



Neutral Citation Number: [2022] EWHC 3381 (Pat)

**Claim No: IL-2022-MAN-000001**

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

**Handed down by email  
Date 20<sup>th</sup> December 2022**

**Before:**

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

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**B E T W E E N:**

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

Claimants

**– and –**

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

Defendants

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

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Hearing dates: 11<sup>th</sup> to 14<sup>th</sup> and 17<sup>th</sup> to 21<sup>st</sup> October 2022

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## JUDGMENT

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

### Introduction

1. In this action the Claimants make claims of patent infringement, copyright infringement, passing off and joint tortfeasorship. The trial was in respect of issues of liability only.

#### *The patent claims*

2. The patent claims relate to two patents, GB 2415714C and GB 2436989B (respectively, the “714 Patent” and the “989 Patent” and, collectively, “the Patents”). The Patents have priority dates of 9 June 2004, filing dates of 8 June 2005 and publication dates of 27 December 2007. They are entitled “Insulated timber framed building structure and components thereof” and relate to a system, invented by the First Claimant (“Mr Price”), for constructing a building using interconnecting insulated timber framed panels. These panels are made up of various layers which provide enhanced thermal insulation.
3. Mr Price claims to be the proprietor of the Patents. His case is that he was their original proprietor but that, on 28 March 2011 (shortly before he was made bankrupt), he assigned them to Fred Bridge who assigned them back to Mr Price on 14 July 2016 (after Mr Price was discharged from bankruptcy). The Second Claimant (Supawall Limited – “SL”) claims to be an exclusive licensee of the Patents under a written licence granted by Mr Price on 14 October 2008. The Claimants assert that the Patents have been infringed by the Defendants’ dealings with the “Old Injectawall Product”, which the Defendants marketed and sold up to around June or July 2019,<sup>1</sup> and with the “New Injectawall Product”, which the Defendants marketed and sold thereafter.
4. The Defendants deny liability under the patent claims. They raise a number of issues as regards the Claimants’ title. Their primary case is that Mr Price had held the Patents on trust for a partnership known as Maple Timber Frame of Langley (“the MTF Partnership”) whose assets (including its beneficial interest in the Patents) are now vested in the First Defendant (“FL”). In the alternative, they argue that, on 22 March 2011 and as a result of certain dealings with David Rich-Jones, Mr Price’s interest in the Patents had been assigned to a company called Lightpeak Limited (“Lightpeak”) and SL’s exclusive licence had been terminated. In the further alternative, they argue that, even if the assignment to

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<sup>1</sup> The precise date is in issue, see Re-Amended Defence at [31] but this is not material for present purposes.

Lightpeak was ineffective, any interest that Mr Price had in the Patents had vested in his trustee in bankruptcy after he was made bankrupt on 27 July 2011. The Defendants deny that there was an assignment of the Patents to Mr Bridge prior to Mr Price's bankruptcy.

5. If the Defendants are wrong as regards these issues of title, then they accept that the Patents were infringed by FL's dealings with the Old Injectawall Product but not by their dealings with the New Injectawall Product. They also deny that the Second Defendant ("FTFL"), which is said to be dormant, has had any dealings with any Products.
6. Finally, the Defendants assert that, to the extent that they are liable for infringement, any sums that are recoverable fall within the terms of a charge over intellectual property rights ("IPR") dated 3 November 2009 which Mr Price gave to North West Transitional Investment Fund LLP ("the NWTIF Charge"), the benefit of which has been assigned to the Third Defendant ("Garry Flitcroft").

*The copyright claims*

7. The copyright claims relate to copyrights ("the Copyrights") in the following works:
  - a. Some photographs said to have been taken by Mr Price's father in around 2006 to 2007. These were photographs of various buildings and cut-away models of sections of floor, roof and wall made using the patented invention (see Appendix 3A and Appendix 3C to the Particulars of Claim, which I will refer to together as "the Photographs"); and
  - b. A drawing said to have been created by Mr Price in 1993 which shows the front view of a two storey building broken into layers – a floor, the walls for the ground floor, a ceiling for the ground floor, the walls of the first floor and, finally, the roof (see Appendix 3B to the Particulars of Claim which I will refer to as "the Drawing"). Copies of this drawing appear at Figure 1 of the Patents.
8. The Defendants do not dispute doing the acts said to infringe the Copyrights. Those acts are, in broad terms, using the works on FL's website and in its marketing materials) but, as with the patent claims, they dispute Mr Price's claim to be the owner of the Copyrights. They claim that FL is the true owner of these rights. In the alternative, if that is not the case, they argue that Mr Price never acquired title to the copyrights in the Photographs and that copyright in the Drawing was either assigned by him to Lightpeak or had vested in his trustee in bankruptcy. They also argue that if they have infringed copyright any sums due are caught by the NWTIL Charge.

*The passing off claim*

9. The passing off claim arises in relation to the goodwill which the claimants say they have acquired in the name “Maple Timber Frame” and from the fact that FL is the owner of the following domain names:  
“mapletimberframe.org”,  
“mapletimberframe.info” and  
“mapletimberframe.co.uk”
10. The Defendants’ case is, simply, that there is no passing off as they have never used those names.

*Joint tortfeasorship*

11. The Claimants’ case is that both Garry Flitcroft and his son, the Fourth Defendant (“Thomas Flitcroft”), are liable as joint tortfeasors for the actions of FL and FTFL because they were the controlling minds of those companies and/or they directed and procured the acts said to constitute infringements.
12. It has already been determined (by order of Recorder Douglas Campbell Q.C. dated 12 June 2019, as varied by order of the Court of Appeal dated 14 July 2020) that, in so far as it is established that FL and/or FTFL are liable, then Thomas Flitcroft is liable as a joint tortfeasor. However, there is an issue as to whether Garry Flitcroft is a joint tortfeasor for the actions of those companies – at least until his reappointment as a director of FL on 15 December 2021.

**The facts**

13. The following are findings of fact that I make on the basis of the evidence before me. In making these findings, I have borne in the mind the helpful summary of the relevant principles regarding the assessment of credibility provided by HHJ Simon Barker QC in *Re Parsonage (deceased)* [2019] EWHC 2362 (Ch) at [32]-[37]. Much of that summary (and particularly the importance of contemporaneous documents and of objective and accepted facts) is relevant to the present case, where the factual issues relate to events that occurred more than 10 years ago and are often obscured by what Mr Grime referred to as “the fog of time” and by the fact that the parties did not always have the full documentation available when making statements regarding those issues.

*Early trading and the creation of the relevant IPR*

14. Mr Price started trading as a sole trader in around 1993, selling timber frames for buildings under the name Maple Timber Frames. He says, and I accept, that it was at about this time that he created the Drawing. Later, from around 2000, he continued that business through the MTF Partnership of himself, Neil Middleton and ECH Limited (a company he owned and controlled, with Mr Middleton).

15. At some point (probably in around 2003 or 2004) Mr Price invented the system that is the subject of the Patents. As mentioned above, applications for the Patents were filed on 8 June 2005 and granted on 27 December 2007 with Mr Price being registered as the proprietor. The invention, referred to as Supawall, was used by the MTF Partnership and one of the issues is whether it should be inferred that Mr Price held the Patents on trust for the MTF Partnership or whether he had merely licensed the MTF Partnership to use the invention. The same issue arises as regards the Photographs which I find were taken by Mr Price's father, John Anthony Price, in around 2006 to 2007 and which the MTF Partnership used in its brochures.
16. By a Head Licence Agreement dated 14 October 2008, Mr Price granted SL an exclusive licence in respect of (inter alia) the Patents. SL was a company of which Mr Price and Mr Middleton were directors, but which was substantially owned by Mr Price<sup>2</sup> and the plan was that SL would be responsible for granting sub-licenses to other businesses wishing to exploit the invention. Notice of SL's licence was given to the UK Intellectual Property Office ("UKIPO") on 14 August 2009. For reasons that are unclear, the entry made on the register by the UKIPO wrongly referred to the licence as non-exclusive – a mistake that was not corrected until 6 July 2018. However, no point is taken by the parties with regard to that mistake.

*The start of negotiations with Mr Rich-Jones*

17. By 2009, the MTF Partnership had run into financial difficulties. In addition to a debt to NWTIL (secured by the NWTIL Charge), the Partnership was indebted to its bank (HSBC). As a result, Mr Price entered into negotiations with Mr Rich-Jones, seeking a cash injection. This resulted in a loan agreement dated 23 December 2009 whereby Paramount Limited ("Paramount", Mr Rich-Jones' pension company, based in the Isle of Man) agreed to lend the sum of £200,000. The loan agreement was made between Paramount and a company called Maple Timber Frame of Langley Limited, but it appears to have been accepted that that was a mistake and that the true borrower was the MTF Partnership.<sup>3</sup> There was, however, a dispute as to when these loan monies were paid and by whom. For much of his cross examination, Mr Price was adamant that they had been paid in late 2008 by Mr Rich-Jones personally. However, faced by a Paramount bank statement produced on the second day of his cross examination, he finally accepted that they had been paid on 24 December 2009 by Paramount.
18. The Loan Agreement was made on condition that Mr Price executed a heads of terms document. Those heads of terms provided, subject to contract, that the £200,000 plus a further £50,000 to be advanced would, instead of being treated as a loan to Maple Timber Frame, be treated as the purchase price for the

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<sup>2</sup> The annual return to 9 June 2010 shows Mr Price as holding 9,300 shares with the remaining 300 shares being held by Brian Woodley. Then, on 4 December 2010, Mr Price transferred 300 of his shares to Mr Middleton.

<sup>3</sup> The loan money was paid the MTF Partnership bank account.

acquisition by Mr Rich-Jones or Paramount of a 25% interest in SL and in the Patents. Significantly, there was no suggestion that Mr Rich-Jones was to acquire any interest in the MTF Partnership.

19. The sum of £200,000 having been paid, the parties continued to negotiate as to how to give effect to the heads of terms. To this end, Mr Rich-Jones instructed a firm of chartered accountants, Charter Tax (acting by Janet Paterson, to whom I will refer to by her later married name, Mrs Pierce) and a firm of Jersey lawyers called Verras Law (acting by Hiren Patel). A suite of documents was produced by Mr Patel intended to give effect to the deal and the correspondence shows that changes continued to be made to those documents over the rest of 2010 and into 2011. To be fair to those who gave evidence, the documentation relating to these negotiations was somewhat limited until Mrs Pierce produced her files during the course of the trial.<sup>4</sup>
20. The original plan was for all relevant IPR to be assigned to a company to be formed in Jersey and to be called Supawall Worldwide Limited (“SWL”). SWL was then to licence others to use the IPR via a subsidiary to be set up in Cyprus. The Cypriot company would grant a licence to SL, whose existing exclusive licence would be terminated, but which would grant licences to others in the UK. Under the deal, another new company was to be formed, to be called Supawall Group Limited (“SGL”). Its role would be to set up further subsidiaries in Europe and worldwide to whom licences could be granted. It was also envisaged that further documentation would be needed to ensure that the shareholdings in the various companies reflected the various parties’ respective interests under the deal.
21. By early January 2011, the proposed structure for the deal had changed in that the plans for a Cypriot company had been shelved. It appears that there were also discussions about SGL (once formed) being granted an option to acquire the IPR from Mr Price, which option would be assignable to SWL (once formed) or about SWL itself being granted an option. However, by mid-January, the parties had reverted to the idea of there being an assignment of the IPR by Mr Price to SWL.

*Were documents signed at a meeting in January 2011?*

22. Also in January 2011, there were suggestions in the correspondence that there should be a meeting at Mrs Pierce’s offices on 14 January 2011 or on 17 or 18 January at which meeting the documents giving effect to the deal could be signed. Mr Price was adamant that this is what had in fact occurred (albeit without, he said, giving rise to any binding agreement, as other aspects of the deal remained unresolved). Given Mrs Pierce’s evidence, it is possible that there was a meeting at her offices in January 2011. However, I reject Mr Price’s

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<sup>4</sup> This is not a criticism of Mrs Pierce. She was not a party to the proceedings and it appears that she had not been asked to produce her files earlier.

evidence that this was when various documents relating to the deal were signed. Mrs Pierce and Mr Rich-Jones both say that nothing was signed then<sup>5</sup> and it is clear that the documentation was far from being finalised. For example, in an email dated 20 January 2011, Mr Patel asked Mr Rich-Jones and Mr Price to review various draft documents in respect of the deal. He noted that many of the drafts were shown “*with deltatview ... so you can see the changes*”. There were further emails on 28 January showing more revisions to the documents.

*The continuing negotiations with Mr Rich-Jones*

23. Matters remained unresolved in February 2011 and the correspondence shows that important elements of the deal were still not in place. In particular, Mr Patel was waiting for confirmation that SGL and SWL had been incorporated and that Mr Price had changed SL’s share capital to create the Class A, Class B and Class C shares that were needed in order to give effect to the various shareholdings that the deal envisaged.
24. Matters became more urgent in early March 2011 as HSBC indicated that its continuation of the MTF Partnership overdraft facility was conditional on Mr Price injecting the additional £50,000 that he was hoping to obtain for selling shares in SL (i.e. under the deal being negotiated with Mr Rich-Jones). As Mr Middleton confirmed, the MTF Partnership was desperate for this money.
25. By this time, it had been decided that, rather than incorporating a new company as SGL, the parties would instead use Lightpeak, an existing company effectively owned by Mr Rich-Jones, which would change its name to SGL. However, it was still envisaged that SWL would be incorporated and would take an assignment of the IPR from Mr Price. It was also still envisaged that the shareholdings in Lightpeak and SL would be changed in order to give effect to the proposed interests of the various proposed shareholders under the deal. On 10 March 2011, Mr Patel chased Mr Rich-Jones for “*clear instructions*” on this. Then, on 15 March 2011, Mrs Pierce emailed Mr Price to remind him that he still had to attend to the changes to SL’s share capital and stating that, without those changes, the various draft agreements would not make any sense. Later, by an email of 17 March 2011, Mr Patel chased Mr Rich-Jones for the information that he still needed in order to complete the documentation in relation to SL. He reiterated that SWL “*needs to be incorporated and have directors and company secretary and shareholder in place in order for the IPR to be assigned to it. Please confirm that this is the case.*”

*The meetings in March 2011*

26. It is not clear exactly how Mr Rich-Jones responded to these emails and, certainly, SWL was never incorporated. Nevertheless, on Monday 21 March 2011, Mr Rich-Jones emailed Mr Patel (copying in Mrs Pierce) saying that “*I*

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<sup>5</sup> This also seemed to be Mr Middleton’s evidence.

