



Neutral Citation Number: [2024] EWHC 2889 (IPEC)

Case Nos: IP-2023-000039 and IP-2023-000132

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

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

Date: 15 November 2024

Before :

HIS HONOUR JUDGE HACON

Between :

IP-2023-000039

I-SMART DEVELOPMENTS LIMITED

Claimant

- and -

CURRENTBODY.COM LIMITED

Defendant

And Between:

IP-2023-000132

**SHENZHEN KAIYAN MEDICAL
EQUIPMENT CO. LTD**

Claimant

- and -

**(1) I-SMART MARKETING SVCS
LIMITED**

(2) I-SMART DEVELOPMENTS LIMITED

(3) SUSAN PATRICIA D'ARCY

Defendants

Andrew Norris KC (instructed by **Shoosmiths LLP**) for the **Claimant** in Case IP-2023-000039 and for the **Defendants** in Case IP-2023-000132

James Abrahams KC and **Henry Edwards** (instructed by **TLT LLP**) for the **Defendant** in Case IP-2023-000039

Chris Aikens (instructed by **Fieldfisher LLP**) for the **Claimant** in Case IP-2023-000132

Hearing date: 6 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. There is an application in each of two actions to strike out a pleaded case of breach of contract, alternatively for summary judgment.

Background

2. The related actions involve, on one side, I-Smart Developments Limited ('ISD'), I-Smart Marketing SVSC Ltd ('ISM') and the owner of both, Susan D'Arcy. ISD and ISM are UK companies which trade in phototherapeutic devices. The two products relevant to these actions are a face mask and a neck bib, both of which are fitted with LEDs. I will refer to the companies jointly as 'the I-Smart Companies' and the three parties collectively as 'the I-Smart Parties'.
3. In 2017 ISM contacted the claimant in claim no. IP-2023-000132 ('Kaiyan'), a Chinese company, to discuss the possible sourcing of the products.
4. On 22 August 2017, to facilitate the discussions ISM and Kaiyan entered into a non-disclosure agreement ('the NDA'). (The name given to ISM at the head of the NDA is different to that given in the pleadings but nothing was made of it). The NDA provided for mutual protection in respect of confidential information passing from one side to the other.
5. Kaiyan's case is that it created designs of the face mask and neck bib. It is clear that by attachments to emails dated 13 April, 13 June and 12 July 2018, designs of a face mask and neck bib were sent by Kaiyan to the one or more of the I-Smart Parties.
6. The two products were then manufactured by Kaiyan in China and sent to ISM and/or ISD. There is a dispute about what happened with regard to these early supplies and when. It is agreed, though, that the products were passed by one or both of the I-Smart Companies to a company called The Light Salon. The I-Smart Parties say that the neck bib was disclosed in confidence. It is not clear what The Light Salon did with the products or, if they were marketed in the UK by The Light Salon, when this happened.
7. On 1 April 2019 ISD entered into a distribution agreement with the defendant in claim no. IP-2023-000039 ('Currentbody'), a UK company ('the Distribution Agreement').
8. The I-Smart Parties say that the face mask and neck bib were advertised and sold in the UK at the latest in September 2019 and October 2019 respectively. All the products were made by Kaiyan at this time and were sent to one or both of the I-Smart Companies for distribution in the UK by at least Currentbody.
9. On 10 June 2020 ISD filed two applications for UK registered designs for face masks: UKRD 6091815 ('RD 815') and UKRD 6091816 ('RD 816'), both later granted. RD 815 was declared invalid by the UKIPO in July 2022 and plays no further role.
10. On 12 June 2020 ISD filed an application for a UK registered design for the neck bib: UKRD 6091966 ('RD 966'), later granted.

11. I will refer to RD 816 and RD 966 collectively as ‘the Registered Designs’.
12. ISD was able to obtain the two Registered Designs pursuant to applications in June 2020 despite both designs having been made available to the public in the UK from September and October 2019 because of the grace period provided for in s.1B(5)(b) and (6) of the Registered Designs Act 1949 (‘the 1949 Act’).
13. In or about 2020 there was a falling out between the I-Smart Companies and Kaiyan. Kaiyan stopped supplying the I-Smart Companies and they obtained the products from another manufacturer. Those events did not necessarily happen in that order – who did what first and why was not agreed. In 2022 Currentbody also fell out with the I-Smart Companies and began to obtain the products directly from Kaiyan.

