



Neutral Citation Number: [2023] EWHC 695 (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  
3 April 2023**

**Before:**

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

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**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

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**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

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Hearing date: 16<sup>th</sup> March 2023  
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## JUDGMENT ON COSTS

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

1. In this judgment, I deal with the issue of costs in relation to the above action, in the light of my findings at [2022] EWHC 3381 (Pat).

### **CPR r.44.2**

2. Under CPR r.44.2(1) the court has a discretion as to (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid. However, as r.44.2(2) makes clear, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order.
3. In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including (inter alia) the conduct of all the parties and whether a party has succeeded on part of its case, even if that party has not been wholly successful (see r.44.2(4)). In this regard, r.44.2(5) provides that the conduct of the parties includes (a) conduct before, as well as during, the proceedings, (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
4. Having considered these matters, r.44.2(6) provides that the costs orders which the court may make include an order that a party must pay (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs from or until a certain date, including a date before judgment. However, r.44.2(7) qualifies this, saying that, before the court considers making an order under sub-paragraph (6)(f), it must first consider whether it is practicable to make an order under sub-paragraph (6)(a) or (c) instead.
5. Accordingly, where a party has succeeded overall but has been unsuccessful on a specific issue or issues, the court has power to make an issue based costs order (i.e. allowing or disallowing the costs of particular issues). However, such orders can lead to considerable difficulties in an assessment as it may not be easy for a costs judge to divide the costs between the various issues. In such cases, a "broad brush" approach, whereby the trial judge makes an order for a proportion of the overall costs to be payable by the unsuccessful party, can be preferable to an issue based order.

### **The issues at trial**

6. In the present case,
  - a. The First Claimant ("Mr Price") made claims for (i) patent infringement on the basis of his claim to be the proprietor of the patents in issue and (ii) copyright

infringement based on his claim to be the owner of copyright in certain works. These claims failed because he failed to establish that he had the requisite title.

- b. The Second Claimant (“Supawall”) made a claim for patent infringement on the basis of its claim to be the exclusive licensee of the patents. It succeeded in this claim as regards the Defendants’ Old Injectawall Products but failed as regards the Defendants’ New Injectawall Products.
- c. The Claimants together made the passing off claim, which failed.

### **The parties’ positions**

7. On the basis of these findings, Mr Maynard-Connor submitted that it would be very difficult (indeed, he said, ridiculous) for a costs judge to have to make an assessment by reference to specific issues. On this basis, having analysed matters such as conduct and the degrees of success on specific issues as required under r.44.2, he invited me to order the Claimants (collectively) to pay 70% of the costs of the Defendants (collectively). He was, in effect, asking me to look at the case very much in the round.
8. Mr Grime in his written submissions took a similar approach in that he also invited me to look at the case in the round. However, his conclusion was that, applying r.44.2, the correct order should be that the Defendants (collectively) should pay a high proportion of the costs of the Claimants (collectively).
9. As I understand it, Mr Grime, in his oral submissions, suggested a different approach. He argued that, whilst Mr Price should pay the costs of the issues on which he had failed, the Defendants should pay 80% of Supawall’s costs of the other issues, the discount reflecting issues on which Supawall had lost (including passing off).

### **Apportionment between the claims**

10. An approach in the round has considerable attractions in terms of simplicity and in reducing the issues for a costs judge carrying out a costs assessment. However, given the findings summarised in paragraph 6 above, I do not think that it is possible to say that either the Claimants collectively or the Defendants collectively have succeeded. It is true that the Claimants collectively brought the passing off action on which they failed. However, the other claims were not brought collectively. Whilst Mr Price’s patent claim had elements that were common to Supawall’s patent claim, the two claims were separate claims and Mr Price’s claim failed whereas Supawall’s succeeded. The copyright claims were brought by Mr Price alone and failed.
11. Given this, and using the broad brush approach that both parties accept is necessary and desirable, it seems to me that I should (i) apportion the costs of the action as a whole as best I can between the three heads of claim (patent, copyright and passing off) and then (ii) in relation to the patent claims, apportion the costs between Mr Price and Supawall. In this regard, it seems better to take a broad brush approach based on what I saw and heard in the course of the trial, rather than to leave this apportionment to a costs judge.
12. On this basis, my starting point is that the parties’ overall costs of the claim can be apportioned 75% as to the patent claims, 20% as to the copyright claims and 5% as to the passing off claims. I say this because the patent claims were by far the most

important, both in terms of value and in terms of the time spent on them during the trial. The copyright claims were of much less importance at trial and the passing off claim occupied very little time.

