouldn't be difficult as we have the FTO search that was performed and didn't identify the EP patent. We can also prepare witness statements to the effect that the client has just found the EP patent – which is true.

815

✓816

Prior use rights

If the client started making and selling their products before the filing date of the EP patent (irrespective of whether doing so is novelty destroying prior art), the client would have accrued prior use rights to continue those actions without infringing the EP patent.

✓806

Hence, this would be a further defence against infringement proceedings.

This right could only be assigned to someone else with the rest of the business.

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Interim injunction

The client has been making and selling his product for 8 years. Hence, this is very much the status quo.

Any attempt by the patent proprietor to obtain an interim injunction would be unsuccessful.

✓814

Licensing/collaboration

If, following analysis, we think that the EP patent is invalid one approach is to attack it with opposition/revocation proceedings as already mentioned.

An alternative approach would be to approach the proprietor for a licence on particularly amendable terms due to the questions over validity.

This might be much less expensive than opposition/revocation proceedings and the EP patent could act as a deterrent for competitors in the UK. The proprietor may also be keen for this option as it would avoid the opposition/revocation proceedings and it is further possible that they do not intend to work the invention in the UK anyway.

✓820

If, following analysis, we think that the EP patent is valid then it may still be beneficial to approach the proprietor. We can explain we have been innocently infringing for 8 years (hence no damages recoverable by the proprietor) but that we would be very interested in obtaining an exclusive licence in the UK. This can be used to establish a monopoly in the UK which the client might not otherwise have.

✓821

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9)

Firstly, I need to carry out a conflict check within in my firm to ensure I can act for Tempo USA. In particular, I should check that we do not already act for Beat UK as is unacceptable to act for conflicting parties.

Assuming the conflict check is clear...

Validity of EP1

EP1 claims priority from US2 which is itself a continuation in part of US1.

US1 cannot have been withdrawn with no rights outstanding before US2 was filed because (a) it must have been pending when US2 was filed and (b) it has now issued.

Therefore, US1 is the first filing of subject matter relating to the range of 185-220 ppm of X. Meanwhile, US2 is the first filing for the subject matter relating to the range of only 170 to <184.5 ppm of X.

A priority claim is only valid for subject matter that was first filed in the priority document. In other words, US2 may act as a convention application with respect to only the range of 170 to <184.5 ppm of X.

The claim in EP1 therefore has partial priority.

The range of only 170 to <185 ppm of X benefits from the priority claim and hence has an effective filing date of November 2020.

The (original) range of 185-220 ppm of X does not benefit from priority and hence has an effective filing date of November 2021.

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For the (original) range 185-220 ppm of X:

The US sales are a public and enabling disclosure which will constitute full prior art because they occurred before the effective filing date. The sales are of a catalyst having 200 ppm, which is inside the relevant range.

✓904

Hence, the US sales are novelty destroying prior art for this part of the range.

This means that, as things stand, the entire claim is invalid.

For the (new) range of 170 to <185 ppm of X:

The US sales are not prior art because they started after the effective date.

However, GB1 and GB2 both have an effective filing date before the effective filing date of EP1 (GB2 because it claims priority from GB1).

GB1 filed in July 2020. Even if GB1 was withdrawn/lapsed before publication, GB2 would have published in January 2022. (We know GB2 published because otherwise it would not have been found by Tempo/the US attorney.)

✓905

Hence, GB2 (at least) is a prior national right with respect to EP1.

✓906

GB2 is not directly citable against EP1 but could affect the validity of the GB validation.

GB2 discloses a range of 190-210 ppm of X. This destroys the novelty of the original range (so is further prior art citable against that range) but does not destroy the novelty of the new range.

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Hence, even in the UK, the new range appears to be novel and, thanks to it being surprisingly effective while also offering economic benefits, it appears to be inventive. Hence, the new range in EP1 appears validly protectable, although the overall claim is currently invalid.

Actions for EP1

We should amend EP1 to limit the scope of the claim to part of the range which is validly protectable.

✓910

One approach would be to narrow the claim to the range of 170-180ppm of X because we have specific examples to support this range and as basis for the amendment.

✓909

✓907

However, because of the situation of partial priority, we are able to validly amend the claim to remove the partial priority. Hence we can amend the claim to obtain slightly broader protection: e.g., catalyst comprising constituent X in an amount greater than or equal to 170ppm but less than 185 ppm.

✓908

This range is valid for reasons set out above. Provided no other prior art emerges, it is likely EP patent protection can be obtained for this range.

Further, GB2 does not have an impact on this range so it will not be necessary to amend the claim further or withdraw the designation in the UK.

If EP1 is granted and kept in force in the UK, this will stop BeatUK from using the catalyst in the range 170 to less than 185 ppm. Hence, they will not be able to benefit from the associated economic benefits.

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Freedom to operate in UK

GB2 claims a range of 190-210ppm and the claim has an effective filing date of July 2020.

US1 would not have published by this date so is not citable prior art against GB1 because it is a US filing.

US1 was granted by virtue of there being no relevant prior art, so we can assume that GB1 is also likely to be granted for the same reason.

If GB1 is granted with the published claim, Tempo will not be able to do any infringing acts (MUDOIK) with respect to a catalyst in the range of 190-210ppm.

✓922

Any damages could be backdated to publication of GB2, which has already happened. Also, Tempo are now aware of/on notice of GB2 so cannot claim innocent infringement. So Tempo should do nothing which could infringe GB2.

The potentially protected range covers the products that Tempo are currently selling in the US (200ppm) – Tempo should not sell the same product in the UK until they are certain that any protection granted by GB2 has expired.

However, they are free to use a catalyst within the new range (170 to <185) and as this is just as effective and more economical, the lack of freedom to operate in the range of 190-210 ppm does not appear to be too damaging.

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Further Actions

Need to check if Beat UK have any other patents in other countries.

✓917

We should also place a watch on GB2 to see if it is granted/what claims are granted and if it is kept in force.

✓925

Request PACE for EP1 to obtain faster grant so that it is enforceable more quickly. Ensure that EP1 is kept in force in at least the UK to stop BeatUK from using the new, cheaper range of X.

✓914

Monitor BeatUK's activities to ensure they do not infringe EP1(GB). Damages could be backdated to publication of EP1, which will have happened around May 2022.

✓921

Put BeatUK on notice of EP1 so there is no innocent infringement defence.

Assuming conflict check is clear, we will register as address for service for EP1.

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