

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT (Ch.D)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL
Date: 1 April 2022

Before: John Kimbell QC, sitting as a Deputy High Court Judge

B E T W E E N:

(1) PHOTOBOTH PROPS LIMITED
(2) LILY'S PRINTS LIMITED

Claimants

- and -

(1) NEPBH LIMITED
(2) QUINN UK HOLDINGS LIMITED
(3) CLAIRE QUINN
(4) REECE QUINN
(5) MICHAEL QUINN
(6) YOUR PRINT SUPPLIES LIMITED
(7) YOUR PHOTOBOTH PROPS LIMITED
(8) MICHAEL CONNOR QUINN

Defendants

Stefanie Wickenden, instructed by **McDaniels & Co.**, for the Claimants
Jonathan Rodger, instructed by **Sintons LLP**, for the Defendants

Hearing date 24 February 2022

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Friday 1 April 2022

John Kimbell QC sitting as a Deputy High Court Judge:

Introduction

1. These proceedings concern a dispute between two SMEs who compete in the niche world of photobooths and associated accessories. The photobooths are the type where you step in, sit down, draw a curtain and wait for a number of photographs to be taken automatically. The photographs then appear a few minutes later in a slot on the outside of the booth. Photobooths of this type are now apparently a common feature at birthday parties, weddings and other events.
2. The panels on the outside of the photobooths are used to provide thematic decoration appropriate to the event. The relevant designs are printed out as “skins” and inserted around the outside of the booth. The purpose of the skin design is to entice people in and to complement the atmosphere of the party or event in question.
3. The First Claimant (**‘PPL’**) is a company which carries on the business of offering photobooths for hire. It also supplies skins for the booths and other accessories. The Second Claimant (**‘LPL’**) is a company which designs and prints, skins, props and panels for use with photobooths. The people behind PPL and LPL are Mr Paul Sherrington and Ms Lie Xie. They are both directors and employees of PPL and LPL.
4. The First Defendant (**‘NEPBH’**) is (or was) in the business of printing and supplying photobooth skins. The Second Defendant (**‘QuinnUK’**) is a company whose sole director is the Third Defendant (**‘Mrs Quinn’**). The sole director of NEPBH is the Fourth Defendant, who is one of Mrs Quinn’s sons. The Fifth Defendant (**‘Mr Quinn’**) is married to the Third Defendant. The Eighth Defendant is the brother of the Fourth Defendant. The Sixth Defendant (**‘D6’**) and Seventh Defendants (**‘D7’**) are companies which supply accessories and equipment related to photobooths. The Claimants allege that NEPBH, D6 and D7 are all under the control of Mr Quinn.
5. The Claimants seek damages and an injunction arising out of alleged infringement of copyright in certain design works. Some of these works are new works said to have been created by Ms Xie (**‘the New Works’**). The other works in issue (**‘the Assigned**

Works’) are said to have been acquired as part of the sale of NEPBH’s business to LPL by means of an oral contract entered into in July 2019 (**‘the July Contract’**).

6. The Claimants seek rescission of the July Contract and damages on the grounds that there were induced to enter into it by fraudulent misrepresentations made by Mr Quinn.
7. The pleaded misrepresentations are set out in paragraph 21 (c), (d) and 22 of the Particulars of Claim. The Claimants go on to allege in paragraph 48 that these misrepresentations were made fraudulently.
8. In their Defence, the Defendants deny any misrepresentations were made. They further deny that the Claimants are “entitled to any relief in copyright”.
9. The Defendants admit a contract of sale was entered into in July 2019 with LPL but say as follows (in paragraph 4 of the Defence):

“The Defendants did not sell a business to [LPL]. Rather—

(1) [QuinnUK] sold to [LPL] a large format printer, a laminator, various website domain names and the designs offered for sale thereon;

(2) [Mr Quinn] sold to [LPL] stock consisting of print consumables and media.

10. In paragraph 20, the Defendants plead that the July Contract contained the following terms:

(1) The Quinns would sell and Mr Sherrington would buy the Printer, the Laminator, the Stock and the Websites at a price of £40,000 plus the cost price of the stock.

(2) The price would be paid as to £15,000 plus the cost price of the stock on completion followed by four monthly instalments of £6,250 each.

