



Neutral Citation Number: [2020] EWCA Civ 850

Case No: A3/2019/1898

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT
Mr Recorder Douglas Campbell QC
[2019] EWHC 1965 (Pat)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE DAVID RICHARDS

Between :

(1) PHILIP PRICE	
(2) SUPAWALL LIMITED	<u>Claimants/</u>
(3) SUPAHOME BY MAPLE LIMITED	<u>Respondents</u>
- and -	
(1) FLITCRAFT LIMITED	
(2) FLITCRAFT TIMBER FRAME LIMITED	
(3) GARRY FLITCROFT	<u>Defendants/</u>
(4) THOMAS FLITCROFT	<u>Appellants</u>

Giles Maynard-Connor (instructed by **Aticus Law Limited**) for the **Appellants**
Geoffrey Pritchard (instructed by **RHF Solicitors**) for the **Respondents**

Hearing date: 13 May 2020

Approved Judgment

Lord Justice Floyd:

1. The first and second appellants and the second and third respondents operate competing businesses in the timber frame construction industry from adjacent properties in the same business park in St Michaels in Preston. The third and fourth appellants are individuals involved in the management of the first and second appellants, whilst the first respondent has been involved in that of the second and third respondents. Over the years the relations between the two factions in this appeal have not been as cordial as one might have hoped, resulting on occasions in litigation. The present proceedings are brought by the respondents (collectively “Supawall”) against the appellants (collectively “Flitcraft”) for infringement of patent, infringement of copyright and passing off. At a hearing on 12 June 2019 Recorder Campbell QC (“the Recorder”) gave summary judgment in favour of Supawall on the patent and copyright infringement claims, but allowed the passing off claim to proceed to trial. Flitcraft appeal to this court, pursuant to permission which I granted, on the ground that the judge ought to have held that Flitcraft had a real prospect of defending both the patent and copyright claims, and on the further ground that the hearing involved a serious procedural irregularity. Flitcraft also seek the admission of new evidence on this appeal, which, they contend, would have had a material influence on the outcome of the application had it been available to adduce before the Recorder.
2. The issues in the patent and copyright infringement claims are narrow ones, related to whether Supawall has title to sue. In its most radical form, Flitcraft’s defence is that title to the patents and copyrights is vested in them by virtue of a series of assignments. If that defence fails, they contend that Supawall do not have title in any event, for reasons which I will have to explain in due course.

The pleaded cases

3. By its amended particulars of claim Supawall plead that “at all material times” the first respondent was the registered proprietor of United Kingdom Patents Nos. 2 415 714 and 2 436 989 (“the patents”), and that the second respondent was his exclusive licensee pursuant to a head licence agreement dated 14 October 2008, subsequently confirmed under another intellectual property licence dated 6 July 2018. The third respondent is alleged to be a non-exclusive licensee.
4. The amended particulars also allege that the first respondent is the proprietor of the artistic works shown in Appendices 3A, 3B and 3C to the pleading. These are photographs of certain buildings said to have been constructed by Supawall in around 2006 to 2008, and to have been used by Flitcraft in its promotional materials and on its website. The Appendix 3A and 3C works are said to have been created by the first respondent’s late father Anthony Price, who was a commercial photographer. The ownership of the copyright in these works is said to have passed to Anthony Price’s wife, Jean Mary Price (the first respondent’s mother) “by the inheritance of Mr Anthony Price’s estates in or about January 2015”. Jean Mary Price is then said to have assigned these copyrights to the first respondent by a deed of assignment dated 25 August 2015. Different particulars applied to the Appendix 3B works, but summary judgment was not pursued in respect of these, which were said to have been created by the first respondent himself in 1993. The Appendix 3B works can thus be safely ignored.

5. Flitcraft deny in their amended defence that the first respondent is the owner of the patents. They develop their positive case as to how the patents had become vested in the first appellant as follows:
 - 1) They admit that the first respondent had been *registered* as the proprietor of the patents from 26 January 2017 and that he purported to be the proprietor.
 - 2) They also admit that the first respondent had previously been the registered proprietor of the patents prior to 16 January 2012, on which date Mr Fred Bridge became the registered proprietor following an assignment recorded on the register dated 28 March 2011 (“the 2011 Bridge assignment”).
 - 3) They also admit that the first respondent’s re-registration as proprietor with effect from 26 January 2017 followed a *purported* assignment from Mr Bridge to the first respondent dated 14 July 2016 (“the 2016 Bridge assignment”).
 - 4) By the time of the 2016 Bridge assignment, however, ownership of the patents is said already to have been assigned and transferred to a company known as Flitcraft Eco Build Limited (“FEBL”), as follows. First, on an unknown date but prior to a company called Maple Timber Systems Limited (“MTS”) entering administration on 22 April 2014, the patents had passed, “by an assignment or other transfer” to MTS, which company was solely owned and controlled by Mr Bridge. Secondly, the patents passed from MTS to FEBL by an Asset Purchase Agreement dated 23 July 2014. Thirdly, they passed from FEBL to the first appellant by an Asset Purchase Agreement dated 29 March 2017.
6. Although not as clear as it might have been, on a fair reading of this pleading, it is being positively asserted by Flitcraft that Mr Bridge assigned or otherwise transferred the patents to MTS. As we shall see, this is how the pleading was interpreted by Supawall, and how it was explained to the Recorder by Flitcraft.
7. Flitcraft do not admit the terms and continued existence of the exclusive licence in favour of the second respondent, and assert that no licence has been granted in favour of the third respondent.
8. In paragraph 17 of the amended defence, Flitcraft pleaded the following alternative case:

“In the alternative, if, which is denied, the [first respondent] did not divest himself of the Patents ... as pleaded above, then in any event, such rights as the [first respondent] had in the Patents vested in his Trustee in Bankruptcy who was appointed with effect from 3 November 2011”.
9. Although not pleaded out in the amended defence, it appears that a petition for the first respondent’s bankruptcy was presented on 19 May 2011, and a bankruptcy order made on 27 July 2011. The Trustee in bankruptcy who was appointed in due course was a Mr Gordon Craig, whose evidence is the subject of the application to adduce fresh evidence before us.

10. In relation to the subsistence and ownership of copyright, Flitcraft pleaded:

“It is not admitted that the [first respondent] is the proprietor of the copyright in the Works as alleged or at all; the [appellants] have no knowledge of the [first respondent’s] claims, and any intellectual property in the matters complained of was acquired from [MTS], again as hereinafter set out.”

11. Flitcraft also pleaded that they believed from dealings with Mr Bridge that the first respondent transferred all his intellectual property rights to Mr Bridge at about the same time as the Patents were assigned to him (i.e. in 2011), and that Mr Bridge assigned and transferred such rights to MTS before 23 July 2014. In such circumstances, by virtue of the Asset Purchase Agreements dated 23 July 2014 and 29 March 2017, the copyright in the Appendix 3A to 3C works was assigned to FEBL and then to the first appellant. Paragraph 21 of the amended defence alleges that the activities of Flitcraft relied on as infringements of copyright were carried out in the belief “correctly held” that the first appellant owned the rights.