*have been working hard on my homework!*” and that *“I am meeting [Mr Price] tomorrow morning [i.e. on 22 March] at 11 am and we need to sign all documents then in advance of a key meeting with Walkers and Scotframe on Wednesday [i.e. on 23 March] where I need to attend as a Shareholder and CEO”* (i.e. of SL).<sup>6</sup> He also noted that some shareholders would be *“attending to sign afterwards”* and that *“we will need to post date the IPR assignment agreement as [the incorporation of SWL] will not be completed before Friday.”*

27. As a result, on 22 March 2011, Mr Patel sent out an amended “bible” of documents. That same day, Mrs Pierce emailed a colleague, David Page, asking for the attached documents to be printed as *“these are what [Mr Rich-Jones] needs to sign”*. She also sent an email suggesting that the meeting take place at 11 St James Place, London. Mr Rich-Jones responded to confirm this. Also on 22 March 2011, Mr Middleton emailed Mr Fingleton (an accountant for the MTF Partnership) (copying in Mr Price) stating that he was *“keen to get this to bed as [Mr Price] is on the train to London to Sign and Get the £50k transferred as they are all meeting Bob and John Campbell tomorrow morning to discuss share deals with them both”*. Mr Middleton went on to say that Mr Price *“is meeting David<sup>7</sup> at 11 am and he has had to force the issue and conclude if not there wont be a meeting tomorrow”*. He ended by stating *“We are nearly there!”*.
28. This suggests that, as stated by Mr Rich-Jones and Mrs Pierce and contrary to the evidence of Mr Price, there was a meeting on 22 March at which Mr Price and Mr Rich-Jones signed a number of documents. I also accept Mr Rich-Jones’ evidence that the parties had shaken hands at that meeting to indicate their belief that a deal had been concluded. Indeed, that conclusion is supported by the parties’ subsequent conduct as summarised below.
29. In the first place, the planned meeting with Scotframe and Walker Timber went ahead the following day (23 March 2011). As Mr Rich-Jones had made clear in his email of 21 March, he had wanted the documents signed before that meeting and, as Mr Middleton had said in his email of 22 March, if they had thought that a deal had not been concluded on 22 March, the meeting on 23 March would not have taken place.
30. Second, on 24 March 2011 and, again, on 25 March, Mr Middleton chased Mr Rich-Jones for payment of the £50,000 that was payable under the deal and that money was paid by Mr Rich-Jones on 25 March 2011. The fact that Mr Middleton felt able to chase for payment and that Mr Rich-Jones made the payment suggests that they believed a deal had been reached on 22 March. As Mr Middleton’s email of 22 March made clear, the purpose of the meeting had been to *“conclude”* the deal so that they could *“Get the £50k”*.

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<sup>6</sup> Walkers (i.e. Walker Timber) and Scotframe were companies (represented by, respectively, John Campbell and Bob Edwards) which, it was hoped, could be persuaded to invest in SL.

<sup>7</sup> Presumably meaning Mr David Rich-Jones



31. Third, are the parties' dealings with Dow Chemicals, a key supplier for SL. On 25 March 2011, Mr Rich-Jones emailed Dow Chemicals stating that he and Mr Price had "*now concluded negotiations and are Partners in SupaWall with equal shareholdings*". He also told Dow Chemicals that, as part of these arrangements, "*I have been appointed CEO of [SL] with immediate effect with executive responsibility to deliver the business plan*". He copied Mr Price into this email and separately forwarded the email to Mr Price asking him to "*reply all to that email and confirm*". Mr Price duly responded (albeit only to Mr Rich-Jones) saying "*Hi David That's fine*".
32. Subsequently, in an email of 29 March 2011, in response to a query from Dow Chemicals, Mr Rich-Jones stated that, thereafter, authorisation for supplies by Dow Chemicals to SL must be by email or written confirmation from himself. Mr Price was copied into this email and did not query that statement. Also on 29 March, Mr Price and Mr Middleton met with Dow Chemicals and, on 30 March, Dow Chemicals sent its notes of that meeting to Mr Price, Mr Middleton and, significantly, Mr Rich-Jones. In his response to Dow Chemicals (copied to Mr Price and Mr Middleton) Mr Rich-Jones again referred to himself as CEO of SupaWall. Again, Mr Price did not query that statement.
33. Fourth, whilst it appears that Mr Rich-Jones had begun to feel a degree of disenchantment by mid-April 2011,<sup>8</sup> Mr Middleton and Mr Price continued to involve him in issues relating to SL. One example of this was in mid-May 2011 with regard to industrial tribunal proceedings brought by Brian Woodley against SL. Another example was in June 2011 when Mr Middleton sought his instructions with regard to product liability insurance certificates. Further examples were in June 2011 and August 2011 when he was copied in on correspondence by which SL terminated the sub-licences that it had granted to Scotframe and to a company called Flight Timber Structures.

*The documents signed on 22 March 2011*

34. For the reasons set out above, I am satisfied that a meeting did take place on 22 March 2011 at which Mr Price and Mr Rich-Jones signed and/or initialled a number of documents, in the presence of Mrs Pierce's colleague, Mr Page who, on occasions, witnessed Mr Price's signature. It appears that, at the end of the meeting, most (but not all) of these documents were scanned onto Mrs Pierce's firm's system and copies of these were produced by her at the trial.
35. It appears that the documents signed included some relating to Lightpeak (sometimes referred to by its proposed new name, SGL) and others relating to SL. There were none in relation to SWL which, as mentioned above, had not then been incorporated.

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<sup>8</sup> As evidenced by his email of 18 April 2011 to Mrs Pierce in which he mentioned that Scotframe and Walker Timber had pulled out of negotiations to acquire shares in SL due to their distrust of Mr Price and in which he asked whether his nomination as a director of SL had gone through and commented that, if it hadn't, then he would prefer not become a director of a business that was likely to fail.

36. The documents relating to Lightpeak/SGL that were signed or initialled by Mr Price and/or Mr Rich-Jones at the meeting included:

- a. Undated minutes of a board meeting of Lightpeak on a date that was left blank. The minutes purported (i) to authorise a change of name to SGL, the restructuring of its share capital, the adoption of new articles of association and the issue of shares, (ii) to approve subscriptions for shares pursuant to a shareholders agreement to be entered into between Mr Price, Mr Rich-Jones, Paramount and a Mr Stephane Bouvier and (iii) to appoint Mr Price and Mr Bouvier as directors (alongside Mr Rich-Jones). This document was signed by Mr Rich-Jones as director of Lightpeak.
- b. Form CC05 recording a change in constitution for Lightpeak. This was also signed by Mr Rich-Jones.
- c. Form AP01 for the appointment of Mr Price as a director of Lightpeak. This was signed by both Mr Price and Mr Rich-Jones. However, the date of the appointment was left blank.
- d. Form SH08 for the designation of classes of shares in Lightpeak. This was signed by Mr Price but, again, the relevant date was left blank.
- e. Special resolution of a general meeting of members of Lightpeak on 22 March 2011 recording a change in name from Lightpeak to SGL. This was signed by Mr Price as “Director/Shareholder”.
- f. Undated shareholders agreement for SGL which provided for the following shareholdings in SGL:
  - i. Mr Price - 4,125 Class B shares and 500 Class C shares,
  - ii. Mr Rich-Jones - 250 Class B shares and 500 Class C shares,
  - iii. Paramount - 3,875 Class B shares, and
  - iv. Stephane Bouvier - 750 Class D shares.

This document was signed and initialled by Mr Price and Mr Rich-Jones. It was not signed on 22 March by Mr Bouvier or by anyone on behalf of either SGL or Paramount.

- g. Undated deed of assignment of IPR (specifically including the Patents) by Mr Price to SGL (referred to as “*formerly Lightpeak Limited*”). This was signed by Mr Price in his personal capacity and by Mr Price and Mr Rich-Jones as officers of SGL. As appears from the above, the fact that the assignment of IPR was to SGL (rather than to SWL) appears to have been a very late change and, in cross examination, Mr Rich-Jones explained that it had been agreed that Lightpeak would assign the IPR on to SWL as and when SWL was formed.

37. The documents relating to SL that were signed or initialled by Mr Price and/or Mr Rich-Jones at the meeting included (inter alia) the following:

- a. Undated minutes of a board meeting of SL on a date that was left blank. These purported (i) to authorise the restructuring of SL's share capital, adopting new articles of association and converting its share capital into 4 new classes of shares, (ii) to approve subscriptions for shares pursuant to a shareholders agreement to be entered into between Mr Price, Mr Rich-Jones, Paramount, Mr Bouvier, Mr Woodley and Mr Middleton and (iii) to appoint Mr Rich-Jones and Mr Bouvier to be directors (alongside Mr Price, with Mr Woodley resigning). This document was signed by Mr Price.
- b. Form AP01 for the appointment of Mr Rich-Jones as a director of SL. This was signed by Mr Price and by Mr Rich-Jones, but the date of the appointment was left blank.
- c. Forms TM01 and TM02 for the termination of the appointments of Mr Woodley and Mr Middleton as director and company secretary of SL. These were signed by Mr Price, but the termination date was left blank.
- d. Form SH08 for the designation of classes of shares in SL. This was signed by Mr Price, but the relevant date was left blank.
- e. Undated shareholders agreement in relation to SL which provided for the following shareholdings in SL:
  - i. Mr Price – 2,000 Class A shares, 2,825 Class B shares and 500 Class C shares,
  - ii. Mr Rich-Jones - 500 Class C shares,
  - iii. Paramount - 2,825 Class B shares,
  - iv. Mr Bouvier - 750 Class D shares,
  - v. Bryan Woodley – 300 Class B shares and
  - vi. Mr Middleton – 100 Class A shares and 200 Class B shares.

There is no copy of this document in Mrs Pierce's file of scanned documents. However, there was a copy elsewhere in the trial bundle which had been signed by Mr Price and Mr Rich-Jones and by Mr Price on behalf of SL. Given the context, I find that they must also have signed this document on 22 March but that it was not signed at that point by the other proposed parties (i.e. Mr Middleton, Mr Bouvier, Mr Woodley or by anyone on behalf of Paramount).

- f. Undated deed for the termination of SL's exclusive licence. Again, there is no copy of this document in Mrs Pierce's file of scanned documents. However, it is clear that it was signed by Mr Price on 22 March 2011

because his signature was witnessed by Mr Page. Mr Price also signed on behalf of SL. However, there would have been no-one present at that meeting to provide the intended second signature on behalf of SL.

38. The final document that was signed at the meeting on 22 March 2011 was an undated Novation Agreement providing for Mr Price to accept that he was personally liable in respect of the £200,000 that had been advanced by Paramount. Again, there is no copy of this document in Mrs Pierce's file of scanned documents. However, it is reasonably clear that Mr Price signed it on 22 March 2011 because, again, his signature was witnessed by Mr Page. At this point, the document was missing a second signature on behalf of Maple Timber Frame of Langley Ltd and it had not been signed on behalf of Paramount.
39. That reflects the position as a result of the meeting on 22 March. Subsequently, on 1 April 2011, Mr Rich-Jones wrote to Mrs Pierce noting that "*Stephane [i.e. Mr Bouvier] has signed the Shareholders Agreement but am conscious that nee [sic] Paramount to sign and that we need to Register the Shareholdings? Do I need to risk sending the Originals to Paramount or could they sign and post a scanned copy?*" Mrs Pierce responded on 5 April suggesting with regard to the agreement "*could this not be couriered to Paramount. If you're asking if the agreement will be legally binding if Paramount sign a copy containing a pdf version of the other parties signatures, though I suspect the answer would be yes but as that is a legal question ... really it is one for Hiren [Mr Patel] rather than me.*"
40. Consistently with Mr Rich-Jones' email of 1 April 2011, there is a further copy of the shareholders agreement for SL that has been signed by Mr Bouvier – although that agreement (like the others) remained undated. Strangely, there is no copy of the equivalent shareholders agreement for SGL with Mr Bouvier's signature, although it seems probable that he would also have signed this.
41. The copy of the shareholders agreement for SL which has been signed by Mr Bouvier has also been signed by Mr Middleton again, clearly, after the meeting of 22 March. Mr Middleton also signed the termination agreement (as an officer of SL) and the novation agreement (as an officer of Maple Timber Frame of Langley Ltd).
42. The final position with regard to the documents for the deal appears to be that:
  - a. The missing dates were never added to any of the documents referred to above;
  - b. The shareholders agreement for SL was never signed by Mr Woodley or by anyone on behalf of Paramount as well as remaining undated;
  - c. The shareholders agreement for SGL was never signed on behalf of Paramount nor, possibly, by anyone on behalf of SGL as well as being left undated; and

- d. The novation agreement was not signed by anyone on behalf of Paramount and was, again, left undated.
43. It is clear that, whilst Mr Rich-Jones believed that a deal had been done, he was unsure as to the extent to which it was legally binding. This is apparent from his email to Mrs Pierce on 18 April (to which I have referred) and from Mrs Pierce's response, on 19 April 2011, when she noted that the question whether Paramount still had a loan of £200,000 to Philip or had a shareholding in SL (the answer to which depended on whether the deal had been finalised) "*may be open to interpretation*" given that "*I have the stock transfer forms sitting here signed by [Mr Price] but of course Paramount hasn't signed up on any of its documentation*". There were, thereafter, email exchanges between Mr Rich-Jones and his advisers as to how the deal might be restructured on the basis that Paramount's entitlement remained as a loan (albeit one repayable by Mr Price).
44. I will deal later with the legal effects of these dealings with Mr Rich-Jones. However, in summary, it is the Defendants' first alternative case that the dealings had resulted in an effective assignment of the Patents by Mr Price to Lightpeak and an effective termination of SL's exclusive licence. In contrast, the Claimants assert that whatever was signed was conditional on other parts of a larger deal which was never finalised because the deal with Mr Rich-Jones had fallen through. They say that this left Mr Price free to enter into a deal with Mr Bridge and that SL's exclusive licence had remained in effect.

