



Neutral Citation Number: [2020] EWHC 2104 (Pat)

Case No: HP-2020-000018

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

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

Date: Friday, 24<sup>th</sup> July 2020

Before:

**RECORDER DOUGLAS CAMPBELL QC**  
**(Sitting as a Judge of the Chancery Division)**

-----

Between:

**SHENZHEN CAR KU TECHNOLOGY CO, LTD**  
**(a company incorporated under the laws of the People's**  
**Republic of China)**

**Claimant**

- and -

**THE NOCO COMPANY**  
**(a company incorporated under the laws of Ohio, United**  
**States of America)**

**Defendant**

-----

**MR. HUGO CUDDIGAN QC and MR. EDWARD CRONAN** (instructed by **Powell Gilbert**  
**LLP**) for the **Claimant**

**MR. JAMES ABRAHAMS QC and MR. ADAM GAMSAL** (instructed by **Taylor Wessing**  
**LLP**) for the **Defendant**

-----

**APPROVED JUDGMENT**

*If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.*

*This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd  
2<sup>nd</sup> Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP  
Tel No: 020 7067 2900 DX: 410 LDE  
Email: [info@martenwalshcherer.com](mailto:info@martenwalshcherer.com)  
Web: [www.martenwalshcherer.com](http://www.martenwalshcherer.com)

**RECORDER DOUGLAS CAMPBELL QC:**

1. In this action the claimant (“Carku”) is a designer and manufacturer of car battery jump start devices. The defendant (“NOCO”) is the proprietor of GB 2,527,858B (“the Patent”). This is an application for summary judgment or, alternatively, an interim declaration. I shall begin by setting out some background facts before focusing on these two applications.

**Background**

2. By claim form issued on 19<sup>th</sup> May 2020, Carku seeks a declaration of non-infringement, relief for threats relating to the defendant's complaints to Amazon, and revocation of the Patent. More precisely, the declaration sought has two parts. One part relates to acts done in relation to "any version of the Carku module". The other part relates to acts done in relation to "Carku 2014 power units". One example given of a Carku 2014 power unit is the Carku E-Power 21.
3. The particulars of claim allege that the Carku 2014 power units do not infringe by virtue of section 64 of the Patents Act 1977. I no longer have to consider this section 64 point, since it was dropped for the purposes of this application on the day before the hearing. However, the Carku E-Power 21 itself remains relevant.
4. Annex A to the particulars of claim gives more information about the Carku module. It says that there are three versions thereof, namely:
  - (a) 'Current Carku module A', as found in at least three named existing Carku products. One example is the Carku 12V/24V Jump Starter.
  - (b) 'Current Carku module B', as found in at least six named existing products. One example of this is the Carku E-Power-Elite.

(c) "Proposed Carku module" about which no further information is given. I need not consider this last one further.

5. Paragraph 6 of this Annex A says as follows:

"The Carku module has a reverse polarity sensor connected in circuit with the positive and negative polarity outputs, configured to detect the polarity of the vehicle battery connected between said positive and negative polarity outputs. The signal from this sensor is *only* used to determine whether an LED indicating reverse polarity is to be illuminated or not. The signal is not used in any other way."

The word "only" is italicised in the pleading.

6. Paragraph 18 of the same document states as follows:

"The IJC provides a forced start: When the vehicle battery is dead or completely empty, the user can choose to force the connection of the internal power source to the output ports by pressing the TEST key. This forced connection operates independently of the connection described in paragraph 10 above."

7. On 9th June 2020, Carku issued an application notice seeking an order that the products identified in Schedule 1 to the draft order do not fall within the scope of protection of the Patent: see box 3 of the application notice and also paragraph 1 of the draft order. Neither the application notice nor the draft order referred to validity or to the issue as to whether a valid claim was being infringed. The draft order did refer to CPR Parts 24.2(a)(i) and 25.1(1)(b), thereby making it clear that the claimant sought summary judgment and an interim declaration.

8. In opening its application the claimant submitted that it might seek some different order in relation to the summary judgment application depending on my judgment. I asked the claimant to identify any alternative form of wording which it had in mind, in order

that both the defendant and I could consider that alternative wording. The claimant did not suggest any specific alternatives.

9. The products identified in Schedule 1 to the order do not obviously correspond to those listed in Annex A to the particulars of claim. For instance, none of the examples I have given from Annex A is mentioned here. Instead, there are 29 products, including, for instance, the Ring RPPL200, Ring RPPL300 and Tacklife T8 Max. Some products appear multiple times: for instance, the Grepro 500A appears four times. It is still not clear to me why it appears four times.
10. The application was supported by the first witness statement of Mr. Ari Laakkonen, a partner in the claimant's solicitors, and the first witness statement of Michael Zhang, Chief Executive Officer of the claimant. These were dated 9th and 8th June 2020 respectively. In answer, the defendant served the first witness statement of Mr. Christopher Thornham, a partner in the defendant's solicitors, and the first witness statement of Professor Marc E. Herniter, a Professor of Electrical and Computer Engineering. These were both dated 14th July 2020.
11. No objection was taken by the claimant as to Professor Herniter's evidence being expert evidence which required the court's permission under Part 35.4(1), nor was any objection taken on the grounds that it contained experiments for which the court's permission is required under CPR Part 63PD paragraph 7.1. The claimant said that it did not want to take what it called "procedural points". The defendant explained that this evidence should be taken as indicating the nature of the expert and experimental evidence upon which it might rely at trial. Given the absence of any objection from the claimant, I will rely upon it in the way the defendant suggested.

12. The claimant subsequently served an amended version of Mr. Laakkonen's first statement on 14th July and a second witness statement from Mr. Laakkonen on 17th July. It also served a first witness statement of a Xingliang Lei on 18th July. The claimant further served a document entitled "Confidential Interim Product and Process Description" on 14th July, which was signed by Bei Ye. Bei Ye was described as a Patent Engineer. The claimant later served an amended version of the confidential interim PPD on 18th July 2020.
13. At the hearing before me yesterday, I asked what Bei Ye's role was at Carku. I was told that she was the head of Carku's R&D. It seemed to me at the time this was a reasonable basis for supposing that Bei Ye would know whether the technical content of the document which she signed was accurate. However, this morning I was sent a letter by the claimant's solicitors telling me this information was incorrect. Ms. Bei Ye is not the head of R&D at all. Instead she manages intellectual property matters. The same letter also included a witness statement from Ms. Bei Ye.
14. I have never come across an interim PPD before, and neither had counsel for the defendant. Paragraph 2 of the interim PPD states as follows:
- "This PPD is interim in nature and provides, together with Annex A to the Particulars of Claim, the information necessary to assess infringement of claim 1 of GB Patent No. 2 527 858 (the **Patent**) on the Claimant's application for interim relief dated 9 June 2020 (the **Application**)."
- Hence paragraph 2 itself envisages that the content of the document may be wrong, since it is only "interim".
15. The original version of the interim PPD was served at or about the same time as the defendant's evidence in answer. The defendant told me -- and the claimant did not

dispute -- that when originally served the original PPD had no Annex A, this being a confidential circuit diagram. Hence although the original confidential interim PPD was supported by the statement of truth signed by Bei Ye, it was unclear whether Bei Ye saw the Annex A circuit diagram prior to signing.

