Neutral Citation Number: [2020] EWHC 1326 (Ch)

Claim No: HC-2016-002285

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (CHD)
INTELLECTUAL PROPERTY
Remote Hearing by Skype for Business

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 20 May 2020

Before:

MR. RECORDER DOUGLAS CAMPBELL QC

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Between:

(1) LIFESTYLE EQUITIES CV **(2) LIFESTYLE LICENSING BV** **(each company incorporated under the laws of the Netherlands)**	**Claimants**
- and -	
(1) SANTA MONICA POLO CLUB LIMITED **(2) AZIRE GROUP LIMITED** **(3) CONTINENTAL SHELF 128 LIMITED t/a JUICE CORPORATION** **(4) MR. ZUBAIR MUKHTAR ALI**	**Previous Defendants**
(5) MR. KASHIF AHMED	**Defendant**
(7) YOURS CLOTHING LIMITED t/a BAD RHINO **(11) HORNBY STREET LIMITED t/a JUICE CORPORATION**	**Previous Defendants**
(13) MO & a LTD t/a BE JEALOUS **(14) BIGGCLOTHING4U LIMITED** **(15) EON CLOTHING LIMITED** **(16) SIZE BASE LIMITED**	**Previous Defendants**
(12) MRS. BUSHRA AHMED	**Defendant**
(13) MO & a LTD t/a BE JEALOUS **(14) BIGGCLOTHING4U LIMITED** **(15) EON CLOTHING LIMITED** **(16) SIZE BASE LIMITED**	**Previous Defendants**

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MR. THOMAS ST. QUINTIN (instructed by Brandsmiths) for the Claimants

DR. TIMOTHY SAMPSON (via Direct Access) appeared for the 5th and 12th Defendants

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Approved Judgment

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MR. RECORDER DOUGLAS CAMPBELL QC:

1. I handed down my judgment in this matter on 23rd March 2020, having supplied the parties with a draft shortly before. It is reported at [2020] EWHC 688 (Ch). In that judgment I explained that I did not believe Mr. Ahmed's evidence that he had repaid a certain loan made to him personally. I said that it would have been an easy thing to for him to prove using his own personal records but that he had not done so, nor had he even explained what the loan was for if not for something to do with the infringement. See my judgment at paragraphs [19] and [98]-[101].

2. On Monday this week, namely 17th May 2020, Mr. Ahmed said via his counsel Dr. Sampson that this finding was wrong. In particular, Dr. Sampson submitted that I could amend my judgment pursuant to the approach identified in **Charlesworth v Relay Roads** [2000] 1WLR 230 and further explained by Lady Hale in **In Re. L** [2013] UKSC 8 at paragraphs [20]-[27]. Lady Hale emphasised that the overriding objective must be to deal with the case justly, but that every case depends on its particular circumstances. Lady Hale added that a relevant factor was whether any party has acted upon the decision to his or her detriment, but Dr. Sampson accepted that this factor did not apply here.

3. Mr. St Quintin accepts the correctness of this but reminds me that now the overriding objective includes dealing with the case at proportionate cost. See CPR 1.1(2), which also defines how dealing with a case justly and at proportionate cost is to be approached.

4. Dr. Sampson submitted that on the basis of this legal approach I should revise my judgment for the reasons explained by the defendant's expert Mr. Clegg in his third witness statement and also in a letter dated 14 May 2020 which was sent to the court.

5. In his third witness statement Mr. Clegg claims to have an “understanding” that the relevant loan agreement has been repaid. This is for two reasons. First, because of a reconciliation summary which he exhibits at DC3 and which he says was provided to the solicitors acting for D11's administrators on 6th June 2018. Secondly, because he says that the administrators have not come back to his firm in the 22 months since then.

6. In the letter from Mr. Clegg dated 14 May 2020 he exhibited a Final Progress Report from the administrators dated 7 May 2020. My attention was particularly drawn to paragraph 2.11 thereof, headed “Connected Party Claims”. The administrators state that having reviewed the prospect of successful recovery and in view of the likely costs involved, it was decided not to issue proceedings against unidentified “remaining parties”.

7. I have a number of concerns about this evidence, beginning with exhibit DC3 to Mr Clegg’s witness statement. First, I have not understood and I was not told what documents were used to prepare this reconciliation. The numbers do not even match up with the numbers relating to the loan which I found had not been repaid.

