



Neutral Citation Number: [2021] EWHC 2992 (Ch)

Case No: IL-2021-000018

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 16/11/2021

Before:

MASTER CLARK

Between:

(1) SAFE-T-SYSTEMS HOLDINGS LIMITED
(2) SAFE-T-SYSTEMS LIMITED

Claimants

- and -

ILR SAFETY CC

Defendant

Guy Hollingworth (instructed by **gunnercooke LLP**) for the **Claimants**
Mr Hein van Spaendonck, with the permission of the court, for the **Defendant**

Hearing date: 8 September 2021

Approved Judgment

I direct that this approved judgment, sent to the parties by email on 16 November 2021, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

Application

1. This is my judgment on the application of the claimants, Safe-T-Systems Holdings Limited (“STSH”) and Safe-T-Systems Limited (collectively “STS”), seeking summary judgment on part of their claim, and to strike out the counterclaim.
2. STS were represented by counsel. The defendant, ILR Safety CC (“ILR”), was represented, with the court’s permission, by its “executive director”¹, Mr Hein van Spaendonck, who is not a lawyer (and who attended the hearing remotely from South Africa, where ILR is based).

Parties and the claim

3. ILR makes and sells emergency exit glass breaking devices (“devices”) which are used for emergency escape from vehicles such as buses and coaches. It (or its predecessors) has sold devices (“ILR’s devices”) throughout the world since 1992, and in the UK since 2009. They include a device sold in a range of models under the name “Safe-T-Punch”. ILR owns UK trade mark registrations no 334554 for the word SAFE-T-PUNCH in class 9 (“the Mark”), and, following the Settlement Agreement referred to below, no.s 3258990 for safeTpunch in classes 9 and 12, and 3261007 for SafePunch in class 9.
4. STS (and for present purposes, it is not necessary to distinguish between the two claimants) are the defendant’s former distributors. The ultimate owner and moving force of STS is Christen Michael Iversen. Mr Iversen is the brother of Pia le Roux, who together with her husband, Ivan le Roux are the owners of ILR.
5. The parties’ relationship was initially governed by a written distribution agreement dated 17 August 2010 (“the Distribution Agreement”), which included the following relevant clauses:
 - “2.1.6 “Know-How” and “Confidential Information means all information of a confidential nature and pertaining to the Products and there (*sic*) formulation including test data, specifications, formulations, methods of manufacture, methods of marketing, commercial information and distributor lists
 - 2.1.9 “Products” means [ILR]’s Emergency Exit Devices listed in Schedule A to this Agreement.
 - 5.4 [STS] acknowledges that all and any Know-How and Confidential Information provided by [ILR] under the provisions of this Agreement or otherwise is exclusively the property of [ILR].
 - 15.1 During the Term of this Agreement, the Distributor shall not ... in any capacity whatsoever, be directly or indirectly engaged, interested or concerned in any business which directly or indirectly competes with [ILR’s devices]. (“the non-compete clause”)

¹ He describes himself as such in a letter dated 18 January 2021 to NFI Group

16.5.6 the termination of this Agreement for whatever reason shall not affect the continuing validity and enforceability of those provisions of this Agreement which are of a continuing nature.”

Materially identical clauses are found in a later document which ILR alleges (and STS denies) superseded the Distribution Agreement. For present purposes, I will refer to the clauses in the Distribution Agreement.