### **The Patent claims**

13. Dealing first with the costs of the patent claims.
14. As I have mentioned, there were two separate claims, one by Mr Price as proprietor, the other by Supawall as exclusive licensee and, it seems to me, that I have to deal with those claims separately not least because Mr Price's claim failed whereas Supawall's claim succeeded in part. Further, I should not make an order that would result in Mr Price paying the Defendants' costs of unsuccessfully defending Supawall's claim. Nor do I think that it would be fair to make an order that the costs of the two patent claims be set off against each other or that there should be no order as to costs of these claims.
15. On this basis, I will apportion the overall patent costs as between Mr Price's claim and Supawall's claim. In taking this approach, I note that in *L'Oréal S.A. v RN Ventures Ltd* (no. 2) [2018] EWHC 391 (Ch), where patent claims were made (successfully) by a proprietor and (unsuccessfully) by an exclusive licensee, Henry Carr J started by apportioning the costs between those claims on a 50/50 basis (see at [21]).
16. In the present case, I do not think a 50/50 split would be correct. Clearly, there were elements that were common to both Mr Price's claim and Supawall's claim (i.e. the need to establish that Mr Price was the inventor and that he had not held the patents on trust for MTFP and to show that the Defendants' actions constituted an infringement). However, there were other and very substantial issues fought at trial which related solely to Mr Price's patent claim (such as the purported assignment to Mr Bridge and the various dealings with the patents involving Mr Craig, FEBL and the Defendants). Somewhat more difficult was the issue of the purported assignment of the Patents to Lightpeak. The evidence on this issue was principally directed to the issue of Mr Price's title to the Patents. However, it was also relevant to Supawall's claim, because of the issue whether Supawall's exclusive licence had been terminated in the course of the dealings with Lightpeak (an issue on which Supawall succeeded).
17. Putting these points together, it seems to me that, taking the broad brush approach, it would be appropriate to apportion the costs of the patent issues as to 60% to Mr Price's claim and 40% to Supawall's claim.

#### *Mr Price's patent claim*

18. As regards the costs of Mr Price's failed claim, it is clear that the Defendants are the successful parties and so, under the general rule, they would be entitled to their costs from Mr Price. I can see no reason why there should be any adjustment on this to reflect aspects of that claim on which Mr Price succeeded (such as my finding that he had not held the Patents on trust for MTFP). As regards the issue whether Mr Price had assigned the Patents to Lightpeak, although Mr Price succeeded on this issue, my findings on this issue were of importance to my conclusion that the purported assignment to Mr Bridge was a fiction (a key issue on which the Defendants succeeded).

19. Accordingly, in my judgment, Mr Price should pay the Defendants' costs of his failed patent claim - the relevant figure being 60% of 75% of the Defendant total costs of the action. Further, as that claim was founded on the purported assignment to Mr Bridge (which I found was a fiction created to keep the Patents out of the hands of Mr Price's trustee in bankruptcy), he should pay these costs on an indemnity basis.