8. Secondly, I do not understand how this reconciliation is said to explain or show the repayment of the loan, even if this reconciliation is correct. Dr. Sampson was understandably unable to go beyond the document itself. Mr. St Quintin accurately

described Mr. Clegg's evidence on this as conclusory and almost entirely lacking in explanation.

9. Thirdly, I have not been shown any of the correspondence with the administrators to show whether Mr. Clegg's evidence about them is correct. For instance, Mr. Clegg told me about a letter of claim from the administrators in his oral evidence at the trial. That seems to me at least potentially inconsistent with Mr. Clegg's claim that they had not come back to him. All I have seen is this final report stating that the administrators did not consider it worthwhile pursuing parties which were not even named in the report. As Mr. St Quintin points out, this position is entirely understandable if Mr. Ahmed had said the same thing to the administrators as he has consistently said to the claimants and to the court, namely that he has no money. The evidence falls far short of any acknowledgment on the part of the administrators that the loan has been repaid.

10. Fourthly, I have not been given any explanation as to why this reconciliation was not put forward at the trial, given that it long predates it and is said to show that the loan was repaid.

11. Fifthly, I still do not have any of the evidence of Mr. Ahmed himself which I pointed out in the judgment was lacking. For instance, I have nothing from Mr. Ahmed himself showing personal records, such as from his own bank, showing that the loan from D11 was repaid. I still do not have any explanation from Mr. Ahmed saying what the loan was for if it was not for something to do with the infringement. Indeed, I do not even have evidence from Mr. Ahmed confirming that what Mr. Clegg now says is correct.

12. Mr. St Quintin also made the valid point that if I were to rely on this evidence, fairness demands that the trial be reopened with further examination of Mr. Clegg and potentially further disclosure. Dr. Sampson did not dispute that. The undesirability of adopting this course is obvious, particularly since this is the second trial already and was only held after an adjournment.

13. Mr. St Quintin also reminded me of the importance, when assessing evidence, of bearing in mind the well-known **Ladd v Marshall** criteria although, as Dr. Sampson pointed out, their strict application is somewhat more relaxed in applications of this kind (see **Charlesworth** at p237E to F). Mr. St Quintin submitted that these criteria were nevertheless not satisfied here. I accept that submission.

14. Dr. Sampson also made a secondary point that the loan should be subjected to a 90% discount. That is a matter for potential appeal, but not for revisiting the judgment, as I think Dr. Sampson accepted.

15. For all of these reasons this new material is not sufficient for me to revisit the conclusion I reached in my judgment on this issue and I decline to do so. I therefore dismiss this application.

[Further submissions]

16. I now come to the issue of the costs of the trial. It is common ground that my discretion should be exercised in accordance with CPR Part 44.2, part of which I hereby incorporate into this judgment:

"(1) The court has 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.

(2) If the court decides to make an order about costs –

a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

b) the court may make a different order.

…

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

a) the conduct of all the parties;

b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

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.

…"

17. In deciding what order, if any, to make about costs the starting point is to identify the winner.

18. The claimants drew my attention to a useful summary of the relevant cases in the note in the White Book at 44.2.13, including for instance **Roache v NGN** [1998] EMLR 161. CA. I consider that the claimants are clear winners. They won the issues of joint and several liability and they won over £800,000 in terms of quantum against the two defendants. Dr. Sampson did not realistically suggest to the contrary.

19. This was not merely a substantial sum but it was also substantially more than the defendants ever offered. The most the defendants ever offered was for a total of £20,000 for both defendants, which was made two weeks after the amended case. I was told by Mr. St Quintin, and Dr. Sampson did not dispute, that this offer was made in a letter stating that it took the claimants' amended case into account.

20. Dr. Sampson also referred to the possibility of mediation. In my judgment the fact that the defendants offered mediation makes no difference as the defendants could always have offered more than £20,000 without a mediation.

21. Dr. Sampson also drew my attention to evidence from Mr. Lee, the claimants' solicitor, which was not disputed and said that on 2nd July 2019 the claimants told the defendants that they were prepared to consider settling for a sum in the region of £800,000 plus costs: see Lee 10, paragraph [16]. Ignoring the costs element for the moment, that is broadly around what the claimants were awarded. Hence it seems to me entirely possible that the action could have settled if only the defendants had increased their offer from what was in truth a low sum.