6. The relationship between the parties broke down, and the distribution arrangements between them had come to an end by at least April 2018. STS’s case is that it began making and selling its own devices (“STS’s devices”) in early 2018, and it continues to do so.
7. On 15 April 2019, ILR issued a claim against STS and Mr Iversen (“the STS parties”) in the IPEC in claim no IP-2019-000063 (“the first claim”) . This included claims that:
 - (1) STS had developed, advertised, promoted and sold under the sign “safePunch” devices which directly competed with ILR’s devices;
 - (2) STS were infringing the Mark by using “safePunch” (and similar signs) in relation to their devices;
 - (3) the UK marks “safeTpunch” and “SafePunch” registered by STS should be removed from the register or declared invalid on the grounds that they were confusingly similar to the Mark and/or registered in bad faith;
 - (4) STS was passing off its devices as ILR’s devices by using the names safePunch and snapPunch;
 - (5) STS was in breach of the non-compete clause by being engaged, interested and concerned with the business of designing, developing, manufacturing (or having manufactured) and sale of STS’s devices, which competed with ILR’s devices;
 - (6) STS had failed to pay ZAR 970,228.86 (about £67,000 at the time) for devices supplied to it by ILR.
8. The STS parties counterclaimed for:
 - (1) copyright infringement by copying various icons and designs (“the Pictograms”), including an icon of a fist striking a button, used in relation to ILR’s devices;
 - (2) malicious falsehood as a result of statements made by ILR that STS’s devices were ‘copied, counterfeit product’ that had ‘not been tested or certified and could fail in an emergency’.
9. On 25 July 2020, following negotiations (in which the STS parties continued to be represented by specialist IP legal advisers, but ILR was by this stage unrepresented), the parties to the first claim entered into a written settlement agreement (“the Settlement Agreement”). This included the following material provisions:

“BACKGROUND

- (A) Court proceedings were commenced by [ILR] on 15 April 2019 ... (claim number IP-2019-000063) (the “**Proceedings**”) against [the STS parties] for, inter alia, trade mark infringement, passing off and breach of contract, on 26 September 2019 [the STS parties] filed a counterclaim for copyright infringement and malicious falsehood (together the claim and counterclaim are the “**Dispute**”).

- (B) The Parties have settled their differences and have agreed terms for the full and final settlement of the Dispute and wish to record those terms of settlement, on a binding basis, in this agreement.

AGREED TERMS

1. Definitions and interpretation

In this agreement, unless the context otherwise requires, the following words and expressions have the following meanings:

Additional Claims: means any claim by [the STS parties] or any of them and their Related Parties arising out of any statement made by [ILR] or its Related Parties prior to the date of this agreement (including but not limited to any claim for malicious falsehood).

...

Party: means [ILR] or [the STS parties], and Parties means [ILR] and [the STS parties].

Receipt date: means the date on which the payment made pursuant to clause 3.1(a) is received in full in the prescribed amount.

Related Parties: means a Party's parent, subsidiaries, assigns, transferees, representatives, principals, agents, officers or directors.

Trade Marks: means the UK registered trade marks with numbers 3258990, 3261007 and 3334554, the signs protected thereby and the Unregistered Marks.

Unregistered Marks: means the signs "SP", "PUNCH" and "SAFETY", where used as trade mark, brand or badge of origin.

3. The Defendants' obligations

- 3.1 In consideration of [ILR]'s obligations in clause 4, [the STS parties] shall
- (a) ... pay [ILR] the sum of ZAR 1,200,000 ...
 - (b) Within 14 days from the date of this agreement, cease to:
 - (i) make any use of the Trade Marks
 - (ii) make any use of any confusingly similar sign to any of the Trade Marks for the same or similar goods; and
 - (iii) pass themselves off as authorised or otherwise connected with [ILR]
- 3.2 ... [STSH] shall assign the following trade marks to ILR
- (i) UK trade mark number 3258990 for safeTpnch in classes 9 and 12; and
 - (ii) UK trade mark number 3261007 for SafePunch in class 9.
- 3.3 ... STSH shall transfer [the domain name safetpunchworld] to [ILR].

4. The Claimant's obligations

- 4.1 In consideration of [STS]'s obligations in clause 3, [ILR] shall:
- ...

- (b) within nine (9) calendar months of the Receipt Date, cease to use [the Pictograms] and will use pictographs created for [ILR] thereafter instead ...