16. Today in the witness statement from Ms. Bei Ye, to which I have already referred, she says that when she received the interim PPD for signature it was not provided with a copy of that Annex, which she calls "Circuit Diagram A". She thought it was going to be annexed. She adds in paragraph 7 of her statement that when making the unamended interim PPD, the circuit diagram was included because in her view it was representative of all Caraku jump starter circuits. She does not explain how she came to that view. The amended version of the interim PPD now has Annex A, and a new Annex B which is another confidential circuit diagram.
17. The amended interim PPD in some respects corrects mistakes in the original which became apparent from the evidence of Professor Herniter. I call them "mistakes" because they are, but the claimant put it differently. For instance, my attention was drawn to a letter from the claimant's solicitors dated 17th July 2020 explaining that the claimant had carried out some investigations into its own products over the last two days. It seems clear to me that these investigations must have been prompted by the defendant's evidence.
18. New paragraphs 15 and 15B of the amended interim PPD accept that one of the products examined by Professor Herniter, known as the Tacklife T8 Max, uses a latching relay. Its functionality is not the same as in the circuit diagram shown in Annex A, but it is said to be as per the circuit diagram set out in new Annex B. As the

defendant pointed out at the hearing, if Bei Ye did see the Annex A circuit diagram prior to signing the interim PPD then it is difficult to see how she could have thought it applied to the Tacklife T8 Max. Furthermore, new footnote 1 says that the other two products examined by Professor Herniter do not comply with paragraph 12 of the original PPD either. It is difficult to see how Ms. Bei Ye thought the original version of the interim PPD applied to these products, since they do not have BOOST buttons.

19. It does not seem to me that paragraph 7 of Ms. Bei Ye's evidence of this morning which, as I say, was served after the hearing, properly answers these questions as to why she thought the original version of the interim PPD was accurate.
20. The upshot is that I do not regard the claimant's approach to preparing the interim PPD as being satisfactory and I do not regard its contents as reliable. I am unclear even now as to whether anyone at the claimant with technical experience of the claimant's own products has ever reviewed it. Even on the claimant's best case the original form of the interim PPD only lasted a few days before it had to be corrected with another interim PPD.
21. As the defendant says, if the defendant had not served its evidence, then the claimant would still be saying that the original version of the interim PPD was correct. The defendant also points out that following the service of the amended interim PPD, it is clear that paragraphs 6 and 18 of Annex A to the particulars of claim -- which I have highlighted above -- are both false, but neither of them has yet been corrected.



22. Finally, on 20th July 2020, i.e. Monday of this week, after the defendant's skeleton argument was filed, the claimant's solicitor sent another letter to the defendant's solicitors which concluded as follows.

"Validity.

Please note that Carku will, at the hearing, be relying on the clear invalidity of GB '858 over each of E-Power 21 (paragraph 3(d), Grounds of Invalidity) and Krieger (paragraph 2(b), Grounds of Invalidity)".

23. These three lines of text seem to be the only notice given to the defendant that the claimant intended to raise the issue of validity or to be more precise, "clear invalidity" at the hearing. The relevant passages of *Krieger* are not even identified. The claimant nevertheless submitted to me that the defendant had had more than enough time to prepare whatever one wanted to say about *Krieger*.
24. As it turns out, the claimant's validity conditions were not restricted to the E-Power 21 or *Krieger*. The claimant also took me to some prior art known as *Chan* and *Richardson 1*. Neither of these documents had previously been mentioned in the letter or in the claimant's evidence.
25. The claimant suggested that I should decide the issues of construction with a view to that prior art. Specifically, the claimant submitted that I should determine the correct construction of integers of 1.6 and 1.7 on a summary basis and without any expert evidence. So far as the facts were concerned, all I needed was the amended interim PPD.
26. The claimant also took me to the patent prosecution history. I asked the claimant's counsel if he was asking for summary judgment on the issue of validity. He confirmed

that he was not, but that he was instead using the patent prosecution history for summary judgment on the issue of equivalents.

### **The application for summary judgment**

#### Legal context

27. The applicable principles for the purpose of summary judgment were summarised in a well-known passage in the judgment of Lewison J as he then was, in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) at 15, which was subsequently approved by the Court of Appeal:

"As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into

the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: If the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Particular reliance was placed by the defendant on (v) and (vi) from this passage.

28. The defendant also drew my attention to a *Nampak Plastics Europe Limited v Alpla* [2015] FSR 11 at paragraphs 4-9 per Floyd LJ, with whom Macur and Briggs LJJ agreed. I set out paragraph 9:

"9. It is clear that the fact that a dispute involves the resolution of an issue of construction of a patent does not automatically render it unsuitable for summary judgment. However it is necessary to proceed with caution given that the court is not being called upon, when construing a patent, to decide what the words of the patent mean to it, but what they would have been understood to mean by the person skilled in the art: see per Lord Hoffmann in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46; [2005] R.P.C. 9 at [32]–[33]. Such an exercise is dependent upon the identity of the person skilled in the art and the knowledge and assumptions which one attributes to him or her."

29. The defendant submitted that the need to proceed with caution is all the more so, given that the issues of infringement are no longer restricted to what I will call the normal construction but now also require consideration of the doctrine of equivalents. That proposition was not disputed by the claimant and I agree, but proceeding with caution does not mean that summary judgment cannot be obtained in patent actions.
30. I also have to deal with a separate topic, namely the procedural safeguards in CPR Part 24 at Practice Direction 24. The importance of complying with those requirements was recently emphasised by the Court of Appeal in *Price v Flitcraft* [2020] EWCA Civ 850 at [41]-[43]:

"41. The CPR contains rules and practice directions which serve the important function of ensuring fairness of the summary judgment procedure. Thus CPR 24.4(3) provides that a respondent must be given proper notice of the application and the issues which the court will be asked to decide:

'Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of —

(a) the date fixed for the hearing; and

(b) the issues which it is proposed that the court will decide at the hearing.'

