



Neutral Citation Number: [2024] EWHC 1964 (Ch)

Claim Nos: IL-2022-000043

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

The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 30 July 2024

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

(1) CLEARCOURSE PARTNERSHIP
ACQUIRECO LIMITED
(2) E-NOVATIONS (LONDON) LIMITED **Claimants**
- and -
(1) MANOJ JETHWA
(2) REKHA JETHWA
(3) PALMYRA HOLDINGS MANAGEMENT
LIMITED
(4) EPOS DIRECT EUROPE LIMITED **Defendants**

Gregory Banner KC and Charles King (instructed by **Sherrards Solicitors LLP**) for the
Third Defendant

James Pickering KC (instructed by **Davis Woolfe Ltd**) for the **First, Second and Fourth**
Defendants

Joseph Leech (instructed by **Gibson & Co**) for the **Claimants**

Hearing date: 3 July 2024

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This judgment was handed down remotely at 10.30am on 30 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Introduction

1. This Judgment deals with the remaining issue to be determined in respect of the relief sought by the application of the Third Defendant, Palmyra Holdings Management Limited (“**Palmyra**”) dated 26 October 2023, namely whether Palmyra is entitled to summary judgment on its Part 20 Claim whereby it seeks a declaration that the second named Claimant, E-Novations (London) Limited (“**ENL**”) is the legal and beneficial owner of the “*Intellectual Property*” (as defined in clause 1.1 of a Share Purchase Agreement dated 30 September 2020 referred to in paragraph 8 below), including “*KEY IP*” (as defined in paragraph 40 of the Re-Amended Particulars of Claim) (“**the IP**”).
2. The Claimants adopt a neutral stand in relation to Palmyra’s summary judgment application (“**the Application**”), even though it is their case that ownership of the IP lies with ENL. The Claimants describe the Application as “*very ambitious*” and one that they do not intend to spend costs pursuing.
3. The Application is opposed by the First, Second and Fourth Defendants, Manoj Jethwa (“**Mr Jethwa**”), Rekha Jethwa (“**Mrs Jethwa**”) and Epos Direct Europe Limited (“**EDE**”) (together “**the Jethwa Defendants**”). It is their case that EDE is entitled to legal and beneficial ownership of the IP.
4. Gregory Banner KC and Charles King appear for Palmyra, James Pickering KC appears for the Jethwa Defendants. I am grateful to them for their helpful written and oral submissions. Joseph Leech appears for the Claimants with what is, essentially, a watching brief.
5. For the purposes of the Application:

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- i) Palmyra relies upon:
 - a) The first witness statement of Matthew Ball of Sherrards Solicitors LLP dated 26 October 2023; and
 - b) The third witness statement of Shamsheer Prakash (“**Mr Prakash**”).
 - ii) The Jethwa Defendants rely upon:
 - a) The fifth witness statement of Mr Jethwa dated 22 March 2024 (“**Jethwa 5**”);
 - b) The sixth witness statement of Mr Jethwa dated 12 June 2024 (“**Jethwa 6**”);
 - c) The witness statement of Shivaji Aravintham (“**Mr Aravinthan**”), a Finance Operations Executive and latterly Finance Operations Director of ENL until February 2023, dated 24 May 2024;
 - d) The witness statement of Kiran Akkamshetty (“**Mr Akkamshetty**”), a software engineer and the CEO of EPOS Guru Private Ltd (“**Epos Guru**”), dated 11 June 2024; and
 - e) The witness statement of Richard Baltutis (“**Mr Baltutis**”), a former employee of ENL, and latterly its Chief Technology Officer, until February 2023, dated 11 June 2024.
6. Before considering the parties’ submissions and dealing with the merits of the Application, it is necessary to set out the background to the Application.

Background

7. A more detailed description of the background to the dispute between the parties that forms the subject matter of the present litigation is provided by a judgment that I handed down on 11 May 2023 determining a number of earlier applications (“**the 2023 Judgment**”). The 2023 Judgment is reported at [2023] EWHC 1122 (Ch).
8. By a Share Purchase Agreement dated 30 September 2020 and made between (1) Mr and Mrs Jethwa, (2) Palmyra, and (3) the first named Claimant, Clearcourse Partnership Acquireco Limited (“**CPA**”) (“**the SPA**”), CPA acquired the entire share capital of ENL from Mr and Mrs Jethwa (who held 75% thereof), and Palmyra (which held 25% thereof).
9. It is to be noted that Palmyra had acquired its 25% shareholding in ENL pursuant to the terms of a Subscription Agreement dated 7 February 2005 and made between (1) ENL, (2) Mr Jethwa, (3) Mrs Jethwa and (4) Palmyra (“**the 2005 Subscription Agreement**”).
10. ENL had been incorporated on 23 June 2000, and its business consisted of the sale of point-of-sale cash registers with integrated software, known as “*Emperium*” (“**Emperium Software**”) that enabled, amongst other things, the user of the cash register to monitor stocks etc... . An important feature of the way that ENL sold its cash registers was that the process included the entry by purchasers into an “*End User*

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Licence Agreement” (“**EULA**”) with ENL under which the purchaser was granted a licence to use the Emperium Software.