12. In their Reply, Supawall took issue with Flitcraft’s case as to successive assignments of the patents. It is clear that they understood that case as including the allegation that Mr Bridge assigned or otherwise transferred the patents to MTS (see e.g. paragraph 7(f) of the Reply). They asserted:

- 1) The first respondent was the proprietor of the patents from the date of their grant on 27 December 2007 to the date of the 2011 Bridge assignment, and again from the 2016 Bridge assignment to the present day.
- 2) Mr Bridge had been the proprietor of the patents, with notice of the exclusive licence to the second respondent, for the period 28 March 2011 to 14 July 2016.
- 3) The respondents had been unable to find a copy of the 2011 Bridge assignment, “since all their contracts and original paperwork were cleared out by others when they were temporarily evicted from their premises in February 2013.” They relied on the filed Patents Forms (Form 21) on which applications were made to the UK Intellectual Property Office (“UKIPO”) to register the assignments of each of the patents, to establish the fact of the assignment. The Form 21s were filed some 9 months after the date of the alleged assignment, on 16 January 2012.
- 4) In July and August 2013 the second respondent had written to Mr Bridge requesting payment of licence fees under a Supawall sub-licence and then to terminate the Supawall sub-licence granted to MTS.
- 5) The “minutes of FEBL” recorded on 1 June 2015 that “at present Fred [Bridge] owns the patents for Supa Wall – client to sort the issues regarding the patent”.
- 6) The 2016 Bridge assignment, a copy of which was made an appendix to the Reply, amounted to a declaration by Mr Bridge that he was indeed still the owner of the patent at its date.

- 7) In June 2015, the appellants had attempted to rectify the register at the UKIPO replacing Mr Bridge with the third appellant. The UKIPO requested further information, but Flitcraft did not respond.
13. On this basis, the respondents pleaded that it was to be inferred that the appellants knew that they were not the legal owners of the patents.
14. Paragraphs 14 and 15 of the Reply dealt with the copyright claim. These pointed out that at the date of the 2011 Bridge assignment the first respondent had not yet acquired any interest in the copyright (which he did not do until 25 August 2015). It followed that the copyright in the Appendix 3A and 3C works could not have been included in an assignment of all the first respondent's intellectual property rights at or about the time of the 2011 Bridge assignment.

Procedural history

15. Supawall made this application for summary judgment on 18 April 2019. The application notice sought "An order in the form attached ... for directions and summary judgment on the whole or part of the claim." In Box 10 of the application notice, which enquires "What information will you be relying on, in support of your application?", Supawall left unticked the boxes for "the attached witness statement" and "the statement of case". No witness statement was served with the application, and although particulars of claim had been served (and amended), the application notice did not notify Flitcraft that the particulars would be relied on in support of the summary judgment application. Instead, Supawall ticked the box entitled "the evidence set out in the box below". In that box one finds only this:

"This is an action for patent infringement, copyright infringement and passing off brought by the Claimants against a timber frame design and construction business referred to as the Flitcraft business. The application is for directions and for summary judgment. The evidence in respect of the part of the application concerning summary judgment will be filed shortly."
16. Despite that clear indication, no evidence at all was served by Supawall in support of their summary judgment application. Shortly before the hearing, however, both sides served skeleton arguments. Supawall's skeleton is dated 7 June 2019, the Friday before the hearing commenced on the following Wednesday. It pointed, at paragraph 11(a), to the fact that Flitcraft's defence was "lightly pleaded" and disclosed no "corroborating documents". It identified the issues in the claims as including proprietorship of the patents, and ownership of copyright in the Appendix 3A and 3C works. The skeleton dealt with ownership of the patents at paragraphs 23 to 37. At paragraph 29 the skeleton referred to the 2011 Bridge assignment, relying only on the Patents Forms 21 to establish its existence. It then referred to the 2016 Bridge assignment, and the fact that that assignment was recorded on the register on 26 January 2017. The skeleton then dealt with the appellants' case, which they took as including (see paragraph 31) the positive allegation that Mr Bridge assigned the patents to MTS. They pointed to the absence of any documentation to establish that assignment. Further, MTS was asserted to have been a former non-exclusive licensee

of the second respondent. Supawall also noted the lack of documentary support for the further assignments relied on by Flitcraft.

17. In paragraph 35 Supawall went on to assert that Flitcraft's position was contradicted by the contemporary documentation and other matters referred to in their Reply, which I have summarised above.
18. In relation to the copyright claim, Supawall's skeleton noted that Flitcraft's positive case depended on the same chain of title as their case on the patents. They submitted, therefore, that the parties were agreed as to the passing of title from Anthony Price to his wife and thereafter to the first respondent. Supawall then contended that "the fundamental difficulty and the reason why this point is suitable for summary judgment" was the fact that Flitcraft's case for owning the copyright depended on the copyrights being assigned in 2011 by the 2011 Bridge assignment, around four years before Anthony Price died, and whilst, at least on Supawall's case, the copyright remained vested in him.
19. Flitcraft's skeleton before the judge placed at its forefront Supawall's procedural failings in connection with their application for summary judgment. At paragraph 5, Flitcraft explained that the chain of title to the various rights in issue was complicated, "not least because [the first respondent] was declared bankrupt in 2011 and a trustee was appointed on 3 November 2011. A bankrupt's estate vests in the trustee ... There has also been at least one corporate insolvency." Having floated those points, Flitcraft then relied, at paragraph 7, on a chain of title to the patents from Mr Bridge to MTS to FEBL to the first appellant:

"[Flitcraft] say that at some point prior to 14 July 2016, [the first respondent]'s business partner, Mr Fred Bridge assigned the patents to [MTS.] MTS was incorporated and initially owned and controlled by [the first respondent] and Mr Neil Middleton (currently a director and shareholder in [the second respondent] and [the third respondent]. In 2011 Mr Bridge took over the ownership and running of MTS. MTS was placed into administration by Mr Bridge on 22 April 2014. A company controlled by [the third appellant] bought the assets of MTS, including its intellectual property, from its administrators on 23 July 2014. It assigned them to [the first appellant] on 29 March 2017."
20. This case therefore affirmed the validity of the 2011 Bridge assignment, and asserted that the patents then passed on from Mr Bridge to MTS, from MTS to FEBL and thence to the first appellant.
21. In relation to copyright Flitcraft said that they "require [Supawall] to prove the particulars of the creation of the copyright works and the chain of title to [the first respondent], but also aver that the rights were transferred under the assignments from MTS's administrators."
22. After this brief overview of the issues, Flitcraft returned to Supawall's procedural failings. At paragraph 23 they invited the court "to dismiss the application for want of procedural compliance alone". They went on to submit:

