



Neutral Citation Number: [2023] EWHC 1746 (Pat)

Claim No: IL-2022-MAN-000001

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT**

**Handed down by email only
13 July 2023**

Before:

MR NICHOLAS CADDICK K.C.
(sitting as a Deputy High Court Judge)

B E T W E E N:

**(1) PHILIP PRICE
(2) SUPAWALL LIMITED
(3) SUPAHOME BY MAPLE LIMITED**

Claimants

– and –

**(1) FLITCRAFT LIMITED
(2) FLITCRAFT TIMBER FRAME LIMITED
(3) GARRY FLITCROFT
(4) THOMAS FLITCROFT**

Defendants

STEPHEN GRIME K.C. and JON KING (instructed by **RHF Solicitors**)
for the Claimants
GILES MAYNARD-CONNOR K.C. (instructed by **Primas Law Solicitors**) for the
Defendants

Applications determined on the papers

JUDGMENT

Nicholas Caddick K.C. (sitting as a Deputy High Court Judge):

1. On 20th December 2022, I handed down judgment dealing with liability in relation to certain patent, copyright and passing off claims brought by the Claimants (see [2022] EWHC 3381 (Pat)).
2. Subsequently, at a form of order hearing on 16 March 2023, I gave the Claimants' permission to join the Official Receiver ("the OR") as a party in order to comply with s.67 Patents Act 1977. I also heard the parties' submissions in relation to, inter alia, costs. On 3 April 2023, I handed down a written judgment dealing with those costs (see [2023] EWHC 695 (Pat)) and then, on 26 May 2023, a written judgment setting out my reasons for granting permission to join the OR as a party (see [2023] EWHC 1222 (Pat)).
3. This present judgment deals with various further matters raised in written submissions filed pursuant to directions made at the form of order hearing. The matters for determination are:
 - a. The Claimants' application for permission to appeal aspects of the costs orders;
 - b. Both parties' applications for stays of aspects of the costs orders;
 - c. The Defendants' application for an interim payment in respect of the costs orders made in their favour.

Claimants' application for permission to appeal

4. Dealing first with the Claimants' application for permission to appeal. The parties are agreed as to the relevant principles.
5. In summary, under CPR r.52.6(1), the Claimants must establish grounds of appeal that have a real (as opposed to fanciful) prospect of success or that there is some other compelling reason for the appeal to be heard. In this regard, both parties referred me to the comments of Sir Murray Stuart-Smith in *Roache v News Group Newspapers* [1998] EMLR 161 CA, that:

“Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale.”

6. Further, as the issue relates to the exercise of my discretion in relation to issues of costs, both parties referred me to a statement in *Tanfern v Cameron MacDonald* (*Practice Note*) [2000] 1 W.L.R. 1311, CA, to the effect that an appeal would only lie where the exercise of discretion:

“exceeded the generous ambit within which reasonable disagreement is possible.”