*The dealings with Mr Bridge*

45. Turning to Mr Price's dealings with Mr Bridge. The Claimants' case (based on the evidence of Mr Price, supported by Mr Bridge and Mr Middleton) is that, on 28 March 2011, Mr Price:
- a. Assigned the Patents to Mr Bridge,
  - b. Transferred shares in SL to Mr Bridge and
  - c. Transferred control of a company called Maple Timber Systems Limited ("MTSL") to Mr Bridge (with a view to that company taking over the business of the failing MTF Partnership).
46. Mr Price's case was that he entered into this deal with Mr Bridge on 28 March 2011 (a Monday) because his deal with Mr Rich-Jones had fallen through. However, in my judgment, it is clear from the evidence summarised above that that was not the case. Only the previous working day (25 March 2011, a Friday) Mr Rich-Jones had injected the further £50,000 into the MTF Partnership and had told Dow Chemicals (SL's principal supplier) that he had become the CEO of SL and that he and Mr Price were partners and equal shareholders – a statement that Mr Price confirmed. That payment and Mr Rich-Jones' role in SL were essential elements of the deal between Mr Price and Rich-Jones and there is nothing to suggest that the position changed between 25 March 2011 and the next working day, 28 March 2011. Indeed, as I have already found, for

some time after 28 March 2011, the parties continued to act on the basis that a deal had been concluded with Mr Rich-Jones. For example, on 31 March 2011, Mr Price himself emailed Mr Rich-Jones referring to SL's need for funds which, he hoped, would be met on the completion of the share sale to Walker and Scotframe. He concluded "*Speak to you later.*" It is hard to see why Mr Price would have sent this email if at the time he had believed that the deal with Mr Rich-Jones had fallen through 3 days before that and if he had already entered into a deal with Mr Bridge.

47. Mr Middleton gave a different explanation. He accepted that the deal with Mr Rich-Jones was still alive in late March. However, he remained adamant that a deal had been done with Mr Bridge on 28 March 2011 which, whilst focussed on rescuing the business of the MTF Partnership, had also involved an assignment of the Patents to Mr Bridge. He justified this on the basis, first, that the deal with Mr Rich-Jones was "*in trouble*" and, second, that Mr Rich-Jones was suspected of being party to some sort of plan involving Mr Woodley to exclude Mr Price from SL. As to the first of these justifications, whilst there may have been doubts as to the intentions of Walker Timer and Scotframe on 28 March, it is clear from the facts set out above that the deal with Mr Rich-Jones was still very much in existence. As to the second, Mr Middleton said that his suspicions of Mr Woodley went back to 8 February 2011, when he had intercepted an email from Mr Woodley to Mr Rich-Jones in which Mr Woodley suggested that Mr Rich-Jones, Mr Woodley and Mr Bouvier should become, respectively, CEO, COO and CFO of SL. Whatever Mr Woodley's motivation (and I note that, as mentioned above, he subsequently brought industrial tribunal proceedings against SL), I accept Mr Rich-Jones' evidence that, so far as he was concerned, there was no hidden agenda between him and Mr Woodley. In any event, Mr Price's talks with Mr Rich-Jones had continued after the discovery of Mr Woodley's email and had led, as I have already found, to what they seemed to think was a concluded deal on 22 March 2011 and to Mr Rich-Jones' payment of £50,000 to the MTF Partnership on 25 March 2011.
48. On this basis, it seems inherently unlikely that, as at 28 March 2011, Mr Price would have been looking for a deal with Mr Bridge that would replace or be inconsistent with his deal with Mr Rich-Jones. In particular, given that ownership of the Patents was a key part of the deal with Mr Rich-Jones, it is inherently unlikely that Mr Price would have entered into an assignment of the Patents to Mr Bridge on that date. There are also a number of other facts that point to the conclusion that there was no such assignment.
49. First, it appears that no copy of the alleged assignment of the Patents to Mr Bridge has ever been produced to any third party. Certainly, no copy was produced in the course of this litigation. Mr Grime argued that this does not mean that it does not exist, and he pointed out that several other documents are

missing.<sup>9</sup> However, there is no reason to doubt the existence of those other documents whereas, as set out below, there is good reason to doubt the existence of the alleged assignment to Mr Bridge.

50. Second, there is no reference to an assignment to Mr Bridge (whether as a proposal or as a fact) in any document until 23 November 2011, which was well after the commencement of Mr Price's bankruptcy and shortly after Mr Craig had been appointed as his trustee in bankruptcy. This reference was in an application to the UKIPO for Mr Bridge to be registered as proprietor of the Patents in place of Mr Price.<sup>10</sup> However, the application was drafted by Mr Middleton, was signed by Mr Price and gave Mr Price's details as the contact point for the applicant. It seems to have been something that was being driven in large part by Mr Price and/or Mr Middleton and in which Mr Bridge played little, if any, part.
51. Third, Mr Craig gave evidence (which I accept) that, shortly after his appointment as Mr Price's trustee in bankruptcy, he would have sent a standard form letter asking Mr Price to provide details of any disposals of assets made by him in the 6 months before the commencement of the bankruptcy or, in the case of disposals to connected persons, in the 2 years before that date. Mr Craig confirmed, and I accept that at that stage Mr Price did not refer to there having been an assignment of the Patents to Mr Bridge.
52. In support of their claim that there had been an assignment to Mr Bridge, the Claimants point to other evidence of dealings between Mr Price and Mr Bridge prior to Mr Price's bankruptcy. However, in my judgment, this evidence does not support the Claimants' case that the deal with Mr Rich-Jones had fallen through by 28 March 2011 let alone that there had been an assignment of the Patents to Mr Bridge on that date.
53. First are certain notices stamped as having been filed at Companies House on 15 April 2011. These record that, on 28 March 2011, Mr Price and Mr Middleton had resigned as officers of MTSL and had been replaced by Mr Bridge and his partner, Mr Brian Hayman. However, the difficulty for the Claimants is that these notices do not suggest that there must also have been an assignment of the Patents to Mr Bridge. As I have already noted, the fact that MTSL was being placed under the control of Mr Bridge (clearly with a view to carrying on the business of the MTF Partnership) does not suggest that the deal with Mr Rich-Jones had fallen through for the simple reason that it was not in any way inconsistent with that deal. It was never part of that deal that Mr Rich-Jones was to have any role or interest in the operation of the MTF Partnership. He was interested only in the Patents and in the business of SL. Interestingly, when explaining why he remembered the date of 28 March 2011, Mr Bridge

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<sup>9</sup> Such as the sale agreements whereby the assets of the MTF Partnership were sold to MTSL and thereafter to FEBL (see paragraphs 60 to 62 below).

<sup>10</sup> The basis of the application was said to be an "*assignment to Fred Bridge dated 28 March 2011*".

stated that “... *I remember it was his [i.e. Mr Hayman’s] birthday, that is all, and I remember saying to him, “Well we’ve got a new company” on that date.*” The fact that he recalled that date as being the date when he acquired control of MTSL does not suggest that there must also have been an assignment of the Patents on that date.

54. The second piece of evidence relates to a conversation on 24 April 2011 between Mr Bridge and Mr Craig (then the prospective administrator of the MTF Partnership). Mr Craig referred to this conversation in a later email of 10 February 2012 in which he told Mr Les Ross (the receiver of certain property of MTSL) that “*I met with Mr Bridge... on Sunday, April 24... He provided me with substantial information about the partnership, the properties and bank. His capacity was that as financier to the successor company which had already been completed prior and without my knowledge.*” However, for the reasons set out above, there is nothing in this which suggests that the deal with Mr Rich-Jones had fallen through by then or that there had been an assignment of the Patents by Mr Price to Mr Bridge on 28 March 2011.
55. The Claimants also rely on documents purporting to show the transfer of shares in SL by Mr Price to Mr Bridge. As these bear revenue stamps of 13 May 2011, they show that, before the commencement of his bankruptcy, Mr Price had had some dealings with Mr Bridge. However, the shares which Mr Price purported to transfer to Mr Bridge were 2,825 class “B” shares and 2,000 class “A” shares in SL – i.e. the very shares that it was envisaged that Mr Price would receive upon the restructuring of SL’s share capital that was required under the deal with Mr Rich-Jones. The fact that Mr Price signed these transfers to Mr Bridge was not, therefore, inconsistent with his deal with Mr Rich-Jones but, rather, suggests that he thought that that deal had been effective not only to create those previously non-existing classes of shares but also to vest those shares in him. Consistently with this, on 18 May 2012, Mr Price wrote to Mr Craig stating that “*The sale of my shares in Supawall to David Rich-Jones, Paramount and Mr Bridge took place in March 2011*”. It seems to me that these documents actually undermine the Claimants’ case that the deal with Mr Rich-Jones had fallen through and they certainly provide no support to the Claimants’ claim that the Patents had been assigned to Mr Bridge, whether on 28 March 2011 or at all.
56. Further, the fact that the Claimants have been able to produce these various documents rather highlights the point that I have already made that they have been unable to produce a copy of any assignment of the Patents to Mr Bridge or even, prior to November 2011, any document referring to it.
57. For these reasons, I conclude that there was in fact no assignment of the Patents to Mr Bridge prior to Mr Price’s bankruptcy. The alleged assignment was, as the Defendants submit, a fiction created in an attempt to keep the Patents out of the hands of Mr Price’s trustee in bankruptcy. I should note that, in his submissions, Mr Maynard-Connor also relied on the fact that, when questioned by Mr Craig’s office about the alleged assignment, Mr Bridge had responded



(by email of 22 February 2013) that “*The patents transferred to me presumably to avoid his [i.e. Mr Price’s] creditors*”. However, as it is possible to read this statement in a way that is consistent with Mr Price’s case, I do not place much weight on it, although it does suggest that the transfer was entered into in the context of an insolvency and, as I have commented above, was being driven by Mr Price.

*The assets sales in insolvency*

58. In the event, the MTF Partnership went into administration on 13 May 2011. Mr Craig was appointed its administrator and, on 3 August 2012, its liquidator.
59. As mentioned above, under Mr Price’s arrangements with Mr Bridge, Mr Bridge had taken control of MTSL with a view to its continuing the business of the MTF Partnership and with Mr Price and Mr Middleton acting as consultants. Consistently with this, in a Proposal to Creditors dated 5 July 2011, Mr Craig reported that “...*an offer for the company’s goodwill was received in the sum of £5,000 by [MTSL] (a firm which currently employs Mr P Price and Mr N Middleton)...*” and that he had accepted that offer.
60. Later, in around October 2013, Mr Craig as liquidator sold the assets of the MTF Partnership to MTSL for £85,000. There is no copy of the relevant asset sale agreement. However, it was referred to in Mr Craig’s reports to creditors dated 20 August 2013 and 9 September 2014. In his oral evidence (which I accept), Mr Craig confirmed that this agreement would have used general language covering such right, title and interest (if any) as the MTF Partnership had in assets including IPR. On this basis, it would have covered such interest as the MTF Partnership had in the Patents and in the Copyrights (even though they were not specifically identified in the agreement).
61. In the event, MTSL also failed and, on 22 April 2014, it too entered into administration with Mr Craig, again, being appointed administrator. On 23 July 2014, MTSL’s assets were sold to a company called Flitcraft Ecobuild Limited (“FEBL”), a company controlled by Garry Flitcroft. As before, the asset sale agreement used general language covering such right title and interest (if any) as MTSL had in assets including any IPR and so would have extended to such interest as MTSL had acquired in the Patents and in the Copyrights.
62. On 14 February 2017, FEBL in its turn failed and it too went into administration with Peter Harald, (a colleague of Mr Craig) being appointed administrator. On 29 March 2017, FEBL’s assets were sold to FL. Once again, this asset sale agreement included such right title and interest (if any) as the seller had in assets including any IPR and so would have extended to such interest as FEBL had acquired in the Patents and in the Copyrights.

*FL’s trading*

63. It appears that, having acquired the assets of FEBL, FL commenced trading in early 2017. As I have mentioned, until around June or July 2019, it sold its “Old Injectawall Product” which it accepts fell within the scope of the Patents. However, at around that time, it replaced that product with its “New Injectawall Product”, which is a panel but without the foam insulation that is a feature of patented invention and so, the Defendants assert, falls outside the Patents.

*Further facts relating to other issues*

64. I will deal with further facts relevant to the issues of copyright, passing off and joint tortfeasorship when I deal with those issues later in this judgment.

**The witnesses**

65. Having made these findings of fact, I will now comment on the various witnesses who gave evidence at trial.

*Mr Price*

66. Mr Price is the First Claimant and was the principal witness for the Claimants. He was cross-examined at length and, in closing, Mr Maynard-Connor submitted that he was an untruthful witness who gave false evidence on a number of matters.
67. As is clear from what I have set out above, there are a number of matters where I have not accepted Mr Price’s evidence. In some instances,<sup>11</sup> it is possible that, as Mr Grime argued, Mr Price’s evidence was affected by the “fog of time” and by the fact that many documents came to light only at trial. However, even in those cases, it seems to me that Mr Price’s credibility is undermined by the fact that he was far more adamant in his assertions than was justified and only reluctantly backed down when faced with clear evidence that contradicted his position. More serious as regards his credibility was his claim to have assigned the Patents to Mr Bridge on 28 March 2011. Whilst it is possible that, by the time of this trial, he might have come to believe that his earlier dealings with Mr Bridge had included an assignment, he cannot have thought that in 2011 when he first claimed to have made such an assignment. As I have indicated, I believe that this story was made up in an attempt to keep the Patents out of the hands of his trustee in bankruptcy and, therefore, of his creditors. Also of concern was Mr Price’s changing position with regard to the assignment of copyright in the Photographs that he claims was made to him by his mother in 2015 (see paragraph 150 below). Overall, I have concluded that where Mr Price’s evidence is not corroborated by other evidence or by known facts, it must be treated with considerable caution.

