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CL-2015-000548

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 25 October 2018

Before:
THE HONOURABLE MR JUSTICE BUTCHER

- -

BETWEEN:

(1) ROTAM AGROCHEMICAL COMPANY LIMITED
(2) ROTAM AGROCHEM INTERNATIONAL COMPANY LIMITED

Claimants

and

GAT MICROENCAPSULATION GMBH
(FORMERLY GAT MICROENCAPSULATION AG)

Defendant

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Anneliese Day QC and **Christopher Langley** (instructed by **Trowers & Hamlins LLP)** for the **Claimants**
Hugo Cuddigan QC and **Chris Aikens** (instructed by **Waterfront Solicitors LLP**) for the **Defendant**

Hearing dates: 5, 9, 10, 11, 12, 16, 17, 18, 19, 23, 24, 25 July 2018

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Approved Judgment

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

MR JUSTICE BUTCHER

THE HONOURABLE MR JUSTICE BUTCHER:

Introduction

1. This action concerns an attempted collaboration in relation to the production of a capsule suspension formulation for Clomazone ("CS-CLO"), this being a plant protection product designed to control the growth of various weeds and to protect crops including, in particular, oilseed rape and potatoes.

2. By way of brief overview, the Claimants wished to develop and commercialise CS-CLO for sale in Europe. To do so, the Claimants worked with the Defendant for quite some time and, in the course of doing so, entered into a confidentiality agreement and made payment of certain sums to the Defendant. The Defendant, however, subsequently sold its entire business (including an exclusive licence to use the data and technology relating to CS-CLO) to another company, FMC Corporation ("FMC").

3. The Claimants' case is that, in doing so, the Defendant breached two further contracts which they contend had been agreed after the confidentiality agreement but before the sale to FMC – namely a collaboration agreement and a data transfer agreement – with further alternative claims in unjust enrichment and the tort of negligent misstatement.

4. The Defendant's position is that there was no collaboration agreement and no binding data transfer agreement. The Defendant's case is that the payments made by Rotam were for access to information and not for ownership, as Rotam contends. The Defendant raises further arguments as to the Claimants' supposed contractual rights, and also denies liability in tort or within the law of unjust enrichment. The Defendant accepted, however, that if there were either a binding collaboration agreement or a data transfer agreement as contended by the Claimants, the sale to FMC would have constituted a breach of such agreement(s).

5. Initially, this case was listed for the determination of both liability and quantum. At the outset of the hearing, however, and by agreement, matters of quantum were adjourned for a subsequent hearing, if necessary.

The Parties

6. The Rotam Group, consisting of some 67 companies, is in the business of agrochemicals, life sciences, pharmaceuticals and packaging. It focuses on post-patent technology, that is to say technology no longer subject to exclusivity and protection by patent.

7. The first Claimant, Rotam Agrochemical Company Limited ("Rotam"), is the principal trading company within the Rotam Group. It is based in Hong Kong. The purpose of the second Claimant, Rotam Agrochem International Company Limited ("RAIC") is to hold and pay for property (its payments being funded by other entities within the Rotam Group).

8. The Defendant ("GAT"), is a company based in Austria. It specialises in the formulation of agrochemicals and is the legal successor to GAT Microencapsulation AG. The latter was founded in 1999 as GIMENO KEG to provide research and development and analytical services to the food and agricultural industries. The food

and agricultural arms of GIMENO KEG were split. GAT has a history of developing technology for the formulation of agrochemicals, and particularly for microencapsulation. It lacked the resources, by itself, to bring plant protection products to market in substantial quantities.

CS-CLO

9. As I have said, CS-CLO is a plant protection product – or agricultural herbicide – in capsule suspension formulation.

10. The active ingredient, Clomazone, is a chemical compound. It was 'invented' by FMC, and FMC held worldwide molecule patents in relation to Clomazone, which expired in 2001. From that point onwards, Clomazone as an active ingredient could be commercially exploited provided the particular product in question did not infringe other patents, such as any relevant formulation patents.

11. FMC had obtained a supplementary protection certificate (or "SPC"), which gave FMC an extension of protection until June 2006 in the Member States of the EU. SPCs have the effect of extending the term of a patent relating to a medicinal or plant protection product, usually for not more than five years. In addition, FMC held a suite of other patents relevant to formulations which used Clomazone as the active ingredient. One such patent relevant to these proceedings was EP1652433, which covered a polymer content of 3% to 15%. This patent expired in June 2016.

12. GAT, as I have said, specialises in microencapsulation. GAT had various patents over its microencapsulation technologies. By 2009 it had developed a capsule-suspension formulation of Clomazone, namely Clomazone 360 g/L CS, i.e. CS-CLO. It is a slurry in which microcapsules (consisting of a core material and an outer wall) are suspended in water. Compared with another common formulation of such products – namely an emulsifiable concentrate formulation – plant protection products in capsule suspension form do not disperse as easily and so present a lower risk of having an adverse effect upon other crops in the vicinity of the target.

13. GAT had not only created CS-CLO but had obtained data in relation to its use, and had obtained a Romanian national registration and was manufacturing this product as "CENIT" for sale in Romania (with the active ingredient being sourced by a third party). The registration in question, however, was not under the European regime but rather governed by pre-existing Romanian legislation.

14. In order to place CS-CLO in an EU market, it was necessary for there to be a valid registration, i.e. an approval of the product for commercialisation, for that market. To this end, under the relevant regulations, a prospective seller had to prepare a dossier containing "Annex II" and "Annex III" data. Annex II data concerns the active ingredient/molecule, while Annex III data relates to the formulation of a product and consists mainly of toxicology data, field trial and phys-chem data.

15. Throughout the relevant period (as discussed below) FMC was marketing its own Clomazone product. FMC re-registered this product in 2008, which gave FMC a period of five years during which no third party was able to rely upon or cite its Annex II data for the purposes of registration. FMC's Annex II protection was due to expire at the beginning of November 2013. What that meant was that if another company wished to

obtain registration of a capsule suspension Clomazone product, it would, prior to November 2013, have to generate its own Annex II data relating to the active ingredient Clomazone. This was possible but expensive and Rotam's view was that most other companies would decide to wait until FMC's Annex II protection had expired before investing in the product in order to avoid those costs. Rotam considered that this provided a "window of opportunity" for it and GAT to produce and register their own Clomazone product.

16. For completeness, I record that Rotam had worked on a Clomazone product from 2006, namely an emulsifiable concentrate product. This was registered by 2008 and was already being sold in South America.

The Individuals Principally Involved

17. At all material times, the CEO of GAT was Dr Barbara Gimeno, to whom I will refer as "Dr Gimeno". Her husband, Dr Miguel Gimeno, to whom I will refer as "Miguel Gimeno", supervised technical activities at GAT. Matthias Reismüller was, from 2011 until he left GAT on 21 January 2017, Portfolio and Regulatory Manager of GAT. Dr Victor Casana-Giner was GAT's R&D and IP Manager.

18. James Bristow was, during the period January 2009 to December 2012 an employee of Rotam, who had the title of General Manager. Rotam's Regional Manager for UK and Northern Europe, who was primarily responsible for relations with GAT until June 2010, was Graham Dickinson. He was succeeded as the person with primary responsibility for the commercial relationship with GAT by Alok Kumar, who was Manager of Business Development. From about March or April 2012, his colleague, Prabhakar Kumar, who succeeded him as Manager of Business Development, became responsible for day-to-day communications with GAT. Ms Leung Ka Man, who has been called by the parties Karman Leung, was Rotam's IP and Patent Manager during the period 2009 to 2012.

The Chronology of the Relationship

19. As with many commercial disputes, this one was heavily documented. Much of the history of the relationship is set out in documents and was not the subject of any serious dispute. What follows represents an outline of the significant phases of the relationship.

Early Relationship and the FTU Project

20. From 2008, Rotam was seeking to expand its portfolio of products and to enter into new markets in Europe. On 2 June 2008, the parties first met at GAT's offices in Ebenfurth, Austria to discuss a potential long-term collaboration on a number of products. These projects did not, at that point in time, include CS-CLO, but did include GAT's Thifensuluron + Fluroxpyr mixes ("FTU"). The FTU project was to continue for some time, but was terminated by Rotam in September 2012 as by then Rotam no longer considered it to be commercially viable.

Initial Discussions of CS-CLO Project

21. In January 2009, the parties began to discuss collaboration on CS-CLO. At that point, Rotam was not exclusively involved with GAT: it explored another CS-CLO project

with another entity, Agform, for some time. Although Rotam entered into a distribution agreement with Agform in late 2008, this was terminated in June 2010 and that collaboration came to an end. From that point, Rotam was seeking to work exclusively with GAT in relation to CS-CLO.

22. After the January 2009 meeting, Rotam forwarded to GAT a sample of the Clomazone "technical" (i.e. the active ingredient) to which Rotam had access.

23. On 10 February 2009, a meeting was held at Heathrow, London. Graham Dickinson, Alok Kumar and Dr Yifan Wu of Rotam attended, with Dr Gimeno and Matthias Reismüller of GAT. The minutes of this meeting record the purpose as being "*Discussions and Decisions on long term collaboration and sustainable joint developments*". Three agreements are identified as being in place, with another three as pending.

24. The minutes were then set out in a tabular format, with the relevant entry for CS-CLO recording the agreed "*joint action*" as being that the parties would "*start collaboration on Clomazone 36CS in EU; extend to USA if registration is not granted. If USA registration is granted negotiate 3 way agreement (lower costs of data compensation).*" Obtaining a registration in the EU would involve the provision by each side of various data, and this was discussed. It is common ground that neither party was committed to a joint CS-CLO project at this point.

25. GAT then prepared laboratory samples of its CS-CLO formulation using the Rotam-supplied "technical". These were sent, with a laboratory sample of FTU, to Agchem Project Consulting Ltd ("APC"), a consultancy company specialising in structuring and supporting agrochemical submissions, primarily in the EU.

26. On 10 March 2008, Graham Dickinson of Rotam requested that GAT provide a warranty that the Clomazone formulation did not infringe the FMC patent. GAT refused to provide this, instead proposing that GAT supply a data file to be used to obtain a freedom to operate (or "FtO") opinion from a patent attorney - in other words, an opinion as to whether the relevant action could be taken without infringing the intellectual property rights of a third party. GAT also proposed a non-challenge agreement to prevent the data supplied being used to challenge GAT's own patents. Graham Dickinson agreed to this, and a draft Confidentiality and Non-Challenge Agreement was supplied by GAT.

27. This was followed by a meeting in London on 9 April 2009 during which, amongst various other projects, CS-CLO was discussed. The minutes, prepared again by GAT after the meeting, record the purpose as being "*Non-binding discussions regarding the continuation of long term collaboration and sustainable joint development.*" Again, certain agreements were identified as being in place. The following footnote appeared on the first page of the minutes:

> *"Only written and signed agreement(s) in between Rotam and GAT shall become binding (see "Agreements in place" as detailed below) for the Parties. The present update – based on the meeting above – only reflect the non-binding scenarios contemplated by the Parties. Whether the content of the discussion in this meeting of April the 19th, 2009, describe a present, past or future collaboration in the actual terms as reflected herein below or not, the Parties make no explicit or*

implicit warranties in any and all form regarding present, past or future liability or transfer of rights associated with the decisions and/or outcome of this meeting. The Parties waive any rights to claim Intellectual Property Rights of the other Party, or loses or any kind of claims based on the non-binding terms of this meeting. The Parties shall not assume any liabilities in front of each other (further than breach of Confidentiality) unless otherwise agreed in writing by both Parties. The Parties agree to respect the Industrial Secrets of each other Party and to treat as highly Confidential the matter disclosed in any of the Meetings of the Parties, whether exists or not a signed Confidentiality Agreement."

28. Under the heading, "Agreements pending", the minutes record that a "Confidentiality and Non- challenge agreement was discussed – see Clomazone."

29. A further meeting was held in Austria between Graham Dickinson and Dr Gimeno (Matthias Reismüller and Dr Casana-Giner attending part of that meeting) on 19 June 2009. The purpose was the same as that specified for the meeting of 9 April 2009 and the same footnote was included.

The Confidentiality Agreement

30. On 20 July 2009, Dr Gimeno, on behalf of GAT, signed a confidentiality agreement ("the Confidentiality Agreement"). The counterparty was Rotam, on whose behalf James Bristow signed the agreement on 23 July 2009. The Confidentiality Agreement contained, amongst others, the following recitals:

"… Whereas Rotam, within the scope of the activity mentioned above, is interested in obtaining information (the "information" as detailed in article 2 herein below) regarding the (a) know-how of GAT, (b) GAT's Patent Applications and (c) GAT's non-binding opinion regarding Freedom to Operate of the Product as referred herein below. Rotam and GAT express their interest in ("the Object of the Agreement"):

(i) Rotam applying in its own name or through any of its affiliates for the registration(s) of plant protection products based on GAT's Formulation CS-CLO (as defined in article 1.7 below);

(ii) Rotam marketing, promoting and selling the same plant protection GAT's Formulation CS-CLO in the Territory;

(iii) GAT supplying CS-CLO product that shall fall inside the proprietary technology of GAT to Rotam.

Being this purpose only understood as the occurrence of the three items (i) and (ii) and (iii) together, and not independently one of another.

Whereas, with a view to establishing the aforementioned Object and relationship with GAT, Rotam wishes to conduct the following in relation to CS-CLO formulations supplied by GAT to Rotam:

(a) obtain a legal opinion regarding freedom of Rotam to operate with respect to the CS-CLO formulations of GAT, including to determine if the carrying out by Rotam of either of (i) or (ii) above would constitute infringement of any third

party patent rights;

(b) conduct field trials to establish the efficacy of the CS-CLO formulations as plant protection products; and

(c) the preparation and analysis of samples of the CS-CLO formulations as may be required for (a) and (b);

(hereafter (a), (b) and (c) collectively being referred to as "the Purpose").

Whereas GAT is willing to disclose the information to Rotam in order to enable Rotam to carry out the Purpose, provided that the strictly and highly confidential and proprietary nature of the Information retains its character as such and that no disclosure is made except as expressly provided for in the present Agreement; and

Whereas Rotam has expressed an interest in entering into a further agreement with GAT to achieve the Object of the Agreement, depending upon the results of the legal opinion regarding freedom to operate and the field trials ((a) and (b) of the Purpose);"

31. The territory referred to in the Object was defined in the following terms:

"1.15 "Territory" shall mean the European Union (27 countries). For the avoidance of the doubt the Parties hereby agree that the scope of the eventual commercialization of the CS-CLO, that gives rise to the Object of this Agreement, is strictly limited to the Territory."

32. Article 7 provided:

*"**Article 7 No license granted – Freedom to Research – Non-exclusivity***
7.1 Recipient shall not be granted a license by the sole signature of the present Agreement, nor shall the Agreement provide any basis for a claim to a license, nor shall the present Agreement and the delivery of the Freedom to Operate opinion from GAT to Recipient imply any undertaking of liability on the side of GAT now or in the future. The terms of licensing, whether exclusive or non-exclusive, if ever to happen, shall be regulated in a separate document to be executed by the Parties.
7.2 The Parties make no warranties in front of each other regarding future earns, benefits or whatsoever, based in the expectancies of this Agreement.
7.3 GAT shall be free to further research and develop any kind of products and processes … GAT shall be the sole owner and proprietary of any Intellectual Property Rights as a result of the research and development performed by GAT and cited in this article 7.3, and Recipient shall refrain from claiming any Intellectual Property Rights on the research and development results of GAT as cited in this article 7.3.
7.4 This Agreement establishes under no circumstances any exclusivity, first right of refusal rights and the like, of a Party in respect of the other Party (this prevailing over any interpretation of the Agreement that may exist). Any such Agreements exceed the scope of the present Agreement. The Parties, without any warranty in this sense, may agree in writing and in a signed document, such further collaborations beyond the present Agreement."