7. The Claimants' first ground of appeal is that, for a number of reasons, the costs orders that I made failed to reflect the reality of the litigation. They argued, in summary, that:
 - a. The trial was primarily about establishing liability for infringement of patent, something on which the Second Claimant succeeded. As a result, they say, it will be the Defendants who end up "writing the cheque" once issues of quantum are resolved;
 - b. Deductions were made in the costs that the Second Claimant was awarded to reflect individual issues on which the Second Claimant had lost, whereas no deduction was made from the costs awarded to the Defendants to reflect issues on which the Defendants had lost; and
 - c. There was no forensic basis for apportioning the costs in relation to the patent issues as to 60% for the First Claimant's patent claim and 40% for the Second Claimant's claim and that the figures had not been canvassed by the parties.
8. Dealing with these points in turn. It is right to say that the patent issues were central to the case. However, as set out in my judgment in relation to s.67 Patents Act 1977, the First Claimant's claim as patent owner and the Second Claimant's claim as exclusive licensee of the Patents were separate and distinct claims. The former claim failed entirely; the latter claim succeeded in part only. The fact that the Defendants might end up writing a cheque once the issue of quantum of the Second Claimant's partially successful claim is resolved, does not mean that the litigation was substantially about that partially successful claim. It seems to me that the Claimants' submissions in this regard ignore the large part played in the litigation by the First Claimant's failed patent claim and certain factual issues relating to that claim that were entirely irrelevant to the Second Claimant's claim. They also ignore the fact that the First Claimant also lost on his copyright claim and the First and Second Claimants lost on their passing off claim.
9. As regards the point concerning deductions, the deductions made in the costs awarded to the Second Claimant reflected the false evidence given by its director in support of its claim that Mr Price was the proprietor of the Patents. They also reflected the fact that the Second Claimant claim based on the 989 Patent failed as did a significant part of its claim in relation to the 714 Patent (i.e. its claim that that Patent was infringed by the Defendants' dealings with the New Injectawall Products) (see paragraph [21] of the costs judgment). Those were distinct and severable matters meriting deductions. In contrast, the issues on which the Defendants lost (and, in particular, the alleged assignment to Lightpeak, which took up a very considerable amount of trial time) were essential parts of the background to the First Claimant's unsuccessful claim and, in my judgment, did not warrant deductions from the Defendants' recoverable costs (see paragraph 18 of the costs judgment).
10. As to the 60/40 apportionment, this was based on an assessment made having heard the evidence at trial and using the "broad-brush" approach that both parties advocated in their submissions (see paragraphs [7], [8], [11] and [17] of the costs judgment). I note that, even now, no attempt is made to put forward let alone to justify some other apportionment.

11. In my judgment, applying the test referred to above, these matters (whether taken together or collectively) do not disclose a ground of appeal with any real prospect of success.
12. The Claimants' second ground of appeal is that it was wrong to determine that all costs payable by the First Claimant should be assessed on the indemnity basis.
13. Again, applying the test outlined above, I do not think that this ground of appeal has any real chance of success. The order for indemnity costs was not in respect of all the costs payable by the First Claimant. It was only in relation to his failed patent claim. The costs orders in relation to his failed copyright and passing off claims were on the standard basis. Indemnity costs were justified as regards the First Claimant's failed patent claim because the whole case was founded on a claim to title which I found to be false. The claim should never have been brought and I do not see how it can be said that awarding costs on an indemnity basis was going beyond the generous ambit of my discretion.
14. The third ground of appeal is that it was wrong to apportion 20% of the costs to the copyright claims. The Claimants now submit that the correct figure should have been 7.5% (no figure was provided before). Once again, I do not think that this ground of appeal has any real chance of success. It may be that a detailed analysis of the evidence and transcript and costs schedules might have supported a lower figure. However, as with the 60/40 apportionment referred to above, this apportionment was made on the basis of my impressions having heard the evidence at trial and using the "broad-brush" approach that was expressly advocated by both parties.
15. The fourth ground of appeal is that it was wrong to order the Claimants to pay costs in relation to the application to join the official receiver as a party in order to comply with s.67 Patents Act 1977. The basis of this argument is that the Claimants succeeded in the application, the need for which only arose as a result of the court's findings in relation to proprietorship of the Patents, and had not been raised as an issue by the Defendants. In my judgment, this ground of appeal has no real prospect of success. The responsibility was on the Second Claimant to comply with s.67 and, as a starting point, it is right that it should pay the costs of the application needed to achieve that compliance. Further, given the lateness of the application reflecting the fact that the need for the application was discovered when the First Claimant's claim to be the proprietor (a claim supported by the Second Claimant) was exposed as false at trial, I do not see any reason to deprive the Defendants of their costs in opposing the application.

Stays of the costs orders

16. Turning to the parties' contentions as regards a stay of the costs orders.
17. The Defendants seek a stay of the costs orders made against them on the bases (i) that they have grounds of appeal that have been found to have a real (as opposed to fanciful) prospect of success and (ii) that the Second Claimant, to whom the costs are payable, is insolvent such that there is a risk that the costs would not be repaid if the Defendants' appeal is successful.