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<sup>11</sup> For example, Mr Price’s claims that the initial loan had been made in late 2008 by Mr Rich-Jones personally and that the deal documents had been signed in January 2011.

*Mr Middleton*

68. Mr Middleton's evidence with regards to the supposed assignment to Mr Bridge was, like that of Mr Price, unsatisfactory. Whilst I can understand that his recollection at trial was affected by the fog of time and the lack of documentation (he having he lost access to much of his documentation when he and Mr Price were evicted from the business premises), he was an active party in making an application to the UKIPO based on a claim that there had been an assignment to Mr Bridge on 28 March 2011. I think that it is unlikely that he thought that there had been such an assignment and he must have known that it would be contrary to the deal the parties thought had been concluded with Mr Rich-Jones. It was on the basis of that deal that Mr Middleton had himself, only days before, pressed Mr Rich-Jones for payment of the £50,000. On any basis, these matters must adversely affect Mr Middleton's credibility and I have concluded that I should treat his evidence with caution.
69. I should note that Mr Grime suggested that Mr Middleton had been prepared to concede points. One such point was his acceptance that the deal with Mr Rich-Jones had not fallen through before 28 March 2011. However, this merely serves to make his claim that an assignment was then made to Mr Bridge looks even more discreditable. Accordingly, this concession hardly operates to Mr Middleton's advantage.

*Mr Bridge*

70. Mr Bridge was adamant that there had been an assignment of the Patents to him on 27 March 2011 and it may be, as Mr Maynard-Connor submitted, that he was motivated in this by animosity to the Defendants. However, although I have rejected Mr Bridge's evidence on this point, I am inclined to believe that that evidence was due to a mistaken recollection and was not knowingly false. As I have found, there were some dealings between him and Mr Price on 28 March in relation to the transfer of the MTF Partnership business to MTSL and I think that with the passage of time, Mr Bridge has conflated that with the issue of the Patents. Indeed, as I have already commented, when asked why that date stuck in his memory, he explained it by reference to the acquisition of "a new company" (i.e. MTSL). Similarly, his comment to Mr Craig's office that the assignment was "presumably to avoid his [i.e. Mr Price's] creditors" and the fact that he appears to have placed little part in making the application to the UKIPO based on the false claim that there had been an assignment on 28 March 2011, suggests that that false claim was being driven by Mr Price.

*Mr McKenna*

71. Mr McKenna was a straightforward witness doing his best to assist the court. He gave evidence that, as a result of a meeting of FEBL in June 2015, he was responsible for filing an application at UKIPO seeking to have Garry Flitcroft's

name substituted for that of Mr Bridge as proprietor of the Patents. As it turns out, I am not sure that this is particularly significant but, for what it is worth, I accept Mr McKenna's evidence that he was asked to do this by Gary Flitcroft.

*Ms White*

72. Ms White is an employee of the Claimants' solicitors, RHF Solicitors. She gave evidence that, in a telephone conversation on 7 July 2020, Mr Patel had told her that the deal with Mr Rich-Jones had not proceeded. I do not doubt her evidence but, ultimately, the issue whether a deal was concluded is a matter for me on the evidence taken as a whole. In this respect, I do not think that what Mr Patel said in this telephone conversation is of much assistance. He was referring to events that had occurred some 9 years before and it is unclear what materials he may have looked at to refresh his memory of those events. Moreover, it is not clear how much (if any) involvement he had after he had sent the bible of documents for the meeting on 22 March (a meeting that he did not attend).

*Mr Rich-Jones*

73. Mr Rich-Jones gave his evidence in a commendably straightforward manner, particularly in view of the losses that he (or Paramount) has suffered as a result of his dealings with Mr Price. Having heard his evidence, I find that he was an honest witness doing his best to assist the court. In particular, I have no hesitation in accepting his evidence with regard to the meeting of 22 March and I accept that, as a result of what happened at that meeting, he honestly believed that he and Mr Price had reached a concluded deal.

*Mr Craig*

74. Although Mr Craig was often somewhat combative under cross examination and was prone to expressing his views rather forcefully, I have no doubt that he too was an honest witness who was trying to assist the court. Whilst, as is clear from this judgment, there are a number of matters on which I have not accepted his evidence, that is in no way a reflection on his honesty. Rather, it is because I believe that his recollection of a complex set of events was clouded by the passage of time and by the fact that, as administrator/liquidator of the MTF Partnership and of MTSL and as trustee in bankruptcy of Mr Price, he was wearing many hats and did not always recall in which capacity an issue had arisen. I also bear in mind the huge stresses that he has had to face in his personal life. As a result, whilst I have no doubt of Mr Craig's honesty, where there is a conflict between the contemporaneous documents and his evidence given some 11 years after the events, I have tended to place more weight on the former.

*Mr Garry Flitcroft*

75. Garry Flitcroft is clearly intelligent, and he gave his evidence in a careful and considered manner. Whilst I have rejected his evidence on some matters (for

example, in preferring Mr McKenna's evidence with regard to the events of June 2015 when the UKIPO was asked to register Garry Flitcroft as proprietor of the Patents), I do not see that as undermining his credibility<sup>12</sup> and I find that he answered questions honestly. For example, he readily accepted that he played a role in relation to FL even after he had resigned as a director. He characterised that role as not being that of a person who was a controlling mind of FL but rather as assisting his son, by developing the business and training him to run the business. Whether that is right is a matter for the court and is considered later in this judgment but, either way, I accept that that was his genuine view.

*Mr Thomas Flitcroft*

76. Similarly, I find that Thomas Flitcroft sought to tell the truth. He did not try to overplay his role as a director of FL. He made clear that he was not involved in the negotiations to acquire the business of FEBL and he accepted that most of his work for FL was as a joiner on building sites rather than in FL's business premises. As set out later in this judgment, he asserted that he exercised control over FL's affairs and he characterised his father's role (certainly from late 2017) as merely relating to sales and not as one of control. Again, I will deal later with whether he was correct but I accept that this was his genuine view and so it is not something that undermines his credibility as a witness.

*Mr Gregory*

77. Mr Gregory is the general manager of FL, having taken on that role in 2018. He gave evidence as to how that company operated and regarding the three manifestations of the Defendants New Injectawall Product (a budget model, a mid-range model and a high-end model) and about what the Defendants supplied to its customers. He was an impressive and straightforward witness and I have no hesitation in accepting his evidence.

*The Experts – Mr Hickey and Mr Evans*

78. Each side called an expert witness. The Claimants' expert, John Hickey is a Chartered and Registered Architect of great experience. In his report, he provided background in relation to timber frame panel systems and how an architect would approach the issues that such systems need to address. He also commented on the Patents and on the Defendants' products. The Defendants' expert, Robert Evans, is an experienced Chartered Architect. His report considered the Patents and commented on the infringement claim. The experts also filed a helpful joint statement. I found that the evidence of both experts was helpful and, ultimately, there seemed to be little difference between them of many of the matters in issue.

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<sup>12</sup> He clearly thought that FEBL had acquired the Patents and, in seeking to put them in his own name, he may simply have been following what Mr Price and Mr Bridge had done before him.

### **The issues**

79. I will deal with the issues in the following order:

- (1) The patent claims;
- (2) The copyright claims;
- (3) The passing off claim;
- (4) Joint tortfeasorship; and
- (5) The significance of the assignment of the benefit of the NWTIF charge.

### **The patent claims - the issues**

80. The issues in relation to the patent claims are:

- a. Were the Patents held by Mr Price on trust for the MTF Partnership;
- b. Did the dealings with Mr Rich-Jones (and in particular the events of 22 March 2011) result in an assignment of the Patents to Lightpeak and in the termination of SL's exclusive licence?
- c. What was the affect (if any) of Mr Price's dealings with Mr Bridge?
- d. Assuming Mr Price or SL has title to the Patents, have the Defendants infringed those Patents?

### **The patent claims - the law on title**

81. Issues (a) to (c) above raise issues of title. It is, therefore, worth summarising some of the law in his regard.
82. Ownership of a patent is a question of fact, and it is the only the actual proprietor (or an exclusive licensee) who is entitled to sue for infringement. The fact that a person is registered as proprietor by the UKIPO is merely prima facie evidence of proprietorship (see s.32(9) Patents Act 1977). It may be rebutted.
83. As with other forms of property, a person may be the proprietor of a patent in law but may hold it on trust for another party. The interests of that other party (the beneficial owner) do not depend on registration. Indeed, s.32(3) Patents Act 1977 provides that "*no notice of any trust, whether express, implied or constructive, shall be entered in the register and the comptroller shall not be affected by any such notice.*" A successor in title to the proprietor will be bound by such trust unless that successor is a bona fide purchaser of the patent without notice of the trust.
84. In contrast, an interest arising under a transaction such as an assignment, mortgage, the grant of security, or the grant of a licence or sub-licence in relation to a patent can be entered on the register at the UKIPO. If such interest is registered, then it will be binding on a person who subsequently acquires an interest under such a transaction. If it is not registered, it is only binding on a person who subsequently acquires an interest under such a transaction if that person knows of it. See s.33 Patents Act 1977.

85. Under s.30(1), (2) and (4) Patents Act 1977, a patent is personal property and (subject to s.36(3), which is irrelevant for present purposes) may be assigned or be the subject of a licence.
86. By reason of s.30(6) Patents Act 1977, an assignment is void in law unless it is in writing and signed by or on behalf of the assignor. However, an oral or implied agreement to assign and a written assignment that does not comply with s.30(6) may nevertheless be enforceable in equity (i.e. be treated as an equitable assignment) if there is an agreement to assign that is supported by consideration – see *Baxter International Inc. v Nederlands Produktielaboratorium BV* [1998] RPC 250 per Jacob J and *Terrell on the Law of Patents* 18<sup>th</sup> ed. at 16-36.

### **The patent claims - were the Patents held on trust for the MTF Partnership?**

87. Turning then to the first issue - whether, as the Defendants assert, Mr Price had held the Patents on trust for the MTF Partnership. The Claimants deny this and assert that the MTF Partnership had used the invention, initially, under an informal licence from Mr Price and, subsequently, under a written licence from SL.
88. The significance of this point is that, if the Defendants are correct, then the MTF Partnership's beneficial interest in the Patents would have passed to FL, via MTSL and FEBL. On this basis, the Defendants argue, Mr Price was and remains bound by that beneficial interest and it would be irrelevant whether there had been an assignment by him to Lightpeak or to Mr Bridge.<sup>13</sup> Similarly, if Mr Price held the Patents on trust for the MTF Partnership then, because he controlled SL, the exclusive licence that he granted to SL on 14 October 2008 would have been subject to the rights of the MTF Partnership. Accordingly, if the Defendants are correct, neither Claimant would be entitled to maintain an infringement claim against the Defendants.
89. Whether property is partnership property is governed by what the partners had agreed and, as stated in *Lindley & Banks on Partnership* 20<sup>th</sup> ed at para.18-03, in the absence (as here) of an express agreement on the point, is determined by reference to (i) the circumstances of the acquisition of the asset in question, (ii) the purpose of the acquisition and (iii) the manner in which the asset has subsequently been dealt with. *Lindley & Banks* say, at para.18-06, the court will not find that there was an implied agreement to treat property as partnership property where that would not accord with the partners' subjective intentions. *Lindley & Banks* also make the point, at para.18-13, that the crucial question is

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<sup>13</sup> Points not addressed at trial were whether, if there had been an assignment to Mr Bridge, Mr Bridge would have been a bona fide purchaser of the Patents without notice of the MTF Partnership's beneficial interest such that he was not bound by that interest and, if that were the case, whether Mr Price (having taken a re-assignment of the Patents from Mr Bridge) could rely on that lack of notice. However, given my findings that there was no trust and there was no assignment to Mr Bridge, I do not need to resolve these points.

whether an asset has been used and treated as partnership property. Mere use by the partnership in itself is not usually sufficient.

90. In support of their claim that the Patents were held on trust for the MTF Partnership, the Defendants make a number of points
91. The Defendants' first point was that Mr Price made the invention at a time when he was trading through the MTF Partnership. However, I do not see that it has to be inferred from this that the partners had agreed that the MTF Partnership owned the Patents. It is frequently the case that inventors keep ownership of their inventions away from the companies exploiting those inventions, not least because of the risk (well-illustrated in the present case) that those trading companies may fail. Here, the application to register was made in Mr Price's name and the evidence of both partners (Mr Price and Mr Middleton) was that they believed that the Patents were owned by Mr Price personally and I see no reason to reject that evidence, particularly as Mr Rich-Jones (who had extensive dealings with them both) also believed that that was the case.
92. The Defendants' second point was that, following registration of the Patent, the inventions were only used by the MTF Partnership. I do not think that this adds much to the previous point. As set out above, mere use of property by a partnership is not usually sufficient to raise an inference that the partners intended that property to be owned by the partnership and, on the facts, it seems to me to be more likely that the parties here envisaged that the MTF Partnership merely had a licence to use the inventions. Further, the argument that they must have impliedly agreed that the MTF Partnership was to be the owner of the Patents is difficult to reconcile with the fact that an exclusive licence was granted by Mr Price to SL which subsequently granted sub-licences to others (such as Scotframe, Flight Timber Structures and, I find, the MTF Partnership). It is also difficult to reconcile with the deal negotiated at length with Mr Rich-Jones.
93. The Defendants' third point was that the Patents were used as security for the debt that the MTF Partnership owed to NWTIF. I do not see this as being particularly significant. It is frequently the case that property belonging to an individual partner is used as security for partnership debts. It does not follow that the partners must be taken to have agreed that that property is partnership property. In fact, it appears that NWTIF also had security over other items of property including Mr Price's 7,000 shares in SL and a property which, according to Mr Craig, was shared by Mr Price and Mr Price's ex-wife. Mr Craig's evidence was that he had not given these much thought as they had negative equities, but it is hard to see on what basis it could be inferred that they were held on trust for the MTF Partnership.
94. The Defendants' fourth point was that Mr Craig gave unchallenged evidence that the MTF Partnership had met various costs associated with the Patents (such as their renewal costs) and that it had not paid Mr Price any royalties for



its use of the Patents. Use of partnership money can be a significant factor (as is apparent from the terms of s.21 Patents Act 1977 which states that “*Unless the contrary intention appears, property bought with money belonging to a firm is deemed to have been bought on account of that firm*”). However, on the facts of the present case I am satisfied that the partners did not intend the Patents to be partnership property. Indeed, it could be argued that the reason why no royalties were paid by the Partnership was because it had paid the other costs (and vice versa).