33. Article 9 provided for the application of English law and contained a multi-level dispute resolution clause, ultimately providing for arbitration in London pursuant to the LCIA rules.

34. So far as is material, Article 10 provided:

> *"10.11 Amendment: No amendment, variation or waiver of this Agreement or of any provision of this Agreement, including of this provision itself, shall be effective unless it is in writing and duly executed by or on behalf of both Parties."*

The FtO Letter

35. Shortly thereafter, on 1 October 2009, GAT sent a FtO Opinion Letter ("the FtO Letter") to Rotam, of which the author was Dr Casana-Giner. The FtO Letter formally recorded GAT's assessment of potential infringements of published European patents covering Clomazone micro-encapsulation methods by GAT products. The conclusion reached was that the FMC patent did not amount to an impediment to the proposed project, one reason being that GAT's product had a thicker polymeric wall around the active ingredient. The FtO Letter contained details of the recipe for CS-CLO, this being sensitive information.

36. Concerns remained, on Rotam's part, as to the content of this letter, particularly as to whether the polymer content of the composition was too close to FMC's patent. Following discussions between Karman Leung of Rotam and Dr Casana-Giner of GAT, on 1 December 2009 it was agreed that the polymer content of GAT's formulation of CS-CLO would be increased to 16.5%. This would thicken the polymeric wall and the polymer content would be considerably in excess of the level set out in FMC's patent (15%) and so reduce the risk of infringement proceedings.

Continuing Negotiations

37. On 14 December 2009, GAT and Rotam met in London to discuss the current status of their joint projects, there being at that time 33 of these. For CS-CLO, the minutes record, *inter alia*, "*Action: Sign agreement on Clomazone FTO patent issue*."

38. Subsequently, on 18 February 2010, Graham Dickinson and Marc Lore of Rotam and Dr Gimeno and Matthias Reismüller of GAT met in Austria, and CS-CLO was discussed at greater length. The minutes of that meeting contain the usual purpose, list of agreements and the footnote previously included. It is apparent from those minutes that Rotam was seeking to obtain the necessary registrations with certain EU countries by 2012. Discussions addressing possible commercial arrangements for CS-CLO were also initiated at the meeting. There was discussion to the effect that the raw material costs for GAT to produce the product were about €6 per litre, and that Rotam hoped to achieve a sale price of about €70 per litre to distributors. There was also discussion of FTU and the cost of manufacture of that product.

39. A draft Frame Supply Agreement had been drawn up by GAT. It was provided to Rotam at the 18 February 2010 meeting. This draft agreement covered CS-CLO, FTU and two other products. The parties, however, did not develop this draft supply agreement. On 17 May 2010, Alok Kumar of Rotam informed GAT that due to the complexity of a common contract Rotam proposed a separate contract for each product.

Alok Kumar stated that he was working with his legal department to produce such contracts and that a draft of "the Clomazone contract" would be produced first and emailed to GAT.

40. In May 2010, GAT updated Rotam as to litigation in Germany in which FMC alleged breaches of competition law. The email recorded that FMC had now threatened patent infringement proceedings in respect of GAT's parallel-imported Clomazone product, CENIT.

41. On 15 June 2010, Graham Dickinson of Rotam stated in an email to Dr Gimeno that they wished "to visit in July to finalise commercial on Clomazone and [FTU]". On 24 June 2010 Graham Dickinson told Dr Gimeno that he was leaving Rotam.

42. On 9 July 2010 Alok Kumar sent to Dr Gimeno a draft "Agreement for the Exploitation of Clomazone 360 CS", that is to say a draft of a contract governing the commercial exploitation of CS-CLO ("the draft Commercial Agreement"). It was a detailed document, containing 23 clauses over 14 pages, with three proposed schedules. It only covered the EU, and identified Rotam Agrochemical Europe Limited as the prospective counterparty.

Meeting of 16 July 2010

43. On 16 July 2010, i.e. shortly after Agform's collaboration with Rotam came to an end, the parties held a further meeting, in Lyon. There was a discussion of the commercial terms of the proposed contract.

Communications following the 16 July Meeting

44. After that meeting, on the same day, Dr Gimeno forwarded the draft Commercial Agreement which had been received from Rotam to Dr Casana-Giner, stating in her email:

> "*I am sure you did not look at this and I did not – because of the court case*
>
> *I was not prepared for the meeting this morning in Lyon but I tried to get away*
>
> *Now we need to make the best out of it*
>
> *Art 2 is a KILLER."*

45. The reference to Article 2 of the draft Commercial Agreement was a provision which would have required GAT to provide Rotam with the regulatory data in its possession, for the purpose of Rotam's obtaining and maintaining marketing authorisations in the EU, free of charge.

46. On the day after the meeting, namely on 17 July 2010, Dr Gimeno sent an email to Rotam which included the following:

> *"thank you for the early meeting yesterday. I apologize for the rush and will get back with details on the commercial agreement on e-mail.*
> *…*
> *I hope to see you all soon in Austria for a long meeting to cover all details of our*

projects and to conclude the commercial agreement."

47. On 21 July, Alok Kumar circulated an email internally within Rotam. This records internal discussions within Rotam in Lyon and also the meeting with GAT on 16 July 2010. The email states:

"*Dear All,*

Internal Discussion in Lyon:

1. *Development/license fees to be paid: % to propose is 1.5% and 3% respectively capping out a total of $500K and $1 Mn respectively. if we can't pay over a duration of 10 years from sales we pay the difference on the 10th year.*

2. *Once we pay the fees the ownership come back to Rotam.*

3. *Definition of product: GAT will not develop any CS of any formulayion (sic) specification any CS of clomazone/we need to look in to FNC's (sic) Patent and design specifications.*

4. *IP rights: If they don't act, Rotam pay's and get its done.*

5. *Insurance: Public and Product liability needs to be increased.*

6. *Clause 12 needs to change of independent specialist consultant*

7. *Clause 13.3. Quality of the product look in to detail what if.*

8. *In case of termintaion (sic)– we need to link the ownership of registration to Rotam. we need to put reneable (sic) points after 10 years. We will have the option of buy the technology.*

9. *Tolling fees to be made very clear.*

10. *Schedule 1: Karman/Lawyers to check*

    Schedule 2: Specification link to Liability. Florence, Yifan to look in to this.

    Schedule 3; Look in to detail.

11. *Full control of thier (sic) AIII data now, pay them and get it done now.*

Meeting with GAT and her comments on key points:

1. *GAT is confident that patent will be granted. GAT also agrees that they will transfer the ownership after 10 years. GAT wants the fees payable from patent Published date as starting date. They will clone the patent related to clomazone and transfer it to us.*

2. *For Technology transfer they are more inclided (sic) to do tolling themselves & They said they have capacity of 1 million liters/year and if required they will start another plant with us (a proposal from her).*

3. *Quality of formulated product: GAT fees (sic) that quality of TG is Key and this need to be evaluated. Current indication of GAT is 5 Euros/liter + price of TG and Pacakaging (sic). Since functional speed is a factor so costs look high. GAT agrees that Improvement in Tolling and review every time. They don't have big packing facilities which will be done in Slovenia.*

4. *GAT's exclusivity will be based on Volumes (What is Rotam's market strategy? Need disucss (sic) in detail with her). GAT's expectation of Volumes can be managed as they are not that realistic in terms of volumes.*

5. *They have combined insurance policy (Public + Product) and they have said they will increase it.*

6. *They feel that Both Rotam and GAT need to defend it together if some body attacks the patent after the agreement is signed.*

7. *GAT has concerns that once FMC's protection will be out how can be capture the makret (sic) so they feel that second entry is Importnant (sic) but if we don't allow*

8. *They agreed that they will transfer the part of the AIII to us asap, we will work in to this.*

   Overall the attitude is there to work and we need to disucss (sic) with them one by one to cover all the key points. The key point remains

   More to follow once I meet with you.

   Thanks.

   Alok"

48. On 11 August 2010, GAT provided Rotam with a considerable number of comments on the draft Commercial Agreement (in track changes). Rotam then worked on matters internally, including the production of a four-page summary document, which was not provided to GAT. Rotam also consulted external solicitors, Hammonds, who provided Rotam with a further draft (which was called "Discussion Draft 4") on 27 August 2010. It did not accept any of the changes proposed by GAT on 11 August 2010. This draft was also not supplied to GAT, but Rotam continued to work on it internally.

49. On the morning of 30 August 2010, Rotam's internal lawyer, Rita Chick, sent an email to, inter alios, Alok Kumar and Karman Leung, stating, amongst other things, that (1) the agreement should "list out all parameters relevant to the Clomazone 360 CS we required GAT to state in their specification, as detailed as possible"; (2) there should be a Schedule 1 to the agreement which should include a definition of the Technology; (3) there were already various clauses relating to patents and the irrevocable transfer of technology in the draft Commercial Agreement; and (4) a list of the regulatory data to be transferred to Rotam should appear in an appendix to the agreement.

The Meeting on 30 August 2010 in Austria

50. On 30 August 2010, there was a meeting between Rotam and GAT in Austria ("the 30 August Meeting"). Present at this meeting, for at least part of the time, were, for Rotam,

Dr Yifan Wu, Alok Kumar, Karman Leung, Marc Lore and Florence Troubac; and for GAT, Dr Gimeno, Miguel Gimeno, Michael Zimmel and Matthias Reismüller. One of the matters discussed was the CS-CLO collaboration. According to the agenda circulated by Alok Kumar in advance of the meeting the entire morning was to be allocated to discussions on the commercial agreement, although there was a disagreement as to whether this was actually what happened. What was agreed (or not) at this meeting is one of the main issues in this litigation. Rotam's case is that in the course of this meeting a binding oral contract was concluded, this being denied by GAT.

51. I will address the witness evidence relating to the meeting in due course. It suffices for present purposes to refer to the existence of detailed minutes produced by GAT, the relevant sections having been appended to this judgment, and also of Dr Gimeno's contemporaneous handwritten notes.

Disclosure of the CENIT Recipe

52. The next day, GAT disclosed its basic recipe, used for CENIT in Romania, to Rotam. GAT also provided samples of the product with added wall material as this change necessitated further field trial data beyond that already obtained.

Communications after the Meeting, Revised Draft and the Scientific Visits

53. On 3 September 2010, Karman Leung sent an email to James Bristow of Rotam, who had not been at the 30 August Meeting. This was the first communication between the two after that meeting. The email commenced:

> "*After meeting with GAT, there are few issues which need your comment.*"

54. The email proceeded to deal with two points. First, it was said that GAT did not agree to the transfer of its parent patent application for its capsule suspension technology platform, but "*they only agree to transfer the divisional patent covering clomazone to Rotam*". Ms Leung commented that the difference might be that it would take an additional two to three years to have the divisional patent granted, and "*In this case, we can insist only paying them the licensing fee once the divisional patent is granted.*" Ms Leung asked: "*What do you think?"* (underlining in original). Second, Ms Leung dealt with the issue of "Legal Indemnification". On this issue the email stated:

> "*GAT does not agree to indemnify Rotam from patent infringement liability. Their reason is the licensing fees from Rotam is not significant enough to cover the legal costs or damages if there is case of patent infringement. It meant Rotam may need to evaluate and take the risks of our own.*
>
> *I think Rotam cannot be liable to all the risk of infringement. GAT should at least responsible for the legal liability from the manufacturing process to the points where the goods are transferred to Rotam.*
>
> *Though GAT does not agree with full indemnification, we can request GAT to share a certain percentage of liability with Rotam (may be 50%). Rotam cannot be the only one to take all the risks.*

I discussed with Patent Attorney for a day on exploring various scenario. Since this matter is sensitive to put in email, we can discuss over the phone anytime convenient to you."

55. On the same day, Dr Casana-Giner, who had not been at the 30 August Meeting, sent an email to Karman Leung, which included the following:

"*Issues to address are, at least for Clomazone:*

-) Divisional

-) Patent Application

-) File Wrap of FMC patent

-) Challenge [Claim 37]

-) FtO".

56. On about 8 September 2010 Dr Casana-Giner had a telephone conversation with Karman Leung. Following that discussion, he sent an email to Dr Gimeno, which included the following:

"*I talked with karman regarding CLO patent issues.*

Axioms for the discussion was that rotam-bg agreed in that:

- *We will transfer all the know-how at some time*
- *We will file a divisional on CLO whose proprietor (not licensee) will be rotam*
- *They will pay an increased license fee if exists IPR granted*

I did not tried (sic) to change any of the above points seems this seems to be fix. (sic)

I am not sure if we plan to give the full know-how of clo technology to rotam at any point of time (please tell me; we have never done this before and I really wonder if we are sure to make that compromise).

…"

57. Dr Gimeno replied to this email on 9 September 2010, as follows:

"*Victor,*

the Axioms are basically correct:

- *GAT and ROTAM enter into a 10 year agreement where ROTAM acquires the EU registrations and GAT licenses the technology and manufactures*

- *After 10 years and a total payment of (currently offered 625kEUR) GAT transfers the technology and the corresponding divisional patent to ROTAM; GAT will continue to manufacture unless ROTAM decides otherwise*

- *ROTAM will pay 3% development license on all CLO sales + 5% royalties – unless the patent is entirely revoked*

We plan to give the full know-how of CLO technology and the divisional patent to Rotam after 10 years and after having received complete payment. Therefore the divisional patent needs to be razor sharp focused on only the CLO product licensed to Rotam – no left no right!

We can discuss this tomorrow in more detail…"

58. The process of finalising the minutes of the 30 August Meeting, within GAT, took some time and involved a number of drafts. They were provided to Rotam on 6 September 2010.

59. On 14 September 2010, Karman Leung sent to Dr Casana-Giner a revised draft of the Commercial Agreement, calling it "*the working document for clomazone CS in Europe*", and stating that "*We will attend amendment to the indemnification clause later*."

60. On 20 September 2010 the parties signed a Confidentiality Agreement in relation to FTU. This was a formal document of 11 pages which had been through a process of exchange of comments on a draft. It was signed by James Bristow for Rotam and by Dr Gimeno and Ernst Sokop for GAT.

61. On 21 and 22 September 2010, two of Rotam's scientists, based in China, attended GAT's premises in Ebenfurth, Austria to learn about the manufacture of GAT products, primarily Clomazone, but others, including Fluroxypyr, as well. The minutes of this visit which were produced by one of the two Rotam scientists, Sonia Chen, included, under "*Further action by GAT*", "*Raw material source and REACH reg after commercial agreement signature.*"

62. On 28 September 2010 Alok Kumar sent an email to Karman Leung asking her to help polish the text of an email to Dr Gimeno, containing a new proposal from Rotam as to an indemnity in respect of claims by FMC. His draft commenced: "*After presenting the proposal of our Clomazone project to the senior management…*".