18. The Defendants have been granted permission to appeal. However, as set out in CPR r.52.16, unless the lower or appeal court orders otherwise, an appeal does not of itself operate as a stay because, as explained in *Hall v Elia* [2016] EWHC 1023 per Proudman J at [10], a successful party ought not to be deprived of the fruits of litigation pending appeal. There must, therefore, be some “solid grounds” to justify a stay. These usually involve some form of irremediable harm if no stay is granted (see CPR r.52.7).
19. The approach, as explained by Clarke LJ in *Hammond Suddards v Agrichem* [2001] EWCA Civ 2065 at [22] is to ask whether there is a risk of injustice to one or other or both parties if the court were to grant or to refuse to grant a stay. One of the risks, as identified at paras.52.16.2 to 52.16.3 of the White Book, is that the appellant, if successful on the appeal, would be unable to recover sums that had been paid to the respondent. Another risk is whether the grant or refusal to grant would result in a party’s case on appeal being stifled.
20. I am satisfied that there is a risk of injustice to the Defendants if they are not granted a stay and if, as a result, they have to pay sums over to the Second Claimant. The Defendants’ evidence shows that the Second Claimant has filed substantially identical accounts (actually, micro-entity balance sheets only) which show that throughout the period from 2017 to 2022 it has had net current liabilities of £149,874 and total net liabilities of £115,604. It is clear from this that there is a very real risk that the Second Claimant would not be in a position to repay the Defendants if the Defendants’ appeal were to succeed. The Claimants have filed no evidence to rebut this.
21. Equally, the Claimants have not filed any evidence to show that the grant of a stay would expose any of them to a risk of injustice. In particular, there is no evidence to suggest that the source that has allowed the Claimants to fund the litigation to date (apparently, the Third Claimant) would not be able to continue to fund the appeal.
22. As I understand it, the Claimants’ position is that they do not oppose a stay of the costs that the Defendants are liable to pay to the Second Claimant provided there is also a stay of the costs payable by the Claimants.
23. In support of their argument that their own costs liability should be stayed, the Claimants assert that that liability is likely to be substantially less than the liability of the Defendants to the Second Claimant in terms of damages or under an account of profits (sums which the Second Claimant has effectively been deprived of for some time). The Claimants also point to the fact that they are seeking permission to appeal against the costs orders made against them. Finally, they say that the insolvency history or entities connected to the Defendants shows that there is a risk that sums paid to the Defendants would not be repaid if the Claimants’ appeals were to succeed.
24. At first sight, the Claimants’ suggestion that all costs be stayed appears attractive. However, on reflection, it seems to me that the respective positions of the parties are really quite different and, as Mr Maynard-Connor submits, the Claimants’ approach wrongly conflates those positions.
25. In the first place, it may well be that, when the issues of quantum are resolved, the Second Claimant will be entitled to recover a substantial sum from the Defendants. However, such sum arises under the Second Claimant’s partially successful patent

claim. In contrast, the costs which the Defendants are entitled to recover and in respect of which the Claimants seek a stay are, very substantially, the costs of the First Claimant's separate and failed claims in relation to the Patents and the copyrights - claims that did not involve the Second Claimant. It is true that a part of the costs payable to the Defendant relates to the passing off claim made by both the First and Second Claimant. However, the costs attributable to that claim are relatively small.