(3) Until the price was fully paid, the Printer, the Laminator and the Stock would remain in situ in the Quinns’ unit and Mr Sherrington would rent the room in which they stood for £500 per month.

11. Paragraph 22 of the Defence says in relation to title to the Assigned Works: “For the further avoidance of doubt, at no time prior to the making of the contract did Mr Sherrington ask or the Quinns speak about the images and designs on the website”. This would appear to suggest that title to any design work was not part of the July Contract at all.
12. However, paragraph 24 of the Defence appears to admit that ownership in at least some designs was in fact transferred. It says “the Quinns transferred the Printer, the Laminator, the Stock and the Websites (including the designs offered for sale thereon)”. In a witness statement dated 16 February 2022, Mr Quinn accepted that the rights to fifteen designs owned by QuinnUK were sold to Mr Sherrington. The images in question are exhibited to the statement at pages 1 – 15 of exhibit ‘MQ1’. Mr Quinn goes on to say that these are the only images which were “sold for exclusive use”.
13. The Claimants served a Reply on 1 September 2021. This was followed on 27 October 2021 by a notice to admit facts in the following terms:
 1. *As at the conclusion of the agreement between the Claimants and Defendants for the sale of assets (the details and terms of which will be determined at trial) the Second Claimant was the owner of copyright in each of the Assigned Works 1-3, 16, 20-21, 26, 30, 35 (as defined in the Particulars of Claim).*
 2. *The Fifth to Seventh Defendants have between them:*
 - a. *copied the whole or a substantial part of each of Cs’ New Works (as defined in the Particulars of Claim);*
 - b. *issued copies of Cs’ New Works to the public;*
 - c. *copied the whole or a substantial part of each of the Assigned Works; and*
 - d. *issued copies of the Assigned Works to the public.*

By a letter sent on 25 November 2021, the Defendants confirmed that they do not admit the facts they were invited to admit in the Notice.

The case management conference

14. A case management conference was originally listed for 7 December 2021. However, that was vacated at the request of the Defendants because they requested a full day listing to deal with the application for summary judgment that had been issued by the

Claimants on 25 November 2021 and because the Defendants stated that they intended to issue a number of applications of their own.

The Applications

(1) The Claimants' application

15. The Claimants' application for summary judgment was in the following terms:

“The Claimants seek an Order pursuant to CPR 24.2(a)(ii) entering summary judgment against the Sixth Defendant and Seventh Defendant in respect of liability for copyright infringement in the works set out at (1) and (2) below, and against the Fourth, Fifth and Eighth Defendants in respect of the issues of substance, ownership and infringement by the Sixth and Seventh Defendants of copyright in relation to the same:

(1) the Assigned Works 1-3, 16, 21, 26, 30, 35 (as defined in the Particulars of Claim and listed in the Notice to Admit dated 27 October 2021); and

(2) New Works 2-4 and 6-7 (as defined in the Particulars of Claim).

The Claimants seek this order as the Defendants have no real prospect of successfully defending the claim and there is no other compelling reason why these issues should be disposed of at trial”

The application was supported by a witness statement of Adam Turley dated 25 November 2021.

(2) The Defendants' applications

16. The Defendants' applications were issued on 16 February 2022. The Defendants' first application was for an order striking out “the claim in fraudulent misrepresentation”. The second application was for security for costs. The applications were both supported by a single witness statement of Mr Quinn dated 16 February 2022. That witness statement also contained, at paragraphs 5 – 19, a response to the Claimants' summary judgment application.

17. Because the Defendant sought to put in at the last minute a supplementary bundle containing company accounts, I gave both parties an opportunity to make further

submissions in writing in relation to security for costs. The Claimant served a short witness statement from Mr Sherrington dated 2 March 2022.

The summary judgment application

18. CPR Part 24.2 provides:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

19. There was no dispute about the applicable principles. They are summarized in para. 24.2.3 of Volume 1 of the 2021 White Book as follows:

“The following principles applicable to applications for summary judgment were formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd’s Rep. I.R. 301 at [24]:

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 E.R. 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] F.S.R. 3;
- vii) On the other hand it is not uncommon for an application under Pt 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.”