11. It is the Claimants’ case that ENL owned the intellectual property in the Emperium Software, i.e. the IP, and that that was the basis upon which it entered into EULAs with the purchasers of cash registers. It is the Claimants’ case therefore that the purchase effected by the SPA included the IP because it was an asset of ENL.
12. Mr Jethwa continued, for a period of time after the SPA, to be employed by ENL, and the terms of the SPA provided for him to receive further earnout consideration dependent upon the application of a formula relating to ENL’s performance.
13. By September 2021, issues had begun to arise as to the entitlement of Mr Jethwa to earnout consideration under the terms of the SPA, and Mr Jethwa asserted that ENL did not own the IP, or indeed have the right to license others, by way of sub-licence or otherwise, to use the Emperium Software.
14. Two sets of proceedings in respect these and other disputes that had arisen were subsequently commenced, namely:
 - i) Proceedings commenced in the Queen’s Bench Division, but subsequently transferred the Intellectual Property List (ChD) and given the Claim No. IL-2023-000027 (“**the QB Proceedings**”), in which CPA and two of its senior employees sought injunctive relief to restrain Mr Jethwa from disseminating what was alleged to be confidential information, and in which proceedings Mr Jethwa subsequently counterclaimed in respect of earnout consideration that he claimed was due, and sought damages for procuring a breach of contract and conspiracy against the two senior employees of CPA in question.
 - ii) Proceedings commenced in the Intellectual Property List (ChD) and given Claim No. IL-2023-000043 (“**the Chancery Proceedings**”), in which the Claimants primarily seek a declaration that ENL is the legal and beneficial owner of the IP, including “*the Key IP*”. However, the Claimants also claimed, in the alternative, that if ENL was not the legal and beneficial owner of the IP, then Mr and Mrs Jethwa were in breach of a number of warranties contained in the SPA and were also liable for fraudulent misrepresentation in respect of a number of representations alleged to have been made prior to the entry into of the SPA to the effect that ENL owned the IP. The claim in fraudulent misrepresentation is also pursued against Palmyra on the basis that Mr Jethwa acted as their agents in making the fraudulent misrepresentations. In addition, the Chancery Proceedings include a claim for repayment of a sum of £200,000 alleged to have been loaned by ENL to Mr and Mrs Jethwa.
15. In defending the Chancery Proceedings, the Jethwa Defendants have maintained that EDE is the legal and beneficial owner of the IP, and Mr and Mrs Jethwa sought to defend the allegations of breach of warranty and fraudulent misrepresentation made against them. They further dispute that the loan alleged to be repayable to ENL is repayable. Palmyra’s position in defence of the Chancery Proceedings is, essentially, that it had no knowledge of the matters in issue in the proceedings, but it denies that any fraudulent misrepresentation on the part of Mr or Mrs Jethwa is properly attributable to it.

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16. For its part, CPA denied that any sums were due to Mr Jethwa by way of earnout consideration.
17. The 2023 Judgment dealt with some five applications that were heard over three days in late March 2023. The net effect of the 2023 Judgment was reflected in my Order dated 7 June 2020 made at a consequential hearing. In essence:
 - i) I dismissed an application brought by Palmyra to strike out the claim against it, whilst giving the Claimants permission to re-amend their Particulars of Claim;
 - ii) I struck out Mr Jethwa's counterclaim in the QB Proceedings, and dismissed an application brought by Mr Jethwa to amend this counterclaim;
 - iii) Having in the 2023 Judgment concluded that the Claimants would have been entitled to summary judgment in respect of their claims against Mr and Mrs Jethwa for breach of warranty and for fraudulent misrepresentation if ENL did not own the IP, I considered that as this was an alternative claim, the appropriate relief was not to enter judgment at that stage, but rather to strike out the relevant paragraphs of the Jethwa Defendants' Defence. However, I dismissed the application for summary judgment in respect of the loan of £200,000 said to be due to ENL.
18. It was observed on behalf of Palmyra at the hearing on 3 July 2024 that Mr and Mrs Jethwa are in something of a bind. If the Jethwa Parties win on the question of ownership of the IP, then the Claimants will be entitled to damages in respect of the breach of warranty and fraudulent misrepresentation claims in respect of which their defences have been stuck out. If they lose in respect of the ownership of the IP, then they will have lost in respect of the main aspect of the claim against them.
19. Of relevance to the present Application is that at paragraph 26 of the 2023 Judgment, I recorded that:

“The present dispute arose because, sometime after entry into the SPA, Mr Jethwa contended that the IP in the Emperium Software did not belong to ENL, but rather to EDE, and that ENL, as now owned by CPA, has no rights in respect of the Emperium Software, whether of ownership, or the right to licence others, by way of sub-licence or otherwise, to use the Emperium Software. It is this stand taken by Mr Jethwa that prompted the issue of the Chancery proceedings in which Claimants maintain that the IP in the Emperium Software did at all relevant times and does now belong to ENL, or, at the very least that ENL has the right to licence purchasers of EPOS hardware and software in respect of the use of the same.”
20. Palmyra subsequently obtained permission to pursue a Counterclaim against the Claimants, and an Additional Claim against the Jethwa Defendants seeking a declaration that ENL is the legal and beneficial owner of the IP. It is in respect of these CPR Part 20 claims that Palmyra, by the Application, seeks summary judgment.
21. From Palmyra's perspective, the attraction of obtaining summary judgment in respect of the legal and beneficial ownership of the IP is that, if successful, the attribution claim

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against it for fraudulent misrepresentation on the part of Mr and Mrs Jethwa must fall away because, in those circumstances, the representations as to the ownership of the IP will have been true.

The Jethwa Defendants' evidence as to the ownership of the IP

22. Palmyra's case is that the Jethwa Defendants have no real prospect of showing at trial that any party other than ENL, is the legal and beneficial owner of the IP.
23. Before considering Palmyra's case in this respect, I will consider the evidence relied upon by the Jethwa Defendants in support of their contention that legal and beneficial ownership of the IP lies with EDE and not ENL, and the gist of their case in relation thereto.
24. Mr Jethwa seeks to explain the basis for maintaining that legal and beneficial ownership of the IP lies with EDE in Jethwa 5 and 6, supported by the witness statements of Mr Aravinthan, Mr Akkamshetty and Mr Baltutis referred to in paragraph 5(ii) above.
25. In essence, it is Mr Jethwa's evidence that ENL was formed in 2000 as a website design company to provide E-Commerce solutions. He says that, initially, ENL outsourced software development to an Indian company, Applitech Solutions ("**Applitech**"), which developed and built software for ENL.
26. Mr Jethwa refers to Mr Prakash becoming a director of ENL in 2005 following Palmyra's entry into the 2005 Subscription Agreement with ENL, effectively as Palmyra's representative, and in that capacity being aware of subsequent developments within ENL.
27. Mr Jethwa says that by 2008, it was necessary to further develop the software. However, by that time, the relationship with Applitech had come to an end, and so Mr Jethwa established Epos Guru in India as a software development company to develop the relevant software for ENL. As ENL had not developed the original software itself, it did not have the relevant source codes, and so, according to Mr Jethwa, it was necessary to develop new software from scratch. Mr Jethwa says that he personally funded Epos Guru for this purpose in that Palmyra had no appetite for introducing further funds.
28. This version of events is broadly supported by the evidence of Mr Aravinthan, Mr Akkamshetty and Mr Baltutis. Mr Akkamshetty refers to having been responsible for employing the team of software developers deployed to build the new software from scratch, with the team of people involved being directly employed by Epos Guru. This is supported by Mr Aravinthan, who also refers to Mr Jethwa investing his own funds. Mr Baltutis provides much the same explanation and refers to Epos Guru having developed the software and owned the IP until 2017.
29. Mr Jethwa says that the new software was in the market by 2010, with Epos Guru and ENL marketing the same together as "*E-Novations Group*", and that Mr Prakash, and through him Palmyra, was aware of this, and that Palmyra was aware that ENL "*had the full benefit of selling and enjoying the license (sic) sales as a result of an implied licence*" – Jethwa 5, paragraph 19. Mr Banner KC, in the course of his submissions on behalf of Palmyra, pointed out that in paragraph 20 of his first witness statement dated 3 August 2022 made at an earlier stage of the present proceedings, Mr Jethwa had

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referred to the new product coming to market in 2013 and being a “game changer” then.