The claims

The ISD Claim

14. On 24 April 2023 ISD issued the claim form in claim no. IP-2023-000039 (‘the ISD Claim’). The defendant is Currentbody. ISD alleges that (1) Currentbody has acted in breach of the Distribution Agreement, (2) Currentbody has infringed the Registered Designs and (3) ISD owns UK unregistered design rights (‘UKUDRs’) in the designs of the neck bib and face mask and that those rights have been infringed by Currentbody.
15. Although ISD did not create the design of either the face mask or the neck bib as supplied by Kaiyan with the emails of April, June and July 2018, it asserts entitlement to claim UKUDR in respect of both because, among other reasons, Kaiyan, the employer of the designer or designers, is not a qualifying person within the meaning of s.217(1) of the Copyright, Designs and Patents Act 1988 (‘the 1988 Act’) and therefore cannot be entitled to UKUDRs. That being so, ISD (or whichever qualifying person first marketed the products in the UK) may claim entitlement to UKUDR as the party which first marketed articles made to the designs in the UK, pursuant to s.220(1) of the 1988 Act.
16. Currentbody has filed a counterclaim seeking (1) a finding that ISM or alternatively ISD is in breach of clause 2.5 of the NDA by (a) applying for and seeking to enforce the Registered Designs and (b) seeking to enforce UKUDRs, and (2) cancellation of both the Registered Designs or alternatively a declaration that they are invalid.

The Kaiyan Claim

17. On 22 December 2023 Kaiyan issued the claim form in claim no. IP-2023-000132 (‘the Kaiyan Claim’). The defendants are the three I-Smart Parties.
18. Kaiyan seeks (1) a declaration that RD 966 is invalid, (2) an order restraining the I-Smart Parties from maintaining the ISD Claim or bringing any other claim for infringement of IP rights in the face mask or neck bib and from claiming any IP rights in the products, all these on the ground that ISM is in breach of the NDA. Ms D’Arcy is joined as the third defendant in the Kaiyan Claim on the basis of the allegation that she is jointly liable with ISM and ISD.

19. The I-Smart Parties have filed a counterclaim in the Kaiyan Claim seeking a declaration that ISD owns all IP rights in the face mask and neck bib and an order that Kaiyan assign all such rights as it may have to ISD.

Order of 18 January 2024

20. By a consent order dated 18 January 2024 it was ordered that the CMC in the two claims be heard together. That made sense because there is a good amount of overlap. I was told that the parties have agreed that the actions should be tried together. That may or may not be appropriate given the constraint on court time that may be allotted to an IPEC trial. There is an application by the I-Smart Parties to transfer the claims to the Patents Court. These matters will be dealt with at a joint CMC to be held after the pleadings have been concluded – that has still not fully been done.

Strike out / Summary judgment

21. On 27 August 2024 the I-Smart Parties filed an application in each claim seeking an order that certain paragraphs in Currentbody’s and Kaiyan’s pleadings be struck out or alternatively that summary judgment be given in favour of the I-Smart Parties with regard to those paragraphs.
22. In summary, the I-Smart Parties submit that all the allegations by Currentbody and Kaiyan that the I-Smart Companies have been in breach of the NDA are hopeless and are bound to fail at trial.

The law

Summary judgment / strike out

23. The main principles of law on the summary disposal of a claim or one or more issues within a claim are well established and are set out in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at [15] (approved in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, at [24]). Although stated in terms appropriate to an application to strike out, they apply to an application for summary judgment (see *Price v Flitcraft Ltd* [2020] EWCA Civ 850, at [40]). This is the relevant passage from *Easyair*:

‘The correct approach on applications by defendants is, in my judgment, as follows:

- i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 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.'
24. The overlap between an application to strike out all or part of a statement of case under CPR 3.4 and an application for summary judgment under CPR Part 24 is not complete. An issue arose in the present applications with regard to notification required in an Application Notice and in supporting evidence.
25. Applications to strike out may go ahead based solely on the pleadings, but if facts need to be proved evidence can and should be filed and served, see PD 3A para. 5.2. The difference is that the procedural requirements which govern evidence filed and served under Part 24 do not apply under CPR 3.4. Those requirements are contained in rule 24.5 and are, so far as is relevant:

‘(1) The application notice must —

(a) state that the application is for summary judgment;

(b) identify concisely any point of law or document relied upon;

...