22. I appreciate the claimants sought substantially more than they recovered. I was told by Dr. Sampson, and this was not disputed by Mr. St Quintin, that the maximum set out in the prayer was for £7 million, although it is fair to say that at trial the claimants primarily argued for £3.5 million. If one takes the figure of £3.5 million there has been a recovery of around 25% of the original sum sought at trial.

23. However, as the claimants point out, their primary case only failed on a point of law and it would otherwise have succeeded to the extent and for the reasons explained in my judgment. The claimants won on virtually all other issues, including common design. The point of law was a reasonable one to advance, particularly since it was supported by foreign authority from Ireland, which is a country with a generally similar legal system. It was not an easy one for me to decide.

24. I also bear in mind that as pointed out by Christopher Clarke J, as he then was, in **Travellers' Casualty and Surety Co of Canada v Sun Life Assurance Co of Canada (UK) Ltd** [2006] EWHC 2885 (Comm) at paragraph [12], "It is a fortunate litigant who wins on every point".

25. I certainly do not consider that the claimants' primary case was in any normal sense of the word an exaggerated claim. It was reasonably advanced, supported on the facts and by foreign law. It was merely a claim which failed for legal reasons under UK law. There was no improper inflation of the claim in an attempt to recover sums to which the claimants knew they were not entitled.

26. I also agree that the point which the defendants won was directed to how much the defendants should pay the claimants, not whether they should pay the claimants at all. Accordingly, as I have already said, the defendants could have protected themselves with a suitable offer but they failed to do so.

27. I do not agree with Dr. Sampson that it was incumbent on the claimants to keep going back to the defendants, given that the defendants made their position clear.

28. It also seems to me that I should best reward the defendants' success on that argument by discounting the claimants' costs by an extent which reflects, at least as a starting point, the time actually spent on that issue, rather than by reference to how much of a difference it made to the total claimed recovery (as Dr Sampson suggested). Dr. Sampson did not show me any case law which supported the latter approach. As a matter of principle this latter approach would not be fair to the claimants since the argument was a pure one of law which had little impact on any of the evidence or cross-examination or the way in which the argument was presented.

29. Each side also complained about the conduct of the other, although this was more done in the written skeleton arguments than oral submissions. Nevertheless, I feel I should deal with it. Having heard the trial I am in no doubt that the defendants' approach to the litigation did significantly increase the claimants' costs. For instance, the defendants have throughout this action spent large amounts of time on unfounded complaints about the claimants' preparation of bundles. Furthermore I agree with the claimants that the contents of the defendants' witness statements throughout this action, and Mr. Ahmed said there had been at least 21 of them, have been largely irrelevant. To make matters worse, the defendants' evidence consistently failed to cover matters which the defendants must have known were important, as I explained in my main judgment. The defendants have also made irrelevant but serious complaints about the conduct of the claimants and their legal team generally, which the claimants understandably felt it necessary to rebut by way of yet more evidence. That will have added to the claimants' costs too.

30. I readily accept that at least part of the defendants' conduct, and perhaps the major part, may be due to fact that they are litigants in person. However, I do not see that this makes any difference since their conduct still unduly increased the costs of the litigation for the claimants and I see no reason why the claimants should have to subsidise the defendants' conduct.

31. By contrast, whilst I appreciate the claimants have amended their case from time to time I see nothing objectionable about any of these amendments, and no way in which the defendants' conduct of their defence was thereby prejudiced. Dr. Sampson did not give any examples of any way in which the defendants' conduct of their defence was prejudiced by the amendments. On the contrary, and as I found in my judgment, the defendants prejudiced their own defence by failing to provide evidence which they must have known was important. Hence, if anything it is the defendants' conduct which would justify a higher level of costs recovery from the claimant, rather than the other way around.

32. I have dealt with the defendants jointly up to this point, but I do not consider that the position of D12 calls for separate consideration. She only offered £5,000 but I awarded over £50,000 plus interest, which is yet to be calculated, against her. The claimants still had to proceed against D12 as well against D5 and they won against D12. I do not consider that the level of success the claimants had against D12, as compared to their success against D5, was so significantly different that it is appropriate to distinguish between the defendants so far as the claimants are

concerned. It is for the defendants to decide what to do about costs as between themselves.