- 1) The dispute over ownership of the patents was factual and would turn on oral evidence and disclosure.
 - 2) Supawall had failed to evidence how the first respondent is alleged to own the copyright in the Appendix 3A and 3C works. There was no evidence of the creation of the works or any disclosure of the documents relating to the chain of title. “Even taken at their highest and ignoring the bankruptcy issues” Supawall had failed to evidence the creation or ownership of the copyright works.
23. Under the heading “Conclusion”, Flitcraft submitted, at paragraph 28, that the court should dismiss the summary judgment application. They went on to say, in paragraph 29, that, if the court determined that the defendants “prima facie have no real prospect of success” it would be wrong in principle to grant summary judgment given that Flitcraft “have not been fairly notified of [Supawall’s] grounds for summary judgment in accordance with the Rules”. They submitted that in these circumstances the only fair outcome would be for the hearing to be adjourned to allow Flitcraft to deal with the points on which Supawall had succeeded.
24. When the application was opened before the Recorder, events took the following course. The Recorder raised the question of the procedural failings (which he described as not filling in the form correctly) and the suggestion of adjournment. Counsel then instructed for Supawall drew attention to paragraph 29 of Flitcraft’s skeleton and submitted “we do not see... how evidence could possibly improve [Flitcraft’s] position”. The Recorder made it clear that he was not going to allow Flitcraft to have an adjournment to address points on which Supawall had succeeded: the hearing would either be adjourned or would go ahead. Counsel then instructed for Flitcraft made it clear that he was not asking the court to adjourn the application. He submitted, nevertheless, that if the court was satisfied that, but for the disclosure of a particular document by Flitcraft, summary judgment should be given, it would be appropriate to order a short adjournment to allow that document to be put in. On that basis the Recorder announced that he would not “adjourn generally”, but would bear in mind what counsel for Flitcraft had said.

The judgment of Recorder Campbell QC

25. The Recorder delivered his judgment in the afternoon of the day of the hearing. At paragraph 3 he dealt with the exchange which I have described above concerning Supawall’s failure to comply with the requirements for a summary judgment application:

“The application notice failed to comply with certain formal requirements under CPR Part 24 Practice Direction, as is now accepted by the claimants. At the outset of the hearing I explored how the parties wished to proceed. The claimants wanted the application for summary judgment heard. The defendants did not ask for the hearing to be adjourned generally. Instead, the defendants asked that I bear in mind the claimants’ lack of compliance with formalities in relation to the non-availability of specific documents. I do bear the lack of compliance with formalities in mind for that purpose.”

26. It is clear that the Recorder approached the case on the basis that Flitcraft were actively relying on Mr Bridge having been the owner of the patents pursuant to the 2011 Bridge assignment. At paragraph 12 the Recorder summarised the dispute in the following terms:

“So the dispute can be summarised as follows. The defendants’ case is that Mr Bridge during his period of ownership assigned ownership of the patents via the transfer [to MTS], and then there were two subsequent assignments. ... The claimants’ case is that none of these events happened ...”

27. At paragraph 13, the Recorder dealt with the absence of evidence in support of or in answer to the summary judgment. He said this:

“13. Somewhat unusually, no evidence was filed either in support of the application by the claimants or in answer to the application by the defendants. Nor was I shown any of the alleged documents referred to in paras.10.5 or 10.6 of the defence. When I asked [counsel for the defendants] why these documents had not been either annexed to the defence or served by way of initial disclosure, I was told this was a “mistake”. If this was simply a mistake at that stage, I have to say, even making all reasonable allowances, it still seems surprising to me that the defendants did not produce these documents in answer to the summary judgment application which was served on them almost two months ago.”

“14. So whilst I do bear in mind, as Mr Smith asked me to do, that the claimants did not tick the box in the application form saying they rely on the statement of case (among other defects) it is in my judgment clear that the defendants knew from April that summary judgment was being sought, and it is also clear to me that if the defendants wanted to rely on these documents to support their defence, they should have produced them for this hearing. They have failed to do that. The upshot is there is no documentary support for the defendants’ case as pleaded.”

28. The judge then conducted a review of such documentary material as was before him. The first was the administrator’s report to the creditors of FEBL dated 7 April 2017. That document recorded that FEBL was incorporated on 20 March 2014 and had purchased the business and assets of MTS in administration. The Recorder accepted that this supported Flitcraft’s case as to a transfer from MTS to FEBL, although the relevant assets transferred were not identified.

29. The same document also dealt in a separate section with the disposal of the assets of FEBL. The breakdown of the sale price of £40,000 included an entry “Business intellectual property rights of £500”. The judge commented at paragraph 22:

“Neither counsel was able to shed any light on what was meant by ‘business intellectual property rights’ in this document, although it seems to me this is something on which the director, Mr

Flitcroft, might have been able to shed some light. For instance was it the patents which were said to be worth only £500, and which the defendants say were owned by this company at the relevant time, or was it something else entirely? There is certainly no suggestion that valuable intellectual property (by which I mean, anything worth more than £500) was owned by this company or formed any part of its assets.”

30. Next, the judge referred to the minutes referred to in paragraph 7(f) of the Reply (referred to in paragraph 12(5) above) which contained the remark “At present Fred [Bridge] owns the patents...” The judge considered this to be a clear statement in support of Supawall’s case. The judge again commented on the lack of evidence from Mr Flitcroft as to what else this statement might mean. Counsel for Flitcraft submitted that the remark might be a reference to Mr Bridge’s company MTS. The Recorder’s answer was:

“... all I can say is that the document does not say so. Furthermore, even if it did mean ‘Mr Bridge’s company’ it is not clear to me what company that would have been at that time.”

31. Next the judge dealt with a series of emails between Mr Neil Middleton, the commercial manager of the second respondent, and Marks & Clerk, patent and trademark attorneys. Mr Middleton’s email referred to events in March 2011 when, he said:

“In March 2011, various documents were signed transferring the IP to a company which was to be jointly owned by Phillip and David Rich Jones. At the same time, he signed transfer forms for shares giving DRJ an equal shareholding in the new company. This was part of a worldwide roll-out of the Supawall product and its derivatives. This was done on the strength of signing Walker Timber, the UK’s largest timber frame manufacturer, as a licensee with four factories nationwide. In the event this deal fell through, mainly because of the machinations of Brian Woodley and Bob Edwards of Scotframe. None of these agreements or share transfers have been registered or notices placed on the various registers and we do not have any signed copies in our possession, only drafts. Would it be possible for DRJ or his solicitors to try and register these now?”

32. The email goes on to say that when the commercial deal fell through, the first respondent assigned the IP to Mr Bridge, and commented:

“As you can see the situation is not straightforward...”