(3) If a party wishes to rely on written evidence at the hearing, other than in a claim under rule 24.4(3), they must file and serve copies of such evidence on every other party at least —

(a) 7 days before the hearing in the case of a respondent’s evidence, or evidence of any party where the hearing is fixed by the court of its own initiative;

(b) 3 days before the hearing in the case of an applicant’s evidence in reply, or reply evidence of any party where the hearing is fixed by the court of its own initiative.’

26. The provision in rule 24.5(1)(b) was until recently found in paragraph 2 of the practice direction supplementing Part 24. It and the provision in CPR 24.5(3) – formerly to be found in CPR 24.5(1) – were considered by the Court of Appeal in *Price v Flitcraft Ltd* [2020] EWCA (Civ) 850. Floyd LJ, with whom David Richards and Patten LJJ agreed, quoted paragraph 2 of the practice direction and continued:

‘[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.’

27. Often a party will apply both to strike out and for summary judgment without making any real distinction between the two alternatives. In my view, in such a case, if a party wishes to serve evidence solely in support of their application to strike out, with the result that the evidence is not subject to the procedural safeguards of Part 24.5, the applicant’s intention to limit the purpose of the evidence in that way should be clearly stated at the time of service so that the respondent knows where they stand.

28. In the present instance the I-Smart Companies identified no distinction in the purpose of their evidence filed in support of their applications. The procedural safeguards of CPR 24.5 apply.

Contractual interpretation

29. A summary of the principles of contractual interpretation was recently given by Lord Hamblen, with whom Lords Hodge, Kitchin and Sales agreed, in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2:

‘[29] The relevant general principles are authoritatively explained by Lord Hodge JSC in his judgment in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at paras 10-15. So far as relevant to the present case, they may be summarised as follows:

(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.’

The NDA

30. I here set out the recitals and some of the clauses of the NDA. I have added numbers to indented subclauses in clauses 2 and 3 for ease of reference:

‘Mutual Confidential and Non Disclosure Agreement

This Mutual Confidential and Non Disclosure Agreement (“Agreement”) is made and entered into, as of 22nd August 2017, by and between

Shenzhen Kaiyan Medical Co. Ltd ... hereinafter referred to as Kaiyan

AND

I-SMART Marketing Services ... (hereinafter referred to as “I-SMART”)

Hereafter collective referred to as “Parties” and individually as “Party”

RECITALS

A/ The Kaiyan conceives [healthcare and related products] (the “Products”)

...

- C/ *The Healthcare division of Kaiyan wishes to hold discussions with I-SMART in order to explore the opportunity to enter into subsequent business activities regarding its new electro medical devices treating psoriasis and others;*
- D/ *During the course of such discussions for the Business Purpose [not defined], Kaiyan may disclose to I-SMART certain proprietary information and data relating to its Products and its Project and I-SMART may disclose to Kaiyan certain proprietary and confidential information relating to Light Therapy for treatment of several indications (“Confidential Information” as further defined below):*

NOW, THEREFORE, the parties agree as follows:

1) Definitions

“Affiliate” of a party shall mean [definition set out] ...

“Discloser” means the Party disclosing information to the other Party and such other Party will be referred to as the “Recipient”

“Confidential Information” shall mean: [definition set out] ...

2) *Recipient hereby agrees to each of the following as it pertains to the Confidential Information received pursuant to this Agreement:*

1. *to hold the Confidential Information in strict confidence;*
2. *to use the Confidential Information only for the Business Purpose;*
3. *not to disclose the Confidential Information to any third party except (i) in accordance with article 4 hereof, or (ii) as authorized by the Discloser in writing;*
4. *not to copy or reproduce the documents or media that embody the Confidential Information, unless necessary for proper assessment thereof or for the purposes of article 7 hereof;*
5. *not to apply for or claim any intellectual property right based on the Confidential Information; and*
6. *not to disclose the existence, the content and the purpose of this agreement to a third party.*