33. These factors point in different ways and I have taken them all into account. It seems to me that the just order would be that the defendants pay the claimants 90% of their costs of the second trial. If anything, that is generous to the defendants given the very limited amount of time spent on the only substantial issue which they won. I doubt that anything like 10% of the action from start to finish was spent on this point of law, or indeed anything more than 1% or 2%. As against that I accept Dr. Sampson's submission that this was an important point and Mr. Quintin did not dispute the principle that I could take its importance into account. In view of the importance of this point I consider that a 10% discount is fair. However, to go any lower than that would not in my judgment be fair to the claimants, given their extensive success on all other issues and the defendants' conduct throughout. That is therefore my order.

[Further submissions]

34. I will now give my judgment on summary assessment of the claimants' costs for the defendants' application to adjourn.

35. The grand total sought is over £18,000. I had two concerns about this, both which I raised with Mr. St Quintin. The first was the number of hours spent, charged for four people to attend the hearing for three hours each and one hour each travel time. However, Mr. St Quintin correctly reminded me that this was the opening day of the trial and the figures, when viewed in that context, are not themselves unreasonable. No challenge was made to the hourly rates as such.

36. The second is whether the sum is disproportionately high having regard to two factors. One, as relied on by Dr. Sampson, was the claimants' costs of an application to set aside or vary an order made by Ms. Penelope Reed QC, which were said to amount to £6,681. He said that this suggested that the figure of £18,568 for the adjournment application was disproportionately high. However, I accept the claimants' submission that this is not comparable. It is a very different sort of application, raising different concerns. This particular application to adjourn the trial was very much more important and substantial in the overall scheme of matters, given that it was the second application to adjourn the trial.

37. The other point of comparison were the claimants' costs of the entire second trial from start to finish. These were given at £129,163, but this total actually includes £18,568. If one subtracts 18,568 from the 129,163 it will be seen that the costs of a single application seem to occupy a disproportionate amount of the costs of the action as a whole.

38. As Dr. Sampson pointed out, this is not an exact science. I do accept his general submission that the costs are disproportionately high given the costs of the action as a whole, even if it is difficult to put one's finger on the precise reason why. However, I do not believe they are £5,000 or £6,000 too high, as was suggested by Dr. Sampson.

39. I am satisfied, taking all of the factors into account, that the proper assessed sum should be £15,000 rather than £18,568, and I so order.

[Further submissions]

40. I now have to deal with the matter of a payment on account in line with Part 44.2(8). This provides:

> "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 cost unless there is good reason to do so."

41. The starting figure for this exercise, as explained by Mr. St. Quintin for the claimants, was £110,595. This is, as I understand it, the claimants' general costs of the second action, excluding those which were the subject of the application to adjourn where I have already made a summary assessment.

42. Taking that figure, it is not disputed that this should be multiplied by 90%, as per my order that the claimants are only entitled to 90% of their costs of the action generally. That brings the total down to about £99,500 or just under £100,000.

43. Mr. St. Quintin submits that a reasonable sum to be ordered on account of this is found by multiplying what is nearly £100,000 by 60%, to arrive at a figure of about £60,000. The value of 60% as an appropriate multiplier was not challenged. However, what was said on behalf of the defendants was that there should be a set off for two cost orders in their favour. Mr. St. Quintin did not dispute the correctness of that approach in principle.

44. The first of these orders is an order made by Master Teverson on 12th June 2019. In particular, I refer to paragraph 4 of that order which states as follows:

> "The Claimants shall pay the Quantum Defendants their costs of and caused by the said amendments to the Points of Claim."

45. The only other paragraph of this order I should mention was paragraph 9 which provided that the costs of the application should follow the event of the second trial. These are covered by my order as regards the general costs.

46. The effect of paragraph 4 as a matter of law, and this was not disputed by either counsel, is that the claimants shall pay the quantum defendants (in this case D5 and D12) their costs of amending their points of defence. It does not go as far as saying that the claimants should have to pay the defendants' costs of having a trial on the substance of these amendments. These latter costs form part of the general costs of the action and are not within the scope of paragraph 4.

47. I am told that the defendants consider their costs dealing with the subject matter of the amendment to the points of defence are £50,000 but since these were not the costs ordered by Master Teverson in paragraph 4 these are not relevant.

48. I therefore turn to what the costs which are within the scope of paragraph 4 are in fact likely to be. I say likely to be because although the defendants gave plenty of evidence in this case generally there was no evidence for the defendants on this particular point. Dr. Sampson has clarified the defendants' position by taking instructions over an adjournment which I permitted to be taken for this purpose but no precise figure has yet been given for the costs of preparing the amendments to the original points of defence. One can only approach it by inference. There are two main sources of inference.