The Divisional Patent

63. On 28 September 2010 Dr Casana-Giner wrote to Karman Leung stating that the filing of the application for a divisional patent would be made by GAT "*and we will pay the fees and costs associated*." The email further stated:

"*Once the contract GAT-Rotam is signed is in place and everything settled down in between GAT and Rotam (I hope so) then we will make the transfer, according the terms of the contract.*"

64. On 29 September 2010, two days before the relevant deadline, GAT filed a divisional patent application (EP 10011557) under the main parent application (EP 1840145).

Further Revision of the Draft Commercial Agreement

65. Michael Zimmel of GAT sent a further revised version of the draft Commercial Agreement to Karman Leung on 8 October 2010, Dr Casana-Giner subsequently sending yet another draft with an additional amendment on 11 October 2010. The figures for the use of the Regulatory Data, Licence and Development Fees and the Manufacture Mark Up were left blank.

66. On 26 October 2010, Alok Kumar proposed the insertion of figures for the licence and/or development fees (only one being payable) - $625k and $405k respectively. That day, Dr Gimeno responded to this with "*Please ask your lawyer for clear wording and we will comment.*"

67. By November 2010 a one litre sample of CS-CLO was sent free of charge by GAT to Rotam in China.

Discussions as to the External Filing Costs

68. On 25 November 2010, Dr Gimeno and Alok Kumar discussed the issue of external costs for the filing of the divisional patent application. Following that discussion, GAT issued an invoice dated that same day, for the sum of €11,918.00. The description provided for the services was "*Charge for external costs regarding Clomazone Project".* At the bottom of the invoice, the following was set out

> *"General Terms and Condition of GAT Microencapsulation AG are explicitly accepted*
>
> *By ROTAM's payment of this invoice, GAT does not grant to ROTAM neither any right nor any partial or full property on the divisional application. Details regarding future ROTAM rights, if any, shall be agreed in a separate contract."*

69. On 26 November 2010, Dr Gimeno sent an email to Alok Kumar in relation to matters which were to be the subject of a telephone conversation the following week. These included:

> "*5) Clomazone 360 CS – progress on various things to finalize the agreement*
>
> *6)Invoice for the external costs for filing a divisional patent – see attached*
>
> *7)Purchase of registration studies for CLO 36 CS.*"

70. On 29 November 2010, Dr Gimeno and Alok Kumar had the planned telephone call. Again, this was minuted. Insofar as they relate to Clomazone, the minutes state:

> "*Clomazone*
>
> *Rotam will purchase the registration studies elaborated by GAT (ca.300k EUR) in 2 instalments, 1. JAN 2011; 2. JAN 2012). The detailed list of studies and costs is sent to Florence by Matthias/Joachim. Rotam will reimburse the EPO filing fees of the divisional patent. The detailed breakdown of fees is sent by Victor. Confirmation of timing of refund is pending with Alok.*

For the single product CLO 36 CS license fees for EU MS of EUR 625.000 are agreed if patent protection is given; if patent protection is denied development fees of EUR 405.000 are agreed.

Action:

The legal aspects regarding the start of patent protection for CLO CS will be clarified by Victor and Karman. Based on these findings the payment model will be drafted (no. of instalments, payment dates, inflation correction).

Rotam asked GAT to assume part of liability towards eventual patent infringement claims and possible indemnization payments. GAT declines any liability beyond inevitable Austrian law. GAT may consider assuming partial liability only upon reserving partial ownership of the product technology and data package.

GAT has sent the product specifications according to FAO/WHO for CLO 36 CS to Sonia.

GAT has communicated tolling costs for the forecasted quantities of product volumes from 3.000 L to 25.000 L campaign size and beyond. Manufacturing costs range from 11.98 to 6.78 EUR p.L in bulk.

Action:

A) Invoice for the external costs for filing a divisional patent – Rotam will reimburse GAT on the agreement signing date.

B) Purchase of registration studies for CLO 36 CS: 50% will be paid in 2011 and 50% in 2012. GAT to invoice Rotam 50% of the agreed Study cost in 2011.

….

D) Comment from Barbara on proposed legal liability of potential IP challenge from FMC that GAT will not accept the proposal of Rotam. Rotam to revisit the things and propose on structure.

E) Costs of Clomazone 360 CS scale up production – Rotam will send a standard format to fill it.

71. On 1 December, Karman Leung emailed Dr Casana-Giner stating that: "We will reimburse GAT the patent filing cost once the commercial agreement is signed. Hopefully it should be finalized in a few months."

72. On 28 December 2010, Alok Kumar emailed Dr Gimeno. The email stated, in part:

"*From Rotam side we thank GAT on the support that GAT has given us in 2010 and we are sure both companies will work much closer together in 2011.*

In order to finalize the two most important projects between the companies i.e.

1) Finalizing the commercial contract of Clomazone 360 CS

2) Planned strategy for [FTU]

We are proposing to meet with GAT on 11th Feb – 11 in our Lyon office.

…

I will send you details on Clomazone 360 CS in separate email in which few important things commercial explanations are pending from my side. …"

73. On 30 December 2010 Karman Leung sent Alok Kumar an email, copied to James Bristow. This stated:

"*Propose to have meeting tomorrow morning with James to evaluate the status of clomazone CS project.*

Before further amending the clomazone agreement, I think we should revisit the following matters with GAT.

- *Legal aspects regarding the date of start of patent protection for GAT clomazone CS patent. Protection starts from patent filing date or patent granting date?*
- *Divisional patent filing cost will be reimbursed to GAT after clomazone agreement is signed.*
- *Legal liability of potential IP challenge from FMC*
- *Inflation rate of development fee or licensing fee*
- *Tolling cost matters*

Internal discussion

- *Backup plan on clomazone CS project. To collaborate with another companies or develop our own technology?*
- *Abamectin CS Material Transfer Agreement*"

74. On 3 January 2011 Alok Kumar sent GAT the separate email which he had promised in his email of 28 December 2010. It stated:

"*Based on our telecom (sic) and minutes of meeting circulated, I would like to summarize some key points about Clomazone agreement that is pending from both side*

1. *Data purchase from GAT: I will circulate an email to Florence cc Yifan to work closely with Matthias to agree on the set of data's that we need to get. As we agree 50% of this paid in 2011 (around 6 weeks after receiving the invoice) and 50% of this will be paid in 2012.*
2. *EPO filling (sic) fees for divisional patent: Rotam will pay this on the agreement signing date.*

3. *Development fees/ Licensing fees/ Inflation factor to be considered by GAT: Before the end of this week, I will propose a matrix to you stating the proposed fees as we have discussed from our side. If Rotam pays within 3.5 and 10 years for both developmental and Licensing fees.*

4. *Tolling costs: Rotam doesn't accept the tolling costs and in order to make it standardize I have sent you the format in which we work with other MNCs. GAT to come back on this.*

Before our meeting in Lyon, we should touch base more on this to address the key issues – Let me know your convenience to talk on this so that we can talk on conclusive points during our Lyon meeting."

The Meeting in Lyon and Subsequent Invoicing

75. On 11 February 2011, the parties met in Lyon. Attendees included Alok Kumar and Dr Gimeno. The minutes of this meeting, which were produced by GAT and sent to Rotam on 15 February 2011, unlike those of the 30 August Meeting, contained a footnote which read:

"*The following minutes reflect the intentions of the parties at the time of the meeting. They shall not be understood as binding for any Party in any sense, neither be a direct or indirect ground for later claims of one Party to the other. Only signed agreements elsewhere in between the Parties in particular regarding to the topics discussed, shall be binding.*"

76. The minutes provide, in part:

"ROTAM agreed to purchase the GAT registration study package (EUR 298.338,05) with 50% payment in Jan 2011 and 50% in Jan 2012. Due to the fact that the GAT study data have already been used for submission of the dossier to UK before end 2010, the invoice of 50% (EUR 149.169,025) is due without any further delay.

Action: Barbara to issue invoice, Alok to pay prompt.

Payment of the technology fee to GAT for CLO 36CS straight of EUR 625,000 is in principle agreed but the value shall be finally fixed in the commercial agreement, that will include scheduling and consider the different possible scenarios.

Payment of the technology fee to GAT for CLO 36CS straight of EUR 625,000 is agreed but requires scheduling. (sic) ROTAM has brought FTO issues which require clarification. Due to lack of communication from ROTAM's side this process has been delayed.

Issues to be cleared:

- *Patent FTO*

  In case if (sic) legal dispute with FMC ROTAM proposes a suspense of the agreement, in case of stop of sales ROTAM proposes different timing of

payment or settlement: Legal liability with regards to patent infringement will be assumed exclusively by ROTAM

…

- *Payment schedule for technology license to be determined:*

  Technology license payment will be reduced to development fee of EUR 405,000 following legal challenge to the granted patent that results in complete annulations (sic). ROTAM proposed an escrow account for the difference between Technology transfer fee 625K and Development fee 405K. Since a realistic time frame for such an action may reach very long (>10 years), a pragmatic approach has to be found.

  Upon technology transfer ROTAM asks GAT to provide patent access allowing manufacture in China although the territory of technology license is EU only.

- *Formulation Quality understanding by Sonia…*

ROTAM and GAT will work out check points and their clarifications in order to sign the technology access agreement within the next 1-2 months. GAT will send a simplified text proposal to depart from. Action: Barbara."

77. The matter of most immediate importance, as is apparent from these minutes, was Rotam's acquisition of the ability to use – to employ what are intended to be neutral terms at the moment – GAT's registration data package, and payment therefor. In accordance with what was recorded in the minutes of the 11 February 2011 meeting, an invoice was sent from GAT to Rotam Europe Limited on 17 February in the amount of €298,335.05. The invoice stated that it was in respect of a "*Charge for Data Access on Registration Data of GAT for Clomazone 36 CS in EU according to Agreement*". The payment terms were stated in that invoice to be 50% in February 2011 and 50% in January 2012. There were communications between the parties as to the amount presently payable, and GAT issued a further invoice on 25 February 2011 to Rotam Europe Limited, c/o RAIC, for the sum of €111,403.25, which was stated to be "*1st Instalment of total charge of €298,335.05*". Again, the invoice stated that it was a "*Charge for Data Access on Registration Data*".

78. Within Rotam, Alok Kumar asked for the payment of €111,403.25 to go ahead. Helen Peng sent an email on 28 February 2011, copied to him, stating "*Please pay attention at the moment there's no contract for this payment.*" Alok Kumar replied: "*Contract negotiation is in process and will inform all once this contract is signed but let us pay this asap*". The sum was then paid on 11 March 2011.

79. In the email informing GAT of payment, Alok Kumar stated that the balance of 50% of the relevant amount would be paid "*in the coming days*". Alok Kumar also set out a series of financial proposals as to the development and licence fees for CS-CLO, as well as what were said to be, "*with regard to the checklist, … the key points that we have agreed*". The "key points" included the suspension of the agreement if Rotam had to stop commercial sales due to legal action by FMC (or a third party), and that Rotam would be responsible for legal fees and damages if FMC brought legal action, and if

FMC succeeded then the fees for the transfer of technology from GAT to Rotam would be reduced.

80. In March 2011, Florence Troubac of Rotam requested GAT provide the Letter of Access for CS-CLO, with Dr Gimeno indicating on 25 March 2011 that, once the list of studies and financial issues were resolved, the Letter of Access would be provided immediately. On 25 March 2011, Rotam (through RAIC) paid GAT €11,918 in respect of the filing costs of the divisional patent. That same day, Dr Gimeno responded to Alok Kumar's email of 11 March 2011, setting out a detailed response. This indicated that there were points of disagreement in relation to most of the "key points" which Alok Kumar had listed in his email. Dr Gimeno concluded by saying that GAT's flexibility on the matters set out was "*very limited*", and added:

> "*In case ROTAM would prefer NOT to enter into a License/Development Agreement upon considering the above criteria of GAT, GAT is offering manufacturing services under a distribution and supply agreement whereas GAT may assume certain liabilities (to be defined precisely) …*"

81. On 3 April 2011, Matthias Reismüller emailed Florence Troubac, Dr Gimeno having drafted the body of this communication. It stated:

> "*thank you for your confirmation that the list of study costs for CLO and FTU is correct and approved both in terms of title and content of studies and in terms of costs. Based on your statement the list of studies and costs has become relevant for the contract regarding Annex III – Letter of Access – between ROTAM and GAT.*
>
> *If there is no disagreement, I will go on and confirm as below.*
>
> *As agreed with Alok, GAT is issuing the invoices for 50% costs of CLO and FTU studies in 2011 and the other 50% in January 2012 for the CLO and FTU registration studies performed by GAT based on the long term collaboration agreement, which is negotiated between ROTAM and GAT. The letters of access for the registration will be issued upon receipt of 50% payment of CLO and FTU studies in 2011 and the irrevocable commitment to pay the remaining 50% in January 2012.*
>
> *Please contact Barbara or Michael in case anything is unclear."*

82. The next day, Michael Zimmel of GAT emailed two invoices, each dated 31 March 2011, to Alok Kumar. One of these, for the sum of €37,765.78, comprised of the remainder of the first 50% of the CS-CLO regulatory studies. The other related to 50% of the costs of the FTU regulatory studies, and the description in the invoice followed the same format as the equivalent invoices for CS-CLO. The CS-CLO invoice was paid.

83. On 18 April 2011, Alok Kumar emailed Dr Gimeno with Rotam's response to GAT's comments on the "Key points" which GAT had sent on 25 March 2011. Most were not accepted but were subject to further comment, and the point which GAT had made as to suspension of the agreement was specifically stated to be "*not acceptable by Rotam*". The covering email stated "*[f]rom Rotam side we want to put a deadline to agree and*

sign the key points on/before 21st June 2011 so that legal department can go through the contract preparation around these points."

84. There were further communications between the parties in June 2011, but there was no agreement between the parties that all the key points had been resolved and the parties did not proceed to further "contract preparation" of the draft Commercial Agreement.

Letters of Access

85. A final version of the text of the Letters of Access was agreed by APC and GAT on 27 June 2011. Dr Gimeno signed the Letter of Access for the French authorities on 27 June, and that for the UK authorities on 5 July, both being backdated to 10 May 2011. Each named the "Registration holder" as Rotam Agrochemical Europe Ltd, and gave access to the relevant regulatory authorities to GAT's specified proprietary data for the purpose of the registration of the CS-CLO product. Each was specified as being revocable, being valid until the permission was withdrawn in writing by GAT.

86. On 12 July 2011, GAT disclosed the complete composition of CS-CLO following the modification of the formula to alter the polymer wall as previously agreed. Two days later GAT further disclosed, at Rotam's request, a document setting out the functions of each of the components of CS-CLO.

87. On 5 August 2011, another meeting between the parties was held in Lyon. CS-CLO was discussed with GAT being informed of the then current status of Rotam's applications in the UK and France, there being "*some issues*" in the UK. As to the proposed Commercial Agreement, the minutes record:

> "*The checklist for the Clomazone 36 CS commercial agreement was reviewed mutually. The discussed version will be sent to GAT for a review.*"

88. Rotam internally updated what was by now a 14-page "Checkpoints" document relating to the Clomazone Commercial Agreement. Yifan Wu noted, on 24 August 2011 that even this "Checkpoints" document was "*the most complex agreement I have ever seen!*" It appears, however, that the "Checkpoints" document, as revised within Rotam, was not sent to GAT, although technical discussions as to CS-CLO continued.