42. Paragraph 2 of the practice direction supplementing Part 24 provides, so far as material, as follows:

'(2) The application notice must include a statement that it is an application for summary judgment made under Part 24.

(3) The application notice or the evidence contained or referred to in it or served with it must —

(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates,

and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

(4) Unless the application notice itself contains all the evidence (if any) on which the applicant relies, the application notice should identify the written evidence on which the applicant relies. This does not affect the applicant's right to file further evidence under rule 24.5(2).

(5) The application notice should draw the attention of the respondent to rule 24.5(1).'

43. Rule 24.5(1) requires a respondent who wishes to rely on written evidence at the hearing, to file that written evidence and serve copies on every other party to the application at least 7 days before the summary judgment hearing. Thus in an idealised case, a claimant can issue and serve an application for summary judgment to be heard in 14 days' time. The defendant must serve his evidence 7 days before the hearing, and the claimant must serve any evidence in reply at least 3 days before the hearing. If all this is done, the hearing can go ahead on the appointed day. The overall object of the rules and practice direction taken together is to ensure a fair hearing of the summary judgment application within a short time scale. The procedural safeguards, such as requiring notice of the rule under which the application is brought, identification of issues and/or a statement in the application notice or the evidence referred to in it that the applicant believes that the respondent has no real prospect of successfully defending the claim or issue are important protections aimed at ensuring that the overall procedure is fair."

31. It will be seen that both CPR Part 24.4(3)(b) and paragraph 2(3)(a) of the Practice Direction to Part 24 are to similar effect. In short the application must give at least 14 days' notice of the issues which it is proposed that the court will decide at the hearing, and the application notice or the evidence served in relation thereto must identify concisely any point of law, provision or document on which the applicant relies. It is therefore not good enough to say that the issues are set out in some document to which the defendant has already had access, even if the defendant has already had such access for a substantial period of time and even if the defendant has pleaded to it. That was a mistake I made in *Price v Flitcraft*. The claimant is, in my view, asking me to make the same mistake again.

32. The claimant did not give 14 days' notice of the interim PPD either in its original or amended form. Nor did it give 14 days' notice of its arguments on construction of integers 1.6 and 1.7 of claim 1, nor of its intention to rely on validity, let alone the precise passages of the prior art documents. Hence it cannot rely on any of that material for the purposes of summary judgment. The claimant submitted that it could still rely on the same material for the purposes of the interim declaration. For the moment I will assume without deciding that this is correct. Hence, I still need to consider this material and I shall therefore do so.

#### The Patent

33. I will start with the Patent. I do not intend to review it in detail, but in short it relates to apparatus for jump starting a vehicle having a depleted or discharged battery. It claims there are two problems found in the prior art. One was short-circuiting when the terminal clamps of the device were inadvertently brought into contact with each other. The other was reverse polarity, which arose when the positive and negative terminals of the device were connected to the opposite polarity terminals in the vehicle to be jump started.
34. These problems are said to be solved by an apparatus according to claim 1 of the Patent. The parties used the following breakdown thereof:

- "1.1 Apparatus for jump starting a vehicle engine, comprising:
- 1.2 an internal power supply;
- 1.3 an output port having positive and negative polarity outputs;

1.4 a vehicle battery isolation sensor connected in circuit with said positive and negative polarity outputs, configured to detect presence of a vehicle battery connected between said positive and negative polarity outputs;

1.5 a reverse polarity sensor connected in circuit with said positive and negative polarity outputs, configured to detect polarity of a vehicle battery connected between said positive and negative polarity outputs;

1.6 a power FET switch connected between said internal power supply and said output port; and

1.7 a microcontroller configured to receive input signals from said vehicle isolation sensor and said reverse polarity sensor, and to provide an output signal to said power FET switch, such that said power FET switch is turned on to connect said internal power supply to said output port in response to signals from said sensors indicating the presence of a vehicle battery at said output port and proper polarity connection of positive and negative terminals of said vehicle battery with said positive and negative polarity outputs."

35. FET is an acronym for a Field Effect Transistor, which is used as a switch to handle high currents. One current type of FET is a metal-oxide semiconductor field effect transistor abbreviated to a MOSFET. Sometimes several MOSFETs can be connected in parallel.

#### The evidence

36. I now turn to Mr. Laakkonen's evidence. The key part of Mr. Laakkonen's original evidence in support of the application consisted of paragraphs 33-53. Just like the original version of the interim PPD, this evidence had to be amended when the defendant's evidence in answer showed it to be at least incomplete. As it currently stands, with amendments shown underlined, paragraph 35 of Mr. Laakkonen's first statement states as follows:

"35. Carku relies on three non-infringement arguments in relation to claim 1 for this application:

a. in its automatic mode of operation, the output of the Caraku module is not dependent on a signal from a reverse polarity sensor;

b. the Caraku module does not use a power FET switch; and

c. the Caraku module was the core of at least one Caraku product (the Caraku E-Power 21) which was on sale before the priority date of GB '858, and Caraku's sales of such pre-priority products and CDPs which are not materially different to the Caraku E-Power 21 cannot infringe GB '858 under section 64 Patents Act 1977.

37. The defendant suggested that although Mr. Laakkonen said these were the three non-infringement arguments, he did not really mean that these were the three non-infringement arguments. What he really meant was that these were merely labels for the real arguments. I do not accept this. In my view, Mr. Laakkonen said these were the three arguments because they were the three arguments. The first argument, namely reverse polarity, goes to integer 1.7 of claim 1. The second argument, power FET switch, goes to integer 1.6. The third argument goes to the section 64 point.

38. There are a number of issues with this evidence.

*Generally*

39. This evidence of Mr. Laakkonen refers to the Caraku module. That is a term used in Annex A to the particulars of claim, but Mr. Laakkonen, as a London solicitor, would not be expected to know the inner workings of the products referred to in that annex. It seemed to me that his information must have been coming from Ms. Bei Ye since she was identified as the patent engineer at Caraku, but today I have been told for the first time that Ms. Bei Ye is a manager of intellectual property and not the head of R&D at all.



40. In addition, it was not clear to me whether this part of Mr. Laakkonen's evidence was intended to apply to all the products listed in Schedule 1 to the draft order. Mr. Laakkonen might have been in some difficulties had he been trying to say that because the products in the Schedule are listed according to what the distributors call them, which is not necessarily what Caraku calls them. However I agree with the defendant that this passage at least gave the impression that all products having the Caraku module worked in the same way, since that was how I read it.
41. That impression is not correct. Professor Herniter's evidence shows that the three products he examined do not work in the same way. It was that evidence which caused the claimant to amend its interim PPD and also to amend Mr. Laakkonen's evidence. Not all of the differences may be material to the issue of infringement. For instance it was not suggested that the issue about the booster switch was relevant. However, this does demonstrate the danger of relying on general assertions about how 29 products work. In fact, as the defendant pointed out, the court only has evidence as to how three out of the 29 products work. There is no evidence about any of the other 26 products, even though the claimant seeks summary judgment on them all.