49. One is that the total figure billed by Excello Law who represented the defendants for at least part of this trial was £34,000. In terms of who prepared the amended points of defence, I was originally told by Dr. Sampson that this had been done by the defendants as litigants in person, but he clarified that this amendment was done by counsel. Mr. St. Quintin took me through the amounts paid by Excello to counsel (not including Dr. Sampson for this purpose, who is instructed under a Direct Access Agreement) for other matters. This showed that only £16,000 of the total bill by Excello Law could relate to counsel's fees for amending the points of defence.

50. It seems that this amendment was done by Mr. Jonathan Hill and I was shown the professional fees of Mr. Jonathan Hill as recorded in a note of 17th June 2019. This does not refer to the costs of drafting any amendment to the points of defence. However, I was told that Mr. Abrahams QC, Mr. Hill's predecessor in this case, charged £3,300 for drafting the whole of the original points of defence. Thus Mr. St. Quintin submits, and I agree, that if Mr. Abrahams QC charged £3,300 for doing the whole of the document it is likely that Mr. Hill charged less than that as a junior to do an amendment to it. I emphasise there is no direct evidence as to what that figure might be. Mr. St. Quintin's best guess was several thousand pounds. Dr. Sampson was not a position to gainsay that.

51. The second point where there is a costs order going in favour of the defendants from the claimants is as regards the costs of an earlier adjournment of the present hearing, pursuant to an order I made earlier in the year. During this stage the defendants were acting as litigants in person and therefore only entitled to their expenses at the rate of £19 per hour.

52. It is true that the defendants both put in substantial quantities of material in support of that application for an adjournment, but it is also true that only some of that material was directly relevant and I did not find the rest of it helpful.

53. Mr. St. Quintin's best estimate here of the sums that might be paid to the defendants was likely to be was £200 on the basis of about £100 to each of the defendants, being litigants in person, at a £19 per hour rate. Even if that is wrong by factor of two or three it is unlikely to make much difference to the overall sum.

54. Having set out the facts in detail, it is not necessary for me to reach final conclusion about all of these matters. All I am required to do is to identify a reasonable sum to pay on account of costs. As I originally stated Mr. St. Quintin arrived at the figure of just under £60,000 and he identified the two costs orders going the other way, one which may be for several thousand pounds relating to Mr. Hill's costs for amending the points of defence and the other in the hundreds for the costs to the defendants themselves relating to the adjournment. Taking that into account it seems to me that a reasonable sum on account of costs would be £55,000 and I so order.

[Further submissions]

55. I am now asked to vary, set aside or stay the order of Ms. Penelope Reed QC sitting as a deputy judge of this court dated 16th July 2019 whereby she granted Mr. Ahmed's application for adjournment of the trial, but ordered Mr. Ahmed to pay £39,100 by way of costs. The claimant correctly points out that the application can only relate to paragraph [2] of that order, and can only be made by Mr. Ahmed, since he was the only party required to pay. As it turns out Mr. Ahmed has not paid this sum.

56. As recorded in the order, Ms. Reed QC heard counsel for the claimants on behalf of the claimants and also from the 12th defendant, Ms. Ahmed, who appeared on behalf of Mr. Ahmed (the fifth defendant) for the purpose of the adjournment application only. The fifth defendant made an application for permission to appeal against this order, but that application for permission was rejected by the Court of Appeal.

57. The application notice for the present application was not issued until 9th April 2020, although D5's intention to make such an application was notified to the court informally on 20th March. This was all long after the adjournment order made by Ms. Reed in the first place.

58. Dealing first with variation, Dr. Sampson submitted that there is jurisdiction to vary the order pursuant to the jurisdiction explained in **Tibbles v SIG** [2012] 1 WLR 25. He drew particular attention to paragraph [39] of the judgment of Rix LJ with whom Etherton LJ and Lewison LJ agreed (my emphasis):

> "(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated."

59. Mr St Quentin emphasised the underlined words in paragraph 39(i). The present application is not any sort of appeal, which I could not hear in any event. Dr. Sampson drew particular attention to the underlined part of paragraph (ii). His argument was founded on the latter limb, ie (b). He did not address any argument either in his skeleton argument or orally to limb (a) nor did he rely on any other basis on which the jurisdiction might arise.

60. **Tibbles** also emphasises that the successful invocation of the rule under Part 3.1(7) is rare and emphasises the need for promptness in making any such application: see eg paragraph [39(vii)].