Raising of the issue of future ownership of registration data and move to agreement on Rotam acquiring worldwide data ownership

89. On 11 November 2011, Alok Kumar contacted Dr Gimeno and Matthias Reismüller raising the issue of ownership of GAT's study data in relation to CS-CLO in the following terms:

> "*We need following confirmation from GAT in an e-mail. I will call to explain*.
>
> …
>
> *For Clomazone 36% CS – The complete ownership & title of data will be transferred to Rotam once we settle the final 50% payment for Clomazone 360 CS in Q1 2012. 50% of the this (sic) payment has been made in 2011. GAT will not use & disclose the data to any third party without written consent from Rotam despite a (sic) fact that GAT has a copy of the data. GAT will notify the respective CRO's*

in writing to register the change of ownership from GAT to Rotam upon the final settlement of payment."

90. The more-or-less immediate internal response to this within GAT, from Matthias Reismüller to Dr Gimeno was "*we have to call Alok. Did we ever discuss this ownership issue? We should not accept*" with Dr Gimeno adding that any entitlement "*must be restricted to EU*". On 13 November 2011, GAT responded by way of comments on the original email, these being underlined below:

> "*For Clomazone 36% CS – The complete ownership & title of data will be transferred to Rotam once we settle the final 50% payment for Clomazone 360 CS in Q1 2012.*
>
> *The ownership & title for EU 27 will be transferred through an irrevocable LoA for use in EU 27 once Rotam has settled the final 50% of the payment for Clomazone 36% CS in Q1 2012. As discussed via email and during our meeting in Lyon on 5 August the following conditions apply:*
>
> - *GAT is explicitly entitled to manufacture the Product or any Clomazone 36CS in any country of the world.*
> - *GAT is explicitly entitled to sell the Product or any Clomazone 36CS in any country of the world except for EU 27.*
> - *GAT is explicitly entitled to sell Clomazone 36CS under a PI permit in Germany until ROTAM has been granted the registration for the Product in Germany.*
> - *Further GAT is explicitly entitled to toll manufacture any CS product including Clomazone 36CS (except for the Product) for any third party in any country of the world.*
>
> *50% of the this payment has been made in 2011. GAT will not use & disclose the data to any third party without written consent from Rotam despite a fact that GAT has a copy of the data.*
>
> *GAT accepts this not use & disclosure clause in EU 27. However, GAT may use data without restriction including for its own purpose or at its sole discretion with third parties outside EU 27.*
>
> *GAT will notify the respective CRO's in writing to register the change of ownership from GAT to Rotam upon the final settlement of payment.*
>
> *GAT will provide hard copies of the study reports including an irrevocable LoA to each study for EU 27 to Rotam upon receipt of the full payment.*"

91. On 18 November 2011, Alok Kumar sent the following email:

> "*Refer to our call today as we discussed we are planning to pay 2nd and final payment of Clomazone 36% CS.*

With regard to second and final payment on Clomazone 35% CS please confirm that the ownership of studies will be transferred to Rotam. Rotam will use the data for EU-27 only and Rotam will issue a LOA to GAT to use the data outside EU.

- *Once you agree on this we will send you a draft contract to be signed in this regard by Tuesday with signature to be done end of next week and once the agreement is signed end of next week, we can still pay you within this month.*

- *All depends upon how quickly we get the agreement signed.*

- *Along with the draft contract, Please help us to attach the complete list of studies along with the amounts, as a part of appendix.*

- *We also need the current sponsorer letter stating that the ownership of the data has been changed from GAT to Rotam for Rotam use in EU only and Rotam as new sponsorer will issue a LOA to GAT for using the data outside EU.*

I am trying my best to get things moving and pay GAT asap but please send us your OK on point mentioned above and get the agreement signed to move forward.

This is outside the standard practice for Rotam as we have never faced this situation in any data transfer ownership issues."

The "draft contract" being referred to here was a draft of a contract dealing exclusively with rights to data, which came to be called the data transfer agreement, not the draft Commercial Agreement.

92. On 21 November 2011 GAT sent an email to Alok Kumar which stated that GAT agreed to a transfer of "*the ownership to the CLO registration studies to ROTAM for the EU 27, although that has not been agreed before*". The email continued that GAT's position was that the transfer of ownership did not have the same price as data access, and specified that the price to acquire ownership of the studies, with GAT permitted to use that data outside the EU by means of a Letter of Access from Rotam, was €320,713.41.

93. On 28 November 2011, however, there was a telephone conversation between Alok Kumar and Dr Gimeno, at which there was discussion of Rotam's acquiring data ownership, without any right of GAT to use the data outside the EU. After that call Dr Gimeno sent an email confirming its contents. It stated:

"*I would like to confirm the phone call from this morning.*

Rotam is willing to acquire worldwide data ownership for CLO registration studies for a total payment of €357,265. GAT will not get a LoA.

Rotam has paid:

Eur 111,403.25 (1st instalment) – Invoice No. 11025/2011-02-17

Eur 37,765.78 (2nd instalment) – Invoice No. 11081/2011-03-31

Rotam is paying a third instalment of EUR 130,000 upon receipt of the invoice.

EUR 130,000 (3rd instalment)

Upon payment there is an open balance of EUR 78,038.49 which will be paid as the 4th instalment upon signature of the data ownership agreement, before the end of 2011.

I am asking Michael and Ernst to issue the invoice for the 3rd instalment and send to you today."

94. That day, GAT sent an invoice to Rotam for the sum of €130,000. It stated "Charge for Data Access on Registration Data of GAT for Clomazone 36 CS in EU according to Agreement (3rd instalment of total charge EUR357,265.00)". The payment of this invoice was chased by Dr Gimeno on 30 November 2011 and on 4 December 2011. On 7 December 2011, Rotam made payment of the €130,000.

95. On 23 December 2011, a further invoice was sent to Rotam, this time for the sum of €78,095.97. This stated: "Charge for Data Access on Registration Data of GAT for Clomazone 36 CS in EU according to Agreement (4th instalment of total charge EUR357,265.00"

96. Michael Zimmel of GAT chased payment of this further invoice on 13 January 2012, with Alok Kumar responding by email the following day that final settlement would be made once the contract for data ownership was signed, and that he would send a draft of that agreement the following week.

Negotiation of a data transfer agreement

97. On 18 January 2012 Alok Kumar wrote to GAT in the following terms:

"*Attached is the draft version of the data transfer agreement with GAT on clomazone, please have a look and we can talk on this to get this signed asap.*

In parallel Florence and Matthias will work on the Physical verification of the data. Please keep Florence, Yifan in loop to get things moving at faster pace.

Once the contract is signed we will settle the remaining balance to close the chapter of data purchase part."

98. Comments on the draft data transfer agreement were provided by GAT. A revised draft was provided by Alok Kumar on 24 February 2012, the covering email stating:

"*Attached revised documents.*

We have gone through the comments and in short we want to state that this is the data ownership transfer agreement and we need to keep the essence of that. If we try to include IPR, Confidentiality and manufacturing process etc in the data transfer agreement it is going to be complicated and we are moving away from our core objective.

> *We are bound by all the key aspects like Confidentiality, IP and technology transfer and we have separate agreements for that.*
>
> *Let us talk on 1st March 9.00AM your time to conclude this by keeping the sole objective defined*."

99. Alok Kumar and Dr Gimeno discussed matters on 1 March 2012 by telephone, agreeing that a revised draft would be prepared. On 29 March 2012, Dr Casana-Giner provided a marked-up revised draft. Rotam did not respond to this until 14 May 2012, when Prabhakar Kumar introduced himself as the individual now responsible for the project and attached a revised draft of the data transfer agreement. On 30 May 2012, Prabhakar Kumar chased Dr Gimeno for a response stating:

> "*We are waiting for your response on this. In case you want to discuss any aspect of this draft, please let me have your contact number and I will call you up to sort out the things. We are just waiting for this agreement to be signed in order to pay your invoices*"

100. On 12 June 2012, following input from external lawyers, Dr Gimeno sent a revised copy of the data transfer agreement to Rotam. On 21 June 2012 Prabhakar Kumar responded, accepting most of the changes GAT had suggested. Further communications between the parties occurred on 24 June 2012 and 17 July 2012.

Project Lila

101. At this point it is necessary to refer to steps which were being taken by the owners of GAT to sell the company.

102. Since at least 2010 some of the equity investors in GAT were looking to exit the company. On 15 September 2011 GAT's Supervisory Board discussed this, and in particular the question of who might assist GAT in finding a suitable buyer. A decision was made to identify and engage M&A consultants, and in late December 2011 R&K Associates were engaged. One of the companies which was identified as being potentially interested in acquiring GAT was FMC. FMC and GAT signed a Confidentiality Agreement in February 2012. A Confidential Information Memorandum and Procedure Letter were sent out to interested parties from 8 March 2012 onwards. After offers had been submitted, GAT's shareholders decided to continue discussions with four entities, one of which was FMC, and invitation letters were sent out to them on 11 April 2012. By July 2012 only two entities remained as potential purchasers, one of which was FMC.

103. Rotam was aware of the possibility that GAT might be sold from at least the end of June 2012, but its case is that it was not aware that the purchaser might be FMC.

The "Hostile" Patents

104. It is also necessary here to mention a further matter, to which GAT came to attribute some importance. This is the fact that, on 19 July 2012, GAT became aware that nine patents had been filed in the name of James Bristow. Three of these patents were considered by Dr Gimeno to fall within the scope of the FTU and CS-CLO collaborations between GAT and Rotam.

Further negotiation of a data transfer agreement

105. On 7 August 2012 a revised version of the data transfer agreement was provided by GAT to Rotam, with a response being received on 29 August 2012. That response attached an updated draft with a small number of amendments. The covering email concluded with "*Please have a look and hope that the current draft is acceptable to you. Upon your confirmation, we will get it signed from Rotam side and send the hard copies to you.*" Dr Casana-Giner of GAT responded on 30 August 2012:

> "*We have reviewed your amendments are we agree in their inclusion.*
>
> *Please, proceed with the signature as you proposed.*"

Prabhakar Kumar replied to that on 31 August 2012:

> "*Thanks for the confirmation. We will be get it signed from Rotam side and send 2 hard copies to you for counter signature early next week.*"

Meeting of 3 September 2012

106. On 3 September 2012, Rotam and GAT held another meeting. It was in the course of this meeting that Rotam brought an end to the collaboration on the FTU project. Following this there was discussion of the CS-CLO project – namely that the terms of the written data transfer agreement had been agreed, and that the next step was for Rotam to send GAT signed copies for GAT's signature, and then "*GAT to send invoice upon signature*."

107. At this meeting GAT raised the issue of the "hostile" patents. The minutes, prepared by GAT, record:

> "*Very recently GAT has discovered that James Bristow, CEO of ROTAM has filed various patents, of which some have been published in 2012*
>
> *GAT requests clarifications and withdrawal of all and any patent applications that*
>
> *1 Possibly limit the FTO of GAT products present and future*
>
> *2 Infringe the agreements signed between ROTAM and GAT*
>
> *3 Use concepts and ideas of GAT products-development*
>
> *This request extends to patents filed and not yet published.*
>
> *GAT has pointed out that any further negotiations on the commercial agreement(s) on CLO technology transfer is depending on the satisfactory resolution of the above issues*"

Disclosure of "tacit agreement"

108. In the meantime, discussions for the sale of GAT with FMC had progressed significantly. In late September 2012, Dr Gimeno decided to inform FMC of her

concerns about a potential "*tacit agreement*" with Rotam (without identifying Rotam or the product in question by name).

Signing of the data transfer agreement by Rotam

109. As I have said, at the end of August 2012, Rotam indicated that it would sign the data transfer agreement and send hard copies for GAT to counter-sign. In fact, Rotam did not do so during September. On 4 October 2012, following a chaser email from GAT on 26 September, Prabhakar Kumar emailed a scanned copy of the data transfer agreement, signed by James Bristow. 1 July 2012 had been inserted in manuscript as the date of the agreement. The covering email provided:

> "*Apology for the delay.*
>
> *We are sending the original agreement signed by Rotam in 2 sets to Barbara today. Attached is a scan copy of the agreement for your reference.*
>
> *The documents are being sent out today by courier via TBT under tracking number GE748437315WW.*
>
> *Kindly acknowledge the receipt of agreement when it is delivered and send back 1 original set to us after counter signature from GAT.*"

110. The recitals to this data transfer agreement provided:

> *"D) Rotam has evaluated the Product Data, subject to the above Confidentiality Agreement, and to date already paid to GAT a partial payment of EUR 279,163.09, amount which GAT acknowledges to have been received.*
>
> *E) In consideration of and upon final payment of the remaining sum of EUR 78.038,49 for acquiring the Product Data, GAT agrees to transfer Rights (as defined below) to Rotam on the terms and conditions of this Agreement, whereas the receipt of the remaining sum in exchange of the ownership and title to the Product Data is the essence of this Agreement."*

111. As is apparent from the history which I have set out above, the data transfer agreement was concerned with the grant of rights in the regulatory data. So far is material, it provided:

> *"2. Transfer of Ownership*
>
> *2.1 Upon receipt of the payment set forth in article 2.2 below, GAT shall transfer full ownership and title of its rights as defined above of the Product Data to Rotam in consideration for the receipt of the remaining sum of EU 78.038,49.*
>
> *2.7 For the avoidance of doubt, the Parties hereby agree that GAT does not grant any license, implied license or right hereunder except as set forth in this Article 2 and that Article 7 of the Confidentiality Agreement signed on July 23, 2009 is incorporated by reference into this Agreement and shall apply without time limitation.*
>
> *…*

3.5 GAT's liability under this Agreement (including any liability of its Group Companies) shall not exceed the payment set forth in clause 2.1. whereas the total aggregate liability of GAT shall not exceed the amount of the purchase price. Any liability of GAT shall be excluded, if Rotam has failed to mitigate any damage, or has been able to recover damages from a third party in relation to the same matter.

…

4.1 The terms of this Agreement shall enter into force upon receipt of the full payment as set forth in article 2.1 above to the account of GAT Microencapsulation AG, Raiffeisenlandesbank NOE, Wien AG, Account no. 627729, BLZ 32000, IBAN AT40 3200 0000 0062 7729, BIC RI. NWATWW, UIC ATU 475 64 906…."

112. On 1 November 2012, Prabhakar Kumar chased Matthias Reismüller for a response:

"*Hope you have received the original copies of the agreement. Could you please send one fully signed copy to us for our records.*

I would also request you to issue a fresh invoice for the remaining amount of EUR78k and we will pay that asap."

113. Matthias Reismüller responded on 5 November 2012 in the following terms:

"*We are waiting for the statement and green light of our patent attorney regarding the patent filed by James Bristow, which limits the FTO of our CLO 36 CS patents. This is causing a delay in the conclusion of the agreement*."

114. On 20 November 2012, Dr Gimeno emailed Alok Kumar:

"with some delay we have received the documents from the team of our patent attorney with regards to the relevant patents. Given the fact that our shareholder meeting is just 3 days away, we have decided to present the issue to our shareholders first and get their view, before we ask you for your proposal and decision.

Therefore I would like to inform you that no actions are required from Rotam's side until we will send our statement and the documents at the beginning of December.

We hope this decision is appreciated and will be in touch upon receipt of the feedback of our shareholder meeting."

The FMC Agreements

115. On 4 December 2012, GAT and FMC signed a series of agreements. Pursuant to the terms of these agreements, FMC bought out the investors of GAT, with Dr Gimeno and her husband becoming the sole shareholders of GAT. In return, FMC was granted an exclusive, perpetual, global licence of all GAT's IP, data, Know How, R&D and registrations.