*Reverse polarity*

42. Secondly, I turn to the evidence on the reverse polarity sensor. Mr. Laakkonen's evidence originally said that the output of the Caraku module was not dependent on a signal from a reverse polarity sensor. Now the refinement is added that this statement only applies in its automatic mode of operation. The problem remains that both the old and new form of this evidence is conclusory. By that I mean that neither the defendant nor the court has any way of investigating whether it is factually correct. It seems to me

that what the claimant should have done is what it is now belatedly trying, or at least beginning, to do, namely to provide a circuit diagram for all of the products in relation to which summary judgment is sought.

43. In so far as these really are products manufactured by the claimant, rather than non-Carku products sold by a distributor, this task should not have been difficult. One might have to go to the level of actual code or one might not, but at the very least the court needs to know how the Carku equivalent of the microcontroller referred to in integer 1.7 of the patent actually works. All Mr. Laakkonen did in his original evidence was to provide a single circuit diagram at his exhibit APL-8 but there is no product before the court for which APL-8 is accurate. It is wrong in relation to the Tacklife T8 Max product, and it is also wrong in relation to the two Ring products because it shows a BOOST button and neither of the Ring products has such a button.
44. More fundamentally the defendant relies on some experiments performed by Professor Herniter on the Ring RPPL 200 device, the Ring RPPL 300 device and the Tacklife T8 Max device. I refer to paragraphs 39-41, 59-61 and paragraph 84 respectively. I was not told how Professor Herniter selected these particular products, but they are specifically mentioned in Schedule 1 to the order so the choice to use them was a reasonable one, and that choice was not criticised by the claimant.
45. The details of Professor Herniter's experiments are set out in the passages I have mentioned. His conclusions are set out in tables: see for instance that at paragraph 41. The results appear to me to show that the output of the Carku module is indeed dependent on a signal from a reverse polarity sensor, contrary to Mr. Laakkonen's

evidence in paragraph 35a. I have referred to paragraph 41 of the report, but see also paragraphs 61, 84 and 87.

46. The claimant points out that Professor Herniter dismantled the Carku product by a destructive removal of the outer casing and that its testing did not correspond to any normal operation of the device. This is true, but I do not see what difference it makes.
- i) First, the experiments still show that Mr. Laakkonen's generalised assertion is wrong, at least for the three products examined, and these are the only products which have so far been examined.
  - ii) Secondly, as the defendant points out, in order to determine how the Carku product works, it may indeed be necessary to pull the product apart and do exactly what Professor Herniter has done. At the moment that seems to me to be the only way in which the defendant could have tested the truth of Mr. Laakkonen's evidence. Certainly no other way has been suggested. That does not mean that Professor Herniter has thereby made a different product, it is simply his way of determining how Carku's commercial products work.
47. If I return to paragraph 41 of the interim PPD, it also seems to me that this does not actually explain what is happening within the microprocessor in terms of processing inputs and outputs. It is merely a statement of three outputs that are said to be obtained. Hence it is just as conclusory as the paragraph 6 of the annex to the particulars of claim was. It turns out that this is also the paragraph of the interim PPD which falsifies that paragraph 6.

48. It could be, of course, that upon further investigation at trial Professor Herniter's testing will be shown to be wrong in some way, although the results are not currently disputed. Indeed, Mr. Laakkonen's second witness statement accepts that the professor has correctly set out what happens when the steps he carried out were performed.
49. In my judgment, this evidence shows at the very least a triable issue to the effect that the output of the Caraku model is dependent on the signals from a reverse polarity sensor and that integer 1.7 is satisfied.
50. I also remind myself that it was only on 17th July 2020 that Caraku's solicitors sent a letter indicating that Caraku did not intend to rely on the reverse polarity argument for three latching relay products, one of which was the Tacklife T8 Max. That was realistic of them, but it raises the question of how carefully the claimant considered its non-infringement case before issuing its application. It also underlines the need for a full investigation of how the claimant's own products work before granting final judgment.

*The power FET switch*

51. I now set out paragraph 47 of Mr. Laakkonen's first witness statement:

"Non-infringement argument B: No power FET

47. Claim 1 of GB '858 requires that the apparatus must have: '**a power FET switch** connected between said internal power supply and said output port; and a microcontroller configured to... and to provide an output signal to said **power FET switch**, such that said **power FET switch** is turned on to connect said internal power supply to said output port ...". (emphasis in original)

52. No one reading this evidence could be in any doubt that the claimant's non-infringement argument was that the Caraku module did not have a power FET switch. That is why the

section had the heading it did and why the words “power FET” switch were underlined in bold three times.

53. Mr Laakkonen went on as follows::

"48. The construction of 'power FET switch' is a key issue in this case. A power FET switch is a silicon switch (i.e. a transistor) capable of switching higher currents. 'FET' stands for 'Field Effect Transistor'. Typically, power FETs will be of the metal oxide semiconductor type, called MOSFETs.

49. The Caraku module connects its internal power supply to the output port using an electromechanical relay, and not a power FET switch. The relay is shown highlighted in the circuit diagram in **Confidential Exhibit APL-8**."

54. Hence paragraph 49 is also emphasising that the relevant connection is done using an electromechanical relay, not a power FET switch. That is consistent with the triple use of bold underlining in paragraph 47. Paragraph 49 does not use, let alone stress, the word "between". It therefore seems to me that paragraph 49 is making the same point as paragraph 45, i.e. the absence of a power FET switch. Consistently with this evidence, the interim PPD did not mention any FET.

55. By contrast Professor Herniter's evidence shows that all three of the tested devices have power FET switches. One arrangement is used in the Ring RPPL 200 and RPPL 300, and a different arrangement in the Tacklife T8 Max.

56. The claimant did not dispute that evidence. Instead it changed tack. The claimant's new case notes that integer 1.6 specifically requires a power FET switch connected between, said internal power supply and said output port, not a power FET switch anywhere in the system. This was not a point which was stressed in Mr. Laakkonen's first or even his second witness statement. The defendant submitted that the claimant's new case, and in particular its new reliance on the word “between”, first came in the claimant's

skeleton argument. The claimant did not dispute that, so I consider it can fairly be called a new case.