61. However, although Mr. Sampson's argument was founded on the premise that the facts on which the original decision was made were (innocently or otherwise) misstated, he did not actually identify any such facts. What Dr. Sampson submitted

was that the judge must have been prejudiced by arguments from the claimants to the effect the stated reason for the adjournment, namely Mr. Ahmed's evidence as to his medical condition, was false. That is not a fact at all, merely an assertion. I find no evidence of that in the judge's judgment.

62. In addition the claimants did not even go that far in their submissions according to the transcript of the hearing or the judge's judgment. The claimants' argument was the more limited one set out in paragraph [11] of Dr. Sampson's skeleton and paragraph [8] of the judge's judgment, namely that the evidence did not show that Mr. Ahmed was so unwell that he could not attend trial.

63. It also seems to me if the claimants' submissions on this point have been accepted then the judge would have refused to grant the adjournment at all. It is precisely because they were not accepted that the judge made the order for adjournment. Thus, I do not accept that the facts on which the original decision was made were innocently or otherwise misstated.

64. The original decision was instead made on the basis of the fact that Mr. Ahmed was unable to attend court for trial. It is not suggested that this fact was in any way misstated. On the contrary, the defendants' position is that this fact is and was entirely correct. Furthermore, this was the same fact on which the costs order was based just as much as the adjournment order. The fact that D12 was appearing on behalf of D5 was not misstated either, because she was appearing on behalf of D5. Nor was the fact that D5, via D12, said he was unable to pay misstated in any way because that fact remains D5's position today.

65. It follows that I must dismiss this application. However, Dr. Sampson raised some additional arguments. I should explain why I do not accept them either.

66. First Dr. Sampson submitted that the judge never provided D5 with any opportunity to make submissions on the appropriateness of the costs order. This is not correct because D5 was represented for the purpose of the adjournment application by his sister, D12. Mr. St. Quintin took me with through the transcript of the hearing which showed that D12 did make submissions in relation to D5's costs about D5's ability to pay. D12 was also given the opportunity to make submissions about quantum. In response to that opportunity D12 made the same point about the ability to pay.

67. The judge's route to the figure of £39,100 is not the subject of a formal judgment but is set out in the passages of transcripts which I have been shown. It is clear from these transcripts that the deputy judge was aware that D12 was making submissions about costs on behalf of D5. The Deputy Judge's judgment also shows that D12 advanced other arguments on D5's behalf which were successful.

68. In any event it seems to me inescapable that arguing the costs for the adjournment fell within the scope of the authorisation which D5 gave to D12, otherwise the court would be saying that D5 can take the benefit of an adjournment because Ms. Ahmed asked for one on his behalf but D5 somehow avoids the associated burden of paying for it. Indeed, if the judge had been told that for one reason or another she was prevented from making an order relating to the costs of adjournment she might not even have granted the adjournment at all. I say this because the judge herself said at paragraph 20 that she only granted the adjournment with "enormous reluctance."

69. However, even if there was something in this point about giving D5 an opportunity to make submissions on costs over and above the opportunity which was given by the Deputy Judge to D12 at a time when D12 was appearing on behalf of D5, the time to make that point would have been shortly after the original order and not nine months later. I do not feel that the delay in making this application has been justified either sufficiently or at all. The fact there have been two other applications by the claimants to enforce this order, one to Master Teverson for an unless order and another via bankruptcy proceedings, do not to my mind justify delay. Indeed, since both of these applications, but particularly the bankruptcy proceedings, relied on the £39, 100 in the first place it was all the more important for the defendants to challenge the £39, 100 order promptly.

70. Still further, even today Dr. Sampson did not actually deal with the substance of the costs order. He simply says that it should have not run to £39,100, particularly having regard to the headline figure for costs of the action overall. But he did not identify any specific reasons as to why that figure is or rather was inappropriate, even though Mr St Quentin went through the passages of transcript where the way in which the judge arrived at that figure was set out.

71. In the end, Dr. Sampson's point is essentially that D5 should not be required to pay for the costs of an adjournment which was due to his own illness. Of course I appreciate that point because nobody would either want to be ill or have to pay for being ill. However I see even less reason why in these circumstances the claimants should not only be forced to have an adjournment due to someone else's illness but should be forced to swallow the costs of that adjournment as well. Someone had to pay these costs and D5 was the one who sought and obtained an adjournment, whereas the claimants did not want one and were not at fault in any way. If I had been in Ms. Reed QC's shoes I would have made the same order.