116. Two days after the conclusion of the FMC Agreements, FMC issued a press release announcing them. The day after that, Alok Kumar made contact with Dr Gimeno. There

was a telephone call on 14 December 2012. During that call Mr Duhamel of Rotam stated that he was shocked by the news that GAT had signed a deal with FMC.

117. Dr Gimeno subsequently, on 17 January 2013, sent an email to Alok Kumar stating that FMC had acquired the rights to the entire GAT technology, and that FMC was willing to meet Rotam as soon as possible. A meeting took place between Rotam, FMC and GAT in Brussels on 14 February 2013, but did not resolve matters.

Intimation of Proceedings

118. On 15 March 2013 Alok Kumar wrote a formal letter to Dr Gimeno, copied to Rotam's legal advisors DWF LLP, referring to there being a data transfer agreement between the parties, and stating that GAT was in breach of this by having transferred rights, covered by the data transfer agreement, to FMC.

119. This letter contained the following:

> "***Background***
>
> *In or around 2011, GAT and Rotam entered into negotiations for the transfer of GAT's rights in registration studies for Clomazone 360 g/L CS.*
>
> *It was initially envisaged that Rotam would acquire rights for the EU 27 area only. However, as negotiations progressed, it was agreed in late 2011 that Rotam would acquire worldwide data ownership rights in return for the total sum of €357,265, in respect of which Rotam had already paid €279,163.03. That left a final payment of €78,038.49 outstanding.*
>
> *The parties subsequently sought to evidence the terms of the agreement reached in a formal document, the Data Transfer Agreement ("DTA").*"

As GAT has pointed out in the present proceedings, there was no mention in this letter of an oral Collaboration Agreement, or any binding agreement, having been reached on 30 August 2010.

120. GAT responded to Rotam's letter of 15 March 2013 on 22 April 2013. GAT recognised that a document in relation to data transfer had been "agreed in principle, and then signed by Rotam", but had not been signed by GAT because of the discovery of the "hostile" patents. The letter continued: "*As such, we had lost our trust in Rotam and did not wish to enter into that contract with you. In short, there is no binding agreement for the sale of the Registration Data.*"

121. DWF LLP, on Rotam's behalf, responded on 17 May 2013. Under the heading "Background" appeared the following:

> "*At the outset of the project, Rotam and GAT entered into a Confidentiality Agreement on 20 July 2009 ('the Confidentiality Agreement'). In general terms, the confidential information protected pursuant to the Confidentiality Agreement was 'all information relating to CS-CLO (360 g/L capsule suspension of Clomazone as invented by GAT) formulations disclosed by GAT to Rotam. The object of the Confidentiality Agreement was recorded as follows:*

1 Rotam applying in its own name or through any of its Affiliates for the registration(s) of plant protection products based on GAT's formulation CS-CLO;

2 Rotam marketing, promoting and selling the same plant protection GAT's Formulation CS-CLO in the Territory; and

3 GAT supplying CS-CLO product that shall fall inside the proprietary technology of GAT to Rotam.

As such, it was clear that the parties' ultimate intention was for Rotam to own and sell plant protection products based on CS-CLO and GAT was to manufacture the product ('the Project'). At a meeting between the parties on 30 August 2010, Rotam confirmed its intention to purchase all the required registration data currently owned by GAT and the price proposed by GAT was approximately 300,000 Euros. GAT agreed to provide a breakdown of development and study costs to Rotam and a discussion was recorded about the possible terms of a licence/development fee agreement."

Again, GAT draws attention to the fact that this letter did not suggest that there had been a binding Collaboration Agreement reached on 30 August 2010.

122. That there was an oral agreement concluded on 30 August 2010 was put forward, rather over a year later, by DWF LLP in draft Particulars of Claim sent under cover of a letter of 10 July 2014.

Rotam's case in the action

123. After proceedings had been commenced in July 2015, Particulars of Claim were served, paragraph 17 of which alleged that by 30 August 2010 there had been concluded what the Particulars dubbed the "Collaboration Agreement". The initial account of what was agreed as part of this Collaboration Agreement was subsequently twice amended, including at the start of the trial before me. The matters which it is said were the subject of a binding agreement on 30 August 2010 (and omitting the pleas in the RAPOC of matters which were agreed subsequently) included in particular the following:

17.1 Rotam and GAT would work together in relation to a number of joint projects including a project related to CS-CLO Formulations.

17.2 Rotam would purchase [GAT's Clomazone regulatory data] from GAT for approximately €300,000 as soon as possible.

17.3 Following such payment, Rotam would acquire the Know How and/or IP Rights for the CS-CLO Formulations and/or Rotam and GAT would enter into a licence fee/development fee agreement and following complete payment of the capped licence fees, Rotam would acquire the Know How and/or IP Rights for the CS-CLO Formulations. The purchase of the IP and Know How was subject to the terms (1) that Rotam would pay GAT the sum of €625,000 over a period of 10 years (inflation corrected) as long as GAT's patent in relation to the IP and Know How continued to be enforceable, and (2) alternatively Rotam would pay GAT €405,000 to acquire the IP and Know How over a period of 10 years (inflation corrected)

in the event that GAT's patent covering the IP and Know How was entirely revoked.

17.4 Rotam would be able to use the [Clomazone regulatory data] to obtain EU approval for CS-CLO Formulations, and would thereafter be able to use that data and the Know How and/or IP Rights together to produce CS-CLO Formulations for sale on the open market once it had been approved.

17.5 GAT would manufacture CS-CLO Formulations for Rotam until the agreement between the parties came to an end (i.e. 10 years, being the time by which the Licence Fee or Development [Fee] as applicable would be paid and Rotam would acquire the Know How). The parties agreed that the costs of manufacture would reflect the actual costs to GAT plus a tolling margin (which were to be subsequently determined).

124. Rotam also pleaded that it was an implied term of the alleged Collaboration Agreement that the parties should deal with each other in good faith. This implied term was said to have a number of features, including that GAT was not to stand by and allow or encourage Rotam to make or continue to make arrangements on the basis of the proposed project if it no longer intended to participate fully in the Collaboration Agreement.

125. In her opening submissions, Ms Day QC made clear, if it was not in the Particulars of Claim, that Rotam's case was that the Collaboration Agreement was made orally on 30 August 2010, that oral agreement being evidenced by the minutes of the meeting (Day 1/49-50).

126. Rotam also pleaded that on or about 30 August 2012 Rotam and GAT entered into a binding "Data Transfer Agreement" on the terms of the draft of such an agreement which was sent by Rotam to GAT on 29 August 2012.

127. Rotam pleaded a case that, as a result of representations made in connexion with the negotiation of the "Collaboration Agreement" or the "Data Transfer Agreement", GAT owed Rotam a "Hedley Byrne duty of care".

128. Rotam also pleaded, as an alternative, a case in unjust enrichment in the sum of €291,087.03.[1]

129. I will consider each of these parts of Rotam's case, and turn first to the issue of whether there was a binding Collaboration Agreement made, as alleged by Rotam.

The Alleged Collaboration Agreement: GAT's answer based on Confidentiality Agreement

130. The first answer which is given by GAT to whether there was a binding Collaboration Agreement is that there was not and could not have been because of the terms of the Confidentiality Agreement. This argument had two aspects: first that the alleged

[1] RAPOC, Prayer, para. 2.

Collaboration Agreement would have amounted to an oral variation of the Confidentiality Agreement and would have been ineffective for that reason; and secondly that, in any event, the alleged Collaboration Agreement would have failed to comply with the formality requirements specified in the Confidentiality Agreement.

131. As to the first, Mr Cuddigan Q.C., on behalf of GAT, submitted that the alleged Collaboration Agreement would have constituted a variation of the Confidentiality Agreement and that, given Article 10.11 of the Confidentiality Agreement, the oral agreement alleged by Rotam lacked effect. In this regard, GAT relied upon the recent decision of the Supreme Court in *MWB Business Exchange Centres v Rock Advertising* [2018] UKSC 24, [2018] 2 WLR 1603. In that case, the Supreme Court held that a "*no oral variation*" clause operated to preclude a contractual variation other than in writing, albeit it was recognised that there is scope for estoppel to operate in such circumstances.

132. As to the second, Mr Cuddigan QC submitted that, in any event, the provisions of the Confidentiality Agreement imposed further requirements as to the formalities which needed to be complied with in subsequent agreements relating to the CS-CLO project, whether or not they amounted to a variation of the Confidentiality Agreement. Reliance was placed upon the following provisions of the Confidentiality Agreement:

1.1. Recital 7: "*Whereas Rotam has expressed an interest in entering into a further agreement with GAT to achieve the Object of [this agreement]*"';

1.2. Article 7.1: "*the terms of licensing, whether exclusive or non-exclusive, if ever to happen, shall be regulated in a separate document to be executed by the Parties.*"

1.3. Article 7.4 "*the Parties… may agree in writing and in a signed document, such further collaborations beyond the present Agreement*."

133. Mr Cuddigan QC's submission was that the effect of these provisions was that the parties had agreed that any future agreement was to be in writing, and that the Court should give effect to such a limitation upon the parties' future freedom. In this regard, he drew an analogy with the position in *MWB v Rock Advertising*, albeit that he accepted that that decision had not actually dealt with provisions of an agreement requiring a further agreement to comply with certain specified formal requirements.

Discussion

134. Given the conclusion which I have reached as to whether a Collaboration Agreement was reached on 30 August 2010, set out below, the answer to these questions is academic. Nevertheless, as they were fully argued, I should express my view of them.

135. In my judgment, this argument of GAT's, in both its limbs, is incorrect.

136. The alleged Collaboration Agreement would not, I consider, have been a variation of the Confidentiality Agreement. Thus, to take the aspects which GAT contends would have amounted to a variation of the Confidentiality Agreement in turn:

(1) GAT contends that an agreement to license and assign the IP and Know How relating to CS-CLO conflicts with the scheme of Article 7.1 of the Confidentiality Agreement. That is not the case. Article 7.1 provides only that a licence is not

granted by virtue of entering into the Confidentiality Agreement. It does not bear on a separate agreement to license or sell the IP and Know How.

(2) GAT contends that Article 7.3 of the Confidentiality Agreement precludes any claim by Rotam to ownership in respect of developments of GAT's Clomazone formulations and is inconsistent with the obligation alleged as part of the Collaboration Agreement in paragraph 17.3 of the Particulars of Claim. Again, I do not consider this to be correct. The wording of Article 7.3 makes clear that GAT can continue to develop the formulations of Clomazone and its technology without restriction, and that Rotam may not claim any ownership to the results of such research and development by reason of the Confidentiality Agreement itself. Again, it does not cover a subsequent agreement to sell and purchase GAT's IP and Know How.

(3) GAT contends that for GAT to be Rotam's exclusive supplier would be contrary to Article 7.4 of the Confidentiality Agreement. However, Article 7.4 is, again, concerned with the effect of the Confidentiality Agreement itself: it does not preclude a subsequent agreement which involves an exclusive relationship.

137. In relation to the argument that the alleged Collaboration Agreement would have failed to comply with "stipulations as to formalities" laid down by the Confidentiality Agreement and, for that reason, would be ineffective, I will assume, without deciding, that appropriately drafted "stipulations as to formalities" for a future agreement should be treated as similar in effect to the "no oral variation" provision in *MWB v Rock Advertising*. However, to have the effect of making a subsequent agreement which did not comply with stipulations as to formalities ineffective, the relevant term would, at least, have to be in clear words. This is because its effect would be to impose an important and exceptional restriction on the contractual autonomy of the parties for the future. In the present case, the terms relied upon, Articles 7.1 and 7.4, unlike Article 10.11 dealing with variations, do not say that a subsequent agreement made otherwise than as specified will not be effective. It is true to say that they envisage that if there are further relevant agreements they will be in writing and "executed" (Article 7.1) or "signed" (Article 7.4), but do not, in my judgment provide or have the effect that an agreement which was not of the sort envisaged will have no effect.

Collaboration Agreement: Was a Binding Agreement Concluded?

138. This issue, whether a binding oral contract was concluded at the 30 August 2010 Meeting, was the subject of the bulk of the evidence and argument at the trial.

Applicable Legal Principles

139. The legal principles as to whether or not a binding contract has been concluded were restated by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 WLR 753 at [45]:

> *"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create*

> *legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement".*

140. The following passage from the judgment of Lloyd LJ in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 610 was cited by the Supreme Court with approval:

> *"(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole … (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed … (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled … (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611] 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."*

141. In determining whether or not a contract has been concluded through communications between the parties, it is necessary to consider communications subsequent to the date of the alleged contract. In the words of Earl Cairns LC in *Hussey v Horne-Payne* (1879) 4 App Cas 311:

> *"You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond'. In order fairly to estimate what was arranged and agreed, if*

anything was agreed between the parties, you must look at the whole of that which took place and passed between them."

142. As to agreements "subject to contract", this area was addressed by Beatson J in *Benourad v Compass Group plc* [2010] EWHC 1882 (QB) at [106(a)]:

> *'"[T]he more complicated the subject matter the more likely the parties are to want to enshrine their contract in some written document to be prepared by their solicitors. This enables them to review all the terms before being committed to any of them. The commonest way of achieving this ability is to stipulate that the negotiations are 'subject to contract'. In such a case there is no binding contract until the formal written agreement has been duly executed …. But it is not necessary that there should have been an express stipulation that the negotiations are to be 'subject to contract'. …": Cheverney Consulting Ltd v Whitehead Mann Ltd [2006] EWCA Civ 1303 at [42], per Sir Andrew Morritt C; Investec Bank (UK) Ltd v Zulman [2010] EWCA Civ. 536 at [17]. Where there is no such stipulation, this (see e.g. Winn v Bull (1877–78) LR 7 Ch 29 , 32, per Jessel MR) is a question of construction. The fact that a draft contractual document or a covering letter to it invites a party to initial or sign a copy and return it to the other party, or contemplates that a party would obtain legal advice before signing are telling indications that the parties do not intend to be bound until the document is signed: Investec Bank (UK) Ltd v Zulman [2010] EWCA Civ. 536 at [19–20]."*

143. Finally, I note that it is possible for parties to agree to a binding preliminary contract, pending the agreement. I was referred to the following passage from the judgment of Pain J in *Donwin Productions Limited v Emi Films Limited* (Times, March 9, 1984):

> *"It is clearly the law that parties may make a preliminary arrangement which may either be an enforceable agreement pending the completion of a fuller and more complete written agreement, or which is to have no effect pending the completion of such written agreement…*
>
> *Whether the preliminary agreement is to have contractual force or not will depend upon the intention of the parties. Mr. Bowsher seemed to suggest that there could be no binding agreement on the 4th June because the parties recognised at that stage that there were further terms to be agreed and embodied in the final written agreement. This is not a valid contention of law. It has considerable force when one is examining the evidence to ascertain the intention of the parties but as a matter of law there is no reason why one cannot have a partial binding agreement pending the completion of the full agreement.*
>
> *Initially the burden is on the Plaintiff to prove that it was the intention of the parties that there should be a binding agreement but if he can show: (1) that there was a commercial relationship between the parties; (2) that there was a meeting of minds; and (3) that consideration passed from the Plaintiff to the Defendant, then the onus shifts to the Defendant to prove that there was no intention to create a binding agreement …"*

The Positions of the Parties in Summary

144. Rotam's essential case was that, on 30 August 2010, the "core terms" of an agreement relating to the commercial exploitation of CS-CLO had been contractually agreed, the parties intending, or objectively to be considered to have intended, that they should be bound by those terms notwithstanding that the detailed terms of a written commercial agreement had not been agreed between the parties, and that there remained certain further matters which needed to be negotiated further.