20. I have also had regard to what is said about summary judgment applications in IPEC in Fox, *The Intellectual Property Enterprise Court: Practice and Procedure* (3rd edition 2021) in paras 6-065 – 6-070. The commentary there suggests that the approach in IPEC does not diverge to any great extent from the approach in the rest of the High Court, save that more frequent use is made of the power to dispose of applications on paper in order to save costs.
21. I start with the Assigned Works. Save for Works No, 16, 21 and 26, which Mr Quinn admits were transferred to Mr Sherrington/LPL, in my judgment, it is clear that there is a triable issue as to whether their transfer was included in the July Contract or not. Mr Quinn and Mr Sherrington were remarkably informal about the terms of the sale. Neither seemed to have thought that it might be helpful to record them in writing. Although, there is some tension between what is said in paragraph 22 and paragraph 24 of the Defence, having heard submissions and read Mr Quinn’s witness statement dated 16 February 2022, it is clear that the Defendants’ case is that only the 15 designs exhibited to that witness statement formed part of the sale and the rest, including all but three of the Assigned Works, were not part of the Sale at all. I am not persuaded that this allegation lacks reasonable prospects of success
22. In her oral submissions in relation to the Assigned Works, Ms Wickenden focused on Assigned Works 16, 21 and 26. She submitted that subsistence of copyright in these works whilst not expressly admitted in para. 53 was not really in issue and nor was infringement because in reality the Defendants “just carried on” using the Assigned Works, including Works 16, 21 and 26.
23. Mr Rodger, submitted that it was untrue to say that the allegedly infringing works were identical to Assigned Works 16, 21 and 26. In relation to Work 16, there were differences in font, arrangement and style and in relation to Assigned Work 21 and 26, the differences were quite substantial. There was, he submitted, a triable issue as to infringement. He also pointed to the plea in the Defence (at para. 53(3) that the designs were by their nature generic, insubstantial and referred me to paragraphs 9 and 11 of

Mr Quinn's witness statement in which he refers to the common and almost indistinguishable imagery in the photobooth skin design industry. Furthermore, he submitted that there is at present little or no evidence of how or when or by whom the Assigned Works were created.

24. In reply Ms Wickenden pointed out that the issue of infringement should not be approached in the manner of a 'spot the difference' competition. Whilst Ms Wickenden is correct for the reasons explained by Lord Millett in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 at 2425 C-E, I am not persuaded that the Claimant's case on either subsistence or infringement is so clear and strong that it would be appropriate for judgment to be entered now under Part 24 in relation to the Assigned Works.
25. In copyright ownership terms, the Claimants as alleged assignees, cannot be in any better position than the assignors. There is before me no evidence of how the allegedly Assigned Works were created and only some evidence (from Mr Quinn) that the designs for the Assigned Works are commonplace or generic. It is for the Claimant to prove each of subsistence, transfer and infringement. If there is an arguable case the designs are so generic or commonplace that no copyright subsists, that is fatal to the application for summary judgement.
26. The issues of subsistence, transfer and infringement in relation to the Assigned Works are in my judgement far more appropriately dealt with by the trial judge who will hear evidence as to how (a) all 36 of the allegedly assigned works came into existence and (b) the nature of the photobooth skin design process. He or she will be in a far better position to form a view on whether copyright subsisted in all or just some of them at the moment of creation, whether they were transferred to LPL and, if so, on what terms and finally whether, after transfer, copyright in them was infringed.
27. It also seems to me to be a disproportionate and at least from a case management point of view a somewhat pointless exercise to invite the court to give summary judgement on the issues of subsistence and infringement in relation to just three works out of a total of 36 allegedly assigned works.