95. The Defendants’ fifth point was that Mr Craig gave evidence that he was told by Mr Price and Mr Middleton that the Patents were held “*on behalf of*” the MTF Partnership. Having heard the evidence, I am not satisfied that Mr Price and Mr Middleton said anything that could be said to amount to a clear statement or acceptance that the Patents had been held on trust for the MTF Partnership. I accept that, looking back, Mr Craig is now genuinely of the view that there was such a trust and believes that that was consistent with certain things that he had been told or had discovered in the course of his administration. However, in my judgment, that view is inconsistent with the partners’ conduct up to that point (including, in particular, their dealings with Mr Rich-Jones). Moreover, it does not seem to have been the view that Mr Craig formed at the time. In his oral evidence he asserted that his reports to creditors had included the Patents as assets of the MTF Partnership. However, as he subsequently accepted, the contrary appears to be the case. In his initial proposal to creditors dated 5 July 2011, he had identified NWTIF as a creditor of the MTF Partnership but said that it had “*security over Supawall Limited IPR (Registered in the Partners personal name)*” and he had gone on to refer to the security as being “*From Philip Price*”. His subsequent reports to creditors, on 12 November 2011, 2 May 2012, 20 August 2013 and 9 September 2014, were even clearer. In them, he stated that “[NWTIF] have advised that they hold security over the following assets, these charges appear to relate to Phillip Price’s personal assets which are being dealt with in his Bankruptcy” and then, in the table of the relevant assets, he referred to (inter alia) “*Supawall Limited IPR (Registered in the Partners personal name)*” and, again, stated that this was “*From Philip Price*”. Faced with this, Mr Craig commented that his reports should have referred to “*Supawall IPR*” rather than “*Supawall Limited IPR*”, but I do not see how that changes the position. It seems to me that this suggests that, at the relevant time, Mr Craig was proceeding on the basis that the Patents had been owned by Mr Price personally and not on trust for the MTF Partnership.
96. This conclusion is reflected in Mr Craig’s conduct as Mr Price’s trustee in bankruptcy. On 18 December 2012, Mr Craig acting as Mr Price’s trustee in bankruptcy informed Mr Price’s creditors that he was investigating the supposed assignment of the Patents by Mr Price to Mr Bridge on the basis that it was a transaction at an undervalue. Later, on 16 April 2014, he made an application within the bankruptcy seeking to set aside the supposed assignment on the basis that it had been a transaction at an undervalue or was a preference.

There was no suggestion that Mr Price had in fact held the Patents on trust for the MTF Partnership. Indeed, if he had held them on trust, there would have been no point in making such an application. It would have been of no benefit to the creditors in the bankruptcy (albeit that some of those creditors may have been creditors of the insolvent Partnership as well). As late as 18 June 2013, when solicitors for Mr Craig (McLoughlin & Company) were dealing with competing claims to the Patents made by Mr Bridge and by Lightpeak, they did so by reference to Mr Craig's role as Mr Price's trustee in bankruptcy and not as administrator/liquidator of the MTF Partnership.

97. In summary, I am satisfied that, whether taken individually or in any combination, the points relied on by the Defendants do not establish the existence of a trust in favour of the MTF Partnership and I reject the Defendants' case in this regard.
98. On this basis, I am also satisfied that the MTF Partnership had used the Patented invention initially pursuant to an informal licence from Mr Price and subsequently (after SL had been granted an exclusive licence) pursuant to a sub-licence from SL. In this regard, I accept the evidence of Mr Price and Mr Middleton.
99. In closing, Mr Maynard-Connor drew attention to the fact that it was only in his oral evidence that Mr Price had said that the licence from SL was in writing and, as part of his attack on Mr Price's credibility, he submitted that Mr Price had made up that evidence. I do not accept this. SL had been set up and had been granted its exclusive licence so that it could grant sub-licenses and the sub-licenses that it granted to Scotframe and Flight Timber Structures (to which reference is made in the correspondence) were clearly in writing.<sup>14</sup> Accordingly, it seems perfectly likely that its licence to the MTF Partnership would also been in writing and that the reason why a copy was not produced was because, as Mr Middleton said, he and Mr Price had lost access to their records when they fell out with Mr Bridge and were evicted from the business premises. In any event, I cannot see what Mr Price had to gain by lying on this point. It was perfectly open to him to say that there was an informal licence from SL, just as there had previously been an informal licence from him.

### **The patent claims – the dealings with Mr Rich-Jones**

100. The next issue is whether, as the Defendants assert, the dealings between Mr Price and Mr Rich-Jones on 22 March 2011 and thereafter resulted in Mr Price's interest in the Patents being assigned to Lightpeak and in SL's exclusive licence being terminated.

*Was there a valid assignment to Lightpeak?*

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<sup>14</sup> This is apparent from the fact that the SL letters terminating those licenses (dated, respectively, 26 May 2011 and 23 August 2011) make reference to specific numbered provisions in those licences.

101. As Mr Maynard-Connor submitted, the document which the Defendants say constitutes an assignment of the Patents to Lightpeak, being in writing and signed by Mr Price (as assignor), satisfies the requirements of s.30(6) Patents Act 1977. Further, as appears from the evidence summarised above, Mr Price and Mr Rich-Jones (initially at least) seem to have thought that they had reached some sort of a deal on 22 March 2011. Nevertheless, I am satisfied that what they signed did not effect an assignment of the Patents to Lightpeak because, objectively viewed, the deal that they thought existed was missing vital elements, such as the agreement of Mr Woodley and Paramount. Mr Price and Mr Rich-Jones may have reached a deal in the sense that they would be committed as and when those missing elements were put in place and, in the belief that that would happen, Mr Rich-Jones had been prepared to pay the £50,000 that the MTF Partnership needed. However, until it happened, there was no binding agreement and the assignment document, so far as Mr Price and Mr Rich-Jones were concerned, was effectively held in escrow in the manner described in *Chitty on Contracts* 34<sup>th</sup> ed at 1-101. In this regard, I note the following points.
102. First, whilst there is no requirement for an assignment of IPR to be dated, the document signed by Mr Price and Mr Rich-Jones included a blank space where a date was clearly intended to be inserted. Mr Rich-Jones gave evidence that, at the meeting on 22 March, he and Mr Price had discussed whether to insert a date in the following terms: "*Shall we do it now or later?*" "*No we have done the deal, we have signed the documents etc., The actual technical dating can actually follow.*" In the event, the space was left blank at the meeting on 22 March 2011 and thereafter. In my judgment, this is significant because the document also contains the words: "*The parties have executed this Deed and delivered it on the date set out on the first page of the Deed*". In other words, in the absence of the date, the document could not be considered executed or delivered and, as Mr Grime submitted, a deed only becomes binding on the date of its delivery, see *Universal Permanent Building Society v Cooke* [1952] Ch 95 at 101 and *Chitty* at 1-098. Even if one ignores the concept of "delivery", the fact that the document was left undated, objectively viewed, reflects the fact that further steps were needed and suggests that it was not yet intended to be effective as an assignment.
103. Second, the document provided for an assignment to SGL and it was signed by Mr Price and Mr Rich-Jones, as officers of SGL. Again, objectively viewed, this suggests that the document was not intended to be of immediate effect. As at 22 March (and, indeed, now), the company was still called Lightpeak and not SGL. Whilst one of the other documents signed on 22 March was a special resolution authorising a change of name to SGL, that resolution was also signed by Mr Price as director of SGL. However, in the document recording his appointment as a director of SGL (again signed on 22 March), the date of appointment was left blank – again suggesting that that appointment and, hence, the change of

name and the assignment itself was not intended to be effective there and then but would need to be completed at some later point.

104. Third, it was clearly intended that the assignment would be to a company in which both Mr Price and Rich-Jones (and/or Paramount) had an interest. However, if the assignment was immediately valid, it would have been to a company (Lightpeak) that was beneficially owned by Mr Rich-Jones and in which Mr Price had no interest and no enforceable right to an interest. This is because Mr Price would only have had an interest in SGL if and when the shareholders agreement for SGL became binding. However, that agreement was not and never became binding. As at 22 March 2011, it had not been signed by three of its intended parties (Mr Bouvier, SGL and Paramount). Whilst it appears that it was later signed by Mr Bouvier, it is unclear whether it was ever signed on behalf of SGL and it was certainly never signed on behalf of Paramount. Further, like the assignment, the space for a date for the agreement was left blank.
105. Fourth, another critical part of the deal between Mr Price and Mr Rich-Jones was for there to be a shareholders agreement in relation to SL under which Mr Rich-Jones would acquire an interest in SL.<sup>15</sup> Again, there was never such an agreement as the document signed by Mr Price and Mr Rich-Jones was also left undated. Moreover, as at 22 March, that document had not been signed by various intended parties (Mr Bouvier, Mr Woodley and someone on behalf of Paramount). Whilst it was later signed by Mr Bouvier, it was never signed by Mr Woodley or by anyone for Paramount.
106. In effect, the reason why the dates were left blank was that the SGL and SL shareholders agreements had not been concluded and needed the agreement of third parties (such as Mr Woodley, Mr Bouvier and Paramount). In my judgment, objectively viewed, the parties cannot have intended the assignment of the IPR to Lightpeak to be valid and effective unless and until those shareholders agreements were in place.
107. In closing, Mr Maynard-Connor argued that, on those occasions referred to above where Mr Price purported to be acting for SGL, his actions would be validated under s.161(1) Companies Act 2006. That section provides that:
- “The acts of a person acting as a director are valid notwithstanding that it is afterwards discovered – (a) that there was a defect in his appointment...”*
108. In my judgment, s.161 does not assist the Defendants as this is not a case where Mr Price’s appointment as a director of SGL was defective. Rather, it is a case where there was no appointment at all. The document said to be the appointment was left undated because it was not intended to be effective until the deal was

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<sup>15</sup> Under the deal being negotiated, SL was to receive a licence from Lightpeak allowing it to sub-licence other businesses in the UK.

complete. In any event, validating Mr Price's actions would not result in Mr Woodley or Paramount being parties to the SGL or SL shareholders agreements.

109. Mr Maynard-Connor also submitted that the Lightpeak assignment should be looked at on its own and that it would be wrong to treat it as part of a package with the various other documents and transactions. However, for the reasons already set out, I do not accept that that is how the objective observer would see the events of 22 March.
110. Mr Maynard-Connor made the point that the parties seem to have regarded the novation agreement that was signed by Mr Price and Mr Rich-Jones on 22 March (and subsequently by Mr Middleton on behalf of Maple Timber Frames of Langley Limited, see paragraph 41 above) as being binding. I do not see how this helps his case as regards the Lightpeak assignment. Whatever Mr Price and Mr Rich-Jones may have thought about the novation agreement, that agreement (like the assignment and the SGL and SL shareholders agreements) remained undated. Further, Paramount (the entity to which the debt was owed) was intended to be a party to this agreement and it never signed the document.
111. Finally, Mr Maynard-Connor referred to the decision of HHJ Hodge Q.C. in *Signature Living Hotel Ltd v Sulyok* [2020] EWHC 257 (Ch) to the effect that where consideration has passed, an assignment is capable of being enforced as a simple contract. However, this would only be relevant if, on the facts, there was a concluded agreement capable of being enforced. For the reasons set out above, I find that there was never a concluded agreement to assign the Patents to Lightpeak

*Was SL's exclusive licence terminated?*

112. Turning to the document entitled Termination Agreement. In my judgment, this document did not effect a termination of SL's exclusive licence.
113. As set out above, the document in question was signed by Mr Price on 22 March and, subsequently, by Mr Middleton as an officer of SL. I note that it was not signed on behalf of SGL, despite SGL being named as a party. However, I do not think that this would prevent it being effective given that it contains no active provisions relating to SGL and that its "Signatories" page does not provide for a signature on behalf of SGL. Accordingly, as Mr Maynard-Connor submitted, there appears to be no issue with the execution formalities of this document.
114. Of more difficulty is the fact that this agreement was never dated by the parties. The first page contains the words "*THIS TERMINATION AGREEMENT is made January 2011*".<sup>16</sup> The date was not filled in and the reference to

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<sup>16</sup> Presumably for this reason, the Defendants' pleaded case was that the termination agreement had been "in around January 2011". However, in closing, the Defendants relied on the 22 March 2011 date.

January had clearly not been updated as the negotiations continued into March 2011. This absence of a date is significant given that:

- a. Clause 1.1(a) of the document provides that SL's exclusive licence "*is hereby terminated and ceases to have effect from the date of this Agreement*" and
- b. The draft concludes (after clause 4) with the words "*The parties have executed this Agreement and delivered it on the date set out on the first page of this Agreement*".

On this basis, it is hard to see how, objectively viewed, this document could be said to be an effective agreement terminating SL's licence.

115. This difficulty is compounded by the fact that the termination provision in clause 1.1 is expressly stated to be "*Conditional only upon the completion of the Deed of Assignment in accordance with its terms...*" and, as appears from the recitals, the "Deed of Assignment" was defined as being a deed of assignment "*made between Mr Price and [SWL]*" under which "*...the IPR is to be assigned to [SWL] with [SWL], SGL and [SL] making their own arrangements for the licence of the IPR*". That condition was never satisfied. There was never any assignment to SWL, indeed, SWL was never incorporated. It seems probable, as Mr Maynard-Connor suggests, that the reference to SWL (like the reference to the January 2011 date) was a mistake and that the document should have been amended to refer to an assignment to Lightpeak (SGL). However, as set out above, there was never even an assignment to Lightpeak.

#### *Conclusion*

116. For these reasons, I reject the Defendants' first alternative claim and I conclude that there never was an effective assignment of the IPR by Mr Price to Lightpeak nor an effective termination of SL's exclusive licence.