*Supawall's patent claim*

20. Turning to the costs of Supawall's patent claim. It seems to me that Supawall is the successful party as regards its patent claim as against the First, Third and Fourth Defendants. It is true that it failed as regards the New Injectawall Products and that it abandoned its claim as regards the (clearly less important) 989 Patent. However, overall it succeeded. Applying the test mentioned in paragraph 44.2.13 of the White Book, it will be the First, Third and Fourth Defendants who, at the end of the day, will have to write a cheque by way of damages. Accordingly, under the general rule in r.44.2(2), Supawall would be entitled to its costs of its patent claim.
21. The issue, then, is whether this is a case where it would be appropriate to make an order under r.44.2(6)(a) that Supawall receive only a proportion of its costs of its patent claim to reflect elements of its claim on which it failed or to reflect its conduct (see r.44.2(4) and (5)). In my judgment, this is such a case. In the first place, Supawall effectively abandoned its claim as regards the 989 Patent and it lost as regards its claim that the New Injectawall Products infringed the 714 Patent. This latter point had been the subject of some evidence (both factual and expert) at trial. Secondly, it seems to me that I should take into account the conduct of Supawall (by its director and shareholder, Mr Middleton) in giving evidence in support of Mr Price's claim to have assigned the patents to Mr Bridge, evidence which I found it was unlikely Mr Middleton believed to be true. It seems to me to be simpler and more appropriate for the court to take that conduct into account by way of reduction in the proportion of Supawall's recoverable costs rather than for the court to order Supawall to pay some part of the Defendants' costs of Mr Price's claim.
22. I have considered whether it would be proper to take into account the fact that Supawall's case only succeeded by reason of the late joinder of the Official Receiver ("the OR") as a party (a joinder needed in order to comply with the requirements of s.67 Patents Act 1977). Supawall should, of course, pay the costs of and associated with its application to join the OR. However, in the course of his submissions in relation to the s.67 issue, Mr Maynard-Connor argued that I should go further and that I should only grant permission for the joinder of the OR on terms that Supawall be deprived of its costs of its claim up to the date of the joinder and, indeed, that it should pay the Defendants' costs of that claim up to that date.
23. But for Supawall's involvement with Mr Price's false claim to be the proprietor of the Patents, I would have no hesitation in rejecting this argument. It is true that under s.67 it is a requirement that the proprietor be a party to a claim brought by an exclusive licensee. However, as was noted in *Begum v Birmingham City Council* [2015] EWCA Civ 386 per Bean LJ at [36], the fact that a claim would have failed but for an amendment is not of itself a reason for ordering the amending party to pay the costs up to the date of the amendment. It all depends, as Bean LJ said, on the facts of the case. In

the present case, the fact that the OR was joined late did not in any meaningful way add to the costs of the action (other than as regards the costs of the joinder application). Indeed, (as I pointed out in my judgment in relation to the joinder of the OR), s.67 is directed primarily at issues of quantum (which are yet to be resolved) rather than at the issue of liability that was being fought at the trial before me. For this reason, I also reject the argument that this is case where the “general rule” referred to in *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137 applies (see per Stuart-Smith LJ at p.154A-B). In contrast to the position in *Beoco*, this was not an amendment which “substantially altered the case that the defendant has to meet”. Indeed, so far as the Defendants were concerned in meeting Supawall’s claim, it made no difference exactly who was the proprietor.<sup>1</sup> Every other aspect of Supawall’s claim remained the same. Moreover, there is every reason to think that, even if the OR had been joined at an earlier stage, Supawall’s claim “would have been vigorously resisted” (to use the words of Stuart Smith LJ in *Beoco* at p.154C) with the result that the general rule should not be applied. On this basis, it would, in my judgment, be unfair to deprive Supawall of its costs and even more unfair to order it to pay the other side’s costs up to the time of the joinder that was needed to comply with s.67.

24. However, in the present case Mr Maynard-Connor argues that the change in Supawall’s claim was a change that was forced on it when the falsity of its case that Mr Price was the proprietor was exposed and that this justifies the order which he now seeks. In this regard, he referred me paragraphs [52], [53] and [61] of the judgment of Lord Clarke in *Summers v Fairclough Homes Ltd* [2012] UKSC 26. For present purposes, I do not derive much assistance from paragraph [52] of *Summers* but, at paragraph [53], Lord Clarke stated that:

*“As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the Court that the prospect of such orders is likely to be a real deterrent.”*

Similarly, at paragraph [61] Lord Clarke commented that a party “*is likely to face a substantial order for indemnity costs in respect of time wasted by his fraudulent claim*”.