28. For all those reasons, I am not persuaded that the Defendant's case in relation to the Assigned Works is fanciful and I decline to give judgment for the Claimants on the issues of subsistence and infringement in relation to the Assigned Works.
29. As to the New Works, the Claimants were on far firmer evidential ground in relation to both subsistence and infringement.
30. In relation to subsistence, Mr Turley's witness statement gives details of when, where and how the New Works were created and published. He provides evidence of Ms Xie's residence in this jurisdiction for the purposes of establishing her status as a qualifying person under section 206 of the Copyright, Designs and Patents Act 1988 ('CPDA') and that she created the New Works in the course of her employment for both Claimants. Mr Turley's witness statement appropriately reveals that some elements of the designs were taken from 'free websites' but states that how the elements were arranged was the creation of Ms Xie.
31. The Defence in relation to the New Works is essentially a non-admission. There is no defence pleaded of coincidental similarity between the New Works and the alleged infringing works or of independent creation of the infringing works. In paragraph 12 of his witness statement Mr Quinn asserts that "some of" the alleged infringing works (he does not say which) were created before July 2019. Mr Quinn goes on to say that he cannot provide further details without assistance from an IT expert. It was unclear why this should be but, in any event, there was no application to amend the Defence to plead independent creation so this evidence takes the Defendants nowhere.
32. In his oral submissions, Mr Rodger made three points:
 - a. There is a triable issue on ownership.
 - b. There is a triable issue on infringement.
 - c. What was being compared were representations of designs without any proper evidence of what the Claimants sold.
33. The first point arose from the fact that in paragraph 9 of the Particulars of Claim the New Works were said to have been created by an employee of LPL or if created in the course of employment with PPL, PPL has assigned the New Works to LPL. No

evidence of the assignment was produced and Ms Wickenden was unable to give any details about the alleged assignment. However, the evidence served with the application supported the plea in paragraph 6 of the Particulars of Claim that each of Mr Sherrington and Ms Xie were employees of PPL and LPL. Pursuant to section 11 of the CPDA, this made the Claimants joint owner of any copyright in the New Works. An assignment from one company to the other is in these circumstances superfluous. There was, in my judgement, therefore no relevant triable issue in relation to ownership.

34. In relation to infringement, whilst making all due allowance for generic themes such as rings representing a wedding, there were so many particular features of layout and design that were strikingly similar between the New Works and the alleged Infringing Works, that it was, in my judgement, for the Defendants to make a case supported by at least some evidence that these striking similarities did not arise from copying, given the New Works were fully accessible on the Claimants' website (applying the dicta of Lord Millet in Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416 at 2425F-G). This the Defendants did not attempt to do notwithstanding being served with (a) an application for summary judgment on the point many months ago and (b) a notice to admit facts.
35. It is pleaded in paragraphs 35 – 39 of the Particulars of Claim (supported by a statement of truth) that the infringing works were offered for sale on the websites of D6 and D7 and/or by Mr Quinn via Facebook profile. Those factual allegations are not responded to in paragraph 46 but only in highly unspecific terms and no evidence has been submitted to counter them. I therefore reject Mr Rodger's submission that there is no evidence of infringement by D6 and D7.
36. Finally, I find that there was also nothing in Mr Rodger's last point about the form in which the evidence was presented. Given that it was the Claimants' case that copyright subsisted in the designs of the photobooth skins, it was natural that the Claimants should compare pictures of the designs of New Works with pictures of skin designs taken from websites owned or controlled by one or more of the Defendants.

37. For those reasons, I am satisfied that the Defendants have no realistic prospect of defending the claims made by the Claimants that copyright in the New Works subsisted and has been infringed by Mr Quinn, D6 and D7.

The application to strike out

38. There are five pleaded representations which are the subject of the strike out application. Mr Rodger's case was that these pleaded representations were not actionable and therefore ought to be struck out under CPR Part 3.4(2)(a). The representations challenged are:

- a. Mr Quinn had no intention of continuing to operate a business that would directly compete with the Business after its sale (POC para. 21(c));
- b. If PPL bought "the Business", PPL would be able to continue operating the Business on the Website as it was represented at the time of the negotiations (POC para 21(d));
- c. That what was being offered for sale was the Business in its entirety as represented on the Websites at the time of negotiation (POC para. 22);
- d. The ownership of the designs on the Website would be conveyed therewith (POC para. 22); and
- e. The sale would include a transfer of the rights required to exploit the designs in the manner represented at the time on the Website (POC para. 22).

39. It is subsequently pleaded in paragraph 27 of the Particulars of Claim that these representations became terms in the July Contract.

40. Mr Rodgers' main attack on the misrepresentation case was that the pleaded representations were not representations of fact at all but were rather statements of opinion or intention or promises of future conduct.