57. The claimant then threw down a challenge to the defendant during the hearing to set out the defendant's answer to the claimant's new case on infringement. The defendant rose to that challenge by drawing my attention to certain aspects of confidential Annex A to the interim PPD. I have set this detail out in a confidential Annex to this judgment (which Annex is not included in the public version).
58. The defendant submitted that it had a "really powerful" equivalents argument on integer 1.6, although it did not accept that it needed an equivalents argument at all. I would not describe the argument as being "really powerful", but accept it is at the very least an arguable case that integer 1.6 is satisfied by the circuits shown in confidential Annexes A and B.
59. All I am required to decide is whether the claimant's application for summary judgment on the issue of non-infringement succeeds. However, at the hearing the claimant did not appear to have an answer to the defendant's infringement case on integer 1.6 at all. Of course I bear in mind that it is early days yet in the action, the claimant will have had limited notice of that argument, and I have not considered the issue of validity in any detail.

#### Validity and the file wrapper

60. I should also deal briefly with the issue of validity. I already said that it will be unfair on the defendant to take this into account for purposes of summary judgment because insufficient notice was given. Even if I were minded to do so, the material relied upon

by the claimant falls well short of what would be necessary to decide the issue of non-infringement on the ground of validity on the summary basis and without the benefit of expert evidence. I do not even accept that I could properly, as the claimant put it, "keep a weather eye on the inventive contribution" of the Patent for the same reason.

61. In any event, the high point of the validity argument seems to me at present to be the Carku E-Power 21. This was at least mentioned in the claimant's evidence, see Laakkonen 1, paragraph 57, so it is open in principle to the claimant to rely on this one. The claimant's evidence establishes that a product of this name was marketed before the priority date. I say "establishes" because the contrary was not suggested.
62. However, the claimant's evidence did not go as far as explaining how this product actually worked. I agree with the defendant that it would, in particular, be necessary to know how the microcontroller was programmed in order to come to a definitive view. The claimant only showed me a high level manual, which did not go into any detail.
63. The interim PPD, at paragraph 5(a), does say that a product of this name is a Carku Module A product, but I have already explained my reservations about the reliability of the interim PPD. It is not clear to me whether the de-listed (ie recent) product is the same as the pre priority date product. The claimant submitted that the defendant had complained to Amazon about this product, therefore it must have had enough information to consider the issue of infringement. I do not accept this. Even if the product is unchanged from the pre-priority date version, the defendant only had to consider whether it had a *prima facie* case for the purpose of that complaint, whereas the claimant is seeking summary judgment.

64. The claimant also submitted that the parties had had discussions about the Carku E-Power 21 product, but as the defendant pointed out, there is no evidence that the defendant actually received a sample. Hence, even if I put aside my concerns about assessing validity on a summary basis without the benefit of expert evidence, the claimant's case in relation to validity over the Carku E-Power 21 product is still not good enough to justify summary judgment.
65. I accept that the file wrapper was raised in Mr. Laakkonen's evidence hence the procedural bar does not apply. I was also surprised by the fact that the defendant declined to address this either in its evidence, or skeleton, or even in oral submissions. Even so it seems to me that there are triable issues both as to whether the high threshold identified for admissibility in *Actavis* are satisfied and as to whether the material relied upon is as clear and unambiguous as the claimant suggested.
66. The high point of this evidence from the file wrapper was a letter from the defendant's patent agents to the examiners about a document called *Richardson 2*. I was not shown *Richardson 2* itself or the form of the claim at the time of this letter. The relevant passage was this:
- “US'543 fails to disclose a vehicle battery isolation sensor configured to detect the presence of a vehicle battery. US' 543 cannot therefore disclose a microcontroller configured to receive inputs from both a vehicle battery isolation sensor and a reverse polarity sensor, and generate an output in response to both of those signals, as required by claim 1. Furthermore, as acknowledged by the Examiner, US' 543 does not disclose the use of a FET, as required by claim 1. Thus, claim 1 is novel over US' 543.” [Emphasis in original]
67. The main point in this paragraph, as indicated by the underlining of the original, is about the sensors. The claimant instead relies on the penultimate sentence which refers



to some point already acknowledged by the examiner. The use of the comma after “FET” may or may not be important to the claimant's argument and I shall assume that use of the comma is not an accident. Even so, it is not clear to me what the author of this sentence actually meant. Was the author simply agreeing with the examiner about the literal wording of the claim or should he or she be taken as saying something else?

68. I emphasise I do not intend to reach any definitive conclusion on these matters, I merely make the point that they should be investigated at trial, rather than on a summary judgment application. It also seems to me that given the court's well-known reluctance to investigate the file wrapper even at full trial, as shown in *Actavis* itself, it will be a rare case where the court relies on the file wrapper or, more precisely, upon isolated fragments thereof as part of its reasoning for summary judgment. The claimant drew my attention to paragraphs [459]-[460] of the *Fibrogen* case [2020] EWHC 866 (Pat) as an example of where the court did rely on the file wrapper, but that was a decision reached after a full trial.
69. I should emphasise, however, that nothing I say in this part of the judgment should be taken as expressing any definitive views on either the issue of validity or the inventive contribution of the patent. I am simply saying that these are matters for trial, not for summary judgment.

#### Conclusions on summary judgment

70. I begin by reminding myself of the legal test which I have already set out above and which I will apply.

71. First I agree with the defendant's fundamental point that it would be wrong to grant summary judgment on the issue of non-infringement without knowing how the claimant's products actually work. This applies particularly to integer 1.7 of claim 1 and an understanding of how the relevant microcontrollers work, but it also applies to integer 1.6.
72. As things stand, summary judgment is sought in relation to 29 products, but only three of them have been considered in any detail. The details of how the other 26 products work are almost entirely unknown. In fact, as the defendant points out, it is not even clear whether they are all the claimant's products. For instance, are the four separately listed Grepro 500A products all made by the claimant, in which case it is not immediately clear why they are separately listed? Or is the same model designation being used to indicate products made by different manufacturers? A fuller investigation into the facts is necessary.
73. Secondly, I agree with the defendant that even the claimant's current evidence as to how its products work is unsatisfactory and unreliable. If I had to single out one thing for special comment, I would mention paragraph 2 of the interim PPD. Here the claimant itself positively asserts that the information put forward is only interim and by implication subject to change. Furthermore, the claimant was right about its interim nature, since the information originally put forward only survived a few days before it had to be corrected and the claimant's pleaded case still remains wrong today. I have already mentioned my concerns about how Ms. Bei Ye felt able to sign the original and then amended versions. I am not at all confident that the current version of the interim PPD is the final word on this subject.