30. In Jethwa 5, Mr Jethwa says that in 2013, he registered the “*EmperiumPos.com*” domain name in ENL’s name, and he refers to the fact that the only intellectual property specifically identified in Schedule 4 to the SPA was in respect of domain names, including this one.
31. Mr Jethwa refers to the sale of the till software continuing until 2017, but to the same becoming obsolete and overtaken by cloud-based software, requiring the development of new cloud-based software which ENL was unable to fund. He says that he formed EDE in 2017 “*as part of a restructure and planning for an exit or investment*”, but with ENL having “*the customers and the benefits of recurring revenues from the till software (for which it had and would have a licence to use)*”, EDE supplying the till systems together with the software and the IP, and EPOS Guru providing a back office function – see Jethwa 5, paragraph 22.
32. Mr Jethwa then says that in preparation for investment or exit, he “*learned that the IP for the till systems vested with the developers in the absence of any contracts*”, and thus with Epos Guru. He says that it was in this context that he prepared an assignment document in order to transfer the IP from Epos Guru to EDE, and that an assignment was executed on 17 June 2017 to this effect.
33. At Jethwa 5, paragraph 24 Mr Jethwa says that immediately before this assignment dated 17 June 2017, ENL had been using the IP under a licence from Epos Guru, and that after the assignment it continued to use the IP under an implied licence from EDE. He later in the witness statement goes on to refer in some detail to the negotiations with CPA suggesting, amongst other things, that during the course thereof he explained that EDE owned the IP and “*will be passing the software licence to ENL free of charge, I believe I used the words perpetual licence but no cost to ENL.*”
34. I note that the position that ENL enjoyed and would continue to enjoy a licence to use the relevant software is inconsistent with the position taken by the Jethwa Defendants at the hearing before me in March 2023 as recorded in paragraph 26 of the 2023 Judgment referred to in paragraph 19 above.
35. Mr Jethwa’s evidence as to the circumstances behind the assignment dated 17 June 2017 is supported by the evidence of Mr Aravinthan and Mr Akkamshetty. They both refer to the IP being transferred from the Indian company, Epos Guru, to EDE to assist with the marketing of the group or obtaining further investment. Mr Akkamshetty refers to he, himself, having drafted the assignment dated 17 June 2017.
36. Both Mr Aravinthan and Mr Baltutis provide some support for Mr Jethwa’s evidence as to what he said during the course of negotiations with CPA’s representatives. Mr Baltutis says that there were no licensing issues because ENL always had permission to issue and sell licenses, albeit not owning the IP.
37. In his witness statement dated 19 April 2024, Mr Prakash, on behalf of Palmyra, denies the allegations contained in Jethwa 5 with regard to his knowledge of the development of the relevant software, and ownership of the IP. In Jethwa 6, Mr Jethwa responded to

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Mr Prakash's witness statement, and maintained his case with regard to Mr Prakash's knowledge in respect of these issues.

38. On the basis of the above evidence, it is the Jethwa Defendants' case that the relevant software was developed by employees of Epos Guru in India, and so the IP belonged, both legally and beneficially to Epos Guru. To the extent that ENL, itself, granted licences to use the same and received recurring licence fees in respect thereof, then it is the Jethwa Defendants' case that it did so pursuant to an implied licence from Epos Guru. It is then said that pursuant to the assignment dated 9 June 2017, the IP was assigned to EDE, which is now the legal and beneficial owner of it. Consequently, neither the Claimants, nor Palmyra, is entitled to a declaration that ENL is the legal and beneficial owner of the IP.

Palmyra's case for summary judgment**Introduction**

39. In support of the Application, and the contention that there is no real prospect of the Court finding otherwise at trial than that ENL is the legal and beneficial owner of the IP, Mr Banner KC on behalf of Palmyra relies upon four key matters which it is submitted, at least when taken together, point only to such a conclusion. These matters are the following:
- i) It is submitted that Mr Jethwa's version of events simply cannot be reconciled with the contemporaneous documentation and for that reason ought to be rejected;
 - ii) The warranties given in connection with the SPA, the representations made that I found to be fraudulent if ENL does not own the IP, and the EULAs and other documentation relevant to the SPA, are, it is said, consistent only with ENL being the legal and beneficial owner of the IP;
 - iii) The inherent probabilities are said to point firmly against any other conclusion but that ENL was and is the legal and beneficial owner of the IP; and
 - iv) If EDE were the owner of the IP, then, so it is said, one would expect the Jethwa Defendants to have been able to provide other contemporaneous documentation to support such being the case, whereas they have not done so.

Contemporaneous documents

40. Mr Banner KC submits that it is necessary to analyse the position over four distinct time periods identified within the Jethwa Defendants' case, namely:
- i) Between 2005 (when the 2005 Subscription Agreement was entered into) and 2008 (when the relationship with Applitech was said to have come to an end);
 - ii) Between 2008 (when Epos Guru is said to have been established in order to develop software) and 2013 (when the new software was released to the market on Mr Jethwa's first version of events);