41. I have no hesitation in dismissing the application, As the editors of *Chitty on Contracts* (34th edition, 2021) observe at para 9-008, "the distinction between a statement of fact on the one hand and a statement of opinion or intention on the other, is not clear cut". Whilst it is true that the pleaded representations are to a large degree statements of

intention or future conduct, it is well recognized that such statements may nevertheless be held to be misrepresentations if the representor did not in fact have any such intention – see Chitty para 9-016-17:

“9.016 A statement of intention may be looked upon as a misrepresentation of existing fact if, at the time when it was made, the person making the statement did not in fact intend to do what he said or knew that he did not have the ability to put the intention into effect; for the promisor’s state of mind was not what he led the other party to believe it to be. Thus, where a man ordered goods having at the time the intention not to pay for them, he was held to have made a fraudulent misrepresentation. Equally, if a person makes a statement of an intention that he should have known he was not able to carry out, in appropriate circumstances he may be held to have made an implied representation that he did have that ability. There is no doubt that a statement as to the intentions of a third party is a statement of fact and can constitute a misrepresentation in the ordinary way.¹

9.017 A statement of intention or as to the future may carry the implication that the party making it does not know of facts that will make it impossible to carry out the intention.⁷¹ But “there is no rule of law that any particular statement carries with it any particular implication. All depends upon the particular statement in its particular context”.”

42. Reading the alleged misrepresentations in the context of the pleading as a whole, the nub of the Claimants’ case is that Mr Quinn made statements as to the future which he knew he had no intention of carrying out or knew he could not carry out (e.g. because he did not himself hold the relevant design rights). Whether these allegations are well founded or not, will depend on the evidence adduced at trial but I have no doubt that, on the basis of the propositions of law set out above, the representations as pleaded are potentially actionable at least if they were, as pleaded, fraudulently made.
43. In his oral submissions, Mr Rodger had one other separate point. He submitted that the plea for rescission in the prayer at the end of the Particulars of Claim could not stand because the July Contract had been affirmed by the Claimants in seeking damages for breach. That point did not feature in his skeleton argument and is a bad one. The Particulars of Claim is structured in the conventional way. It pleads misrepresentation as the Claimants’ primary claim and rescission as the primary remedy. Damages for

¹ Another way to put the same point is that if a person states that he holds an opinion that in fact he does not hold, or that he has an intention that in fact he does not have, he makes a false statement of fact. See Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019), para.3-18

breach of contract is clearly pleaded in the alternative. In the circumstances, the Claimants are in my judgment not barred from seeking rescission.

44. I also do not accept Mr Rodger's complaint that the particulars of falsity and fraud in paragraph 48 of the Particulars of Claim are inadequate. They are short and to the point but none the worse for that.
45. The application to strike out the Claimants' misrepresentation claim is accordingly dismissed.

Security for costs

46. The application was based on CPR 25.13(1)(c) and (a) i.e. that:
 - a. The Claimants are companies and there is reason to believe they will be unable to pay DD's costs if ordered to do so (rule 25.13(2)(c)); and
 - b. Having regard to all the circumstances of the case, it is just to make an order (rule 25.13(1)(a)), and
47. I was referred to the following guidance provided in Volume 1 of the White Book 2021 at paras 25.13.12 – 14 (with emphasis added by counsel for the Claimants):

“25.13.12: Security for costs may be ordered against a company or other incorporated body (whether English or foreign) where there is reason to believe that it will be unable to pay the applicant's costs if ordered to do so. However, **security is not ordered as of course against such companies: the court's power is discretionary, to be exercised having regard to all the circumstances of the case** (see above para.25.13.1). Rule 25.13(2)(c) refers to a company which is a claimant. As to this, see further paras 25.12.3 and 25.12.4 above...

Applicants will fail to establish ground (c) if they cannot adduce sufficient evidence to give the court reason to believe that the claimant company “will be unable” to pay costs if ordered to do so; evidence giving the court reason to believe that the claimant company “may be unable” etc is not enough (Re Unisoft Group (No.2) [1993] B.C.L.C. 532, construing similar words in s.726(1) of the Companies Act 1985; SARPD Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120; [2016] B.L.R. 301 at [11])...