### **The patent claims - effect of the dealings with Mr Bridge**

117. For the reasons set out in paragraphs [45] – [57] above, I am satisfied that Mr Price's dealings with Mr Bridge did not result in an assignment of the Patents to Mr Bridge and that Mr Price's dealings with Mr Bridge did not have any effect on SL's exclusive licence.

### **The patent claims - infringement**

#### *Mr Price's infringement claim*

118. On my findings above, Mr Price was the original proprietor of the Patents and, as he had not assigned them to either Lightpeak or Mr Bridge, he remained their proprietor when he was made bankrupt. Accordingly, on the evidence before me, I find that Mr Price's interest in the Patents vested in Mr Craig as his trustee in bankruptcy and remained vested in Mr Craig after Mr Price's discharge from bankruptcy on 9 June 2015. See ss.283, 306 and 436 Insolvency Act 1986.

119. For these reasons, notwithstanding that Mr Bridge was registered as proprietor on 16 January 2012 and Mr Price was subsequently re-registered as proprietor (on 26 January 2017), Mr Price has failed to prove that he has title to the Patents. The reality is that Mr Bridge never acquired title to the Patents from Mr Price and so the purported re-assignment by Mr Bridge to Mr Price on 14 July 2016 was of no effect. Accordingly, for the reasons set out in *Hartington Conway's Patent Applications* [2004] RPC 7 per Pumfrey J at [25], Mr Price has no title to maintain a claim for infringement against the Defendants under s.61 Patents Act 1977 and I dismiss his claim in that regard.

*SL's infringement claim*

120. Turning to SL's patent infringement claim. The issues that arise are, first, whether SL has the right to bring infringement proceedings in respect of the Patents and, second, if so, whether the Defendants have infringed the Patents.

*SL - its right to bring infringement proceedings*

121. As set out above, I am satisfied that the licence that Mr Price granted to SL on 14 October 2008 ("the SL Licence") was not terminated in the course of Mr Price's dealings with Mr Rich-Jones and that it was unaffected by his dealings with Mr Bridge. Accordingly, as the SL Licence was expressed to be an exclusive licence then, under s.67 Patents Act 1977, SL has the right to bring an infringement action in relation to the licensed rights.
122. In the course of his closing submissions with regard to the NWTIF Charge (see below), Mr Maynard-Connor made a point which, it seems to me, did not relate to that Charge, but rather to whether SL's claim is within the scope of its licensed rights. His point was that, under clause 9 of the SL Licence (and, in particular, clause 9.3), the right to bring the present proceedings was not SL's right but had been retained by Mr Price as proprietor (and, as such, it would have passed to Mr Price's trustee in bankruptcy and would, on Mr Maynard-Connor's case, be subject to the NWTIF Charge).
123. This was not part of the Defendants' pleaded case. Indeed, the Re-Re-Re-Amended Defence asserted (at paragraph 28A.12.1) that SL's rights (as well as those of Mr Price) were subject to the NWTIF Charge. On this basis, I am not sure that the Defendants should now be allowed to argue that SL had no right under the SL Licence to bring this action. Having said that, I do not agree with Mr Maynard-Connor's construction of clause 9 of the SL Licence.
124. Under clause 9.1, SL agreed to notify Mr Price of infringements of which it became aware. Clause 9.2 then provided that:

*"[Mr Price] and Supawall shall take all steps as may be agreed by them in pursuance of clause 9.1 including the Institution of legal proceedings where*

*necessary in the name of one of the parties or in the joint names of [Mr Price] and Supawall as appropriate.”*

And clause 9.3 provided that:

*“If [Mr Price] notifies Supawall that he does not intend to take any action or fails within a reasonable period in the circumstances to take such steps as may be considered necessary or appropriate by Supawall .... Supawall shall have the right and is hereby authorised by [Mr Price] to take those steps independently. In doing so Supawall shall not be taken as acting as the agent or in any way on behalf of [Mr Price] but [Mr Price] shall give all reasonable assistance at Supawall's expense to facilitate any proceedings by Supawall. Supawall shall bear all costs but shall be entitled to retain for its own absolute benefit any damages, costs or other expenses awarded or recovered in any such proceedings.”*

125. Mr Maynard-Connor argued that this means that it is only if Mr Price (or his successor as proprietor) had notified SL that he (or it) did not intend to bring proceedings that SL would have the right to bring an action. I do not agree. It seems to me that clause 9.2 shows that both parties were seen as having rights and that they would, in general, agree how to exercise those rights against an infringer. Clause 9.3 then deals with a narrower situation where the proprietor gives notice that it does not wish to participate. I do not construe this as meaning that, in other circumstances, SL would have no rights. That would be completely contrary to the usual status of an exclusive licensee under s.67 and I do not think that that is what the parties intended, particularly given the terms of clause 9.2.

*SL – joinder of proprietor*

126. Another issue not raised in the pleadings but to which I should refer is the significance of s.67(3) Patents Act 1977. Section 67(3) provides that:

*“(3) In any proceedings taken by an exclusive licensee by virtue of this section the proprietor of the patent shall be made a party to the proceedings, but if made a defendant or defender shall not be liable for any costs or expenses unless he enters an appearance and takes part in the proceedings.”*

127. In the present case, on my findings, the proprietor of the Patents is Mr Price's trustee in bankruptcy who (if it is still Mr Craig) is aware of the proceedings but has not been made party to the action. However, the words “*shall be made a party*” in s.67(3) suggest that the proprietor must be a party to proceedings brought by SL as exclusive licensee and I note that, in contrast to the position in relation to copyright (under s.102(1) Copyright Designs and Patents Act 1988), the application of s.67(3) is not said to be subject to “*the leave of the court*”. The point is not a mere technicality as the policy underlying s.67(3) is to prevent a defendant being exposed to being sued again by the absent proprietor.



128. As the point was not raised by the Defendants, my preliminary view is that it would not be right to dismiss SL's claim on the basis of non-compliance with s.67(3). I will, therefore, allow the parties to make submissions as to the appropriate way forward before making any order giving effect to this judgment. Subject to this, I am satisfied that SL has the right to bring an infringement action under s.67 Patents Act 1977.

*SL – have the Defendants infringed?*

129. As to whether SL's rights have been infringed, in closing, Mr Grime stated that the Claimants no longer pursued any claim based on the 984 Patent and that SL's claim is based solely on its rights in respect of the 714 Patent.
130. So far as the 714 Patent is concerned, it is common ground that, if the Defendants' challenges to the Claimants' title failed, the Old Injectawall Product fell within the scope of the 714 Patent. On that basis (and subject to the point in relation to s.67(3) referred to above), I find that, by its dealings with the Old Injectawall Product, FL has infringed SL's rights as an exclusive licensee of the 714 Patent.
131. As regards the position of FTFL, there is no evidence to show that FTFL was actively involved in any dealings with the Old Injectawall Product. Accordingly, I reject SL's patent claim insofar as it relates to FTFL.
132. Turning to the FL's New Injectawall Product. The difference between this and the Old Injectawall Product is that the New Product omits the final outer layer of insulation that is a feature of that Patented invention. For this reason, SL's claim was not one of direct infringement under s.60(1) Patents Act 1977 but was of indirect infringement under s.60(2). Section 60(2) Patents Act 1977 provides that:

*“... a person ... also infringes a patent for an invention if, while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person ... with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.”*

133. The Claimants say that s.60(2) is satisfied because the Defendants have supplied customers with the New Injectawall Product in circumstances where they knew, or where it would have been obvious to a reasonable person, that those customers would attach an additional layer of insulation to that Product, thereby bringing it within the scope of the 714 Patent. Indeed, the Claimants suggested that the Defendants may well be supplying customers with separate sheets of insulation to be attached to their New Injectawall Product. This suggestion was based on the Claimants having seen panels of insulation material stacked outside

the Defendants' premises. When shown a photograph of these stacks, the Claimants' expert, Mr Hickey, commented that this "*could indicate*" that the Defendants were infringing the 714 Patent. However, the evidence of Mr Gregory (which I accept) was that those panels are not used in conjunction with the New Injectawall Product. He explained that some of what was shown in the photograph (a stack of 150-200mm thick panels) would be used between ceiling joists and others (a stack of 50mm thick panels) on flat or less steeply pitched roofs or between rafters. He confirmed that the Defendants do not put an external layer of insulation on its New Injectawall Product.

134. On this basis, to be liable under s.60(2), it would have to be shown that the Defendants, merely by supplying customers with the New Injectawall Product, are:
- a. Supplying those customers with the means for putting an essential element of the invention into effect and
  - b. Doing so in the knowledge or in circumstances where it would be obvious to a reasonable person that those means are suitable for putting and are intended to put the invention into effect.
135. Little was said at trial regarding the first of these requirements. It seems to have been common ground that, in supplying customers with the New Injectawall Product (a product without an external layer of insulation), the Defendants were supplying the *means* by which those customers could put the invention into effect by adding that external layer. It also seems to be common ground that those means are in relation to an essential element of the invention.
136. As to the requirement to show knowledge and intention, I was referred to a passage in the joint judgment of Jacob and Etherton LJ in *Grimme Maschinenfabrik GmbH & Co KG v Scott (t/a Scotts Potato Machinery)* [2010] EWCA Civ 1110 at 108. That passage and others in *Grimme* were subsequently summarised by Jacob LJ in *KCI Licensing Inc v Smith & Nephew plc* [2010] EWCA Civ 1260, (with cross references to *Grimme*) as follows:
- i) The required intention is to put the invention into effect. The question is what the supplier knows or ought to know about the intention of the person who is in a position to put the invention into effect – the person at the end of the supply chain, [108].
  - ii) It is enough if the supplier knows (or it is obvious to a reasonable person in the circumstances) that some ultimate users will intend to use or adapt the 'means' so as to infringe, [107(i)] and [114].
  - iii) There is no requirement that the intention of the individual ultimate user must be known to the defendant at the moment of the alleged infringement, [124].

iv) Whilst it is the intention of the ultimate user which matters, a future intention of a future ultimate user is enough if that is what one would expect in all the circumstances, [125].

v) The knowledge and intention requirements are satisfied if, at the time of supply or offer to supply, the supplier knows, or it obvious to a reasonable person in the circumstances, that ultimate users will intend to put the invention into effect. This has to be proved on the usual standard of the balance of probabilities. It is not enough merely that the means are suitable for putting the invention into effect (for that is a separate requirement), but it is likely to be the case where the supplier proposes or recommends or even indicates the possibility of such use in his promotional material, [131].”

137. That summary was later quoted in *Actavis UK Limited v Eli Lilly & Co.* [2016] EWHC 234 (Pat) at [31] by Arnold J, who went on, at [32], to say that:

“32. It is clear from these decisions that it is sufficient that a proportion of users will intend to use the means so as to infringe. Even if the majority of users will not intend to use the means to infringe, that is only relevant to remedies, and in particular financial remedies (see *Grimme* at [134]-[137]). On the other hand, one should disregard “speculative, maverick or unlikely use” of the means (see *Grimme* at [116], [124], [127] and [129]-[130] and *KCI* at [47]).”

138. On this basis, Mr Grime submitted that the New Injectawall Product infringed the 714 Patent because “*a proportion of users of the New Injectawall Product will add another layer of insulation so as to infringe the 714 Patent and that [the Defendants] had the requisite knowledge and intention*”. In my judgment, the evidence does not support that submission.

139. In the first place, there was no evidence before me that *any* of the Defendants’ customers had actually added an exterior layer of insulation to the New Injectawall Product supplied by the Defendants.

140. Second, on the evidence before me, it seems unlikely that any customer would think of adding such a layer of insulation. I note the following:

- a. There is no suggestion that the Defendants have indicated to customers that they should or even that they could add an additional layer of insulation to the exterior of the New Injectawall Product.
- b. It seems to have been common ground that, even without an additional layer, the New Injectawall Product satisfied the requisite building regulations guidelines regarding thermal insulation.

- c. Mr Hickey noted that the New Injectawall Product, whilst it satisfied those guidelines, would have a problem with thermal bridging in the timber framing. However, Mr Evans' evidence was that a customer was unlikely to address that problem by adding an extra layer of insulation to the outside of the Product. His evidence was that to do so could prevent or reduce the ability of the membrane in the Product to breathe and would, therefore, be inadvisable. In this regard, it was common ground that, in order to ensure breathability in the walls of a building, there must always be a 50mm void between exterior face of the Product and the outer wall of the building. Accordingly, if a customer was to add the external layer of insulation to exterior of the Product, the gap to be allowed would have to be increased by the width of that layer. Mr Evans noted that this might involve a change to the foundations.
- d. Mr Gregory made a similar point when asked whether a builder or architect acting for a customer would recommend adding this layer of insulation. His response was: *"That could not be done. We are -- our plans are prepared. When a client engages Flitcraft, they place an order, we send everything off to a structural engineer to get checked and they come back with any line and (indistinct). Then are then given to our designers who design the DPC detail, which is the ground detail and the sole plate layout and that would clearly show any pad stones or any steel or additional reinforcement that maybe required. But it also shows where the outer skin of the property is going to go, it will show a 50 millimetres cavity and then it will show the depth of the panel that we are recommending. So if we were to recommend, price, sell and erect this 140 millimetres panel, there would only be 50 millimetres left as a cavity before the external skin or brickwork or cladding or whatever, so you could not do it because you would be filling the cavity."*
- e. Mr Evans also commented that he could not see why a customer would want to add an additional layer of insulation to the New Injectawall Product. He commented that: *"I cannot envisage anyone buying this system in order to bastardise it into a hybrid of something else."* He also stated that: *"Why would you go to a proprietary system with given quality and cost if you wanted to achieve something other than what the proprietary system offers? It just seems rather unlikely that one would go about designing a building by selecting a product that you were not satisfied with so that you wanted to enhance its performance before you even started the building."*
- f. Ultimately, the addition of an extra layer of insulation to the new Injectawall Product would require customers to incur additional cost and labour and maybe also to depart from their existing plans. It would achieve a higher level of thermal insulation than was recommended in the guidelines but would, potentially, lead to other problems.