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- iii) Between 2013 (when the new software was released) and 2017 (when the IP is alleged to have been assigned by Epos Guro to EDE); and
 - iv) Post 2017 (i.e. from and after the assignment dated 17 June 2017).
41. It is submitted that throughout each of these periods of time, the consistent message and pitch of the documents provided to third parties was that ENL had developed a single piece of software in respect of which it owned the IP. Mr Prakash's witness statement refers to, and I was taken at the hearing through, a significant number of documents said to be of this effect. It is unnecessary for me to refer to all these documents, but I shall identify a selection of the documents in question.
42. 2005-2008:
- i) Schedule C to the 2005 Subscription Agreement referred to a "*Business Summary*" in respect of ENL. The Executive Summary to this document referred to ENL having developed its own range of "EMPERIUM" branded software products for Epos and Ecommerce trading, and it set out that "*Emperium Retail*" was EPOS (electronic point of sale) software that allowed retailers to manage products, purchases, stock locations etc... .
 - ii) On 18 October 2008, Mr Prakash, who was assisting ENL in seeking to find investors, sent an email to an interested party, copying in Mr Jethwa, that attached a "*brief introduction to E-Novations, its products and its unique position in the UK*". This latter document explained that ENL was, through its Emperium brand, a provider of retail solutions for small to medium-sized enterprises, and expressly stated that: "*E-Novations owns all of its intellectual property rights (source codes) and can thus be easily customised to meet clients' requirements. The technology is 'future proof' and utilises enterprise-level database models.*"
43. 2008-2013:
- i) On 2 June 2010, Mr Prakash, again assisting ENL with regard to potential investment, undercover of an email of this date, sent to an interested party a one-page information sheet in relation to ENL. This stated, amongst other things, that ENL was: "*Highly innovative software company with own IPR.*" The point is made on behalf of Palmyra that there is no reference whatsoever to a third party such as Epos Guru owning the IP.
 - ii) Under cover of an email dated 19 September 2011, Mr Jethwa sent to Mr Prakash for his thoughts a document headed "*E-Novations Group Investment Opportunity 2011*". This document identified, amongst other things, the opportunity to be part of "*a specialist software company serving the Retail and Hospitality market globally.*" The document included the following:

"IPR and established brand name ...

E-Novations has its own IPR software ensuring exclusivity and cutting outlay to third parties ..."

...

Business overview

E-Novations is a specialist software company with its own IPR, branded EMPERIUM EPoS. Emperium is a suite of software with applications designed for various types of retail and hospitality businesses.”

- iii) On 11 January 2012, Jeanette Mackie of BCMS Corporate sent to Mr Jethwa an Information Memorandum in respect of ENL. This identified the latter as a: *“World class leader in e-commerce and supply chain solutions; a specialist software company offering EPoS applications”*. It specifically referred to: *“IPR and establish brand name”*. It went on to say that: *“The company has full IPR ownership of the software ensuring exclusivity in the market. The Emperium brand is well established in the marketplace. The business benefits from an extremely low-cost business model assisted by in-house sales and marketing and overseas support staff.”* The document identified EPOS Direct (UK) Ltd (**“Epos Direct”**) as a wholly owned subsidiary of ENL. There was no reference to any other company.

44. 2013-2017:

- i) On 1 September 2014, Mr Jethwa emailed a Sam Myers under the heading *“E-Novations Opportunity”*, the email being expressed as sent on behalf of *“E-Novations Group”*. The email referred, amongst other things, to Canary Wharf, London being *“our HQ”*, and to Hyderabad, India being *“our global support centre and our back office operations.”* The email referred to *“Emperium EPOS”* as being *“... a brand of software that we have created over the years, it is a modern day retail and hospitality software suite to cater for the small to medium size business in any country meeting fiscal requirements and currencies.”*
- ii) On 27 July 2015, Mr Jethwa emailed an interested party attaching a document entitled *“Introduction to E-Novations Group”*. The document defined *“E-Novations Group”* as comprising ENL and its wholly owned subsidiary, Epos Direct. It referred to its main activity is being a leading supplier of EPoS solutions, *“developing and distributing software and services to the global retail, hospitality and leisure sectors through its 2 key brands”*. It also referred to the fact that it was headquartered in London, with strategic offices across the UK and with a high-tech back office support centre based out of Hyderabad, India. It stated that: *“E-Novations has developed its own robust ERP Software and owns the IPR to Emperium EPOS.”*
- iii) Further, reliance is placed upon the spreadsheet, document 2.01 referred to in paragraph 25(b) of the Amended Particulars of Claim, which is a document uploaded to the Data Room by or on behalf of Mr and Mrs Jethwa prior to the execution of the SPA and showing the dates of the various versions of the Emperium software. The point is made on behalf of Palmyra that first versions in respect of *“Emperium Sage”*, *“Beauty”*, and *“Wholesale”* pre-date 2008, after which date the software is, on Mr Jethwa’s version of events, said to have

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been completely rewritten by Epos Guru's employees. It is said that this cannot be possible, if Epos Guru was not established until 2008.

45. 2017 onwards:

- i) Reliance is placed upon an email dated 3 October 2017 from Mr Jethwa to Mr Prakash wherein reference is made to dissolving EPOS Direct, but then, in respect of "*E-Novations*", it is said: "*We will take on the performing staff from eposdirect and all sales, recurring will remain under this company with IP also*". It is submitted that this is consistent only with ENL owning the IP. Further, it is pointed out that the assignment dated 17 June 2017 does not actually identify the intellectual property said to be the subject matter thereof.
- ii) A further point is made in relation to the circumstances behind the assignment dated 17 June 2017, and in respect of Mr Jethwa's comment in paragraph 23 of Jethwa 5 that, at about the time thereof, he "*learned that the IP for the till systems vested with the developers in the absence of any contract.*" The point is made that if he only "*learned that*" at this point, then prior thereto he must have believed something else, which he does not explain, and which can only be that ENL owned the IP, at least beneficially, because, even if it had been developed by Epos Guru, it had been developed on behalf of ENL.

46. As to this documentary evidence, in their Skeleton Argument, Mr Banner KC and Mr King referred to the much cited passage from the judgment of Leggatt J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3650 at [22], where Leggatt J expressed the view that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. Palmyra relies thereupon in support of the submission that the above documentary evidence should be relied upon by the Court, and that little if any weight attached to the recollections of Mr Jethwa and the other witnesses on behalf of the Jethwa Defendants.

Warranties, fraudulent misrepresentation & contractual documents

47. The premise of my finding that Mr and Mrs Jethwa were in breach of warranty, and guilty of fraudulent misrepresentation in the event that ENL did not own the IP was that they had warranted and represented that ENL did own the IP. The fact that they did so is relied upon by Palmyra in support of its case that the Jethwa Defendants cannot now realistically seek to argue that ENL did not own the IP.
48. Palmyra further relies upon the fact that both prior to, and after the entry into the SPA, ENL has contracted with all its customers using the standard form EULA, the premise of which was and is that ENL was in a position to grant the licenses provided for thereby. Although the Jethwa Defendants might now seek to explain this on the basis that ENL had a licence, if not a perpetual licence, itself to act in this way, that was not the position taken by them at the hearing before me in March 2023, and it is a position only recently adopted. It is submitted on behalf of Palmyra that the very fact that the premise to the SPA was that ENL would continue to grant standard form EULAs to customers in order to generate an income is consistent, and in reality, consistent only, with ENL owning the IP.