145. GAT's case, by contrast, is that the 30 August Meeting formed simply part of a "continuum of negotiations". Judged objectively, the parties always intended that any agreement relating to the commercial exploitation of CS-CLO, to be binding, would need to be set out in an agreed written contract. Further, the 30 August Meeting did not resolve various matters which were of fundamental importance to the existence of such an agreement. The parties had not acted as if any contractual agreement had been reached on 30 August 2010, and there were no internal or external documents demonstrating that a concluded agreement had been reached. Further, if there was any contract, it would have been with Rotam Agrochemical Europe Limited ("RAEL"), not one of the Claimants.

Analysis and Conclusions

146. In my judgment, GAT is correct on this issue. The 30 August Meeting did not involve what, viewed objectively, was an intention on the part of the parties to create legal relations, or an agreement on all the terms which they regarded as essential for the formation of legally binding relations. I consider that the following five, overlapping, considerations support the conclusion that there was no binding contract concluded on 30 August 2010.

147. In the first place it is, in my judgment, clear that the parties intended, and had demonstrated to each other that they intended, that any binding agreement relating to the commercial exploitation of CS-CLO should be the subject of a formal written contract. The parties had been proceeding, before 30 August 2010, on the basis that significant arrangements between them would be embodied in formal agreed contracts. That had been the case in relation to the Clomazone Confidentiality Agreement. It was the case in relation to an agreement dated 24 September 2009 to transfer registrations in relation to GAT's VERTIS product, and in relation to a number of other agreements dating from August and September 2009 transferring registrations in various other products.

148. Furthermore, any such agreement in relation to CS-CLO was bound to be a complex one, on which the parties would wish to consult internal or external lawyers. They had already, prior to 30 August 2010, been exchanging drafts of a formal Commercial Agreement. Rotam had engaged outside lawyers to consider the drafts. Given this context, in my judgment it was implicit in the discussions on 30 August 2010 that to the extent that matters were the subject of agreement between those present, they would be embodied in the formal agreement which was being negotiated, so that the parties could then review all the terms before being committed to any of them. It is to be noted that the process of continuing to attempt to agree the terms of the formal contract continued after 30 August 2010, with the exchange of further drafts on 14 September, 8 October, and 11 October 2010.

149. That formal agreements were required for there to be binding relations had been stated in the footnote to GAT's minutes of, inter alia, the meeting on 18 February 2010. As was accepted by Alok Kumar, there was no written or oral communication after February 2010 which indicated a relaxation or alteration of GAT's approach to the conclusion of contracts or the assumption of binding liabilities. There was no discussion or agreement at the meeting of 30 August 2010 as to a relaxation of the formality requirements previously stated in those footnotes: no such discussion is recorded in Dr Gimeno's handwritten notes or in the minutes subsequently produced, and I accept Dr Gimeno's evidence that there was none. On that basis, the meeting took place in the context of a – communicated – understanding on the part of GAT that only written and signed agreements would become binding, and nothing was said to the contrary. In this context, Rotam can gain little assistance from the fact that the minutes of the meeting of 30 August 2010 themselves did not contain such a footnote. Rotam only saw those minutes some time after the meeting, and there had been no discussion at the meeting of how the minutes would be drafted in this regard.

150. The terms of the footnote to the minutes of 18 February 2010 was consistent with what Rotam, before and at the time of the 30 August Meeting, knew to be GAT's strict attitude to the documentation of contracts. James Bristow, in an internal email of 20 March 2010 had stated that Rotam had to be "very careful with GAT agreements as the issues we are addressing are complex", and that "GAT is clear in contracts". Alok Kumar, in evidence, agreed that Rotam was well aware that GAT was scrupulous about contractual documentation. Given this background, I do not consider that, viewed objectively, there was manifested an intention to depart from such an approach and for the parties to commit themselves orally to a very important and long term agreement.

151. In this context it is also, in my judgment, significant that none of Rotam's senior management was at the 30 August Meeting. As Alok Kumar confirmed, a Clomazone collaboration agreement required the approval of senior management. While Rotam's senior management may have approved the direction in which negotiations were heading prior to 30 August 2010, they were not present for the meeting and there was no suggestion that they were asked, on 30 August 2010, for approval of any of the terms which Rotam contends were then agreed. The significance of this is not, in my view, as to whether the representatives of Rotam who were present had actual or apparent authority to commit the relevant Rotam company, but is rather an indication that it was not intended that the 30 August Meeting should result in a binding contract, because it was envisaged that that would depend on there being an agreed written document, which would be subject to a process of finalisation and signature which would involve senior management.

152. Secondly, there are none of the contemporary indications which might be expected that the parties considered, or conveyed to each other, that they had crossed from non-binding negotiation to contractual commitment at the 30 August Meeting. There is no suggestion, for example, that there was a handshake to signify a contractual commitment, or any express words confirming that a binding deal had just been concluded. There are no expressions in the contemporary documents of relief or congratulation at a deal having been arrived at.

153. Furthermore in the aftermath of the 30 August Meeting, although undoubtedly the parties considered that they had made progress as to the basis on which they might collaborate and viewed the prospects of successful collaboration as having improved,

there are many indications that they did not consider that a binding contract had been formed on 30 August 2010 and did not conduct themselves as if, or on the basis that, there was. Of particular significance in this regard are the following:

(1) The email from Karman Leung to James Bristow of 3 September 2010 does not suggest that there had been any concluded agreement. On the contrary, it deals with unresolved issues and asks for James Bristow's input on how to proceed.

(2) Alok Kumar's email of 28 September 2010 to Karman Leung, which speaks of there having been a 'proposal' of the Clomazone project to Rotam's senior management, does not suggest that there was considered to be a concluded deal.

(3) The continued negotiation of the terms of the formal contract, to which I have already referred.

(4) The statement in Dr Casana-Giner's email of 28 September 2010 that the transfer of the divisional patent would be made "once the contract GAT-Rotam is signed and everything settled down between GAT and Rotam (I hope so)…", which indicates that GAT was proceeding, to Rotam's knowledge, on the basis that there would be a contractual document embodying and settling the arrangements between the parties, which it was "hoped" would be concluded.

(5) Alok Kumar's email to Dr Gimeno of 28 December 2010, which spoke of steps needed to "finalise" the "important project" of the "commercial contract of Clomazone 360 CS". That does not suggest that there was already a contractual commitment to the project.

(6) Karman Leung's email to Alok Kumar and James Bristow of 30 December 2010, which raised points to be revisited with GAT before making further changes to the draft of the formal contract. It also referred to a "Backup plan on Clomazone CS project". It appears to me clear that the "backup plan" was being contemplated on the basis that a binding contract for collaboration with GAT on CS-CLO might not, eventually, be concluded.

(7) The minutes of the meeting of 11 February 2011 indicate that many of the same topics were covered as Rotam contends had been the subject of binding agreement on 30 August 2010. The footnote to those minutes states that only signed agreements, including in relation to the topics discussed, were to be binding. That was not challenged by Rotam at the time.

(8) In March 2011 the parties had exchanged a list of "key points", which Rotam contended had been "agreed", but in relation to most of which GAT indicated that there were points of disagreement. At that point, Dr Gimeno, by email of 25 March 2011, referred to the possibility that Rotam might prefer not to enter into a "License/Development Agreement", and if that were the case, GAT would offer manufacturing services under a distribution and supply agreement. Rotam did not respond to that communication to say that there was already a binding commitment to important aspects of a "License/Development Agreement", although there would have been if its case as to a binding agreement having been reached on 30 August 2010 were correct.

(9) The terms of the data transfer agreement which were negotiated, including in particular clause 2.7 thereof, are difficult to reconcile with the existence of a binding agreement on 30 August 2010 that Rotam should have a licence in respect of GAT's Know How and IP Rights for CS-CLO.

154. Thirdly, the agreement which Rotam contends was reached on 30 August 2010 did not resolve a number of very significant issues. In my judgment these included issues which the parties intended, or which, judged objectively, they are to be taken to have intended, as essential to be resolved before there was a binding contract. In particular there were two such issues.

(1) The first was that there was no resolution as to how the profits from the proposed joint venture would be split, and in particular there was no agreement as to the tolling manufacture margin.

(2) The second was as to whether one or the other party, or both, should bear the risk of a claim for patent infringement by FMC. The costs of defending an infringement claim, even in one jurisdiction, and even if the claim was unsuccessful, would have been substantial and could have severely reduced the profits of the joint venture. Karman Leung accepted in her evidence that an action in the UK alone would have cost a few million pounds. The irrecoverable costs of such an action would have been considerable, and likely to be such as would have eliminated GAT's profits from the sale of its IP. Accordingly, the issue of whether there should be an indemnity by GAT in respect of an infringement claim was of manifest importance. It was a matter which had been raised by Graham Dickinson as early as March and July 2009. GAT's position in July 2009 had been stated as being that it would not provide such an indemnity. Rotam's first draft of the Commercial Agreement had contained, in clause 8.4, a provision for GAT to give an IP infringement indemnity. GAT's August 2010 markup of the Commercial Agreement had restricted GAT's liability to Austria. Accordingly, going into the 30 August Meeting there was a clear issue on this point. It was not resolved at that meeting, and, as I have already set out, was one of the matters which, on 3 September 2010, Karman Leung referred to James Bristow as needing his comment. The issue continued, thereafter, to be the subject of extensive, and increasingly complex, negotiation.

155. Fourthly, I considered that the evidence relied upon by Rotam as to what occurred at the 30 August Meeting to suggest that there was a binding contract fell clearly short of doing so.

156. Rotam relied heavily on the minutes of the meeting. It is notable, however, that those minutes do not, at any point, state that there has been a decision to seek to reach a binding agreement on some key points in advance of an agreement on everything, nor is there any statement that any points have been the subject of a concluded and binding agreement.

157. Furthermore, in the minutes, Rotam's purchase of GAT's regulatory data is recorded as a "proposal", and the capped licence fees for a licence fee/development fee agreement are recorded as being "offered" by Rotam. The issue of whether there would be a divisional patent or a partial licence to some claims "has to be studied". In my judgment, each of these phrases records a discussion in which, while there may have

been no disagreement as to the subject matter, there was no indication of an intention to enter into binding commitments there and then.

158. The fact that the minutes did not contain a footnote of the type which minutes of earlier meetings had, to the effect that only written and signed agreements would be binding, does not alter this. The omission of that footnote, as I have said, was not itself a matter of discussion at the meeting. Furthermore, insofar as it is relevant, I accept Dr Gimeno's evidence that the reason for the omission of the footnote was not that she did so deliberately in recognition of there having been a binding agreement, but was a mistake caused by her using a different format of meeting minutes. That the omission of the footnote was due to a mistake is supported by the fact that an equivalent footnote appeared in the minutes of the meeting of 11 February 2011, which dealt with much of the same subject-matter.

159. Dr Gimeno took detailed handwritten notes at the meeting. They were not a verbatim record of what was said, but were a summary of the points being discussed. They did not contain any indication that there was a perception that a contractual commitment had been entered into at the meeting, and the style of the treatment in the notes of CS-CLO is similar to that of other projects in relation to which it is common ground that no binding agreement was then concluded.

160. As to the oral evidence, Rotam relied on the evidence of two witnesses who had been at the 30 August Meeting: Alok Kumar and Karman Leung. Their evidence was essentially to the effect that the minutes of the meeting were a correct record. They did not, for example, suggest that there had been specific words spoken expressly recognising the existence of binding obligations which are not in the minutes or Dr Gimeno's notes. Alok Kumar gave evidence to the effect that his understanding was that the parties were committed at the meeting of 30 August 2010. However, he also gave evidence that there was no agreement at that meeting to try to concentrate on reaching a binding agreement on a small number of "key points" instead of on all the points which were raised by the detailed terms of the draft Commercial Agreement which had been exchanged between the parties. He confirmed that the process of seeking to identify and agree certain key points had commenced at some point after the 30 August Meeting. Furthermore, Alok Kumar gave some evidence which gave significant support to GAT's case that the 30 August Meeting did not mark any contractual watershed. As he put it, as at 30 August 2010, the agreement was "a work in progress". He agreed that, broadly speaking, there was a continuum of negotiations from July 2010, stretching through 2010 and into 2011.

161. Karman Leung's evidence was also to the effect that she thought that the parties were committed. I treated her evidence with caution, however, because she showed a marked tendency to argue points in accordance with Rotam's interests. In addition, as she said, she was focussing at the 30 August Meeting on the IP aspects.

162. The evidence of Dr Gimeno for GAT was that, while potential terms of an agreement were discussed, they needed to be included in a written commercial agreement which would then be reviewed by GAT and eventually, if agreed, signed. Dr Gimeno was a witness who had an impressive grasp of the details of the case. She was rather inclined to over-dogmatic assertion of GAT's position. Nevertheless, I considered that her evidence was truthfully given, and largely accurate, and specifically that she gave an essentially accurate account of what occurred at the 30 August Meeting and as to her

understanding that no matters were the subject of binding agreement at that stage. I consider that that understanding will have reflected the tenor of the meeting.

163. GAT also relied on the evidence of Matthias Reismüller. I considered him to be a disinterested and honest witness. He had been at the meeting and gave evidence that he agreed with the account of it in Dr Gimeno's witness statement. While he accepted that he did not remember all the details of what had happened, he said he remembered it as "a project meeting where certain things were discussed and certain things were new and introduced to us." It was not put to Matthias Reismüller that a binding agreement had been made at the meeting. In the result, I considered that Matthias Reismüller's evidence gave some support to GAT's case that no binding oral contract was concluded.

164. Fifthly, the terms of the first two letters of claim written by or on behalf of Rotam (namely those of 15 March 2013 and 17 May 2013) are of significance. One was signed, and both were approved, by Alok Kumar. Neither suggests a binding oral Collaboration Agreement made in August 2010, and the account of the 30 August Meeting in the second letter is difficult to reconcile with a case that there was such a binding agreement. The inference I draw from the terms of those letters is that, in 2013, when matters were undoubtedly fresher in Alok Kumar's mind than they are now, he did not attribute to the 30 August Meeting the significance, in terms of its being a contractual watershed, which Rotam has subsequently ascribed to it.

165. There are four particular points raised by Rotam suggesting that a binding agreement was reached on 30 August 2010 which deserve individual consideration. The first of these is the suggestion that the parties acted on the concluded agreement, including in the immediate aftermath of the 30 August 2010 Meeting. Reliance was placed in particular on the fact that on 31 August 2010 GAT disclosed to Rotam its basic recipe, that on 21 September 2010 two of Rotam's chemists had attended GAT's premises in Austria to learn about the process of manufacturing GAT's products, and that on 15 December 2010 GAT provided Rotam with the final specifications of CS-CLO.

166. As to these, I consider that these were steps taken as part of a collaboration which had been proceeding before and continued after 30 August 2010. After 30 August 2010, the parties were undoubtedly more confident that this collaboration would be put onto a binding contractual basis, but I do not consider that these steps were referable to a binding contract having been formed at that time. Thus, GAT had already, in 2009, and under the protection of the Confidentiality Agreement, sent Rotam the basic recipe with the FtO letter. The only change in the recipe sent on 31 August 2010 was in relation to the wall thickness which had changed the polymer content to 16.5%. Sending it was a step in the collaboration between the parties but not one which is inexplicable without there having been a binding contract reached on 30 August 2010. The same applies to the visit of the Rotam scientists to GAT in September and the supply of the final specifications of CS-CLO in December. I accept Dr Gimeno's evidence that these were steps in the collaboration envisaged by, and conducted pursuant to, the Confidentiality Agreement, and were not dependent on an understanding that a binding contract had been concluded on 30 August 2010.