25. 13. 14 An applicant for security for costs who relies on r.25.2(13)(c) has to persuade the court that there is reason to believe that the company will not be able

to pay costs if it is subsequently ordered to do so. **It is not enough to show that the applicant has a reasonable belief to that effect: the court will take account of the evidence adduced by both sides** (Re Unisoft (No.2) [1993] B.C.L.C. 532).

48. As noted in Fox, *The Intellectual Property Enterprise Court: Practice and Procedure* (3rd edition 2021) at para. 3-26, IPEC is designed to facilitate access to justice for SMEs. Nevertheless, it is clear that the principles which determine whether security ought to be granted are the same in IPEC as in the rest of the Chancery Division. The only obvious difference is that the amount of any security is likely to be lower in IPEC because of the cap on recoverable costs. In this case, the relevant cap is £50,000.
49. The gateway issue on this application under CPR 25.13(2)(c) is whether I am satisfied on the evidence presented by both sides that there is reason to believe the Claimants will be unable to pay £50,000 in costs if ordered to do so.
50. In support of his application Mr Rodgers submitted that:
- a. The Claimants are young and insubstantial companies: PPL was incorporated on 25 August 2016, LPL on 26 August 2019.
 - b. PPL has a share capital of only £2, LPL only £1
 - c. PPL's accounts to 31 August 2021 reveal
 - i. a deficit in shareholders' funds of £63,870 (substantially worse than in 2020's figure of £17,127),
 - ii. assets down (£79,200 as against £122,798 in 2020);
 - iii. creditors up (£143,518 as against £137,430 in 2020)
 - d. LPL's accounts to 31 August 2021 show shareholders' funds of only £23,650.
51. In response, the Claimants submitted that neither of the Claimants is by any normal measure an impecunious company and both are trading companies not subject to any insolvency procedures. It was not part of the Claimants case that if ordered to pay security the claim would be stifled.
52. The Claimants relied on the following points taken from the witness statements filed by Mr Turley and Mr Sherrington:

- a. The Claimants currently hold in excess of £100k worth of stock (Turley 2 para 21);
- b. As of the morning of 18 February 2022 the Claimants had ready access to cash in the sum of £80,965.41 (Turley 2 para 22), which is now nearly £107,000 (Sherrington 1 para 11);
- c. PPL's turnover from September 2021 (5 and a half months) is £152,996.85 not including VAT (Turley para 23);
- d. The deficit in accounts as at 2021 is as a result of:
 - i. difficulties, experienced by all businesses, in obtaining stock from China meaning that less stock than usual was carried, however the most recent accounts do not include the delivery of stock – if it did there would be no deficit (Sherrington 1 para 7.a);
 - ii. stock loans being repaid from C2 to C1 (Sherrington 1 para 7.b);
 - iii. the business recovering from reduced sales from various lockdowns which is inevitable for this type of business (Sherrington 1 para 8);
 - iv. a drop in sales caused by the Defendants' activities in 2020-2021 (Sherrington 1 para 8);
 - v. the businesses carrying forward losses whilst new and growing, as is common with any newly started business (Sherrington 1 para 11).

53. In my judgement, in light of the evidence above, in particular that set out in sub paragraphs (a) – (c), the Defendants have failed to show that there is reason to believe that the Claimants will not be able to satisfy a costs order of £50,000. The Claimants are small businesses and a costs order of that size will not be easy to absorb or pay but I am not persuaded on the present evidence that there is reason to believe they will be unable to pay it if ordered to do so. This is it seems to me a classic case where there is reason to believe that they may not be able to pay it but that is not sufficient.

54. I should add for the sake of completeness that in response to the matters relied upon by the Defendant as to circumstances said to be relevant to the application:

- a. I have not made any assumption about the value of the claim or the level of profit, if any, made by the Defendants by reason of the alleged copyright infringements;
- b. I do not consider that the Claimants have pursued the claim in a disproportionate manner. The number of Defendants arises from the way that the Defendants have structured their family business.
- c. I have noted that it is not part of the Claimants' case that they cannot give security.
- d. I accept that the application has not been made late. It was reasonable to wait until the first case management conference to make the application.

55. The application for security for costs is therefore dismissed.

56. That concludes my judgment. I would request that an order be drawn up in the usual way and submitted for approval. In light of my judgment on the summary judgment application the list of issues for trial will also have to be amended.