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49. Further reliance is placed by Palmyra upon the terms of the Outsourced Services Agreement between EDE and ENL signed on 7 August 2020 (“**the OSA**”), referred to in paragraph 21 of the 2023 Judgment. In particular the point is taken that the OSA provided for EDE to provide software development services for ENL, rather than licensing the use of IP by ENL, and that clause 6 thereof referred to ENL as being the one to “*take ownership*”.

Inherent probabilities

50. Palmyra submits that there are a number of factors that make it inherently unlikely that any party other than ENL has at all relevant times owned, and now owns the IP. These factors include the following:
- i) ENL was, as the documentation referred to above demonstrates, marketed as a software company. Why do so, it is said, if it was not?
 - ii) The Jethwa Defendants’ case now is that ENL was entitled to use, and itself licensed the software under an implied licence from EDE. In paragraph 39 of Jethwa 5, Mr Jethwa refers to having suggested in the negotiations prior to the SPA that the licence was a “*perpetual license (sic) but no cost to ENL*”. The basis for a perpetual licence is not explained, and ordinarily an implied licence would be determinable on reasonable notice. However, it is submitted that there is something wholly unrealistic about the suggestion that this fundamental aspect of ENL’s business, namely the entry into EULAs with customers on the sale of cash registers should be dependent upon a mere implied licence granted by EDE, in particular, in circumstances, where:
 - a) EDE was to receive no consideration, yet ENL would take the entire income stream from the entry into the EULAs with customers;
 - b) ENL had the relevant source codes.

Absence of expected evidence in support of the Jethwa case

51. Palmyra maintains that if there were any substance or reality in the Jethwa Defendants’ case, then there is certain evidence that might have been expected to have been adduced in support of their case as to the ownership of the IP. In particular, it is said that there is an absence of:
- i) Documentary evidence to support the claim that there were two separate pieces of software, such as correspondence with Applitech with regard to its exit, a brief to Epos Guru or progress reports relating to the development of the software.
 - ii) Communications between Mr Jethwa and Mr Prakash supporting Mr Jethwa’s story that Palmyra was invited to invest further and declined to do so.
 - iii) Documentary evidence to support Mr Jethwa’s story about what is alleged to have been said to Mr Prakash that is said to have made Mr Prakash, and therefore Palmyra, aware of various matters, including the respective roles of Applitech

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and Epos Guru in developing the software, and that ENL did not own the relevant IP.

- iv) An explanation as to why Palmyra, by Mr Prakash, would have been prepared to lie to potential investors with regard to the ownership of the IP, which is what is alleged given Mr Prakash's role in providing information to potential investors that stated, amongst other things, that ENL had developed the software and owned the IP.
 - v) Documentary evidence that Mr Jethwa personally funded the development of software by Epos Guru.
 - vi) Documentary evidence of the work done by Epos Guru in developing the software.
 - vii) The absence of an explanation as to how Mr Jethwa, late in the day, "*learned that*" the IP vested with the developers thereof in the absence of any contract, and therefore in Epos Guru, and as to what advice, if any, he might have taken at that time in relation thereto.
 - viii) The absence of an explanation with regard to what is said to be the curious situation with regard to ENL granting licences to customers, and generating an income stream therefrom for itself, without being liable to account in any way to the alleged developer of the software, Epos Guru, or its assignee EDE.
52. With regard to Mr Aravinthan and Mr Akkamshetty, it is said that there is no proper evidence as to what the software developers actually did. Reliance is placed upon the fact that in the case of the latter, although he is described as being a software engineer, no specifics are provided with regard to the development of the software. The evidence of Mr Baltutis is described as being largely assertion without specifics.

Intellectual property rights

53. Mr Banner KC and Mr King refer in paragraph 23 of their Skeleton Argument to s.9 of the Copyright, Designs and Patents Act 1988 ("**CDPA**") as providing that the "*author*", "*in relation to a work means the person who creates it.*" Further, they refer to s.11(1) CDPA as providing, so far as relevant, that:
- "(1) The author of a work is the first owner of any copyright in it, subject to the following provisions.*
 - (2) Where a literary, dramatic, music or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary."*
54. Computer programs are treated as literary works under s.3(1) CDPA.
55. Palmyra submits that the matters referred to above allow the Court to grant summary judgment in respect of the ownership of the IP. However, Mr Banner KC and Mr King submit that even if the Jethwa Defendants' case as to legal ownership does have reality such that legal title may vest in Epos Guru or EDE, it is clear that equitable ownership rests with ENL.

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56. As to the relevant principles concerning equitable ownership, Palmyra submits that there are no set rules which determine the circumstances in which an equitable title arises, and *“there is no limit to the variety of contractual situations in which parties may agree that the copyright in a work yet to be created will belong to someone other than the first legal owner”* (Copinger and Skone James on Copyright, 18th Ed at 5-205 and 5-207).
57. It is submitted that this result may arise because of what the parties agreed or as the consequence of a fiduciary relationship (see Copinger, at 5-206). It is submitted that two particular circumstances are relevant in the present context:
- i) Firstly, it is submitted that in commissioning cases, and in the absence of a detailed contract, the question is what term should be implied (into the agreement), and generally whether that should be for a non-exclusive licence, an exclusive licence, or an assignment of the copyright in whole or part. Reference is made by Mr Banner KC and Mr King to:
 - a) Copinger at 5-211 (excluding footnotes) as saying that: *“because the term to be implied should go no further than is necessary to fill the lacuna in the express terms of the contract, there is a greater tendency to imply the grant of a licence rather than to imply the assignment of copyright to fill that lacuna [...] there are still situations where it would be proper to imply a term for the assignment of copyright in a commissioned work [...] If, therefore, it would have been obvious that the commissioner might need to enforce the copyright against third parties and have exclusive control over the work, this will point to an implied term for an assignment;*
 - b) The summary of the law in *Ray v Classic FM Plc* [1998] FSR 622 at 640-644.
 - c) The list of further factors mentioned in Copinger at 5-212, which includes the following (excluding footnotes):
 - “(1) The fact that a work is made specifically for the commissioner’s business and at the commissioner’s expense in circumstances where neither party can have contemplated that the author of the work would have any other genuine use for it, may justify the implication of an agreement to assign the copyright to the commissioner”;*
 - ...
 - “(3) The impact of an assignment on the author and whether it could sensibly have been intended that the author should retain the copyright obviously needs to be considered”;*
 - “(4) Where the author works as part of a team with employees of the commissioner, this may justify the implication”.*

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- ii) Secondly, in the case of fiduciaries: “Where a work is created by a person who stands in a fiduciary relationship with another, such that that person cannot claim to have created the work for their own benefit, that person will usually hold the copyright in trust for that other person” – see Copinger at 5-214, and *Vitof Ltd v Altoft* [2006] EWHC 1678 at [144] to [151], where summary judgment was granted on this basis.