33. The Recorder said that this email did seem to him to raise the possibility of the patents being transferred to a third-party company. That, he thought, might have raised a triable issue, even though not pleaded by Flitcraft. Counsel for Flitcraft had, however, explained that this was not his case. Instead, counsel had relied on this exchange to show a propensity on the part of Supawall to enter into assignments

transferring the IP to various parties. The Recorder rejected this submission and continued:

“In fact if one disregards the reference in the first line to various documents being signed transferring the IP to a company which was to be jointly owned, all it shows is what the claimants say actually did happen, i.e. the transfer to Mr Bridge in March 2011, which was subsequently registered in, I believe, December of that year.”

34. The judge then noted that the first time Supawall knew that Flitcraft were going to rely on this document was either during the hearing or from Flitcraft’s skeleton. Again the judge referred to the absence of evidence from Mr Flitcroft to explain the relevance, context or background of this email.
35. Finally the Recorder referred to the attempt by Flitcraft to rectify the register (referred to in paragraph 12(7) above). In the absence of evidence from Mr Flitcroft, he did not think that the attempt took matters very far.
36. The Recorder concluded as follows in relation to the patents at paragraphs 34 to 37:

“34. So the position is that there is no documentation to support the defendants’ case as regards the three alleged assignments on which it relies, or indeed any of them; and all the contemporaneous documentation which I was shown supports the claimants’ case. Of course, I have to take into account not only the evidence actually placed before me but also the evidence that can reasonably be expected to be available at trial. The difficulty here as I see it for the defendants, is that the defendants invite me to assume that the documentation on which they rely will be available at trial, when that documentation is not available now, has not been supplied at any time since the defence, or indeed since the issue of the application for summary judgment; and I have been given no obvious reason as to why I have not been supplied with any of that documentation, assuming it exists.

35. In so far as the extra material might be evidence from Mr Flitcroft himself to put these documents into context, again it is not obvious why that evidence is not before the court now. Otherwise, the defendants’ submission that there is clearly additional material available seems to be no more than speculation to suppose that something will turn up to support their pleaded defence.

36. I do bear in mind that the defence was supported by in fact four different statements of truth. However, it was not suggested by the claimants, and, in my judgment, it does not mean, that the application for summary judgment automatically fails for that reason alone. I accept that those signing the statement of truth

may honestly believe in their defence, and the contrary was not suggested by the claimants.

37. I return to the legal test. For the reasons set out above, but particularly (a) the lack of documentation, or any evidence other than the pleading, to support the defendants' case, and (b) the contemporaneous documentation, to which I have referred, supporting the claimants' case, I conclude that the defendants do not have a real prospect of successfully defending the patent claim, and I should, therefore, grant summary judgment for the claimants."

37. The Recorder dealt with the copyright claim at paragraphs 38 to 49 of his judgment. He held that the reference in paragraph 21 of the defence to the belief that the relevant acts of infringement were carried out in the belief "correctly held" that the relevant rights were vested in the first appellant meant that the appellants accepted that intellectual property rights did subsist in the photographs in question, and claimed they were owned by the first appellant. It followed that the only issue was that of title. He concluded at paragraph 46 that the appellants' claim relied on the same assignments as they relied upon in relation to the patents, and that their claim could be no better than it was in relation to the patents. In fact it was worse, because of the timing the first respondent did not acquire the copyrights in the Appendix 3A and 3C works until after the time of the 2011 Bridge assignment.

The appeal

38. The grounds of appeal are, in summary, the following:
- 1) The Recorder was wrong to hold that Flitcraft had no real prospect of showing that the patents and/or copyright works in issue had been assigned to the first appellant.
 - 2) The decision of the Recorder that Supawall were entitled to summary judgment on the issue of patent infringement was wrong.
 - 3) The decision of the Recorder that Supawall were entitled to summary judgment on the issue of copyright infringement was wrong.
 - 4) Supawall's failures to comply with the mandatory provisions of Part 24, and the Recorder's failure to give proper consideration to the consequences of those failures meant that the decisions of the Recorder were unjust because of a serious procedural irregularity. He should have considered that any lack of evidence to support the appellants' case was a direct consequence of those failures. He should have either dismissed the application or permitted the Appellants to file evidence supporting their case on the issues where the Recorder considered that Supawall had established a *prima facie* case for summary judgment.
 - 5) In view of the further evidence, there ought to be a re-hearing of the application.

Relevant legal principles

39. There was no real dispute before us as to the correct legal approach to an application for summary judgment. The principles are summarised in a now well-known passage in the judgment of Lewison J (as he was then) in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) at [15]:

“(i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;

ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is

quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

40. Those principles are stated in terms appropriate to an application to strike out a claim; but they apply *mutatis mutandis* to an application for summary judgment by a claimant. Of particular importance in this case are the principles set out at paragraphs 15 (v) and (vi).
41. The CPR contains rules and practice directions which serve the important function of ensuring fairness of the summary judgment procedure. Thus CPR 24.4(3) provides that a respondent must be given proper notice of the application and the issues which the court will be asked to decide:

“Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court’s own initiative) must be given at least 14 days’ notice of—

 - (a) the date fixed for the hearing; and
 - (b) the issues which it is proposed that the court will decide at the hearing.”
42. Paragraph 2 of the practice direction supplementing Part 24 provides, so far as material, as follows:

“(2) The application notice must include a statement that it is an application for summary judgment made under Part 24.

(3) The application notice or the evidence contained or referred to in it or served with it must—

 - (a) identify concisely any point of law or provision in a document on which the applicant relies, and/or
 - (b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of

successfully defending the claim or issue to which the application relates,

and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

(4) Unless the application notice itself contains all the evidence (if any) on which the applicant relies, the application notice should identify the written evidence on which the applicant relies. This does not affect the applicant's right to file further evidence under rule 24.5(2).

(5) The application notice should draw the attention of the respondent to rule 24.5(1)."