26. Another significant difference is as regards the parties' financial positions. As set out above, the evidence with regard to the Second Claimant suggests that there is a risk that the Defendants would be unable to recover sums paid to it. In contrast, the Claimants have not provided any evidence to show that, in the event that they are successful in an appeal, they would be unable to recover sums paid to the Defendants. In this regard, whilst it appears that Flitcraft Ecobuild Limited (an earlier company connected to the Third Defendant but not a party to this litigation) had failed, the filed accounts for the First Defendant show that, as at 29 August 2022, it had net current assets of £693,274 and a net assets of £547,027. The Third Defendant's evidence is that the First Defendant continues to be solvent and that there have been no material changes in its financial position. Moreover, recovery could also be sought from the Third and Fourth Defendants, who are individuals without limited liability. The Claimants have not, therefore, established that there is a risk that sums paid to the Defendants would not be repaid if the Claimants were to succeed in an appeal.
27. This leads into the final difference. As set out above, I have found that the Claimants have no real prospect of success in overturning the costs orders made against them. Moreover, the Claimants do not seem to be appealing in respect of the costs of their failed passing off claim. In contrast, I have found that the Defendants have a more than fanciful prospect of succeeding in an appeal against the orders giving rise to their liability in costs.
28. For these reasons, whilst at first sight the course of action proposed by the Claimants appears attractive, I have decided that it is right to draw a distinction between the parties in relation to the issue of a stay. In my judgment, the Defendants have shown that there is a risk of injustice if a stay is not granted in respect of their liability to pay the costs of the Second Claimant. In contrast, the Claimants have not shown that there is a risk of injustice if I were to refuse to grant a stay of either (a) the First Claimant's liability to pay the costs of his failed patent and copyright claims or (b) of the First and Second Claimants' liability to pay the costs of their failed passing off claim.
29. I will, therefore, order a stay of the sums which the Defendants are liable to pay by way of costs but will not order a stay of the sums which the Claimants are liable to pay. In the case of the First Claimant, those sums are the sums due in respect of his failed patent claim, copyright claim and passing off claim. In the case of the Second Claimant, they are the costs of the passing off claim.

Should there be an interim payment on account of costs?

30. Turning to the issue of an interim payment of costs. Logically, it may be that the issue of an interim payment ought to be determined before the issue of a stay. However, given the way in which the parties' submissions have developed, I have dealt with the issue of a stay first and, as appears below, many of the points raised were the same.

31. Under CPR r.44.2(8), where a court orders a party to pay costs subject to a detailed assessment, it will order that party to pay a reasonable sum on account of those costs, unless there is a good reason not to do so. Where the court has made a costs management order under r.3.15, the receiving party's budget, insofar as it has been agreed between the parties or approved by the Court, may be a sensible starting position for determining the "reasonable sum" to be paid on account under r.44.2(8)
32. Guidance as regards the courts' approach to payments under r.44.2(8) was provided by Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [23] and [24], as follows:
 - "23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.
 - "24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."
33. The starting point, therefore, is that it is generally appropriate to order an interim payment and the Defendants seek orders against the First and Second Claimants accordingly.
34. Against the making of an order in this case, the Claimants say (a) that they are seeking to appeal the costs orders, (b) that there is a risk of injustice arising from the risk of non-repayment by the Defendants, (c) the Defendants are likely to make a substantial payment to the Second Claimant when the issues of quantum are determined, and (d) that it would be unjust for the Defendants to receive an interim payment when the Claimants are not.
35. It seems to me that I have already considered and rejected each of these arguments in relation to the issue of a stay. In summary: (a) I have found that the Claimants have no real prospect on appeal; (b) there is no evidence to show that, in the event that the Claimants were to succeed on an appeal, the Defendants would be unable to repay sums they have received by way of costs; (c) the fact that the Second Claimant may eventually be found to be entitled to a substantial sum in respect of its (partially successful) patent claim is not a reason why the Defendants should not receive an interim payment in respect of the costs of the First Claimant's separate and failed claims or the First and Second Claimants' failed passing off claim; and (d) given that

the costs relate to separate claims and given the state of the evidence as regards the financial positions of the respective parties, I do not accept that it would be unjust for the Defendants to be receiving an interim payment when the Claimants are not.

What sum should be awarded as an interim payment of costs?