74. Thirdly, the defendant's substantive answer to the claimant's case on non-infringement seems to me to be well arguable for the reasons I have given. I refer both to the claimant's original non-infringement case as argued by its solicitor and his evidence and its new case as argued by its counsel. In this context, I accept the defendant's submission that Professor Herniter's statement shows what evidence could reasonably be expected to be available at trial. The claimant, of course, does not have any expert evidence.
75. Fourthly, in any event, I agree with the defendant that I should be cautious before granting summary judgment in a patent case, where infringement on the doctrine of equivalents is relied upon and I have no expert evidence dealing with that or other issues such as the common general knowledge.
76. Fifthly, even if I were to take into account the claimant's arguments on validity, most of which are not open to it for procedural reasons anyway, it does not seem to me that they are clear and convincing enough to justify granting summary judgment on infringement or anything else. A fuller investigation is necessary here.
77. In short, I accept the defendant's submission that the points (v) and (vi) of Lewison J's judgment in *Easyair* apply in this case and I therefore refuse the claimant's application for summary judgment.

### **The application for interim declaration**

#### **Background**

78. The reason why this relief is sought is, in short, because in January this year the defendant complained to the relevant Amazon company, to which I shall simply refer as "Amazon", about Carku's products. More precisely it complained about Carku products sold by distributors. The defendant did so using Amazon's own complaints procedure. As a result of the complaints made, Amazon de-listed a number of Carku products, although some appear to have been re-listed again.
79. The evidence on this is summarised in paragraph [101] of the claimant's skeleton argument, which refers in turn to evidence given by the claimant's Chief Executive Officer Mr Zhang. In short, this particular sales channel is commercially important to Carku, since about 30% to 40% of Carku's UK sales are made via Amazon. The figure may even be growing during lockdown. The size of the figures in money terms is substantial.
80. Amazon's lawyers, Hogan Lovells, wrote on 12th May 2020 as follows:
- "Amazon would therefore not be in a position to re-list Car-ku's products on [www.amazon.co.uk](http://www.amazon.co.uk) for the time being for the above reasons. However, our client would be more than willing to revisit its position should Car-ku provide it with a judicial decision declaring that Car-ku's products do not infringe NOCO's patent, or that NOCO's products infringe Car-ku's patents, the latter in order to de-list NOCO's concerned products."
81. It is not clear to me what Hogan Lovells meant by "judicial decision" and, in particular, whether they meant a final appeal decision, or a first instance final decision subject to appeal, or to something else. I doubt that they meant an interim declaration, since this is not a common remedy in patent litigation and, if they had meant that, they might well have said so. However, Carku have made it clear to me that this is why I am asked to grant the interim declaration, i.e. in order to show it to Amazon.

82. I was shown the nature of Amazon's complaints procedure. It is a web-based procedure which at least has the merits of being quick, cheap and simple. There are limits on the information which can be given. Much of it is conveyed via drop-down menus and the substance of the complaint is limited to just 1,000 characters.
83. This procedure has obvious limitations. I agree with the claimant that it is more suitable for obvious counterfeits than for trying to resolve patent validity and infringement issues. I also agree with the claimant that it is unsatisfactory that the defendant has failed to disclose copies of its complaints to Amazon. It may be, as the defendant says, that the complainer does not get a copy of the complaint itself, although if so, I find that surprising. I also note that the defendant seems to have made little or no effort to obtain any such copies from Amazon, which, apparently, it could have done for at least some period afterwards.
84. It may be, as the claimant submits, that the defendant is in breach of its obligations under paragraph 3 of the pilot disclosure scheme. However, no relief relating to that point was sought in the application notice and draft order and I therefore make no finding about that. In any event it does not seem to me that even if a breach were established, that would substantially change the nature of the legal argument as to whether the interim declaration should be granted. Two wrongs would not make a right.
85. I agree with the claimant that the approach applied by Amazon in relation to such complaints is very different to that applied by the court when considering an application for interim relief. For instance there was no assessment of whether there is a serious issue to be tried, or whether damages are an adequate remedy to either side if an injunction is wrongly granted or wrongly refused. There is also the major difference

that the court will generally insist on a cross-undertaking as to damages, whereas Amazon does not.

86. I have already mentioned the evidence from the claimant's Chief Executive Officer, Mr. Michael Zhang, setting out what the claimant says are substantial losses, both quantifiable and unquantifiable, as a result of this delisting. The claimant says with some force that the effect of the Amazon delisting is equivalent to an injunction keeping Carku out of 30% to 40%, or even more, of the UK market.
87. The relief the claimant asked me to grant, i.e. interim declaration, originally seemed to me to suffer from exactly the same disadvantage as that of which it complained: specifically, the lack of any cross-undertaking in damages, whether in favour of either NOCO or anyone else. After I raised this during the hearing, counsel for the claimant confirmed he was prepared to offer such an undertaking in his reply speech. However, as the defendant pointed out, there is no evidence that the claimant would be good for such an undertaking.
88. The claimant alleged that NOCO had obtained a thoroughly inequitable benefit by invoking Amazon's complaint procedure rather than going to court. Although the claimant did not say so, the same logic would presumably apply to any IP right proprietor who made a complaint to Amazon rather than going to court.

#### The law on interim declaration

89. The concept of an interim declaration was developed in the public law context principally as an alternative to an interim injunction which cannot be ordered against the

Crown, but it is not so limited. CPR Part 25.1(1)(b) provides the court can grant an interim declaration in any proceedings.

90. The defendant drew my attention to a line of cases establishing that interim declarations are not appropriate or, at the very least, difficult to get in respect of questions that only permit of a final answer.

91. In *Amalgamated Metal Trading v City of London Police* [2003] 1 WLR 2711, Tomlinson J stated as follows:

"10... It remains to be worked out what are the circumstances in which it might be appropriate to resort to this new jurisdiction. For my part I find it difficult to conceive that the court would ever be prepared to grant an 'interim declaration' of the type here sought. Either the relevant sum is the proceeds of crime or it is not. Whilst the question could only be decided as between the parties before the court, and on the basis of such evidence as they chose to place before it, the court would surely only be prepared to pronounce upon the question, if at all, on a final basis, not upon the basis that whatever is the position today may by further or different evidence tomorrow be shown to be different."