43. Rule 24.5(1) requires a respondent who wishes to rely on written evidence at the hearing, to file that written evidence and serve copies on every other party to the application at least 7 days before the summary judgment hearing. Thus in an idealised case, a claimant can issue and serve an application for summary judgment to be heard in 14 days' time. The defendant must serve his evidence 7 days before the hearing, and the claimant must serve any evidence in reply at least 3 days before the hearing. If all this is done, the hearing can go ahead on the appointed day. The overall object of the rules and practice direction taken together is to ensure a fair hearing of the summary judgment application within a short time scale. The procedural safeguards, such as requiring notice of the rule under which the application is brought, identification of issues and/or a statement in the application notice or the evidence referred to in it that the applicant believes that the respondent has no real prospect of successfully defending the claim or issue are important protections aimed at ensuring that the overall procedure is fair.
44. The Court of Appeal has a discretionary power to admit further evidence on an appeal: CPR 52.21(2)(b). The criteria formerly applied under the Rules of the Supreme Court to the admission of further evidence, based on the judgment of Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489, continue to be highly relevant, although the court must, first and foremost, give effect to the overriding objective of doing justice at proportionate cost. The criteria are: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible. In *Terluk v Berezovsky* [2011] EWCA Civ 1534 Laws LJ (with whom Morritt Ch and Rafferty J agreed) summarised the approach in this way at [32]:

"The impact of the CPR on the established approach set out in *Ladd v Marshall* has been considered in a number of cases. It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice (see for example *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 per Hale LJ as she then was at paragraph 35, *Sharab v Al-Sud* [2009] EWCA Civ 353 per Richards LJ at paragraph 52). The *Ladd v Marshall* criteria remain important

(‘powerful persuasive authority’) but do not place the court in a straitjacket (*Hamilton v Al-Fayed* (No 4) [2001] EMLR 15 per Lord Phillips MR as he then was at paragraph 11). The learning shows, in my judgment, that the *Ladd v Marshall* criteria are no longer primary rules, effectively constitutive of the court’s power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence.”

45. On an appeal from an interim judgment or order, as opposed to an appeal after a trial on the merits, the same criteria fall to be applied, but with appropriate modification to recognise the different nature of the proceeding at first instance. In *Aylwen v Taylor Joynson Garrett* [2001] EWCA Civ 1171 at [48] Arden LJ (as she was then) said with the agreement of Peter Gibson and Maurice Kay LJ at [48] to [49]:

“48. I remind myself of the old Rules of the Supreme Court. The question of the *Ladd v Marshall* principles in relation to summary judgment was considered by the House of Lords in *Langdale v Danby* [1982] 1 WLR 1123 ... In that case the Court of Appeal set aside a judgment under Order 86 ... on the basis of evidence adduced for the first time in the Court of Appeal. The House of Lords held that the principles in *Ladd v Marshall* should have been applied. Lord Bridge, with whom the other members of the House agreed, held that:

‘In the situation arising on an appeal to the House of Lords from a summary judgment the application of these conditions, and perhaps the conditions themselves, will require some modification. It may well be that the standard of diligence required of the defendant preparing his case in opposition to a summons for summary judgment, especially if under pressure of time, would not be so high as that required in preparing for trial. The second and third conditions will no doubt be satisfied if the further evidence tendered is sufficient, according to the ordinary principles applied on applications for summary judgment to raise a triable issue. But I see no injustice at all in requiring the defendant to use such diligence as is reasonable in the circumstances to put before the judge on the hearing of the summons, albeit in summary form, all the evidence he relies on in defence; whereas it would be a great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which was readily available at the hearing of the summons but which was not produced.’

49. ... It seems to me that a similar approach should apply to the reception of fresh evidence on applications under CPR 3.4

and 24.1 as now apply to other appeals (see *Hertfordshire Investment v Bubb*), respecting of course the type of difference in application of the principles to which Lord Bridge referred in *Langdale v Danby*...”

46. I would summarise this as follows. Subject always to the overriding objective, (1) the evidence must not have been readily available for use at the interim hearing, or easily made so available; (2) the standard of diligence expected of the applicant in seeking out evidence to support its case is that which is reasonable in the circumstances, which may not be as exacting as the “reasonable diligence” standard applied after a trial; and (3) the evidence must be such that, if given, it would, taken with the existing evidence, raise a triable issue.
47. The rules as to raising new points on appeal after a trial on the merits are strict: for a recent summary see per Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [16] to [18]. The court is in the highest degree reluctant to allow fresh arguments to be deployed after a trial when the effect may be to require fresh evidence to be adduced in response, or if, had the point been run below, it would have caused the trial to take a different course. The rule is an aspect of the finality principle, and the trial is intended to be a final determination of the parties’ rights. Where, in contrast, the issue is whether a party has a realistic prospect of succeeding in or defending a claim at a trial at some point in the future, the same strict approach is not necessitated. There is a hint of this in *Aylwen v Taylor Joynson Garrett* (cited above) where Arden LJ accepted at [49] that the modified approach to the admission of further evidence on interim appeals applied equally to amendments to statements of case adduced for the first time in the Court of Appeal to avert the unfavourable outcome of an application to dismiss a claim under CPR 24.2.

Ground 5 and the application to adduce further evidence

48. The further evidence consists of an affidavit (and further clarifying witness statement) of Mr Gordon Craig. Mr Craig was:
1. appointed administrator on 13 May 2011 of the partnership Maple Timber Frames of Langley, a partnership of the first respondent, Mr Neil Middleton and ECH Limited (“the Maple Partnership”);
 2. appointed trustee in bankruptcy of the first respondent on 3 November 2011, following the bankruptcy order made against the first respondent dated 27 July 2011 on the petition of Her Majesty’s Revenue and Customs Commissioners presented on 19 May 2011;
 3. appointed trustee in bankruptcy of Mr Middleton, the first respondent’s partner in the Maple Partnership, on 4 November 2011; and
 4. appointed administrator of MTS on 22 April 2014.
49. Mr Craig relates his understanding that the patents were held in the name of the first respondent, but asserts that they were so held on trust for the Maple Partnership. In his role as administrator (or perhaps prospective administrator) of the Maple Partnership he discovered that the patents were the subject of a charge in favour of

North West Transitional Loan Investment Fund as security for a loan advanced to the Maple Partnership. Although much was made of this loan and the corresponding charge in Mr Craig's evidence, the appellants did not explain in what manner this transaction assisted their case.

50. Mr Craig explains that MTS was a dormant company of which the first respondent and Mr Middleton were directors. They resigned as directors in April 2011, and were replaced by Mr Bridge and a Mr Brian Hayman. Thereafter Mr Craig states that he granted MTS a licence under the patents whilst the administration was ongoing, and then, in about October 2013 "negotiated an agreement whereby the patents and other assets deriving from the Maple Partnership could be sold to MTS for a total sum of about £85,000." In March 2014, however, Mr Craig says he was approached by Fred Bridge saying that MTS was in financial difficulties and could not pay the agreed purchase price. According to Mr Craig this meant that the assets, including the patents, reverted back to him. Mr Craig then says that, having been appointed administrator of MTS on 29 April 2014, he sold the assets of MTS, including, he says, the patents, to FEBL. He also relates that his partner, Peter Harold, acted as administrator of FEBL and that, as part of the administration, the assets of FEBL including, he says, the patents, were sold to the first respondent.
51. Mr Craig explains that he found out about the 2011 Bridge assignment when acting as the first respondent's trustee in bankruptcy in February 2012. The discovery caused him to make enquiries of both the first respondent and Mr Bridge. In an email dated 15 August 2012 the first respondent responds:

"Fred Bridge has been a friend for many years...