58. Palmyra relies upon each of the two above circumstances:

- i) As to commissioning, it is submitted that Mr Jethwa commissioned the software from Epos Guru, of which Mr Jethwa was a director and shareholder, for the benefit of ENL. This is said to be supported by the following in particular:
 - a) On the Jethwa Defendants’ own pleaded case, ENL was the original owner of the software as developed by Applitech. After that software fell out of use, ENL continue to exploit and receive the economic benefit of the software it relied on for its business, all free of charge. It is submitted that if ENL were not the owner of the software, this was an inexplicable uncommercial agreement in a context in which ENL needed to and did grant licences of the Emperium software.
 - b) The numerous contemporaneous documents that are relied upon as showing that Mr Jethwa was party to numerous representations that ENL owned the IP, consistent with it being commissioned for ENL’s benefit.
 - c) It is submitted that the Jethwa Defendants cannot say that it was intended that Epos Guru should be the owner of the software, given that it was only: “*In preparing for the investment or exit, [that Mr Jethwa] learned that the IP for the till systems vested with the developers [allegedly Epos Guru] in the absence of any contract*” – Jethwa 5, paragraph 23. It is submitted that this is a conclusion reinforced by the fact that on the Jethwa Defendants’ case, Epos Guru was content to assign the relevant rights to EDE for no consideration.
- ii) As to the effect of Mr Jethwa being in a fiduciary relationship with ENL, it is submitted that as Mr Jethwa stood in such a relationship to ENL, he cannot claim to have set up a situation whereby ENL was not the equitable owner of the IP, a conclusion said to be reinforced by the fact that the relevant software was critical to ENL’s business.

Conclusion

59. It is submitted on behalf of Palmyra that, having regard to the above matters viewed collectively, the real position is clear, namely that there was one piece of software developed over time, and that ENL owned it. Mr Banner KC submits that whether or not Epos Guru actually did anything, so that it became the legal owner of the IP does not matter, because it is clear and obvious that it was always intended, by all relevant parties, that the software was being developed for the benefit of ENL, and that ENL would own it, such that ENL has always properly to have been regarded as the beneficial owner of the IP.

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60. Mr Banner KC submitted that even if legal title might have passed to EDE, this makes no real difference because, as beneficial owner, ENL is entitled to call for the legal title. Consequently, summary judgment ought to be granted to Palmyra regarding the ownership of the IP.

The Submissions of the Jethwa Defendants

61. The principal submission made on behalf of the Jethwa Defendants by Mr Pickering KC is that Mr Jethwa has provided evidence, supported by three long-standing members of staff, that the software was developed by Epos Guru, which had been funded by Mr Jethwa, and that the IP was therefore owned by Epos Guru until it was assigned to EDE by the assignment dated 17 June 2017. On the basis of this evidence, it is submitted that the ability of ENL to enter into EULAs with customers is explicable on the basis of having an implied licence to do so, and that any challenge to the evidence of Mr Jethwa can only properly determined at trial, and that the issues of fact and law that arise are inappropriate to be determined on a summary basis given that the evidence of Mr Jethwa and the other witnesses cannot, it is said, be dismissed out of hand.
62. In the course of his submissions, Mr Pickering KC made the following specific submissions:
- i) Mr Pickering KC submits that the observations of Leggett J in *Gestmin v Credit Suisse* (supra) at [22] are more concerned with how evidence ought to be dealt with at trial, and although Leggatt J stresses the importance of contemporaneous documentary in contrast to witness evidence, Leggatt J's observations do not provide a proper basis for dismissing witness evidence out of hand on an application for summary judgment simply because it might be inconsistent with contemporaneous documents.
 - ii) Mr Pickering KC submits that the present claim involves questions of ownership of intellectual property and intellectual property rights, and thus that one is concerned with an action in rem, the determination of which will bind the whole world. Whilst this will not prevent summary judgment being granted in an appropriate case, it is submitted that it means that care must be taken in determining intellectual property rights such as those under consideration in the present case on a summary basis.
 - iii) Mr Pickering KC submits that the issues that arise raise mixed questions of fact and law that require an examination at trial as to who the author of the relevant software was, in the context of evidence to the effect that the author was an employee or employees of Epos Guru. Reliance is placed on the evidence of Mr Jethwa, supported by the three other witnesses, that he funded Epos Guru to develop the software afresh from scratch following the determination of the relationship with Applitech.
 - iv) So far as the assignment dated 17 June 2017 is concerned, Mr Pickering KC makes the point that nobody has sought to suggest that this assignment is a forgery or not otherwise a genuine document, and he points to the fact that Mr Jethwa is supported by the other witnesses in the contention that the subject matter of the assignment, although perhaps not obvious on its face, was the IP in question. Mr Pickering KC makes the point that if it had been intended that

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ENL should be the owner of the IP, then the assignment might have been expected to have provided for an assignment to ENL.

- v) So far as the contemporaneous documentation is concerned in which it was stated that ENL was the owner of the IP in the software that it was providing, Mr Pickering KC recognises that in certain of the documentation “*Emperium Group*” had been defined as ENL and Epos Direct, without reference to Epos Guru. However, he submitted that during the period in question, Epos Guru was in reality being treated as part of a group with ENL, hence the various references in the documents to an operation in India. Reference was made, in particular, to the executive summary sent undercover of Mr Jethwa’s email dated 17 July 2013 which referred to the fact that: “*The group’s technology and marketing activities are supported by a global network of offices located in UK, India, Hong Kong and UAE.*” A further example is the document sent by Mr Jethwa to Mr Prakash under cover of the email dated 17 April 2012 which, under the heading “*About us*”, and having referred to 3 strategic locations in the UK, went on to say that: “*Our global software support centre is based out of Ahmedabad, India, serving the global EMPERIUM EPOS users.*”
- vi) Mr Pickering KC relies upon the fact that Palmyra does not positively assert a case as to ownership of the IP in its Defence, merely pleading in paragraph 5 of its original Defence that it “*has no direct knowledge of authorship and so ownership of*” the IP.