"27.... The arising of such disputes is one of the ordinary commercial risks which any financial institution faces. I also think it most unlikely that the Court of Appeal can have had in mind that the court would in such circumstances grant interim declaratory relief on the ultimate substantive question whether the funds are derived from criminal conduct. Such a question only permits of a final answer, not a temporary answer, and it is only appropriate to answer it as and when it arises, and then as between the parties between whom it arises. Then it is decided, if it is necessary so to do, upon the basis of such evidence as the parties place before the court, and having regard to the incidence of the burden of proof..." [Emphasis added]

92. See also *N v Royal Bank of Scotland plc* [2017] EWCA Civ 253, CA, per Hamblen LJ with whom Hickinbottom and Simon LJJ agreed. Hamblen LJ cited *Amalgamated Metal* and concluded:

"88. It can equally be said that here the question of whether the Bank would commit any criminal offence in making the transactions and whether the Bank

was obliged by the criminal law to make disclosure were substantive law questions that only permit of a final rather than a temporary answer. For all the reasons given by Tomlinson J I have real difficulty in seeing how it could be appropriate for the court to give an interim answer to such questions. The declarations sought were in determinative rather than advisory terms.

89. Assuming, however, that such an answer can be given, it would be necessary to consider the degree of confidence which the court must have in the applicant's entitlement to a declaration before such relief could be granted. In my judgment the most appropriate evidential threshold in a case such as the present is the high degree of assurance which is generally required before mandatory injunctive relief will be granted. The need for a close consideration of the merits is particularly important in a case in which the grant of the interim declaratory relief is likely to be determinative of the issue, as in this case. The relevant potentially criminal acts here were the carrying out of the specified transactions and/or failing to make prior disclosure. Once the monies had been irrevocably paid over without further disclosure under the protection of the interim declarations there could be no criminal liability."

93. Finally, my attention was drawn to *British Airline Pilots' Association v British Airways* [2018] EWHC 1889 (QB), Butcher J, at paras 25-32. Paragraph 25 states:

"25. The form of relief sought on this application is an interim declaration. There is no doubt that the court has the power to grant interim declarations (CPR r.25.1(1)(b)). It is a very different question as to whether it is appropriate to grant an interim declaration in this case. The difficulties of an interim declaration include, at least, the following: one concern is that it can be said to amount, effectively, to seeking to circumvent requirements of a summary judgment application by bringing this matter on at considerable speed and asking the court to determine, at least for the present, that there is no answer to their case without having complied with the safeguards and requirements which would be a part of an application for summary judgment. This is the same concern as was enunciated by Auld J in *Jakeman v South West Thames RHA*, paras.36 to 37 and 41..." [My emphasis]

94. Paragraph 26 goes on as follows:

"26. I consider that an interim declaration in relation to the contractual rights of parties to a private law contract must be a very exceptional remedy, and I consider in that regard that it is significant that I have been shown no case in which an interim declaration has been granted in a private law dispute relating to contractual rights. Indeed, it appears that an interim declaration is an exceptional remedy even in the public law context (see Lewis on Judicial Remedies in Public Law)."



95. This particular paragraph had been highlighted before the hearing in the joint authorities bundle. I asked the claimant if he was able to show me a case where any interim declaration had ever been granted and he was unable to do so. He instead referred me to the UKIPO practice of issuing opinions on infringement. I do not regard that practice as comparable. Certainly the application for an interim declaration was refused in each of the three cases I have mentioned.

96. Butcher J then quotes from paras 81 to 91 of *N v Royal Bank of Scotland plc* and concluded as follows

"30. I consider that the present issue is one of substantive law, which, to use Hamblen LJ's language in para.88, only permits of a final rather than a temporary answer. I have real difficulties in seeing how it can be appropriate for this court to give an interim answer to the question of the construction, variation or implied terms of a contract between the parties. On that basis, I would refuse to grant an interim declaration. However, even if that point is wrong or too absolute a position, I do not consider that the present is a case for an interim declaration because I am not satisfied with the high degree of assurance which would have permitted the grant of a mandatory injunction, and which is the test which Hamblen LJ considered would be applicable, assuming that an interim answer could be given. I should say that I consider that that test can hardly be different, or not markedly different, from the question of whether there should be summary judgment."

97. In short, there are two issues. The first is the issue of whether it could be appropriate for the court to grant a declaration where the question only permits of a final rather than a temporary answer. The second issue assumes that the first position is either wrong or too absolute a position, in which case the court has to be satisfied to the high degree of assurance which should permit a mandatory injunction to be granted. This latter test can hardly be different or is not markedly different from the question of summary judgment.

98. It is not immediately clear to me from this, or from any of the cases, when the first issue is all that needs to be considered and when the court needs to consider the second issue as well. The cases seem to show that the court will normally consider both issues and hence I will do likewise.
99. As regards the high degree of assurance arising in relation to the second issue, it is not clear to me, just as it was not clear to Butcher J, how the application for interim declaration can succeed where an application for a summary judgment on the same point has failed. I accept, for my own part, that it is theoretically possible where the evidence relied upon is different, but that assumes that it is legitimate to rely on evidence for the purposes of an interim declaration when it would have been unfair to rely on the same evidence for the purposes of summary judgment. That would seem to be a prime example of what Butcher J referred to at paragraph 25 of *British Airline Pilots' Association*, namely circumventing the requirements for summary judgment.
100. Returning to the present case, it seems to me that despite the claimant's attempts to persuade me to the contrary, infringement is indeed a yes/no question, and it only permits a final answer, not a temporary one. The products either infringe or they do not. It would not be satisfactory to grant a declaration one day which might become false another day. That is because it cannot be right to say that certain acts infringe a patent one day but the same acts do not infringe the same patent another day. It is not as if there is any interim state of affairs which is subject to change. For instance, a decision as to whether to permit products to be sold pending trial is a decision about an interim state of affairs.

101. It does not, therefore, seem to me that the application gets to the next stage of considering whether I have the high degree of assurance which is generally required before mandatory injunctive relief will be granted. But even if it does get to that stage, I do not have that high degree of assurance. That should not be taken as equating to a finding that Carku's arguments are "very weak" as the defendant submits. But it is not clear to me at present that Carku is going to win on non-infringement, even for the three products where there is specific evidence as to how they work. Carku may win at trial or may not. It is simply too early to say.
102. It therefore seems to me that upon the existing case law, that is the end of the matter so far as interim declaration is concerned. However, additional arguments were raised so I shall deal with them as well.
103. The claimant submitted that its application was not pre-emptive but responsive. I do not see why that of itself makes a difference.
104. The claimant relied heavily on what it called the inequity of the present situation and submitted that an interim declaration was necessary to right the wrong. I agree that the Amazon procedure is significantly different from the court's approach to an interim injunction in all the ways the claimant has mentioned, but I do not see that this of itself entitles me to depart from the clear and consistent line of case law I have mentioned. It is not as if the claimant is without a remedy. For instance, it currently has a pleaded threats claim. The claimant suggested that the damages it recovers if successful on the threats claim may not compensate it for the damage it says it is currently suffering by virtue of being de-listed. I accept this is possible, but it is not immediately obvious to me that this submission is correct. In any event, it still seems to me that the threats

action, if successful, will go a long way towards compensating the claimant for the damage it claims to be suffering.