I was required by the official receiver to resign my directorships, this I did. Fred Bridge bought the goodwill of the partnership from Gordon Craig the administrator, not the goodwill of a dormant company. Mr Bridge was keen to keep the brand and the company used by him to do this was Maple Timber Systems Ltd., which had been dormant until this point..."

52. Under the heading "Intellectual Property Rights", the email continues:

"This is a complicated subject but there has never been any intention to deceive. I was the patent holder for a product I invented in 2003 and this product Supawall[®] is licensed through the company Supawall Limited to other Timber Frame manufacturers. Supawall Limited holds the UK license for the product. Supawall limited was formed in 2008 specifically to act as the UK licensor. Supawall[®] sells chemicals which form part of the process of manufacture of the Supawall[®] panel. The company initially experienced some success and at one point had five licensees. I wanted to bring the product to an international market and to this end approached investors to invest in shares in the business. After I secured an initial investor who bought an interest in 2009, what followed was a

long protracted negotiation and in March 2011 a further two investors bought the rest of my interest.”

53. One might infer from this account by the first respondent that the first respondent disposed of his interest in the patents to investors in March 2011, rather than to Mr Bridge.
54. Mr Craig also states that in May 2013 McLoughlin & Law, solicitors acting for him as the first respondent’s trustee in bankruptcy, received a telephone call from Verras Law, Jersey solicitors acting for a David Rich Jones and Lightpeak Limited, a company of which Mr Rich Jones was a shareholder and managing director. Verras Law asserted that the patents had been assigned to their client as part of a funding deal on 22 March 2011. McLoughlin & Law asked for this claim to be set out in writing. Verras Law responded by a letter dated 7 June 2013 in which they asserted that their client had met with the first respondent in April 2013. At that meeting Mr Rich Jones had asserted, amongst other things, Lightpeak’s right to certain intellectual property pursuant to a deed of assignment. A copy of the deed was attached to the letter, and carries the signatures of both the first respondent and Mr Rich Jones. The deed is undated, but the letter states that it was executed on 22 March 2011. The deed is expressed to be made between the first respondent and “Supawall Group Limited ... formerly Lightpeak Limited”. The patents are included, by Part 1 of Schedule 1, in the intellectual property apparently assigned by this deed. I will refer to this deed as “the Lightpeak assignment”, without implying anything as to its effectiveness. It is plausible that the Lightpeak assignment is the disposal to which the first respondent refers in his August email quoted in paragraphs 51 and 52 above.
55. The enquiries of Mr Bridge included, in February 2013, a request for an explanation of the assignment of the patents to him. It is fair to say that by this time it appears that the first respondent and Mr Bridge were not on good terms, but Mr Bridge’s concise response was:

“The patents transferred to me presumably to avoid his creditors”.
56. Turning to the copyright claim, Mr Craig suggests that the copyright works relied on were used by MTS in their brochures. He goes on to say that he does not accept the claim that the copyright vested in Anthony Price and then passed to the first respondent. During the administration of the Maple Partnership the first respondent and Mr Middleton did not raise the suggestion that these copyrights belonged to anyone other than the Maple Partnership. He goes on to record that the accounts of the Maple Partnership contained multiple entries of payments to Anthony Price, and that the copyrights in the photographs would have transferred to the Maple partnership at the time of payment. Accordingly Mr Craig maintains that the copyright passed from the Maple Partnership, and then followed the same chain of title as the patents, ending up with the first appellant.
57. Mr Craig explains that “from about October/November 2018” he was contacted by the third appellant who invited him to provide evidence and disclosure in respect of the present claim. He says that “due to my illness and my condition, I was unable to become involved and refused to do so”. In April 2018 he was involved in a car crash causing him to be off work for a month. Thereafter in June 2018 his business Refresh

Recovery Limited, collapsed. The collapse of his business had consequences for his health. He says that he has only started to re-integrate himself into work and business since May/June 2019.

Ground 5: Should the further evidence be admitted?

58. Mr Pritchard, who appeared on the appeal for Supawall, submitted that the further evidence should not be admitted because Flitcraft could have obtained the evidence for the hearing before the Recorder. Flitcraft had contemplated that Mr Craig's evidence might be relevant no later than January 2019 when their solicitor had made a witness statement saying that Flitcraft were considering raising a defence based on a failure to disclose ownership of the patents to the first respondent's trustee in bankruptcy. There was no evidence of the efforts made by Flitcraft's solicitors to "chase" Mr Craig between this date and the date of the summary judgment application. They had not, therefore, used reasonable diligence to obtain the evidence for the summary judgment application.
59. Mr Pritchard submitted further that, insofar as the further evidence concerned the Lightpeak assignment, the point is one which had not been pleaded by Flitcraft, and which Flitcraft had stated was not part of their case in the hearing before the Recorder. Furthermore, Flitcraft had conceded that the patents had been assigned from the first respondent to Mr Bridge by the 2011 Bridge assignment. Mr Craig's evidence was therefore either wrong or inconsistent with the pleaded case.
60. Finally Mr Pritchard submitted that the evidence of Mr Craig, taken as a whole would not have had an important influence on the outcome, because it provided no documents which materially supported Flitcraft's case, was confused and unconvincing and did not undermine the contemporaneous documents which were before the judge. Whilst expressing reservations about it, Mr Pritchard did not suggest at this stage that Mr Craig's evidence was not such as should be believed.
61. I take first the question of whether the evidence of Mr Craig could easily have been obtained for use at the hearing. In my judgment, it could not. It is clear that Mr Craig's evidence was not readily available to be deployed at the hearing, and I am not persuaded that it could have been easily obtained, given Mr Craig's evidence as to the problems he was encountering until May/June of 2019. Had the plaintiff's solicitors "chased" Mr Craig between January and May of 2019 it is reasonable to assume that he would have replied that he was unable to help them.
62. It is true that it is possible that enquiries of parties other than Mr Craig might have revealed more about the Lightpeak assignment. There is, however, no reason to assume that those parties would have co-operated. I am not persuaded that alternative evidence about the assignment would have been readily or easily available to be deployed at the hearing.
63. The procedural deficiencies of the summary judgment application are also material to the exercise of the court's discretion to admit the evidence. Supawall's application notice did not explain which specific issues Supawall was going to ask the court to decide. It did not give notice that they believed that Flitcraft had no prospect of defending themselves on those issues. It did not indicate that reliance would be placed on the amended particulars of claim or reply to prove their case (which they

subsequently did at the hearing). Instead, it indicated that evidence in support would be served by them (but they did not serve any). In those circumstances, criticism of the efforts made by Flitcraft to prepare their evidence seems to me to be misplaced.