63. In short, the Jethwa Defendants submit that the issue as to the ownership of the IP can only properly and fairly be determined at trial, and that it is inappropriate to determine the same on an application for summary judgment.

Determination**Principles to apply**

64. So far as the appropriate principles for the Court to apply on an application for summary judgment under CPR Part 24 are concerned, it is common ground that they are as set out in paragraph 29 of the 2023 Judgment as follows:

- i) The question is whether the respondent to the application can show that they have a “*real prospect*” of succeeding on the relevant claim or issue, or of successfully defending the relevant claim or issue, as appropriate, within the meaning of CPR 24.2.
- ii) What this means was helpfully explained by Lewison J (as he then was) in his oft approved and applied passage in *Easyair Ltd (ta Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], referred to in Civil Procedure 2023 at 24.2.3. In short:
 - a) The court must consider whether the respondent to the application has a “*realistic*” as opposed to a “*fanciful*” prospect of success.
 - b) The question boils down to whether the claim carries some degree of conviction, is more than merely arguable and has reality to it;

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- c) The Court should not conduct a “*mini trial*” in reaching its decision, although that does not mean that it is bound to accept everything that a party says if factual assertions lack reality, particularly if contradicted by contemporaneous documents;
 - d) Although micawberism will not assist a party seeking to rely on something that might turn up at trial, the Court should take account of evidence that can reasonably be expected to be available at trial. Thus if reasonable grounds exist for believing a fuller investigation into the facts would add to or alter the evidence available to a trial judge, or if a factual dispute is unlikely to be able to be resolved without reference to further (and especially oral) evidence, then a case should be permitted to proceed to trial – see *Three Rivers DC v Bank of England* [2003] AC 1, and *Doncaster Pharmaceuticals v Bolton* [2007] FSR 63 at [18];
 - e) On the other hand, if a case or issue can be disposed of on the basis of a short question of law or construction, and all the relevant materials are before the court to enable it to do so, then the Court should grasp the nettle and decide it.
- iii) The decision of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [23] – [27], provides some helpful guidance as to the correct approach to an application for summary judgment in cases of deceit / fraudulent misrepresentation. Summary judgment can be granted in such cases, where the defence lacks the necessary realism.

Real prospect of success?

65. Palmyra has, through the submissions of Mr Banner KC and Mr King, mounted a very formidable attack on the credibility and reality of the case maintained by the Jethwa Defendants that EDE and not ENL is the legal and beneficial owner of the IP. However, despite the force thereof, I am not persuaded that the Jethwa Defendants do not stand any real prospect of success in establishing at trial that EDE is the legal and beneficial owner of the IP. This is because I do not consider that such case can properly be described as fanciful, and I consider that it is more than merely arguable, and does carry some conviction.
66. In reaching this conclusion, I have not taken into account in support of the Jethwa Defendants’ case, Mr Jethwa’s evidence, to some extent supported by the other witnesses, with regard to what was said during the course of the negotiations leading to the conclusion of the SPA, and in particular the suggestion that representatives of CPA might have been informed that ENL had the benefit of a licence, and possibly a perpetual licence, to use the relevant IP. I have a concern that in seeking to rely upon this evidence, the Jethwa Defendants are seeking to go behind my decision as contained in the 2023 Judgment that Mr and Mrs Jethwa were in breach of warranty, and guilty of deceit having warranted, and represented, that ENL was the owner of the IP. To the extent that they might be seeking to go behind my decision by maintaining something different would, as I see it, amount to an abuse of process that I ought not to entertain. It is to be noted that permission to appeal my decision in the 2023 Judgment was refused by the single Lord Justice (Newey LJ) in the Court of Appeal.

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67. I am not persuaded that the observations of Leggett J in *Gestmin v Credit Suisse* (supra) at [22] are of any real assistance in the context of the present application for summary judgment, save to the extent that the observations highlight the potential significance, and potential conclusive significance, of contemporary documentation in the context of a commercial dispute. I do not consider that the observations in question can be taken to mean that, in particular in the context of a summary judgment application, witness evidence recounting past events should be ignored, or treated as lacking reality, simply because it appears to be contradicted by contemporaneous documentation. I bear in mind that if the matter were to get to trial, it would be necessary to test the witness evidence not only against the documentary evidence, but against the inherent probabilities, and the evidence of other witnesses – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98]. In these circumstances, I consider that it would only be appropriate to reject witness evidence on the basis of inconsistent documentary evidence at this stage if it could properly be said that the documentary evidence rendered the witness evidence wholly incredible or unrealistic in respect of matters required to be proved.
68. I am not convinced that the seeking of a declaration as to ownership of intellectual property rights as between particular parties to litigation is to be regarded as an action in rem binding on the whole world. I have been referred to no authority to this effect and this does not accord with ordinary principles regarding the granting of declaratory relief, cf. Copinger at 21-231.
69. However, in considering the terms of the assignment dated 17 June 2017 following the hearing, a concern does arise in my mind as to the effect thereof. This arises in respect of clause II thereof which speaks in terms of Epos Guru assigning to EDE: “*all the present and future rights, title as well as the interest to any and all Intellectual Property (IP) created, developed, currently under creation/development, committed for future creation/development by [EposGuru] for and on behalf of [EDE]*”. It seems to me that the point might be taken that this could not extend to the IP because it was not created on behalf of EDE (which was not in any event incorporated until April 2017), but, if anybody, on behalf of ENL. In this scenario, title might conceivably remain with Epos Guru which is not presently before the Court as a party.
70. The witness evidence of Mr Jethwa, supported by the Jethwa Defendants’ witnesses, does, at least at face value, support a case that whilst ENL might initially have owned the relevant software created by Applitech, it was rewritten from scratch by Epos Guru’s employees from and after 2008 funded by Mr Jethwa personally. If that is right, then subject to any considerations of Indian law that may apply if the software was written in India, and the arguments as to beneficial ownership arising as a result of the commissioning of the writing of software for ENL or Mr Jethwa’s fiduciary duties, ownership of the IP would lie with Epos Guru pursuant to s.9 and s.11 CDPA. I take the point that there is some evidence that earlier versions of the software were created prior to Epos Guru being incorporated, but what the record of software versions does show is that the vast bulk of the work was done from and after 2008, and what exactly the work done prior to 2008 represented strikes me as being a matter to be explored and determined at trial.
71. The authorities relied upon by Palmyra and referred to in paragraphs 56 and 57 above demonstrate, as I see it, that any consideration as to what implied rights may have been conferred where software is commissioned, and as to whether the existence of fiduciary

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duties has resulted in IP rights being held beneficially for the party to whom the fiduciary duties are owed, is likely to be extremely fact sensitive.