3) *Confidential and restriction of use obligations as contained herein shall not apply for such information that the Recipient can demonstrate through appropriate written evidence :-*

1. *now or hereafter becomes generally known or available to the public through no act or omission on the part of Recipient;*

2. *was rightfully acquired from a third party who did not obtain it directly or indirectly from Discloser or one of its Affiliates;*
3. *was in Recipient's lawful possession at the time of disclosure by Discloser and which was not acquired directly or indirectly from Discloser or one of its Affiliates;*
4. *was developed independently by Recipient without use of or reference to the Confidential Information provided by Discloser pursuant to this Agreement;*

...

- 4) *Recipient may disclose the Confidential Information only to those of its employees and Affiliates who need to know the same but only to the extent necessary to evaluate the Business Purpose and only if such employees and Affiliates are advised of the confidential nature of such Confidential Information and the terms of this Agreement and are obligated to protect the confidentiality of such Confidential Information.*

...

- 12) *All rights and obligations under this Agreement shall come in force as of its Effective Date and remain in full force for a period of 3 years.'*

ISD's grounds for summary judgment in the ISD Claim

31. ISD had broadly three reasons in support of its contention that Currentbody's counterclaim based on ISM's or ISD's alleged breach of clause 2.5 of the NDA must fail.

The Contracts (Rights of Third Parties) Act 1999

32. Currentbody is not a party to the NDA and therefore has no direct cause of action against ISM or ISD for alleged breach. In its counterclaim Currentbody relies on s.1 of the Contracts (Rights of Third Parties) Act 1999. That section provides, so far as is relevant:

'1.— Right of third party to enforce contractual term.

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) *The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.*

33. Currentbody's counterclaim states that the purpose of clause 2.5 is to benefit Kaiyan's distributors by allowing them to market the products without risk of a claim from the I-Smart Companies, and that the NDA therefore purports to grant a benefit to Currentbody as a member of the class of distributors.
34. In the present application ISD contended that s.1 cannot assist Currentbody. There is no express provision that Currentbody may enforce any term of the NDA, nor does any term purport to confer any benefit on Currentbody. Currentbody is neither expressly identified in the NDA by name, as a member of a class or as answering a particular description.
35. Currentbody responded by saying that ISD is in breach of CPR 24.5(1)(b) and 24.5(3)(b): ISD has raised an argument under s.1(3) of the Contracts (Rights of Third Parties) Act 1999. This was neither mentioned or alluded to in ISD's application notice. It was first raised in ISD's evidence one clear day before the hearing. Currentbody said that had the point been signalled in good time, ISD would have had the opportunity to research and present case law on s.1, in particular s.1(3). As it is, this first argument should be disregarded.
36. The importance of the procedural safeguards underlined by the Court of Appeal in *Price v Flitcraft* can only have been enhanced by the subsequent transfer from a practice direction to the rule itself. The relevance of the Contracts (Rights of Third Parties) Act 1999 did not of course come as a surprise to Currentbody. However, s.1(3), its scope and effect in law was not in play until the present application.
37. ISD had plenty of time to signal its intended reliance on s.1(3). I think that there is room for argument about its effect in the present case, particularly with regard to the correct meaning of a 'third party ... expressly identified ... as answering a particular description but [which] need not be in existence when the contract is entered into'. It may be, as Currentbody said at the hearing, that there is authority on this which must be considered by the court.
38. ISD did not comply with either CPR 24.5(1)(b) or 24.5(3)(b). Subject to other arguments, the issue in respect of the Contracts (Rights of Third Parties) Act 1999 must go to trial.

The expiry of the NDA

39. ISD's next argument was that the only acts complained of that were done before the date of expiry of the NDA, 22 August 2020, were the applications for the Registered Designs. Everything else must fall away.
40. Currentbody again complained that there was no mention of this argument in the Application Notice and said that there was nothing anywhere in ISD's evidence about it.

41. I doubt that advance warning of this very straightforward point would have much helped Currentbody, but ISD is in breach of CPR 24.5. Further, there is a dispute with regard to the acts done by ISD before the expiry of the NDA which are relevant to the allegation of a breach of the NDA and which will have to be explored. While there is an apparently clear cut-off date of 22 August 2020 for Currentbody's allegations of breach of the NDA, I see little to be gained by an order now making that plain.