167. The second matter is Rotam's reliance on the exchange of emails between Dr Casana-Giner and Dr Gimeno on 8-9 September 2010, in which Dr Gimeno had recognised the basic correctness of the "axioms" which Dr Casana-Giner had agreed with Karman

Leung as to patent issues. I accept Dr Gimeno's evidence that the "axioms" were what had been discussed at the meeting "but they were not fixed until they would show up in the next draft of a commercial agreement".

168. The third matter is the email of 3 April 2011, sent by GAT, which referred to the "long term collaboration agreement which is negotiated". In context I considered that this clearly meant "which is being negotiated". English was not the first language of the author(s) of this email (Dr Gimeno's evidence was that she had prepared it in conjunction with Matthias Reismüller). While her evidence, in English, indicated that she was very fluent and had an exceptionally wide vocabulary, it also demonstrated that her English was not always grammatically perfect or always idiomatic.

169. The fourth matter is reliance on the payments made by RAIC in respect of the acquisition of the right to use GAT's registration data, particularly the first and second instalments paid on 8 March 2011 and 4 May 2011 respectively. Rotam contended, as I understood it, that payment of those amounts was referable to the binding Collaboration Agreement reached on 30 August 2010. I will have to return to those payments in the context of the claim in unjust enrichment. For present purposes, it is sufficient to say that these payments are explicable on a basis which does not involve there having been a binding Collaboration Agreement reached in August 2010. The parties had taken forward this aspect of the collaboration in November (especially in the telephone call of 29 November 2010) to January 2011, and it was agreed at the meeting in Lyon that 50% of a total sum of €298,338.05 would be paid promptly. The fact that this aspect was taken forward in this way does not necessarily entail that there had been a wider binding agreement reached on 30 August 2010.

170. For the reasons I have expressed, therefore, I have concluded that there was no binding Collaboration Agreement made on 30 August 2010. Given this conclusion, it is not necessary for me to consider GAT's argument that, if there was any binding agreement it was with RAEL and not with either of the Claimants.

Was the data transfer agreement a binding contract?

The parties' positions

171. Rotam contends that the parties entered into a binding agreement, on the terms of a draft written data transfer agreement, on or about 30 August 2012. It relies on the facts that the terms had been negotiated, that GAT had asked Rotam to proceed to sign the agreement on 30 August 2012, and that at the meeting on 3 September 2012 the parties had discussed that they "agreed" on the data transfer agreement. GAT however denies that a binding contract was formed at that time because there was at that point no agreement signed by either party, and because it did not sign the data transfer agreement when Rotam eventually forwarded a copy for it to do so.

Legal principles

172. I have already referred to the salient principles and authorities relating to contract formation and an intention to create legal relations. In relation to the data transfer agreement in particular, Rotam also referred me to Maple Leaf Macro Volatility Master Fund v Rouvroy at first instance, [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep

475, and on appeal, [2009] EWCA Civ 1334. At first instance, Andrew Smith J stated, at [224]:

> "*I therefore have to consider whether, objectively assessed, the parties evinced in their exchanges an intention to conclude a contract. Their conduct is, of course, to be assessed against the background of the parties' dealings and their experience in so far as it is to be taken to be known to the other parties.*"

173. In the Court of Appeal, an argument was rejected that an agreement had not become binding because one of a number of parties had not signed it. Longmore LJ stated (at [16]) that there had been no consensus that the agreement would become binding only when signed. The most that could be said in that case was that there was a space for the parties' signatures, but "*there was no requirement either within or outside the Funding Agreement that it would only become binding when signed.*"

Discussion and Conclusions

174. In the present case it is necessary to examine the parties' prior dealings and the terms of the data transfer agreement which it is contended was concluded with some care. As to the former, I have already referred in paragraph 147 to a history in which the parties' previous agreements had been embodied in formal signed documents.

175. More specifically, GAT was able to point to a number of instances in which the parties had both proceeded on the basis that it was only when an agreement was signed by both parties that it became binding. Thus, in relation to a confidentiality agreement relating to a proposed collaboration on Clomazone in the USA Rotam chose, in August 2010, not to sign it even though GAT had. At the 30 August Meeting, this is minuted as follows:

> "*ROTAM and GAT have elaborated the confidentiality agreement for the disclosure of data to allow an FtO statement. This confidentiality agreement has been signed by GAT on 25.08.2010.*
>
> *Based on the USA patents in force ROTAM decided not to sign this agreement till the patent litigation risk is clear.*"

This indicates that the parties were each proceeding on the basis that Rotam's decision not to sign the confidentiality agreement meant that it was not concluded. Alok Kumar accepted in his evidence that the deliberate withholding of Rotam's signature meant that Rotam considered that it was not bound. While it is correct to say that the terms of the Clomazone USA confidentiality agreement expressly stated that the "Agreement shall be considered valid upon signature of both Parties", there appears to have been no reference at the 30 August Meeting to this specific provision as being the reason why Rotam's failure to sign would mean that there was no concluded agreement.

176. Instead it appears to have been more generally understood between the parties that that would be the effect of one party not signing. In relation to a proposed material transfer and confidentiality agreement relating to trials of Abamectin in Argentina, which was being negotiated in late 2010 and early 2011, Rotam amended the draft agreement and sent a copy for GAT to sign, which GAT proceeded to do. Rotam did not immediately send back a copy signed by itself, and GAT chased for one, indicating that it would not

send samples until it had received a copy signed by Rotam. Alok Kumar accepted that the exchange in relation to Abamectin was indicative of how the parties dealt with each other in relation to the conclusion of written agreements. He did not refer the apparent acceptance that a binding contract would require both parties to sign to the specific terms of the Abamectin agreement. In my judgment this incident was consistent with a joint, and communicated, understanding that agreements were not binding until signed by both parties.

177. It is also instructive to consider a confidentiality agreement with GAT in relation to FTU which Rotam decided, in July 2010, not to sign until it had filed its patent applications. It is clear that it did so on the understanding that the agreement would not be legally binding until it had signed, even if its terms had already been agreed with GAT. While this thinking in relation to the FTU agreement was not expressly communicated to GAT, this incident is, again, consistent with GAT's case that the parties each proceeded on the basis that only mutually signed agreements were binding.

178. As to the terms of the draft data transfer agreement which was sent by Rotam on 29 August 2012 (and eventually signed by Rotam and sent to GAT on 4 October 2012), these included the following:

(1) The signature page provides a space for signature by each party, and is prefaced by the words "*... this Agreement has been executed by duly authorised representatives of the Parties*". This is consistent with an intention that there is an agreement only once there has been execution by each party.

(2) Clause 7 provides that "*This Agreement may only be amended by a document in writing signed by a duly authorised officer of GAT and Rotam.*" It might be regarded as unlikely that the parties intended that a higher degree of formality was required for the variation than for the conclusion of the agreement.

(3) Clause 2.2 requires Rotam to pay GAT €78,038.49 "*within 30 days from the last day of signature of this Agreement*." The "*last day of signature*" must, in the context of the agreement, which does not specify any particular date by which it is to be agreed, be taken to mean the date of the last signature. That clearly envisages that there will be more than one.

179. I consider that, objectively assessed, by reason of the terms of the data transfer agreement, including in particular those which I have set out above, considered against the background of their previous dealings, the parties did not intend to be bound by the data transfer agreement until they had both signed it. In my judgment, to use Longmore LJ's terminology in Maple Leaf, there was a "consensus" that the agreement would not be binding until signed by both parties.

180. Rotam contends that this conclusion is inconsistent with the terms of the minutes of the meeting of 3 September 2012, which I have already quoted. I do not consider this to be the case. The reference to the parties having "agreed" on the data transfer agreement is, in context, recording that the parties have agreed the terms of the data transfer agreement. However, the minute also indicates that Rotam is (1) to send two signed originals to GAT and, further, (2) that "GAT to send invoice upon signature" which must be a reference to GAT's own signature of one of the originals which are to be sent

to it by Rotam. This is consistent with an understanding that the agreement will only become effective on the signature of the agreement by both parties.

181. Rotam also relied on the minutes of the meeting of 3 September 2012 to contend that there had been an unequivocal representation by GAT to Rotam that the data transfer agreement was binding, even though it had not been signed. I do not consider that this is so. If there was any representation, it was at most equivocal, given the previous dealings between the parties, the terms of the draft data transfer agreement and what is recorded in the minutes themselves. Nor did I find persuasive Rotam's further suggestion that there was an "implied term" that the parties would append their signatures to the data transfer agreement within a reasonable time. If there was no intention for the data transfer agreement to be binding until both signatures had been placed on it, then this could not be an implied term of the data transfer agreement. If the suggestion was that there was an agreement separate from the data transfer agreement, into which this term could be implied, this does not appear to accord with Rotam's pleaded case, and in any event, I do not consider that such an agreement was made out, whether by reference to the minutes of the meeting of 3 September 2012 or otherwise. In my judgment those minutes do not record a contract separate from the data transfer agreement. Instead, as I have said, the minutes record that there were no issues as to the terms of the draft data transfer agreement, but envisage that the conclusion of the agreement should now take place, as with previous agreements, by its signature by both parties.

The effect of clause 4.1 of the data transfer agreement

182. Had I decided that a contract had been concluded on the terms of the data transfer agreement that contract would have been on terms which included clause 4.1. That clause, coupled with Recital E, make it clear that any further obligations under the agreement, including the obligation to transfer the defined Rights, would not arise until Rotam paid the sum specified in clause 2.1, namely €78,038.49. That sum was not paid by Rotam. Accordingly, if there were a contract on the terms of the data transfer agreement, the obligation to transfer the specified Rights did not arise.

183. Rotam contends that GAT cannot rely on its non-payment because GAT did not submit an invoice in respect of the €78,038.49 at any point after August 2012. I do not consider that this provides an answer. There was nothing to prevent Rotam paying the relevant amount, which was specified in the data transfer agreement, to GAT without an invoice. The bank details as to how a transfer could be made were set out, in considerable detail, in the data transfer agreement itself. In any event, if for some reason it was necessary for Rotam to have an invoice to pay against, I do not see why the relevant sum could not have been paid against the invoice which GAT had submitted on 23 December 2011.

The limitation in clause 3.5 of the data transfer agreement

184. For the sake of completeness I should also say that, if Rotam had succeeded in overcoming the two points with which I have dealt above, I consider that any damages which Rotam could recover for breach of the data transfer agreement would have been limited to the sum of €78,038.49, as specified in clause 3.5. I do not accept, as Rotam contended, that that limitation was intended to apply only when the ownership of the data has been transferred: clause 3.5 does not so provide.

Unjust Enrichment

185. Rotam made an alternative case that, if there were no concluded Collaboration Agreement or data transfer agreement, it was entitled to recover the monies which it paid (through RAIC) to GAT for the registration data and in relation to the costs of the Divisional Patent, namely €291,087.03 in unjust enrichment.

186. In this regard, Rotam contended that the payments obviously enriched GAT at Rotam and/or RAIC's expense. It contended that the enrichment was unjust because it was caused by a mistake of fact or law, or alternatively because there was a failure of consideration.

187. A significant part of GAT's answer to this claim was the contention that the sums in question were paid pursuant to what it called the "Letters of Access Agreement", and which it pleaded was a contract "agreed in and/or evidenced by" the telephone conversation between Dr Gimeno and Alok Kumar on 29 November 2010, various emails, and the contents of the invoices. Its case was that it was agreed that Rotam should pay these sums for the use of GAT's registration data, rather than for the ownership of that data, which would not be transferred under the "Letters of Access Agreement".

188. In my judgment the payments were made by Rotam in the expectation that a contract would be concluded whereby it would acquire the ownership of the registration data. Until the end of November 2011 Rotam expected that it would purchase that data, and have an exclusive right to use it, albeit that GAT would retain rights to use the data outside the EU. From then on Rotam expected that it would eventually acquire outright ownership, with GAT having no rights to use the data outside the EU.

189. That this was Rotam's expectation and that the payments were made on this basis was communicated to GAT. This is apparent from, amongst others, the following documents:

(1) The minutes of the 30 August Meeting, which referred to Rotam proposing "to purchase as soon as possible all required registration data".

(2) The minutes of the telephone conference between the parties on 29 November 2010, which referred to Rotam as going "to purchase the registration studies elaborated by GAT …" in two instalments.

(3) The minutes of the meeting on 11 February 2011, which state that Rotam "agreed to purchase the GAT registration study package".

190. As I find, Rotam made the payments on the basis of its expectation that a binding commercial exploitation agreement or, subsequently, at least a binding data transfer agreement would be entered into, under which there would be transferred at least an exclusive right to use the data in the EU. I do not accept that the payments were made pursuant to a "Letters of Access Agreement" whereunder it was agreed that Rotam would make the payments in return for a limited right – namely to have access to the registration data but no ownership or control of it. GAT's suggestion that there was such a "Letters of Access Agreement" is at odds with its case – which I have essentially accepted – that these parties were careful, and knew each other to be careful, to embody

their contracts in formal documents. There was no such documentation of the alleged "Letters of Access Agreement", and there was not even a suggestion by Dr Gimeno in her evidence of an express oral agreement on the terms of the alleged "Letters of Access Agreement". Such a narrow agreement would, in any event, have made little commercial sense. It would have meant that Rotam would have contractually agreed to pay the full costs of the registration data, without having any control over what it had paid for. It would also have been a highly unlikely agreement for the parties to have made in circumstances where, even though they had not reached a binding commercial agreement they were both working on a joint project to develop, register and launch CS-CLO.

191. The reference in the invoices to "data access" does not compel any different conclusion. It was necessary for GAT to provide Rotam access to the registration data in order to allow submission of registration dossiers as soon as possible. This was seen by the parties as a step in their collaboration, which they envisaged would be embodied in a binding agreement. The invoices reflected that access would be given, but did not, in my judgment, embody or constitute any separate agreement that the money was being paid exclusively for access rather than ownership.

192. In light of the above, it is necessary to turn to the elements of Rotam's claim in unjust enrichment. It is clear that GAT has been enriched by the transfer of the amounts of €291,087.03 at Rotam's expense.[2]

193. The next question is whether the enrichment was unjust. As I have said, Rotam contended for the existence of one or other of two "unjust factors". The first was that the payments were made under a mistake of fact or law. I understood Rotam's case to be that the mistake of fact or law was that the sums were due under the Collaboration Agreement, and that but for that mistake Rotam would not have paid those amounts. I am unable to accept that there was such a mistake. I do not accept, for reasons which have already been set out, that there was a binding Collaboration Agreement, or that Rotam, or any relevant individual at Rotam believed, at the material time, that there was a binding Collaboration Agreement or other binding contractual agreement which imposed a legal obligation on Rotam to pay the sums in question. The true position is, I consider, accurately revealed by the exchange between Alok Kumar and Helen Peng in March 2011, which I have recited above, in which, though Alok Kumar recognises that the contract was still being negotiated, the relevant sum should be paid in any event.