64. Of more substance are Mr Pritchard's points that the evidence is not consistent with the existing pleadings and the case as it was presented to the Recorder. The existing pleadings appear to accept that the 2011 Bridge assignment was effective to transfer the patents to Mr Bridge, and this is certainly the way in which the case was presented to the Recorder. Yet if the Lightpeak assignment was effective, then the 2011 Bridge assignment 6 days later cannot have conveyed the patents. Moreover the 2011 Bridge assignment formed the first stage in Flitcraft's chain of title. Its validity is therefore, at least on the pleadings as they stand, common ground.
65. Mr Maynard-Connor, who appeared on the appeal for Flitcraft, accepted that Mr Craig's evidence necessitated amendments to Flitcraft's defence, but did not make clear at the hearing what form those amendments would take. We considered this state of affairs to be unsatisfactory, and invited him to provide a draft amended pleading to make clear how Flitcraft's case would fit together in reliance on Mr Craig's evidence.
66. The draft re-re-amended defence alleges that:
 - 1) Prior to March 2011 the first respondent held the patents on trust for the Maple Partnership which was sole equitable owner of all rights in the patents. The first respondent was a partner in the Maple Partnership: paragraph 10.3.1.1;
 - 2) On 22 March 2011, by the Lightpeak assignment, the first respondent assigned all his right title and interest in the patents to Lightpeak Limited: paragraph 10.3.1.2;
 - 3) Thereafter, Mr Craig, as Administrator of the Maple Partnership, caused all its rights in the patents to be assigned to MTS by way of an asset sale agreement entered into in or about October 2013: paragraph 10.3.1.3;
 - 4) MTS's rights were subsequently assigned from MTS to FEBL by an Asset Purchase Agreement dated 23 July 2014: paragraph 10.5.2;
 - 5) FEBL then transferred ownership of the patents to the first appellant by an Asset Purchase Agreement dated 29 March 2017: paragraph 10.6.
67. The pleading goes on to explain "for the avoidance of doubt" that Flitcraft's primary case is that the Lightpeak assignment did not result in a valid and effective transfer of the rights in the patents held by the Maple Partnership, which rights remained vested in the Maple Partnership until transferred to MTS: paragraph 10.6A.1. It continues (see paragraph 10.6A.2) by asserting that Flitcraft "no longer admit" that the 2011 Bridge assignment was entered into, or entered into on any date before the commencement of the first respondent's bankruptcy. They allege that it is to be inferred that either no such assignment was entered into, or alternatively that it was entered into after the Lightpeak Assignment and after the relevant bankruptcy petition was presented. In that case the 2011 Bridge assignment was either of no effect

(because the rights had already been disposed of to Lightpeak) or it was void pursuant to section 284 of the Insolvency Act 1986: paragraph 10.6A.2.1 and 10.6A.2.2.

68. Flitcraft's primary case is therefore that it owns the patents. That case depends on the trust in favour of the Maple Partnership, allowing the beneficial interest in the patents to pass down the chain of assignments to the first appellant. It no longer relies on the 2011 Bridge assignment. Their alternative case accepts that if the trust does not exist, then the rights to the patents are not owned by Flitcraft. However, in those circumstances they contend that the rights are either owned by Lightpeak or vested in the first respondent's trustee in bankruptcy, and have not re-vested in the first respondent: paragraph 10.6B.
69. The amendments to the defence also embrace the copyright claim. These now point to the fact that (a) the respondents have not produced Anthony Price's will or any subsequent assent or assignment relied on between the executor of his estate and Jean Mary Price, or the assignment alleged to have been entered into between Jean Mary Price and the first respondent; and (b) Anthony Price was paid by the Maple Partnership in respect of the services provided to it, and any copyright in the Appendix A and C Works was owned by the Maple Partnership and subsequently passed to the first appellant by the various assignments pleaded in respect of the patents.
70. The primary case now presented is significantly different from that presented in the pleadings as they stood at the time of the hearing before the Recorder. Instead of tracing the title to the patents and copyright from the first respondent via Mr Bridge to MTS, it is asserted that the beneficial ownership of these rights vested in the Maple Partnership, and passed from there to MTS without the involvement of Mr Bridge.
71. I am entirely satisfied that Flitcraft's secondary case in relation to the patents, as now explained in the draft amended pleading and supported by the fresh evidence, raises a triable defence. On its face, the Lightpeak assignment appears to dispose of the patents, and the documentary material produced by Mr Craig suggests that it did so before the date of the 2011 Bridge assignment. Mr Pritchard suggested that the Lightpeak assignment had been executed but not delivered. That may turn out to be the case, but there are a number of pointers in the opposite direction. First, Mr Middleton writing to the patent attorneys in June 2012 thought that the possibility that the patents had been transferred to Lightpeak was sufficiently serious to justify taking advice and described the situation as "not straightforward". Secondly, the first respondent's August 2012 email to his trustee in bankruptcy may suggest that the Lightpeak assignment had been effective to dispose of the patents. Thirdly, the attempts by Lightpeak and its solicitors in 2013 to enforce the transfer suggest that Lightpeak did not think that the assignment was ineffective.
72. It is true that the use made of what Flitcraft knew of the Lightpeak transaction at the hearing before the Recorder was different. At that stage they did not have the executed assignment, and were unaware that attempts had been made to rely on it in 2013. The further evidence has strengthened the case in support of the effectiveness of the Lightpeak assignment. I do not think it would be right, at the interim stage, to hold Flitcraft to the attitude which they took at the interim hearing.

73. There are also serious grounds to doubt whether the 2011 Bridge assignment existed or was made on 28 March 2011. It is true that section 32(9) of the Patents Act 1977 allows Supawall to rely on the fact of registration as “*prima facie* evidence” of an assignment. The 2011 Bridge assignment is, however, said to have been dated only 6 days after the Lightpeak assignment. It is of course conceivable that in those 6 days Supawall decided not to proceed with the Lightpeak transaction, but, again, there are indications the other way. For example, Mr Middleton’s June 2012 email to the patent attorneys is not obviously reconcilable with this as it suggests that it was subsequent commercial developments which removed the basis for the Lightpeak transaction, resulting in the assignment to Mr Bridge. This seems a lot to have happened in the 6 days between the two assignments. Further, Supawall have not, thus far, been able to produce a copy of the 2011 Bridge assignment, or any secondary evidence of it apart from the Forms 21 filed much later at the UKIPO. The circumstances plainly warrant investigation, and Flitcraft cannot be said not to have a real prospect of successfully defending the action, notwithstanding the effect of section 32(9).

74. For completeness I should say that the answer offered by Mr Middleton in a witness statement, which I would admit in response to the further evidence, does not fully explain matters. He says:

“I am aware that the [Lightpeak] agreement might have been signed but in the event it was not acted upon. Lightpeak didn’t take any interest in pursuing the agreement post-bankruptcy and further, made no attempt to register any interest at the patent office. As far as we are concerned no one considered it was still operational.”