Construction of clause 3(1)

42. ISD argued that on a clear construction of the NDA, which can be decided now, by the time of the alleged breaches of the NDA the designs were 'generally known or available to the public through no act or omission on the part of' ISM within the meaning of clause 3(1).
43. Expanding on this, ISD said that on any view the products were on the market by September and October 2019. Thereby the designs of those products – the confidential information in issue – were made public by those dates. This cannot be said to have happened 'through an act or omission on the part of [ISM]', referring to the words of clause 3.1 of the NDA. That is because the products were supplied by Kaiyan in full knowledge that they were destined for open sale on the UK market. Accordingly by June 2020, the earliest date of any relevant act by ISM, clause 2.5 of the NDA did not bite.
44. Currentbody's response was that the designs became public due to the joint actions of Kaiyan *and* ISM. The fact that ISM was only jointly responsible did not exonerate ISM or lead to the view that the publications happened through no act of ISM.
45. I take the view that Currentbody's response is sufficiently arguable to go to trial. It raises in part a question of construction of clause 3(1) and this is likely to be an instance in which construction requires consideration of the purpose of clause 3(1) by reference to the factual matrix. The issue also raises a partly factual investigation into whether ISD or ISM was the relevant actor as between the I-Smart Companies and whether that matters.

Currentbody's arguments in the ISD Claim

46. Because I am not satisfied that ISD's arguments are sufficiently strong, there will be no summary judgment in the ISD Claim. However, Currentbody had further independent arguments for resisting summary judgment even if one or more of ISD's arguments would have led to a summary finding.

The purpose of clause 2(5)

47. Currentbody submitted that the NDA is a contract between two SMEs, badly drafted apparently without professional help. It is therefore all the more important to investigate the factual matrix underpinning the NDA to resolve what a reasonable person, with the relevant background knowledge in mind, would have understood the language of the contract to mean.
48. Currentbody continued: the background knowledge would have included an awareness that even though ISM did not create the designs in issue, it or a related company would

have had the opportunity to file an application for the Registered Designs at the IPO in its own name, exploiting the grace period, and, relying on ss.217(1) and 220(1) of the 1988 Act, to claim UKUDR in respect of the designs and to assert those rights against Kaiyan. Clause 2(5) was included to prevent that happening. The NDA is reciprocal, so to the extent that Kaiyan could exploit confidential information provided by ISM to obtain registered designs in the UK or IP rights in China, this too was prohibited under clause 2(5). That is why clause 3(1) is not drafted to provide an exception to clause 2(5), as is apparent from its wording. It is directed only to information which ‘now or hereafter becomes generally known or available to the public’. Its function is to prevent contractual attempts to restrain the use of information in the public domain, nothing more. It is not directed to the unfair application for, or claim to, IP rights based on the discloser’s information.

49. Responding to this, ISD argued that clauses 2(1) and (2) provide general prohibitions on the use of confidential information, while the remaining subclauses of clause 2 are examples of such misuse. One such is clause 2(5) which prevents the misuse of the other party’s confidential information to apply for or claim IP rights. That is a use of confidential information and clause 2(5) spells out that it is a misuse. If the parties’ intention had been to give clause 2(5) the special status contended for by Currentbody, the NDA would have made that clear.

Generally known

50. Currentbody submitted that on a correct construction of ‘generally known’, the lifting of the obligations of confidentiality allowed for by clause 3(1) did not operate until after the acts in breach of clause 2(5) were done. Currentbody said that for information to become ‘generally known’ within the meaning of clause 3(1) it requires more than one disclosure, e.g. to the UKIPO. It is a question of fact and degree which will require evidence at trial.
51. ISD said at the hearing that on any view the information had become generally known by 2020 because the designs were published in Vogue UK and Hello magazines.
52. Currentbody complained that these publications were raised for the first time in evidence less than 3 days before the hearing in breach of CPR 24.5(3)(b).