72. That brings me to the application for a stay. As Mr. St Quintin pointed out, and as was not disputed by Dr. Sampson, this raises the same point as under the main application. No separate legal or factual argument was advanced by Dr. Sampson over and above the legal and factual arguments he advanced in relation to variation. That means that I will refuse the application for the stay as well.

73. I should mention one further point, which in my view forms an additional reason to reject the application for a stay. Mr. St. Quintin submitted that any stay of enforcement of Ms. Reed QC's order should only be pending appeal of Ms. Reed QC's order itself and that it was not right in principle to order a stay of that order pending stay of some other order. I believe in principle that is correct.

74. In this context it is important to note that there already has been an application for permission to appeal from Ms. Reed QC's order and that application has been rejected. Even if it was on a narrow ground the end result was that the application for permission to appeal was rejected. Therefore it seems to me that even though the application for a stay fails for all the same reasons as the application for variation, there is this additional reason why the application for a stay should be refused. I therefore dismiss this application.

[Further submissions]

75. I will give permission to appeal to the claimants on this point. I do so on the grounds that I consider the appeal would have a real prospect of success, essentially for the reasons given by the claimants. It is not necessary for me to consider whether there is also another compelling reason for the appeal to be heard and I do not do so.

[Further submissions]

76. I now have to deal with the defendants' application for permission to appeal. I have already granted permission to appeal for the claimant on a specific point of law. The test I apply is exactly the same one, in other words as set out in CPR Part 52.6. Either I must consider that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

77. Dr. Sampson focused on the first limb of this, ie real prospect of success. I do not understand him to say the second limb added a separate point.

78. Originally four grounds of appeal were identified although only three were pursued in oral submissions. Dr. Sampson made it clear that these were not all the potential grounds of appeal which the defendants may in due course wish to put forward but merely those which have *"a significant chance of success before the Court of Appeal"*: see paragraph [51] of the defendants' skeleton. By implication this means that the defendants themselves accept that any grounds of appeal not mentioned do not have a "significant" chance of success before the Court of Appeal.

79. Paragraph [53] of the same skeleton as says that the defendants have multiple further complaints relating to the fairness of the conduct of the trial. I find it surprising that if the defendants had any such complaints they did not make them either at the time of the trial or at any time prior to judgment because I would have taken them most seriously if they had done so. Indeed, the defendants have still not articulated any specific complaints relating to the fairness of the conduct of the trial even now, months after the trial took place.

80. The three grounds of appeal in relation to which permission is sought are as follows:

(1) The learned judge was wrong to find that there was an outstanding loan from D11 to D5 that could be recovered from D5 by the Cs as part of their account of profits. The evidence supports D5's contention to that the loan from D11 had been repaid.

(2) Subject to ground 1 above, even if the learned judge was correct in holding that there was an outstanding loan from D11 to D5 that could be subject to recovery by the Cs as part of their account of profits the learned judge was wrong to require payment of 100% of that loan sum. The requirement to pay 100% of that sum would only be justified in the event that the entire loan sum could be traced back to monies obtained by D11 from the sale of infringing goods. No such evidence exists and moreover the approach taken with regards to the loan is wholly inconsistent with the approach taken towards salary (where only 10% was found to be derived from profits generated from infringing sales).

(3) The learned judge was wrong to find that 10%1 of D5 salary could be said to be derived from sales of infringing goods by D11. It is the Ds case that the judgment does not deal with the fact that D5 was paid a single salary for all his work for the Juice Corporation Group – because this evidence was not included by the Claimants

in the trial bundles despite Ds request. In particular, the overall salary paid to D5 should reflect the fact that he was not working solely for D11 but also for Wembley Mens Wear. As such, the 10% figure exaggerates the level of profit that can be said to have passed to D5. Even if the percentage applied is correct it should only be applied to that part of his salary that could be said to relate to his work for D11 (i.e. the company responsible for the sale of infringing goods).

81. The first of these is a pure matter of fact which does not raise any issue of principle. In addition, as currently drafted it does not explain why the evidence is said to *"support D5's contention that the loan from D11 had been repaid."* Nor does it explain why the reasoning set out at paragraphs [98] to [101] of my judgment is actually wrong.