105. I also agree with the defendant that there is a risk of the declaration sought being liable to mislead third parties, although I do not believe that the risk is quite as great as the defendant submits. Hogan Lovells, Amazon's solicitors, are well able to distinguish between an interim declaration and the final one, and the primary purpose seems to be to show them rather than the public at large, who I agree might be more easily misled, but even an experienced IP lawyer might wonder what the effect of an interim declaration actually is. That is particularly so given its novelty in this particular field of litigation. It is not a judicial finding that there is an arguable case of non-infringement. It is an interim judicial finding that certain acts do not infringe today, but that exactly the same acts might infringe some other day. It is not an inherently easy concept to grasp and granting the remedy might lead to some confusion, particularly among the public as the defendant submits.
106. Nor do I actually have any evidence that granting an interim declaration would actually solve the issue with Amazon of which Carku complains. Absent any evidence from or on behalf of Amazon or its solicitors, it seem to me at least possible that Amazon would wait for a final ruling, whether on appeal or at first instance, rather than an interim ruling before selling the accused goods. If so, the interim declaration serves no point.
107. Finally, although I place less weight on this, it seems to me the claimant is guilty of at least some delay. The delisting started as long ago as January 2020; see Zhang 1, paragraph 9. Carku could have done more to bring its issue with Amazon to a head, for instance seeking some form of mandatory injunction long before now.

108. For these reasons I also refuse the application for interim declaration.

*(For continuation of proceedings: please see separate transcript)*

109. I now have to deal with the matter of costs. There are three main aspects with which to deal. The first is what the incidence of costs is; secondly, the basis; and, thirdly, whether they should be assessed on a summary or detailed basis and, if the latter, whether a payment on account should be made. At the moment I am dealing with the first two of these, ie what the incidence of costs should be and the basis thereof.

110. The parties are some way apart. The defendant asks for its costs in any event on the indemnity basis, whereas the claimant suggests it should be defendant's costs in the case rather than in any event, and, obviously, it resists the indemnity basis as well. Both sides took these two points together.

111. In support of its position, the defendant made the following points. It submitted that the claimant's evidence was inaccurate; that it was late; that the claimant had flouted Part 24; and that the claimant had persisted with the application long after it should have become obvious it was going to fail.

112. It seems to me these complaints are well made. So far as persistence is concerned, it seems to me that the claimant must always have known that summary judgment was likely to be ambitious but after Professor Herniter's evidence was served, the claimant had to start amending its interim PPD and correcting its evidence. At that stage, if not before, the claimant must have realised what an uphill job it had.

113. The claimant's main point in answer was to draw my attention to the parties' conduct, and in particular, to what it said was non-disclosure by the defendant amounting to a breach of its disclosure obligations under the Part 51U Practice Direction. As I believe I indicated in my judgment, I said I was not going to consider that issue on this occasion, because it was not mentioned in the application notice or the draft order. That was reinforced by counsel for the defendant who reminded me that the present hearing was not a hearing for the purpose of deciding whether the defendant had complied with its disclosure obligations.
114. I do not in any way seek to trivialise the importance of breach of disclosure obligations, but even taking the claimant's case at its highest, it does not seem to me that that aspect of the defendant's conduct is anything like as serious as the claimant's own conduct. I have already referred to the inaccurate evidence, late evidence and the flouting of Part 24.
115. The claimant also suggested that there might be a saving in costs down the line as a result of the material put forward. That may well be true as a matter of fact, but it is not clear to me as a matter of logic why that is a reason to deprive the successful party of any part of its costs.
116. Standing back and taking all these factors into account, it seems to me the correct order I should make is that the defendant has its costs in any event. The application failed and it was not even close. But I reject the application for indemnity costs. The test to be applied there is, in short, whether the case is "out of the norm",. I have accepted the criticisms made of the claimant's approach to this application, but it does not seem to

me that they are sufficiently severe to go to the level of ordering indemnity costs. I therefore refuse that part of the defendant's application.

*(For continuation of proceedings: please see separate transcript)*

117. I now have to consider whether to make a summary assessment or a detailed assessment. It seems to me the answer to that is very clear. I will order this to go for detailed assessment, because as is accepted by Mr. Abrahams and reinforced by Mr. Cuddigan, the costs schedule which has just been sent to me was actually prepared this morning after the hearing itself, and as Mr. Cuddigan says, in the knowledge of how the hearing actually went. It does not comply with the rules applicable to service of such Schedules, which is particularly rich given that the defendant has complained about the claimant's flouting of Part 24. Hence detailed assessment is appropriate.
118. However, I bear in mind that under Part 44.2(8): "Where the court orders a party to pay costs subject to detail assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so." Therefore I do have the power to order a reasonable sum to be paid on account and it was not suggested I should decline to exercise it.
119. The parties are very far apart as to what a reasonable sum would be. The defendant's costs schedule, which I have seen, comes out at £268,737. As a practitioner in this field I am used to seeing figures like that but many people who are not practitioners in this field will be quite surprised to see that being put forward as a reasonable figure for a one-day summary judgment application.

120. I was told that the claimant's figure by way of comparison was £128,000 which is very much less. Understandably, the claimant therefore submitted to me that that should be the starting point. More accurately it submitted that £128,000 multiplied by two thirds, which I am told comes out at £77,000, provided a useful yardstick as to what was a reasonable sum.
121. I agree this is certainly a useful starting point as to what I should consider to be a reasonable sum. I do not consider that it does full justice to the fact that the defendant had to fight this application hard, because otherwise it was the end of the line so far as it was concerned. I therefore increase the figure I am prepared to order by way of reasonable sum from £77,000 to £100,000. That is the order I make. I will, of course, stress that since this is a payment on account, it will be entirely open to the defendant to argue for a higher figure during the detailed assessment proceedings unless the issue has been settled before then.

*(For continuation of proceedings: please see separate transcript)*

122. I am now asked for permission to appeal. Sorry, Mr. Cuddigan, you will have to ask the Court of Appeal for this permission. It seems to me that as Mr. Abrahams has just pointed out the issue of interim declaration has been before the Court of Appeal before in that *RBS* case. I do not think you identified anything I got wrong. You were stressing more that it was an important issue and that valuable guidance was required. I do not regard these as sufficient to justify real prospects of success and, hence, sufficient to justify permission to appeal.

-----