141. For these reasons, I reject SL's claim that the Defendants' activities with regard to the New Injectawall Product infringed the 714 Patent. The Claimants have not established that the Defendants' customers (or a proportion of them) intended to use the New Injectawall Product as a means to put the Patented invention into effect, let alone that any such intention would have been known to the Defendants or would have been obvious to a reasonable person.

### **The copyright claims – the Photographs**

142. Turning to the copyright claims, I will deal first with Mr Price's claims in relation to the Photographs.

#### *Initial ownership of copyright in the Photographs*

143. As set out above, I find that the Photographs were taken by Mr Price's father, John Anthony Price (known as Anthony), in around 2005 - 2006. On the balance of probabilities, I find that copyright subsisted in the Photographs (certainly no reason was put forward as to why it would not subsist) and, as it is not suggested that Anthony Price was acting as an employee in the course of his employment, I find that he would have been the first owner of such copyrights in accordance with s.11 Copyright Designs and Patents Act 1988.
144. It was suggested by the Defendants that Anthony Price held these copyrights in the Photographs on trust for the MTF Partnership on the basis that that firm had commissioned him to take the Photographs and had then used the Photographs in their brochures. However, in my judgment, the evidence does not establish the existence of such a trust. I was not taken to any evidence that Anthony Price was paid by the Partnership to take the Photographs and, in my judgment, it is far more likely that he simply allowed the Partnership to use them (by way of licence) as a favour to his son. In this regard, I accept Mr Price's evidence.

#### *Ownership of copyrights in the Photographs on Anthony Price's death*

145. On the death of a copyright owner, that copyright vests in that person's personal representative(s) by operation of law (i.e. without need for any formal assignment) and is held, subject to the payment of the deceased's debts and testamentary expenses, for the person entitled to them under the deceased's will – see s.90(1) Copyright Designs and Patents Act 1988 and *Copinger & Skone James on Copyright* 18<sup>th</sup> ed. at 5-121.
146. Under Anthony Price's will, his wife, Jean Mary Price, was appointed his executor and, provided (as was the case) she survived him by 30 days, he left his residuary estate to her. However, a difficulty that I raised at trial was that there was no evidence of a grant of probate to Jean Price and, on enquiry, I was informed that there had never been such a grant. As set out below, this has implications as regards Mr Price's copyright claim because, in order to succeed

in that claim, he needs to be able to prove, first, that his mother had acquired title to the copyrights in the Photographs and, second, that that title had passed to him.

147. The relevant principles of law are as follows:
- a. The title of a person named as executor to the property of the deceased is derived from the deceased's will and not from the grant of probate. However, a grant of probate is necessary in order to prove the executor's title.
  - b. Because an executor's title is derived from the will, an executor may pass valid title to the deceased's property (whether by assignment to an assignee or by assent to a beneficiary under a bequest) even where there has been no grant of probate. However, again, a grant of probate is necessary if it becomes necessary to prove that the named executor had title to the property that was being transferred by such assignment or assent.
  - c. The above principles were referred to in *Re Stevens* [1897] 1 Ch 422 per North J at 429-430, quoting from *Williams on Executors* 9<sup>th</sup> ed. (to which he referred as "*an authority which cannot be disputed*"), at p.249, where it was stated that "*...although an executor may, before probate, by assignment of a term of years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it becomes requisite to shew the right to make the assignment or assent; which can only be effected by producing the probate, or other evidence of the admission of the will in the Court...*" See now, *Williams Mortimer & Sunnucks on Executors, Administrators and Probate* 21<sup>st</sup> ed at paras.5-02 to 5-10.
  - d. The executor's assent in relation to personal property (such as a copyright) may be express or implied – and this remains the case even where, under the deceased's will, the relevant property has been bequeathed to that executor. In such a case, the assent operates to vest the property in the executor in his/her capacity as beneficiary rather than as executor. Whether there has been an implied assent is a question of fact and turns on whether the executor has spoken or acted in relation to the relevant property in a way that is consistent with the devise or legacy having taken effect and which shows that the property is no longer required for the payment of the deceased's debts and testamentary expenses. See *Williams Mortimer & Sunnucks* at paras.76-01 to 76-08.
148. Applying these principles, it is clear that Jean Price, as Anthony Price's executor, acquired title to his copyrights notwithstanding the lack of any grant

of probate albeit that, if it is necessary to prove her title, a grant of probate would be required.

149. As to whether Jean Price had assented to the copyrights vesting in herself as beneficiary rather than as executor, in the absence of an express assent the question whether there had been an implied assent turns on the next issue – i.e. whether she had assigned copyright to Mr Price. In my judgment, if she had, then she must impliedly have assented to the copyrights vesting in herself beneficially on the basis that they were not needed as assets to discharge the deceased's debts and testamentary expense.

*Did the copyrights in the Photographs pass to Mr Price in August 2015?*

150. The next issue, therefore, is whether there was an assignment of the copyrights from Jean Price to Mr Price. The Claimants' case on this was something of a moving target. As originally pleaded, it was said that there had been a Deed of Assignment dated 25 August 2015 and, as Mr Maynard-Connor pointed out, it was on this basis that Mr Price obtained summary judgment earlier in these proceedings. After that summary judgment was set aside on appeal, there was a change to the pleaded case to assert that, in fact, no deed of assignment had been prepared or signed on 25 August 2015 but that there had been an oral assignment in August 2015, which was subsequently formalised by a written deed of assignment dated 21 December 2021. Then, in the course of cross examination, the case changed again as Mr Price asserted that a few weeks after his conversation with his mother in August 2015, there had been a written assignment (prepared, probably, by his solicitor) which had later gone missing. It was as a result of this, he said, that the later written assignment dated 21 December 2021 had been produced to formalise the position.
151. In the absence of any statement from either Mr Price's mother, Jean, or his solicitor or any supporting documentation, I am not able to accept Mr Price's evidence that there had been a written assignment in 2015. His various positions on this issue were confused and inconsistent and his evidence in this regard lacks any credibility. Indeed, I note that he claimed that he had asked his mother to assign the copyrights to him because he was fed up with FEBL's use of the Photographs. If that were the case, I would expect to see some form of correspondence in which he asserted those rights against FEBL or some communication with his solicitor or someone else on the issue. However, so far as I am aware, there is none. Nor is there any other document referring to the copyrights at this point in time. In the circumstances, I reject Mr Price's evidence that there was a written assignment of the copyrights to him in 2015.
152. It is possible that Mr Price and his mother did have a conversation about the Photographs in August 2015. However, as Mr Maynard-Connor points out, under s.90(3) Copyright Designs and Patents Act 1988 (like s.30(6) Patents Act 1977, to which I have referred) an assignment "*is not effective unless it is in writing signed by or on behalf of the assignor*". Accordingly, a conversation

could not have effected a legal assignment of the copyrights. Further, for there to have been an equitable assignment, Mr Price would have to show that there had been a binding agreement to assign – i.e. an agreement supported by consideration (see *Copinger & Skone James* at paras.5-217 to 5-218). Here, there is no suggestion that Mr Price provided any consideration for an assignment of the copyrights from his mother in August 2015.

*Did copyrights in the Photographs pass to Mr Price in December 2021?*

153. What then of the written assignment dated 21 December 2021 on which Mr Price relies? This provides for the assignment of (inter alia) the copyright in the Photographs by Mr Price’s mother, Jean, to Mr Price, to the extent that they had not already passed to him under an “oral agreement, on or about 25 August 2015” and it appears to be signed by both of them.
154. Mr Maynard-Connor submits this is not a genuine document and he asks me to draw an adverse inference from the fact that Mr Price’s mother has not been called to give evidence verifying it. However, notwithstanding this and my reservations about Mr Price’s evidence, I find, on the balance of probabilities, that this document is genuine and that it was signed by Mr Price and his mother.
155. The difficulty for Mr Price, however, is that the Re-Re-Re Amended Defence puts him to proof of his claim with regard to the Copyrights. Whilst, for the reasons set out above, I am satisfied that there was a valid assignment to him, the bigger problem is the one that is mentioned above, namely that in order to prove that he had acquired title from his mother under that assignment, he must prove that his mother had had title to assign to him and this requires there to have been a grant of probate to her. In my judgment, the law summarised above is quite clear. Without a grant, Mr Price cannot establish his mother’s title to the copyrights in the Photographs and, therefore, cannot establish his own title. Whilst this may seem like another technicality, it is something that is required for the protection of anyone who may have a claim in relation to the estate of a deceased’s person. Accordingly, unless a grant is obtained, Mr Price’s claim for infringement of copyright in the Photographs must fail.

*Copyright in the Photographs – infringement*

156. It is common ground that the Defendants have reproduced the Photographs. Accordingly, but for the issue of the grant of probate, I would have found that FL’s activities had infringed the copyrights in the Photographs.

*Copyright in the Photographs – conclusion*

157. Given the above, in the absence of a grant of probate, I reject Mr Price’s copyright claim with regard to the Photographs.

### **The copyright claims – the Drawing**



158. As mentioned above, I am satisfied that the Drawing was created by Mr Price in around 1993 and, as with the Photographs I find that, on the balance of probabilities, copyright subsisted in it. In my judgment, Mr Price was the owner of that copyright and remained so even when, some years later, the MFT Partnership started trading using the Drawing. I am, therefore, satisfied that Mr Price did not hold this copyright on trust for the Partnership.
159. On this basis and given my findings above, I am satisfied that copyright in the Drawings was not assigned by Mr Price to either Lightpeak or Mr Bridge. Accordingly, I find that, like the Patents, this copyright vested in and remains with Mr Price's trustee in bankruptcy. As a result, I find that Mr Price has no title to support his claim for infringement of copyright in the Drawing and I dismiss his copyright claim in relation to the Drawing.

### **Passing off**

160. Turning now to the passing off claim. This relates to the goodwill attached to the trading name "Maple Timber Frames".
161. The test for passing off is well known and not in issue. In essence, as appears from the speech of Lord Oliver in *Reckitt & Colman Products Ltd v Borden Inc* (No. 3) [1990] 1 WLR 491 at 499E-H ('the Jif Lemon case'), the Claimants must establish (i) goodwill or reputation attached to their goods or services; (ii) a misrepresentation by the Defendants to the public that is likely to lead the public to believe that the goods or services offered by the Defendants are those of the Claimants and (iii) that they have suffered, or in a *quia timet* action are likely to suffer, damage by reason of the erroneous belief caused by that misrepresentation.
162. Given the complicated trading history described above, the passing off claim in this case could have raised difficult issues as to who owned the goodwill in the name Maple Timber Frames. However, the passing off case as pleaded by the parties was somewhat simpler. I will follow their approach. I should note that the passing off claim was not referred to in the Claimants' closing submissions and, probably for that reason, received only a brief mention in the Defendants' closing submissions.
163. The Claimants' pleaded case is that they have goodwill in "Maple Timber Frames" as a trading name. They argue that Mr Price has used this name since 1993 and that it is currently used by SL as exclusive licensee and by the Third Claimant under licence. As regards the issues of misrepresentation and damage, they rely on the Defendants' registrations of "mapletimberframe.org", "mapletimberframe.info" and "mapletimberframe.co.uk" as domain names which they say amounts to passing off in itself or to the Defendants equipping themselves with instruments of fraud justifying *quia timet* relief. This is because the use of those names in connection with the Defendants' goods or services

would be bound to mislead the public into believing that those goods or services are connected with the Claimants. The Claimants therefore seek damages and an order for the transfer of the domain names.

164. In their Defence, the Defendants admit that Mr Price and the Third Claimant have traded as Maple Timber Frames since July 2016 but assert that, prior to that, had traded as Maple Timber Systems.<sup>17</sup> They admit to owning the relevant domain names which had been purchased by FEBL and were later acquired by FL. It does not appear to be asserted (and it was not argued) that FL has used the Maple Timber Frame name as a trading name in other respects or that it has the right to use that name as the successor to the business of FEBL (and hence the businesses of the MTF Partnership and MTSL). Their principal defence is that these domain names are not being and have not been used by them. Otherwise, they do not admit the Claimants' case on passing off.

#### *Goodwill*

165. I am satisfied that the Claimants have established goodwill in the name Maple Timber Frame. In the first place, as mentioned above, the Defendants admit that the Claimants have traded under that name since July 2016. As for the period before July 2016, the Defendants' case is limited to saying that the Claimants had then traded as Maple Timber Systems. On any basis, these are admissions that the Claimants had traded under the relevant name or a very similar name from a time before the Defendants' domain names were registered on 20 September 2016. I have also taken into account some documentary material annexed to the Particulars of Claim which shows use of the name, namely a Maple Timber Frame advert for SupaWall of 18 November 2015 and entitled "Making Zero Carbon Affordable". I have not, however, taken into account use of the Maple Timber Frame name prior to mid-2011 (when the MTF Partnership failed)<sup>18</sup> nor those other uses referred to in paragraph 20 of the Re-Amended Particulars of Claim,<sup>19</sup> which are (so far as I can see) unsubstantiated, save by a statement of truth from the Claimants' solicitor.

#### *Misrepresentation and damage*

166. Given that goodwill, it seems to me that *if* the Defendants were to make use of the Maple Timber Frame domain names in connection with their goods or services, such use is highly likely to constitute passing off. It is hard to see how any such use would not be likely to lead the public to believing that such goods or services were in some way connected with the Claimants. However, as Mr

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<sup>17</sup> As MTSL ceased trading in 2014, this suggests the Defendants have in mind use of the name by the Claimants that was separate from MTSL's use of that name.

<sup>18</sup> In respect of such use, issues might have arisen as to whether the goodwill accrued to MTF Partnership or to Mr Price and as to the effect of Mr Price's bankruptcy.

<sup>19</sup> Such as the claim that, between June 2014 and September 2018, the Claimants had websites at [www.mapletimberframe.uk](http://www.mapletimberframe.uk) and [www.mapletimberframe.com](http://www.mapletimberframe.com) websites which had some 45,140 visits and that, since August 2014, they have sent out 1,650 brochures under the Maple Timber Frame name.

Grime conceded in his opening Skeleton, there is no evidence of any use of the domain names by the Defendants. On that basis, it appears to be accepted that that there has been no misrepresentation to the public and no damage suffered by the Claimants.