82. Dr. Sampson says that his clients are adamant that I have reached the wrong conclusion on this point, and he drew my conclusion to some documentation in the defendants' bundle for today (which runs to nearly 4000 pages) at E34 onwards. I found it surprising that this material was not drawn to my attention earlier today when the defendant asked me to revise my judgment on this very point. On inspection it turned out that this was the same material which I found unconvincing earlier today. That does not support an application for permission to appeal any more than it supports an application to revise my judgment.

83. Dr. Sampson also says upon instructions that the timing of this loan suggests that it was nothing to do with infringement. As the trial judge it appeared to me and also to Mr. St. Quintin, who was counsel for the claimants at trial, that this was new material which was not the subject of any evidence either at trial or, indeed, even now. It would be entirely wrong of me to grant permission to appeal based on any such material on instructions.

84. I therefore refuse permission to appeal on this ground.

85. The second ground of appeal - which was advanced with rather more force - was that the requirement to pay 100% of the loan would only be justified in the event that the entire loan sum could be traced back to monies obtained by D11 from the sale of infringing goods, and that no such evidence exists. This is a bold submission, in my view, since I reached my conclusion on the basis that the defence failed because of D5's approach to his own evidence on an issue where the burden of proof was upon him. It seems to me this ground of appeal has no real prospect of success either.

86. In relation to the second ground it is also said that I was inconsistent in my approach to the loan and the approach I took towards salary, whereby only 10% was found to be derived from profits generated for infringing sales. This is another bold submission because the defendants also failed to provide relevant evidence in this area as well. As I explained in my judgment at paragraphs [95] to [97], I apportioned the figure of 10% on the basis that turnover in infringing goods accounted for about 10% of D11's turnover. The main reason for using this method of apportionment was because the defendants failed to produce evidence of the actual figures. In the absence of the actual figures my assessment of 10% may have been too generous to the defendants and too unfair to the claimants. Perhaps it should have been closer to 100% than it was.

87. The more important point is that I do not accept there was any inconsistency here in any event. There is no doubt that D5's remuneration over the years (and also that of D12) covered a range of activities, not all of which infringed. The director's loan on the other hand to D5 is and was treated as being a single sum during the trial. Mr. Ahmed never said it was for matters unrelated to infringement. I therefore reject this part of the second ground of appeal too.

88. The third ground of appeal says that I was wrong to find that 10% of D5's salary could be said to be derived from sales of infringing goods. I already explained that I reached this figure as well on the evidence available bearing in mind the lack of relevant evidence from the defendants. It seems to me, having heard Dr. Sampson, that this ground of appeal also relies on fresh evidence from the defendants which neither I nor the claimants have seen, either at the trial or since, but which was nevertheless available to the defendants at trial. I therefore refuse permission to appeal on this ground as well.

89. The fourth ground of appeal is not pursued, therefore I do not need to deal with that.

90. Standing back, much the strongest argument in favour of granting permission to appeal for the defendants is the fact that I have given permission to the claimant. However, they are very different types of appeal. The claimants' appeal is a self-contained point of principle which, as I have already held, has a real prospect of success before the Court of Appeal and where there are conflicting authorities.

91. The defendants' appeal on the other hand, and in this respect I agree with Mr. St. Quintin for the claimants, does no more than revisit matters of fact which I decided on the evidence before me at trial: evidence which, in a number of respects, was deficient. It seems to me that it is a very different sort of appeal. Therefore, the mere reason I have given the claimant permission on a point of law is not a good reason for imposing a complicated appeal relating simply to the facts on to the Court of Appeal. I therefore, for all these reasons, dismiss the defendants' application for permission to appeal.

[Further submissions]

92. I now have to consider the final application which is the defendants' application for a stay of the order for payment of the sum ordered on the account. No particular legal grounds were relied upon in support of this application, only two factual points.

93. The first one is the defendants' inability to pay. Of course if this were enough to justify a stay then orders for payment would be routinely stayed in many cases. I was not shown any case law suggesting that a mere inability to pay would be enough and in my judgment it is not enough.

94. The second point specifically relied on by the defendants was the suggestion that the claimants received money due to delivered up goods, therefore the claimants were not out of pocket due to the litigation. This is irrelevant. Insofar as the claimants have received money from delivered up goods, that is simply part of the relief to which they are entitled by virtue of winning the action. Whether the claimant has received any such money is entirely irrelevant to the fact they are also entitled to the sums which I have ordered on the account.

95. For these reasons I refuse the application for a stay of order for payment pending appeal or at all.

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