194. Rotam also relies, however, on a failure of consideration as an "unjust factor". In this regard, Rotam contends that, in the present context, a failure of "consideration" means that the "state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself", for which definition it refers to Sharma v Simposh Ltd [2011] EWCA Civ 1383. It is helpful to cite paragraphs [21]-[25] of that case, where Toulson LJ said:

> "*21. The agreement between the parties lacked formal validity and so had no contractual effect. It was no more than a mutual declaration of intent. An important part of the law of restitution is concerned with money paid or benefits conferred in respect of legally ineffective transactions. Goff & Jones' text book on*

[2] The total of the amounts of €11,918, €111,403.25, €37,765.78 and €130,000

the Law of Restitution 7th. Ed. 2007, begins its treatment of the subject with this important statement of general principle (para. 19-001):

'Transactions may be or become ineffective for a variety of reasons. But the reason the courts will award restitution is in each case fundamentally the same, namely, that the plaintiff's expectations have not been fulfilled.'

22. In relation to money paid, the authors continue (para. 19-002):

'If money has been paid under a contract which is or becomes ineffective, the recipient is evidently enriched. It is a distinct question whether that enrichment is an unjust enrichment … In most of the situations, however, the ground of recovery is that the expected return for the payment, or consideration, as it is confusingly called, has failed.'

23. The confusion is caused by the fact that the term 'consideration', when used in the phrase 'total failure of consideration' as a reason for restitution, does not mean quite the same thing as it does when considering whether there is sufficient 'consideration' to support the formation of a valid contract. Viscount Simon LC, explained this in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 48:

'In English law an enforceable contract may be formed by the exchange of a promise for a promise or by the exchange of a promise for an act … but when one is considering the law of failure of consideration and the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise that is referred to as the consideration but the performance of the promise.'

24. A succinct summary of the meaning of failure of consideration was given by Professor Birks in his Introduction to the Law of Restitution (1989), page 223:

'Failure of consideration for a payment … means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist has failed to sustain itself.'"

195. I was also referred to Burrows, A Restatement of the English Law of Unjust Enrichment (2015), section 15. Prof. Burrows there states the following propositions:

"15(2) The usual consideration that fails is a promised counter-performance: see the classic formulation by Viscount Simon LC in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 48. Failure of consideration, used in that sense, has therefore been applied to where there was once a valid contract but that contract has been terminated for breach [citations omitted] or for frustration. It has been used in the same sense where the contract was void or unenforceable or anticipated.

…

15(3) … it has traditionally been thought to be a requirement, in relation to payments, that the failure of consideration has been total. Total failure means that there has been none of the performance that the claimant was promised….

> *However this insistence on total failure is not borne out by several cases which, while purporting to insist on a total failure, have often allowed restitution, even though there has been some of the promised performance … Furthermore, as many commentators have argued, there is no good reason in principle to confine failure of consideration to where the failure is total. …"*

196. In my judgment there was a failure of consideration in the sense described in these authorities and commentaries. The state of affairs contemplated by Rotam (and GAT) as the basis for the payments, which were that there should be a commercial collaboration agreement or at least a data transfer agreement under which Rotam would acquire ownership or exclusive use of the regulatory data, did not materialise. I consider that Rotam's expectations were not fulfilled.

197. In those circumstances I consider that Rotam has made out that GAT was unjustly enriched. Other than reliance on the alleged "Letters of Access Agreement", with which I have dealt above, GAT relied on no other defence to the restitutionary claim if an unjust factor were established, and accordingly I find that Rotam is entitled to recover the sums of €291,087.03.

Duty of Care

198. Rotam made a further case to the effect that GAT had owed it a duty of care, in accordance with the principles set out in Hedley Byrne & Co v Heller & Partners Ltd [1964] AC 465. Rotam contended that GAT had assumed responsibility to it in the course of their collaboration, and that it accordingly assumed a duty of care to Rotam, inter alia, not to "stand by and allow and/or encourage Rotam to make or continue to make arrangements on the basis of the joint project if GAT did not intend to participate fully in the Collaboration Agreement" and that "GAT would inform Rotam if in breach of the Collaboration Agreement or otherwise it entered into, or planned to enter into, negotiations with any other party for the sale of the Data and/or the Know How and/or IP rights."

199. This case received very little attention at the trial. In my judgment it must be rejected. These were potential contractual counterparties who were negotiating with each other. They were both sophisticated parties, with access to legal advice. They were conducting a detailed negotiation from broadly equal bargaining positions. I do not consider that either can be regarded as having assumed responsibility to the other within the meaning of Hedley Byrne and subsequent authorities.

Conclusion

200. Rotam's claim in unjust enrichment succeeds in the amount of €291,087.03. Otherwise its claims fail.

APPENDIX

Minutes of the meeting
ROTAM - GAT
Ebenfurth, August 30th, 2010

Participants:
Yifan Wu, Senior Technical Manager ROTAM HK
Alok Kumar, Business Development and Sales, ROTAM HK
Karman Leung, IPR and patents, ROTAM HK
Marc Lore, Sales Manager South ROTAM Europe
Florence Troubac, Regulatory Manager ROTAM Europe

Miguel Gimeno, Senior Technical Adviser GAT
Barbara Gimeno, CEO GAT
Michael Zimmel, Financial Manager GAT
Matthias Reismüller, Regulatory Manager GAT

ROTAM Europe – expansion of structure

1. Regulatory team is built with 6 internal experts adding on +4 specialists:
   tox (NN), ecotox (Thierry Grollier), e-fate (NN – before Afssa), efficacy (NN)
   Regulatory work with APC is continued.
   ROTAM elaborates and manages 6 Annex II dossiers and 13 Annex III dossiers with an invest level of 25 – 30 MEUR.
2. Sales support: a) James Anderdon: arable crops, northern region (UK, IL, Baltics, North EU)
   b) (NN – before Dow): Mediterranean region – fruits, vine, veggies
3. Sales: a) Marc Lore, Sales Manager South ROTAM Europe will be supported by NN for FR and BE and by Wardia Sinaty for ALG and MA.
   b) Paul Savage, Sales Manager North ROTAM Europe (UK, IL, Baltics, North EU)
4. Offices: ROTAM Europe Ltd. Office in Peterborough (Ian Campbell - Finance Manager ROTAM Europe)
   ROTAM Lyon office will be opened in Oct/Nov (Regulatory/Marketing)
5. Framework: ROTAM will be listed at the Taiwan stock exchange in Q1/2011

ROTAM global has grown to 200 MUSD annual sales, with 45% of sales (25% of contribution) coming from the Southern Cone (Brazil (staff 40), Argentina, Chile) and 10 products (Abamectine, Imidacloprid, Metomil, Thiodicarb, Tebuconazole, Carbendazim, Hexazinona, Cloreto de Mepiquate, Nicosulfuron, Metsulfuron, Chlorotalonil); 35 products are in the pipeline within 24 months.

Joint projects ROTAM GAT:

CLOMAZONE 36 CS

Basis for this project is the proprietary know-how of GAT on the formulation process and recipe(s), that currently belongs in full to GAT.

1. Clomazone straight market in EU:
   Market for the single 36CS is 84kL; Market for 48EC in HU 15kL, PL 95kL - equivalent to 140kL of 36 CS.
   Including WG formulations the entire addressable EU market is 275kL equivalent of 36CS and 30MUSD end user price level (USD 110 p.L)
2. Clomazone mixture market in EU:
   Mixtures with Dimethachlor (500kL), Metazachlor (1ML), Dimethachlor+Napropamide (1.68ML) and Linuron, Trifluralin.
   ROTAM plans to address the much bigger Clomazone mixture market as a second step of market entry. The numbers of the Clomazone mixture market are therefore not considered in the further calculations. GAT expects a possible market share of 10% or 200-300kL including mixtures.

Rotam will send the market data which has been summarized in the above points to GAT.

Clomazone 36CS – first step of market entry:
The volume of the addressable market to ROTAM for straight 36CS (main target crop potatoes) is 200kL – 300kL; ROTAM targets between 25% and 40% of the national markets in BE, CZ, DE, HU, IL, IT, PL (current sales price for 1L 48EC =150zl (37 EUR), RO, UK, AT, SK, FR, ES; in ES and IT. Further crops are targeted later (carrots, broad beans, cabbage, rice?).
Total prospective sales volume for straight 36CS product is 50kL in year 3 after launch.
Prices are to be matched.
Challenges:

1. Annex II – data protection ends 11. 2013
2. FMC patent expires 2016

Assumptions:

(1) GAT Patent is enforceable:

Justification:
Article 29 of PCT has the effect of ensuring, with certain qualifications, that provisional protection is available after the international publication of an international application in the same way as it is after national publication of unexamined national applications. The qualifications are such as to enable Contracting States to make such protection conditional on the furnishing of translations (in some circumstances), on the expiration of 18 months from the priority date, and/or on receipt by the designated Office of a copy of the international application as published under the PCT.

Article 67 of EPC ensures the Rights conferred by a European patent application after publication:

I. A European patent application shall, from the date of its publication, provisionally confer upon the applicant the protection provided for by Article 64, in the Contracting States designated in the application.

II. Any Contracting State may prescribe that a European patent application shall not confer such protection as is conferred by Article 64. However, the protection attached to the publication of the European patent application may not be less than that which the laws of the State concerned attach to the compulsory publication of unexamined national patent applications. In any event, each State shall ensure at least that, from the date of publication of a European patent application, the applicant can claim compensation reasonable in the circumstances from any person who has used the invention in that State in circumstances where that person would be liable under national law for infringement of a national patent.

III. Any Contracting State which does not have as an official language the language of the proceedings may prescribe that provisional protection in accordance with paragraphs 1 and 2 above shall not be effective until such time as a translation of the claims in one of its official languages at the option of the applicant or, where that State has prescribed the use of one specific official language, in that language:
   a. has been made available to the public in the manner prescribed by national law, or
   b. has been communicated to the person using the invention in the said State.

IV. The European patent application shall be deemed never to have had the effects set out in paragraphs 1 and 2 when it has been withdrawn, deemed to be withdrawn or finally refused. The same shall apply in respect of the effects of the European patent application in a Contracting State the designation of which is withdrawn or deemed to be withdrawn.

(2) ROTAM meets registration timelines (first launch in UK mid 2011- following submission of the potato dossier end 2010, followed by label extension to OSR)
(3) Sales of GAT on the active Romanian registration and parallel imports to Germany will continue as long as possible till transition to ROTAM registrations.

ROTAM proposes to purchase as soon as possible all required registration data elaborated by GAT (external and internal studies) including APC consulting fees. Total cost of the data package which has been elaborated by GAT is ca. 300kEUR – GAT will provide a breakdown of development and study costs to Rotam. Rotam and GAT will enter into a license fee/development fee agreement:

- ROTAM offers caped license fees for the Clomazone 36CS technology of EUR 625k paid over 10 years (inflation corrected) as long as the GAT patent continues to be enforceable. License fee payment shall be due as of patent filing date with repayment obligation in case of entire revocation (instead of later payment after granting)
- ROTAM offers caped development fees for the Clomazone 36CS technology of EUR 405k (instead of EUR 625k) paid over 10 years (inflation corrected) if the GAT patent is entirely revoked. Contractual details to be worked out by patent attorneys.
- Upon complete payment of the capped license fees Rotam acquires the IPR and the know-how for the product Clomazone 36 CS. Whether this will be done under a divisional patent or a partial license to some claims has to be studied.
- GAT will manufacture Clomazone 36CS for ROTAM during the period of the contract and if suitable beyond.

- Benefits for GAT based on the second step of market entry (Clomazone mixtures) will be discussed between Rotam and GAT at a later stage.

Manufacturing:
GAT will elaborate a break up of product manufacturing costs* with detailed split of

TC (supplied by ROTAM) at EUR 11 p. kg	4.05
Tolling by GAT estimated at EUR 5 p. L	5.00
Packaging + repackaging + labeling by GAT + Pinus at EUR 1.6 p. L	1.60
Storage and freight from packaging site at EUR 0.5 p. L	0.50
	11.15

*Costs of specific QC parameters (e.g. release rate) not included. Increased insurance premium not included.

The manufacturing price will be differentiated according to the campaign size.
Planned campaigns: 2012 – 3.500 L
2013 – 20.700 L
2014 – 36.800 L
2015 – 50.000 L

The product will be provided in 1000L IBC's by GAT.
Refilling according to GAT SOP can be organized e.g. with PINUS (from 50ml to 20L) in PET or COEX bottles.

In the annexes of the license and manufacturing agreement will be included:

- Product specifications including release parameters.
  Florence will inform about the results of biological trials (phytotox, volatility, release) – GAT will try to correlate in vitro release rate models.
- Insurance certificate for product liability -towards Rotam- and public liability - towards public in Austria related to the manufacturing process in the headquarters in Austria - up to MEUR 10 per event.
  GAT has currently a PPL coverage of MEUR 2.5 per event and has to check the cost of increase of cap which will be paid by Rotam.

GAT patent application EP 1840145 is valid in the EPO Member States. The territory of the license and manufacturing agreement are the EU member states. Other European Countries may be included depending on the outcome of market evaluations.
Upside on payments to GAT in the event of better sales than planned for the straight Clomazone 36CS product will come from increased tolling volumes.

FLUROXYPYR + THIFENSULFURON OD (FTU)

The wording of the confidentially agreement has been discussed between Rotam and GAT. The agreement will be signed as soon as possible.
FTU is expected to sell ca. 300kL p.a., in view of heavy generic competition and at a competitive price position. First year biological trials suggested that a lower application rate

(1.0L/ha versus 1.11L/ha) may deliver equivalent efficacy. The farmer may even apply the product at an application rate of 0.75L/ha.
The manufacturing process of the product is quite complex involving 3 major formulation process steps (CS, WG, OD). The sum of such 3 steps of formulation create an add on costs of EUR 2.50 for ingredients + EUR 1.00 for manufacturing (overheads and GAT margin not included) on the already high costs of the TC (EUR 6.15 for aliquot TC costs). Fluroxypyr is used as the ester at 26.17 wt% in the formulation in order to obtain the nominal 180g/L acid content. Based on the above calculation the COGS are estimated to be EUR 9.65.
Significant cost saving potential is limited due to high TC prices – currently for FXP from Helm and for TFS from Rotam.
Competitive costs are expected to range at EUR 8 incl. packaging – which is impossible to comply with at actual TC prices. ROTAM will inform about the prices and the structure in order to make the project viable.

The GAT data package for Annex III submission has already been contracted. Application rate 0.75L versus 1.0L and 1.11L has to be confirmed. The required studies are selected and monitored by APC.
ROTAM has confirmed to GO AHEAD with this project, as it is required for the Rotam product portfolio (even if margin is low).

Submission in UK is planned for May 2011 (bottle neck= efficacy).
For FXP supply - ROTAM has a meeting with HELM in Oct 2010- Helm FXP source is estimated at USD 21 p.kg.
AIR clarification is needed since HELM is not in the list of EU notifiers?

Patent protection of FTU OD is very solid since based on 3 different patents:

- EP 06006748 for the FXP CS,
- EP 06024299 for the drying of CS,
- EP1840145 for the OD formulation.

Confidentiality agreement for FTO on the exact product composition was proposed to be extended to the duration of patent life due to the commodity status of the AIs. The cap on breach of agreement at 1 MEUR is too low in terms of product volumes. ROTAM agreed to extend the duration of the confidentiality agreement to the terms of patent life and to include a specific clause on cap of breach.