Mr Price was not adjudicated bankrupt until 27 July 2011 on a petition dated 19 May 2011. If Lightpeak did not lose interest until either of those dates, there is at least a suggestion that the assignment to Mr Bridge must be later, or did not occur at all.

75. Flitcraft’s primary case based on the patents being held in trust for the Maple Partnership has less promising underpinnings. The assertion of a trust in the amended pleading is based entirely on Mr Craig’s evidence, but Mr Craig does not explain with any particularity how he says the trust arose. It faces a number of difficulties. For example, the patents were granted in 2007. Did the partnership exist at that time and, if not, how did the patents become partnership property? Moreover, the first respondent licensed the patents in 2008 to the second respondent. Again, it is not clear whether the partnership existed at that time. If it did exist, then it is surprising that, as beneficial owner, it was not a party to the licence. If it did not exist, then, again, it is not clear how the patents came, subsequently, to be its beneficial property. There is also a substantial question surrounding the circumstances of the abortive sale to MTS. If the patents reverted to Mr Craig at that stage, as he says they did, were they part of the sale of MTS’s assets to FEBL?

76. Whilst I have pointed out the difficulties still faced by Flitcraft’s primary case in relation to the patents as advanced in the draft re-re-amended defence, even with the benefit of the further evidence, I am, by a narrow margin, nonetheless persuaded that there is a further triable issue here. Whilst it may appear unpromising at the moment,

we must have in mind that the full facts have yet to be investigated at a trial. The primary case is, at least in outline, supported by the evidence of Mr Craig.

77. Turning to the copyright claim, the further evidence now available to Flitcraft enables them to allege that the Maple Partnership acquired the beneficial ownership of the copyrights by virtue of having paid for their creation. It is well settled that, depending on the circumstances, a person who commissions a work by paying for its creation may acquire an equitable title to the copyright.¹ Whether the circumstances are such as to give rise to beneficial ownership, as opposed, for example, to a licence, is an issue which cannot be satisfactorily determined at this stage. The further evidence raises a triable issue in relation to copyright as well.
78. I would therefore admit the further evidence, and allow the appellants to re-re-amend the defence to advance the cases supported by that evidence.

Grounds 1 and 3: should the judge have granted summary judgment in relation to copyright?

79. I have held, when considering the admission of the fresh evidence, that the appellants have a real prospect of succeeding in their defence that beneficial ownership of such copyright as is shown to subsist in the Appendix 3A and 3C works was assigned from the Maple Partnership to the first appellant. That defence is not vulnerable to the principal point taken by Supawall before the judge, because it no longer relies on an assignment from the first respondent to Mr Bridge or from Mr Bridge to MTS. It is therefore no answer to say that the assignment to Mr Bridge predates the first respondent's acquisition of any interest in the copyright.
80. It is worth noting at this stage that, at trial, it will be necessary to investigate the chain of assignments relied on by Flitcraft, from the Maple Partnership, via MTS and FEBL, to the first appellant.
81. A further aspect of Flitcraft's stance in relation to the copyright claim was to point out that they had no knowledge of the events said to have resulted in the origination of the Appendix 3A and 3C works or the transfer of the copyright in those works from the first respondent's father, then to his mother and then by assignment to the first respondent. They put Supawall on notice that they required these matters to be proved. They might, therefore, reasonably have expected Supawall to support their summary judgment application with evidence as to these matters, but no such evidence was forthcoming.
82. The Recorder thought that the fact that Flitcraft had pleaded that they "correctly" believed that they owned all relevant rights meant that they accepted that copyright subsisted in the works. I accept that one might reach that conclusion reading paragraph 21 of the amended defence in isolation, but such a reading cannot be reconciled with the earlier part of the pleading. In my judgment, reading the pleading as a whole, the second part of Flitcraft's defence is pleaded on the assumption that Supawall are able to establish the subsistence of copyright. Furthermore, I do not see how Flitcraft can be taken to have admitted that the title to the copyright got as far as the first respondent, when the matters on which reliance is placed were simply not within Flitcraft's knowledge, as they had expressly pleaded. Again, the second part of

¹ See e.g. *Copinger and Skone James on Copyright* 17th Edn (2016) paragraphs 5-182 and following.

Flitcraft's defence must be pleaded on the assumption that Supawall is able to establish that the copyright passed in the way alleged from the first respondent's father, to his mother and then to him.

83. It follows that I would in any event have allowed the appeal in relation to this further aspect of Flitcraft's defence to the copyright claim.

Grounds 1 and 2: should the Recorder have given summary judgment on the patents?

84. I have concluded, when considering the admission of the fresh evidence, that Flitcraft has a real prospect of successfully defending the first respondent's claim to ownership of the patents on the basis of its case as now pleaded, supported by the further evidence. That means that Supawall cannot obtain summary judgment on their patent claim. There is no purpose in examining further whether the judge was entitled to reach the conclusion he did on the evidence which was available to him at that stage, particularly as the case is now put in a different way.

Ground 4: Serious procedural irregularity?

85. In the light of my decision to admit the further evidence, it is not necessary to consider this ground. I cannot leave this part of the case, however, without commenting on some aspects of the way in which the application proceeded in front of the Recorder.
86. The application for summary judgment made by Supawall did not comply with the mandatory procedural requirements for such applications. With respect to the Recorder, these procedural safeguards in the rule and practice direction are not "formal requirements" or "formalities" if by that it is intended to detract from their critical importance for ensuring a fair hearing of the application. The requirement to state in the application notice (or in the evidence contained or referred to in it) that it is made because the applicant believes that on the evidence the respondent has no real prospect of successfully defending the claim is an important one. It prevents a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise. In the present case I doubt that Supawall could have made such a statement when (a) the first respondent in his August 2012 email had described the ownership of the IP as "a complicated subject"; and (b) Mr Middleton had described the same question as "not straightforward".
87. The way in which the Recorder agreed to compensate for the breaches of the practice direction was "to bear in mind the [respondents'] lack of compliance with formalities in relation to the non-availability of specific documents". However, the Recorder went on to grant summary judgment, notwithstanding the issues of fact on the pleadings, because "there was no documentation to support the [appellants'] case as regards the three assignments on which it relies." Given the way in which the matter was brought before the court in breach of the important procedural safeguards, I do not think the Recorder was justified in criticising the absence of documentation. He went on to criticise the absence of evidence from the third appellant to put the documents into context. In circumstances where the application was brought in breach of the rules, without any evidence in support from Supawall, and where Flitcraft had only agreed to the hearing proceeding on the basis that they would not be

penalised for failing to produce documents, that does not seem to me to have been a fair point.

Conclusion

88. For the reasons I have given, I would admit the further evidence, give permission for the re-re-amendments to the defence in the draft provided to the court and allow the appeal.

Lord Justice David Richards:

89. I agree.

Lord Justice Patten:

90. I also agree.