36. The remaining issue is what sum to award the Defendants by way of interim payment.
37. The Defendants have stated in evidence that their total costs are £634,615.62 of which they have already received £52,261.20. This leaves a net sum of £582,354.42. Of this, under the costs orders, they are entitled to receive 70% - i.e. £407,400. Then, to reflect the uncertainties referred to in *Excalibur*, they seek an order that the First Claimant make an interim payment of 60% of that sum, namely £244,440. As against the Second Claimant, Mr Maynard-Connor's skeleton seeks an interim payment of £12,222 (5% of £244,440).
38. In their reply submissions, the Claimants argued that any award against them should take into account the fact that the Defendants will be liable to pay substantial sums to the Second Claimant and the fact that the Defendants are, in effect, already holding the sum of £66,470 that they will be liable to pay the Second Claimant by way of the costs of its patent claim. These are, in effect, the same arguments that I have already considered and rejected when dealing with the issues of a stay and whether an interim payment should be awarded in principle. I do not think that they are relevant as regards the level of any interim payment.
39. The Claimant's other point was that the sum of £634,615.62 is not the appropriate starting point and that the court should, instead, adopt the Defendants' earlier costs budget figure of £283,900. On this basis, the Claimants argue that, applying the same 70% and 60% discounts, the figure to be awarded (presumably as regards the First Claimant) should be no more than £119,238 (£283,900 x 70% x 60%).
40. As I understand it, the parties both filed costs budgets at an earlier stage of the action. These were approved (with some variations) by order of Meade J on 22 September 2021, more than a year before the trial was finally heard. It is common ground that there were significant developments thereafter which led, post-trial, to my giving both parties permission to apply to a district judge to revise and vary their costs budgets. However, I do not know if any such application has yet been made and I am not in a position to assess whether, given the terms of CPR r.3.15A, permission would be granted if one were to be made.
41. It is also worth noting the terms of CPR r.3.18 which provide that, "*In any case where a costs management order has been made, when assessing costs on a standard basis, the court will ... (b) not depart from the approved budgeted costs unless satisfied that there is a good reason to do so*".
42. On its terms, CPR r.3.18(b) is not directly applicable to the matter before me, in part because I am not formally assessing costs (I am simply trying to estimate what might eventually be ordered) and in part because a significant part of the relevant costs are payable on an indemnity basis. Nevertheless, r.3.18(b) does show the importance of costs budgets and the need to explain departures from them. Further, as I am not in a position to determine the merits of the Defendants' claim to increase its costs budget, it

seems to me that I should use the Defendants' approved cost budget figure (of £283,900) as my starting point, of which, under the costs orders, the Defendants would be entitled to 70% - i.e. £198,730 (70% of £283,900).

43. From this figure, some deduction needs to be made to reflect the uncertainties referred to in *Excalibur*. In this regard, as my starting point is the Defendants' approved costs budget, there are fewer uncertainties than there would be in relation to the Defendants' new figure of £634,615.62. I also bear in mind that the award is (in large part) for indemnity costs such that, under CPR r.44.3, the court would in cases of doubt assume the costs claimed to have been reasonably incurred and therefore recoverable. Finally, I bear in mind that there is at least some prospect that the Defendants will be allowed at least some increase in the figures in their costs budgets. Still, some deduction is sensible in case, for example, the budgets provided for any items of expenditure that were not actually incurred. In my judgment, an award of 60% would be far too large a deduction and that the appropriate figure is 90%. As against the First Claimant, this gives rise to an interim payment of £178,857 (£283,900 x 70% x 90%).
44. As regards the position of the Second Claimant, it is only liable for 5% of the Defendants' costs (those referable to the passing off claim). Accordingly, it seems to me that, as regards its liability to make an interim payment on account of those costs, the starting point should be 5% of £283,900 = £14,195. Applying the same 90% figure to reflect the *Excalibur* uncertainties, this gives an interim payment figure of £12,775.50.

Conclusion

45. In conclusion:
- a. I reject the Claimants' applications for permission to appeal;
 - b. I will order a stay of the costs that the Defendants are liable to pay to the Second Claimant, such stay to be pending the outcome of the Defendants' appeal or further order;
 - c. I refuse a stay of the costs that the Claimants are liable to pay to the Defendants; and
 - d. I direct that the following sums be paid within 28 days by way of interim payment on account of costs:
 - i. The First Claimant do pay the Defendants the sum of £178,857; and
 - ii. The Second Claimant do pay the Defendants the sum of £12,775.50
46. I hope that the parties will be able to agree the terms of an order to reflect what I have said above.