25. These comments clearly suggest that it might be appropriate to penalise a party which has given false evidence. However, I do not think that these comments are particularly relevant to the present case. Given what I have said regarding the purpose of s.67, I do not think that it can be said that Supawall’s claim as exclusive licensee was founded on the false claim that Mr Price was the proprietor. The proprietor is a necessary party, but largely so that issues of quantum can be properly considered and resolved. In that sense, the costs of Supawall’s claim as regards the issue of liability that was before me were not costs that were caused by the false evidence. Moreover, as I have mentioned, Supawall’s claim was always likely to be resisted by the Defendants. In any event, as mentioned in paragraph [21] above, I have already decided that Mr Middleton’s

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<sup>1</sup> I note that the s.67 issue was not one raised by the Defendants at trial and was the subject of submissions after my judgment was handed down.

conduct in giving the evidence that he gave in support of Mr Price's false claim to be proprietor, justifies a deduction in the sum recoverable by Supawall in respect of its costs. It does not, in my judgment, merit additionally making the sort of costs order sought by Mr Maynard-Connor as a condition of the joinder.

26. In relation to conduct, Mr Grime submitted that I should also take into account the fact that Supawall had earlier obtained summary judgment, only for that judgment to be set aside on the basis of Mr Craig's evidence, some of which evidence was subsequently rejected at trial (without for a moment doubting Mr Craig's honesty). Mr Grime also pointed to the fact that much of the documentation on the Lightpeak issue only came to light at trial (when it was produced by Mrs Pierce). Given my findings in the action overall, I do not see that either of these points requires me to make any adjustment to the costs order that I would otherwise be minded to make. In particular, I do not see either point as being something in respect of which the Defendants should be criticised or penalised in costs.
27. For these reasons, and to reflect the matters mentioned in paragraph 21 above, I will make a deduction in the costs that Supawall would otherwise recover such that the First, Third and Fourth Defendants should pay Supawall 30% (rather than 40%) of 75% of the Claimants' total costs of the action.
28. Separately, I will make an order that the Defendants' costs of and relating to the application to join the OR as a party be paid by Supawall in any event on a standard basis.

### **Copyright claims**

29. Turning to the costs of Mr Price's copyright claims. These claims failed because Mr Price was unable to establish title to the copyrights in issue. Whilst I found that, but for title, the claims would have succeeded, this is not a case where it would be appropriate to adopt an issue based order and, indeed, Mr Grime did not suggest the contrary. In my judgment, Mr Price must pay the Defendants' costs of the copyright claims (being 20% of the Defendants' total costs) to be assessed on a standard basis.

### **Passing off claims**

30. Turning to the costs of the passing off claims. The position here was that the passing off claim was made by both Claimants and it failed. This was also treated by Mr Grime (in my view correctly) as a matter on which the Defendants had succeeded. On this basis, the Claimants must pay the Defendants' costs of the passing off claims (being 5% of the Defendants' total costs) on, again, the standard basis.

### **Costs payment on account**

31. Under r.44.2(8), where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.
32. Accordingly, I will invite the parties to file and serve evidence sufficient for the court to reach an estimation of the costs that they are likely, on a detailed assessment, to receive as a result of my judgment above. For the reasons set out at paragraph 44.2.12

of the White Book, I do not envisage that this evidence will be extensive. It should be just enough to enable the court to arrive at a reasonable estimation of the relevant costs. That evidence should be exchanged together with an indication of the sum which the relevant party is seeking by way of payment on account. If the parties are unable to agree, I will direct the filing of written submissions with a view to the matter being resolved on the papers (unless the parties indicate that it is necessary for there to be a hearing).

33. Given the history of the case and the length of the trial, preparing the evidence referred to above may not be simple. Accordingly, I would be happy for the parties to agree a timetable for taking the steps referred to above. In the absence of agreement, I will direct that the evidence and indication of sum sought be filed and exchanged within 21 days and that submissions on any point in dispute be filed and exchanges within 7 days thereafter.