Discussion

53. It seems to me that the meaning and effect of both clauses 2(5) and 3(1) of the NDA will require consideration by reference to the matrix of fact against which the NDA was settled. This includes consideration of the meaning of ‘generally known’ and also what happened by way of disclosure of the designs and when. They raise issues which are sufficiently arguable to support my earlier indication that Currentbody’s counterclaim based on the NDA must go to trial.

The arguments in the Kaiyan Claim

54. The I-Smart Parties’ application to strike out Kaiyan’s claim insofar as it relies on ISM’s alleged breach of the NDA raises issues that in large part overlap those in ISD’s application in the ISD Claim.

55. Kaiyan's pleaded case is that the designs of the face mask and neck bib provided by Kaiyan were disclosed by ISM to ISD and that this was in breach of the NDA by ISM because it was done:

'... for purposes other than those permitted by the NDA, in particular for the purpose of: (a) [filing applications for the Registered Designs] and (b) claiming, and alleging infringement of, intellectual property rights based on the designs for the Kaiyan Neck Bib and Kaiyan Face Mask against third parties, including Currentbody ...'

56. Kaiyan says that ISM acted in breach of the NDA by claiming and alleging infringement of IP rights based on the designs.
57. Kaiyan also pleads that in consequence of the foregoing, both ISM and ISD are in breach of an obligation of confidence owed by them to Kaiyan.
58. I was taken through the pleadings by counsel for the I-Smart Parties, among them Currentbody's Reply to Defence to Counterclaim in the ISD Claim which includes this:

'Kaiyan disclosed the Kaiyan Designs to I-Smart on the basis and understanding that it was doing so pursuant to the Kaiyan NDA and in accordance with its terms, in particular clause 2. I-Smart accepted that disclosure on the same understanding and on the same basis, and to further Business Purpose of the Kaiyan NDA, eventually leading to a customer/supplier relationship.'

59. The I-Smart Parties submitted that Kaiyan's and Currentbody's pleadings were consistent only with the disclosure of the designs by ISM to ISD having been done to further the arrangement for the supply of the products by Kaiyan to the I-Smart Companies and distribution by Currentbody, nothing else.
60. The claim to IP rights as against Currentbody and the allegation of infringement only happened long after the expiry of the NDA. The two purposes relied on by Kaiyan to support the alleged breach of the NDA are both untenable.

Discussion

61. Taking these two limbs of the I-Smart Parties' argument in turn, in my view the reading of the Kaiyan and Currentbody pleadings pressed by the I-Smart Parties is too narrow. Kaiyan's principal pleaded case that the disclosure of the designs by ISM to ISD was done for purposes other than those permitted by the NDA does not exclude such disclosure have been made also for promoting the business plan. The fact that disclosure for pursuing the business plan crops up elsewhere in the pleadings, including Currentbody's pleading, does not alter Kaiyan's main complaint that one of the purposes was the one complained about: for filing, claiming and enforcing IP rights.
62. As to the second limb, it appears that ISD or ISM at least claimed IP rights by applying for the Registered Designs before the expiry of the NDA. The point at which UKUDRs were claimed depends on what is meant by 'claiming'. These aspects of Kaiyan's allegation of breach of the NDA must go to trial.

63. Kaiyan is not on strong ground when it says that allegations of infringement of IP rights can have happened before the expiry of the NDA. However, it seems to me that this is a relatively minor point and is better explored along with the other matters at the trial.
64. Moreover, as in the ISD Claim, Kaiyan in the Kaiyan claim advanced reasons why there should not be summary judgment even if any of the I-Smart Parties' arguments were correct. Kaiyan endorsed the reasons given by ISD in the ISD Claim, discussed above. To these, Kaiyan added two. First, on any view the parallel allegation of breach of confidence would survive a strike out of the allegation of breach of the NDA. The factual issues applicable to both will have to be explored. Secondly, the validity of RD 966 is bound to be dealt with at trial. I was taken through the pleadings in support of Kaiyan's submission that much of the factual landscape relevant to the issues relating to the NDA will have to be considered anyway. There may be some substance in these two additional submissions.

Conclusion

65. For all the foregoing reasons, I am satisfied that both Currentbody's and Kaiyan's cases based on alleged breach of the NDA carry some degree of conviction. The saving in time at the trial if they were not considered may be less than at first appears, though that is secondary. The applications to strike out and for summary judgment are dismissed.