*Qui timet*

167. Mr Grime's case in his skeleton argument was that, despite this, the Claimants are nevertheless entitled to relief on a *quia timet* basis, to prevent a threatened passing off by the Defendants. On this basis, he pursued the Claimants' claim for an order for the transfer of the domain names.
168. The relevant law was discussed in *British Telecommunications plc v One in a Million Ltd.* [1999] 1 WLR 902, another domain name passing off case where Aldous LJ commented (at 920D-G) that the court had

*"... a jurisdiction to grant injunctive relief where a defendant is equipped with or is intending to equip another with an instrument of fraud. Whether any name is an instrument of fraud will depend upon all the circumstances. A name which will, by reason of its similarity to the name of another, inherently lead to passing off is such an instrument. If it would not inherently lead to passing off, it does not follow that it is not an instrument of fraud. The court should consider the similarity of the names, the intention of the defendant, the type of trade and all the surrounding circumstances. If it be the intention of the defendant to appropriate the goodwill of another or enable others to do so, I can see no reason why the court should not infer that it will happen, even if there is a possibility that such an appropriation would not take place. If, taking all the circumstances into account the court should conclude that the name was produced to enable passing off, is adapted to be used for passing off and, if used, is likely to be fraudulently used, an injunction will be appropriate. It follows that a court will intervene by way of injunction in passing off cases in three types of case. First, where there is passing off established or it is threatened. Second, where the defendant is a joint tortfeasor with another in passing off either actual or threatened. Third, where the defendant has equipped himself with or intends to equip another with an instrument of fraud. This third type is probably a mere quia timet action."*

169. On the facts of *One in a Million*, the court was satisfied that the defendants had acquired the relevant domain names (such as "bt.org" or "britishtelecom.co.uk") in order that they could be used in a fraudulent way - as a means to extract payments from legitimate traders whose goodwill might be damaged if the defendants were to sell those marks to a third party (see Aldous LJ at p.924H-925A and p.925E-G).
170. With some hesitation, I have concluded that, on the facts of the present case, I should not make an order on a *quia timet* basis.

171. I bear in mind that, according to the data on the <https://www.whois.net/> website, the domain names were registered on 20 September 2016 on the application of Garry Flitcroft (then of FEBL and now of FL), at a time when it is clear that he was aware that the Claimants were trading under that name. However, although Garry Flitcroft has not explained his reasoning in applying for the registrations, it seems likely that the application was made because FEBL thought it had some right to use that name as a result of its acquisition of the MTSL business. Ultimately, though, the basis for *quia timet* relief is the existence of a threat of infringement and I do not think that the Claimants have established such a threat. The fact is that the domains have not been used for 6 years (initially by FEBL and, since 2017, by FL) and it seems highly unlikely that they would be used now, particularly in view of the indications above that use in relation to their goods or services would constitute passing off. The domain names may be of no use to the Defendants, but they are the Defendants' property and an order for transfer would not, therefore, be appropriate.
172. I therefore reject the Claimants' passing off claim.

### **Joint tortfeasorship**

173. Given my findings above, the issue of joint tortfeasorship is only relevant to SL's claim that its rights as exclusive licensee of the 714 Patent were infringed by FL's dealings with the Old Injectawall Product. All other claims have failed, including the claims against FTFLL.
174. As mentioned above, it has already been determined that Thomas Flitcroft is liable as a joint tortfeasor for such of FL's dealings as are found to be infringements. The issue, therefore, is whether Garry Flitcroft should also be held jointly liable.
175. As with the passing off claim, the joint tortfeasorship claim and the facts relating to it were not addressed by the Claimants in closing. However, the Claimants rely on their case as set out in their opening Skeleton.
176. As to the law on joint tortfeasorship, I was referred to *MCA Record Inc. v Charly Records Ltd (No.5)* [2001] EWCA Civ 1441, *Sea Shepherd UK v Fish & Fish Limited* [2015] UKSC 10 and *Lifestyle Equities CV v Ahmed* [2021] EWCA Civ 675 at [28] to [41]. From these, it appears that the relevant question is whether an individual's conduct is such as to make that person liable as an accessory for the acts said to infringe. This may be because that person was closely involved and participated in the relevant acts and/or had directed or procured their commission or had assisted in (not merely facilitated) them pursuant to a common design to bring them about. Where the principal infringer is a company, a person can be liable as a joint tortfeasor regardless of whether or not that person is a director or shareholder.

177. On balance, I have concluded that the evidence does show that Garry Flitcroft was sufficiently involved in the matters I have found were infringements to make him a joint tortfeasor with FL.
178. Dealing first, with the position up to October 2017 (when Garry Flitcroft resigned as a director of FL), I note the following:
- a. Garry Flitcroft had been the sole director of and sole shareholder in FEBL. His own evidence in cross examination was that he ran that company and took all important decisions. His evidence was that FEBL had “*progressed to sell, manufacture and install timber frame products, built in accordance with the specifications of and associated with the Patents....*”. This was clearly something decided by Garry Flitcroft.
  - b. On 30 January 2017, very shortly before FEBL went into administration, FL was incorporated with Garry Flitcroft’s domestic partner (Charmian Wilson) and his son, Thomas, as its shareholders. Although, initially, Thomas (then 18 years old) was FL’s only director, Garry Flitcroft was appointed a director only 3 days later, on 2 February 2017.
  - c. When FEBL went into administration on 14 February 2017, it was Garry Flitcroft who negotiated with FEBL’s administrator for FL to purchase the assets of FEBL. This was confirmed by Thomas Flitcroft in cross examination and by FEBL’s administrator who stated in his report to the creditors of FEBL dated 7 April 2017 that Garry Flitcroft had “*advised that he would wish to buy the assets of [FEBL] using his new company Flitcraft Limited*” and later that FL was “*controlled and owned by [Garry Flitcroft]*”.
  - d. That Garry Flitcroft was perceived to be the person who owned and controlled FL at this stage is apparent from these statements in the Administrator’s Report. It is also apparent in a North West press article entitled “*Ex-premier league star buys construction firm out of administration*”, which reported that all FEBL’s employees had transferred to FL and that “*Both companies are controlled by Gary Flitcroft*”.
179. In these circumstances, it seems to me that, in this period of trading, when it was decided that FL would continue to manufacture, sell and install the Old Injectawall Product (i.e. the acts that infringed the Patents), FL was continuing where FEBL had left off and was clearly acting under the control and direction of Garry Flitcroft, just as FEBL had done. There was nothing to suggest that these were decisions taken by anyone else.
180. As mentioned above, Garry Flitcroft resigned as a director of FL on 13 October 2017. It is unclear to what extent FL continued to deal with the Old Injectawall Product thereafter and when, exactly it replaced that Product with the New

Injectawall Product. However, to the extent that it did continue to deal with the Old Injectawall Product, I am satisfied that Garry Flitcroft remained the person ultimately in control of or responsible for those dealings. In this regard, I note that:

- a. On 29 September 2017, shortly before his resignation, Charmian Wilson was appointed a director. As a result, his domestic partner and his son (still only 19 years old) were the sole recorded directors of FL as well as being the sole shareholders in that company.
- b. These changes do not appear to have altered perceptions as to how FL was owned or controlled. Indeed, Instagram postings made by FL itself after these changes (which are admitted in the Defence) suggest that Garry Flitcroft continued to be the person in control of FL. They certainly show that he was held out as being its owner. One such posting on 28 March 2018 stated that *“Flitcraft Timber Frame is owned by former premiership footballer Garry Flitcroft”* and quoted him as saying *“our timber structure replaces the block work in a traditional house build by using injected structural insulated panels”*. Another post, on 9 April 2018, referred to Flitcraft Timber Frame and Flitcraft and stated: *Company owned by Garry Flitcroft”*.
- c. Whilst ownership does not necessarily mean control and is not of itself sufficient to give rise to joint liability. Here, other evidence shows that Garry Flitcroft remained in control of or, at the very least, an active participant in decision making at FL.
- d. In the period from late 2017 until 2021, Mr Middleton estimated (on the basis on CCTV footage) that Garry Flitcroft visited FL’s business premises some 185 times, as against 15 visits by his son, Thomas. There was some debate about these figures, based on the positioning of the cameras. However, whilst it is possible that the figures may not be entirely accurate, I am satisfied that they support the Claimants’ case that Garry Flitcroft was a regular visitor to FL’s premises and was almost certainly a far more regular visitor than Thomas. Similarly, the “Meet the Team” page on Flitcraft’s website includes Garry Flitcroft as part of that team under the title “UK Business”. Neither his son Thomas nor his partner Charmian Wilson were shown as part of the Team. These facts suggest that his involvement went beyond mere ownership.
- e. The Defendants seek to explain Garry Flitcroft’s presence on FL’s premises and on the “Meet the Team” page of its website on the basis that he was involved in sales. However, in their Defence, the Defendants admit that he was *“held out as controller of the Flitcraft Business”* which they explain on the basis that he was *“assisting Thomas Flitcroft in developing the business and training him to run the business accordingly”*. Given the disparity in the frequency of their visits, this

cannot tell the entire story. But, in any event, this admission again suggests that Garry Flitcroft was actively involved in decisions regarding development and running the business.

- f. Garry Flitcroft's past involvement in FL's decision to make and supply the Old Injectawall Product and his ongoing and regular involvement in its operations contrasts with Thomas' role. Thomas' own evidence suggests that he only visited FL's premises around once a week and that his main role was as a joiner on the sites where FL's Products were being installed. He gave evidence that he had met FL's accountants on, apparently, no more than three occasions and that he dealt with staff wages and took part in "some of" the discussions about the change from the Old to the New Injectawall Product. None of this suggests that it was only he (and not his father) who took or was responsible for the decisions which resulted in the actions that infringed the 714 Patent.
- g. It is true that when Mr Gregory (who had worked in the office from 2018) was asked whether Garry Flitcroft was involved in FL, he responded "*Not ever on a day to day basis*". Again, I do not think that this means that Garry Flitcroft was not in control of the business insofar as it involved its dealings with the Old Injectawall Product. Mr Gregory, as General Manager, was responsible for the day to day running of the business (including dealing with the customers and processing their orders). However, in my judgment, he and his predecessors were implementing the strategic decisions made by Garry Flitcroft. One of those strategic decisions was that FL would continue to manufacture, sell and install the Old Injectawall Product just as FEBL had done before.
- h. Of course, in December 2021, Garry Flitcroft was re-appointed a director of FL but it appears from the evidence of Mr Gregory that FL had ceased dealing with the Old Injectawall Product by then.

181. Having heard the oral evidence, I find that, even after his resignation, Garry Flitcroft remained active in the decision making process of FL and, in effect, had directed its activities in continuing to deal with the Old Injectawall Product.

#### **Are any sums recoverable caught by the NWTIL Charge**

182. The last issue relates to the NWTIF Charge, the benefit of which was assigned by NWTIF to Garry Flitcroft on 16 December 2019. The Defendants' case is that any sums found due under the claims in his action fall within the scope of that Charge and so are not payable to the Claimants.
183. As set out above, I have rejected all of Mr Price's claims. Accordingly, on my findings, the issue of the NWTIF Charge (like the issue of joint tortfeasorship) is only relevant to SL's claim that FL's dealings with the Old Injectawall Product infringed its rights as exclusive licensee in respect of the 714 Patent.

184. It is worth starting by noting the usual position with regard to exclusive licensees. Under s.67 Patents Act 1977, an exclusive licensee can bring infringement proceedings in relation to the licensed rights and its right to bring such proceedings is concurrent with the right of the Patent owner to bring proceedings. In awarding damages, the court must take into account the terms of the licence.
185. In my judgment, it is clear that the NWTIF Charge affects only the rights of Mr Price (and his successor as proprietor). It cannot affect the rights granted to SL under the SL Licence. This is because the SL licence was granted and registered before the NWTIF Charge was granted. Accordingly, insofar as SL in this action is suing for an infringement of its rights under the SL Licence, SL is entitled to the benefit of any damages awarded.
186. It was, presumably, for this reason that Mr Maynard-Connor sought to argue that, on the true construction of clause 9, it was Mr Price and not SL that had the right to bring the present action and, therefore, that that right fell within the scope of the IPR covered by the NWTIF Charge.<sup>20</sup> I have already considered and rejected this argument when considering SL's infringement claim.
187. Accordingly, whatever might have been the position under the NWTIF Charge if (contrary to my finding above) Mr Price's infringement claims had succeeded, I find that the NWTIF is of no relevance to SL's claims which (subject to the issue under s.67(3) to which I have referred) were infringed by FL's dealings in relation to the Old Injectawall Product.

### **Conclusion**

188. For the reasons set out above, I find that:
- a. Mr Price has failed to establish that he has title to the Patents and I therefore reject his patent infringement claims.
  - b. Subject to further submissions regarding the application of s.67(3) in this case, SL rights as exclusive licensee of the 714 Patent were infringed by FL's dealings with the Old Injectawall Product.
  - c. I reject SL's claims that FL's dealings with the New Injectawall Product infringed its rights as exclusive licensee of the 714 Patent.
  - d. Mr Price has failed to establish that he has title to the Copyrights and I therefore reject his copyright infringement claims.

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<sup>20</sup> Which, as defined in clause 1.1, included not only the Patents but also "*all licences, agreements and ancillary and connected rights*" and "*the right to sue for damages ... in respect of infringement*".



- e. I reject the Claimants' passing off claim and their claim for *quia timet* relief arising from FL's ownership of the domain names:

“mapletimberframe.org”,  
“mapletimberframe.info” and  
“mapletimberframe.co.uk”

- f. I reject all claims against the Second Defendant (FTFL).

- g. Subject again to the s.67(3) issue, the Third and Fourth Defendants (Garry and Thomas Flitcroft) are jointly liable with FL as regards its said infringements of the 714 Patent.

189. I will ask the parties to try to agree a form of order reflecting these findings and to file submissions with regard to their proposed course of action with regard to the point that I have raised with regard to s.67 Patents Act 1977.
190. Finally, I would like to thank both parties for their helpful submissions and, in particular, Mr Grime who only took on this complicated case very shortly before trial.