72. In the case where software is commissioned, as *Ray v Classic FM Plc* (supra), demonstrates, the key consideration is as to whether there is a contract and, if so, what rights, if any, are to be implied by way of beneficial ownership or, alternatively, a licence – see at pp640-641, per Lightman J. As Lightman J points out at sub-paragraph (3) on p641, the mere fact that a contractor has been commissioned is insufficient to entitle the client to the copyright. Further, the consideration as to what rights are to be implied involves the application of ordinary principles so far as the implications of terms in a contract are concerned, and so the Court will only imply such term or terms as it is necessary to imply. As Copinger at 5-211 comments, because the term to be implied should go no further than is necessary to fill the lacuna in the express terms of the contract, there is a greater tendency to imply the grant of a licence rather than to imply the assignment of copyright to fill that lacuna.
73. In the light of these considerations, I consider that real issues do arise, if Mr Jethwa's evidence is not to be rejected out of hand, as to the basis upon which Epos Guru might have been commissioned to create the software in question given that, prima facie, it would only be appropriate to imply a term in favour of ENL if Epos Guru had been contracted pursuant to a contract with ENL to develop the software, which is by no means clear, certainly if Mr Jethwa personally paid for its development. Even if there were a contract, and thus possible to imply a term, I consider that there is a real issue as to whether it would be appropriate to imply a licence, as the Jethwa Defendants now say was the case, or whether beneficial ownership of the software in favour of ENL is to be implied.
74. So far as the case as to Mr Jethwa being subject to fiduciary duties in favour of ENL is concerned, the present case is, I consider, very different from *Vitof Ltd v Altoft* (supra) relied upon by Mr Banner KC and Mr King where, on the facts of that case, Mr Richard Arnold QC, sitting as a Judge of the High Court, found that the director in question held the relevant intellectual property rights on trust for the company in circumstances where it was fairly obvious that he had an obligation to account to the company in respect of the opportunity provided to him as a fiduciary. In the present case, the position is in my judgment, at least arguably with a real prospect of success, rather different where, on the Jethwa Defendants' case, ENL did not have the requisite funds, and the funds for the development of the software were provided personally by Mr Jethwa, in circumstances where it is, now at least, accepted that ENL has enjoyed the benefit of a licence to use the software. Consequently, I do not consider that it can be said that there is an open and shut case that Epos Guru held the IP on trust for ENL as a result of the existence of fiduciary duties owed by Mr Jethwa to the latter.
75. I agree with Mr Banner KC's observation that Mr Jethwa "*learned that*" the IP may have belonged to the creator of the software somewhat late in the day, and that this raises the question, which Mr Jethwa does not answer, as to what his thinking was prior thereto, the obvious inference perhaps being that prior thereto he understood that the IP belong to ENL who was primarily making use of the same. However, the point might be made that prior to the issue arising in 2017, and the execution of the assignment dated 17 June 2017, it really did not matter as between the various companies in which Mr Jethwa had a hand as to where ownership of the IP strictly lay, and it may well be that no thought was given thereto.

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76. In a similar vein, whilst Mr Banner KC was able, in the course of submissions, to refer to the significant number of documents referred to above, and more in which ENL was seemingly held out as the owner of the IP in the Emperium software, as Mr Pickering KC pointed out, this was in the context of the existence of a number of companies in which Mr Jethwa had a hand and was in a position to control, including Epos Guru. As identified above, although some of documents may have defined the “*Emperium Group*” as restricted to ENL and Epos Direct, there was significant reference in the documents to operations in and a connection with India, where Epos Guru is based. Consequently, whilst the documentation referred to does provide powerful evidence in support of Palmyra’s case for summary judgment, I do not consider that it can be properly said to wholly undermine Mr Jethwa’s and the other witnesses’ evidence with regard to the ownership of the IP, and I consider that there are issues to be explored at trial in relation thereto.
77. So far as the EULAs granted by ENL are concerned, the fact that ENL’s business model is based upon the granting thereof, and the receipt of income as a result thereof, does, as I see it, support a case that ENL is the true owner, beneficially at least, of the IP. However, I do not consider it to be conclusive, bearing in mind that it would be possible for ENL to have been licensed to, itself, grant licences to its customers.
78. So far as the OSA is concerned, it is, again, supportive of Palmyra’s position, but not in my judgment conclusively so bearing in mind that it was primarily concerned with future software development, as opposed to ownership of IP consequential upon past software development.
79. Further, there is force in Palmyra’s point in respect of inherent probabilities. However, again bearing in mind that Mr Jethwa had a hand in the various companies, including ENL (prior to the SPA) and Epos Guru, what might seem uncommercial as between parties operating at arm’s length, is more explicable in the context of a number of companies in respect of each of which Mr Jethwa had a connection and an ability to control events. Further, there is the point that if it had been intended that the IP should belong to ENL, then one might have expected the assignment dated 17 June 2017 to have provided for the assignment of the IP to ENL.
80. Again, Mr Banner KC made a number of forceful points in relation to the lack of evidence that one might have expected to have seen in support of the Jethwa Defendants’ case. However, the force thereof is, I consider, somewhat blunted by a number of considerations including that:
- i) We are concerned with events that took place sometime ago, dating back to 2005, and where a number of the key events may have taken place, and thus documentation created, some distance away in India.
 - ii) Further, at paragraph 10 of Jethwa 5, and paragraph 16 of Jethwa 6, Mr Jethwa explains that correspondence and a file in respect of the development of software by Applitech was handed over to Andrew Gore of CPA on 5 October 2022. The Claimants do not appear to dispute this, and I note that the Claimants have declined to disclose documentation, which would include this documentation, ahead of formal disclosure in the present proceedings that might shed further light on events.

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81. Having regard to the considerations that I have identified above, I have a real concern that this is a case where further documentation and other relevant evidence may well come to light following disclosure, and ahead of trial, that might well support the Jethwa Defendants' position in relation to the ownership of the IP.

Conclusion

82. In light of the various considerations that I have identified above, and despite there being much force behind the Application, I am unable to conclude on the evidence before me that there is no real prospect of the Court concluding at trial that both legal and beneficial ownership of the IP belongs to EDE rather than ENL, even if Palmyra and the Claimants might, on the evidence presently before the Court, appear to have the better case to the effect that the ownership of the IP belongs to ENL.
83. In the circumstances, I consider that the Application must be dismissed.