5. All Parties' obligations

... as part of this Agreement each Party irrevocably undertakes on its own behalf not to publish any comment to any third party regarding the other party which is false and defamatory within the meaning of Section 1 of the Defamation Act 2013 as amended, extended or re-enacted from time to time. For the purpose of this clause "publish" includes sharing on public or private social media and communications with persons within the industry whether by telephone, email, letter or otherwise.

...

7. Release

... this agreement is in full and final settlement of, and each Party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the Parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with:

- (a) the Dispute;
 - (b) the Additional Claims;
 - (c) the underlying facts relating to the Dispute and the Additional Claims; and
 - (d) the Proceedings
- (collectively, the "Released Claims").

...

8. Agreement not to sue

8.1 ... each party agrees, on behalf of itself and on behalf of its Related Parties, not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the other Party or its Related Parties any action, suit or other proceeding concerning the Released Claims, in this jurisdiction or any other.

8.2 Clause 7 and clause 8.1 shall not apply to, and the Released Claims shall not include, any claims in respect of any breach of this agreement."

10. In accordance with the Settlement Agreement, a Tomlin Order was filed and sealed on 14 September 2020, and STS transferred to ILR ZAR 1,200,000.

Claim

11. This claim was issued on 6 April 2021. It concerns written statements made by ILR or its new distributor, PLR Distribution (PTY) Ltd ("PLR"), (whether the statements were made by ILR or PLR is an issue in the claim) about STS and its devices to STS's customers and others.

12. The particulars of claim specifically complain of:

- (1) A letter written on 18 January 2021 to one of STS’s most significant customers, Alexander Dennis Ltd (“ADL”), which is the UK’s largest bus and coach manufacturer, and to its parent company (paras 20 to 25 PoC);
 - (2) An email copied to ADL on 21 February 2021 (paras 26 to 30 PoC);
 - (3) An email and letter sent to the operators of an industry website, Sustainable Bus, on 4 March 2021 (paras 31 to 37 PoC: the “Sustainable Bus Email” and “Sustainable Bus Letter”); and
 - (4) A “letter/press release” making allegations of “design theft and subsequent breach of contract” by STS, sent to STS’s legal representatives on 17 March 2021 with a covering letter stating that it had been “distributed to various Public transport publications and prior Safe-T-Punch clients, to whom your client STS has lied and hoodwinked” (paras 38 to 44 PoC).
- (collectively “the Communications”)
13. STS accepts that the issue as to whether ILR or PLR are responsible for the Communications is unsuitable for summary determination for those listed at (1), (2) and (4) above; but seeks summary judgment in respect of the Sustainable Bus Email and Sustainable Bus Letter.
 14. There is no dispute as to the following factual matters. As set out on its website at www.sustainable-bus.com:

“Sustainable Bus is the only international media fully focused on clean buses and sustainability in the field of public transport. It belongs to the editorial platform of the publishing house Vado e Torno Edizioni and devotes attention to product news, tenders, experiences, case studies, market trends, international exhibitions and congresses.

Sustainable Bus is a network composed by a website daily updated with the last news, by weekly newsletters and by social network channels, in order to meet the needs of a broad and diverse public. It is media partner of UITP, Busworld, Zero Emission Bus Conference.”
 15. In about March 2021 Sustainable Bus published an article on its website about STS’s devices (sold under the brand “SnapXit”).
 16. The Sustainable Bus Email was sent on 4 March 2021 by Pia le Roux (from pia@ilrsafety.co.za, with Mr van Spaendonck at hein@safe-t-punch.co.za and Ivan le Roux at ivan@safe-t-punch.co.za copied in):

“We, the owners of the copyrighted designs for Safe-T-Punch (and therefore SnapXit) are concerned that you have published an article showcasing a patented product that is copied in China.”
 17. The email attached an undated letter on ILR headed notepaper:

“We would like to inform you that SnapXit is a direct copy of the original equipment called Safe-T-Punch™ whose copyright and patent is owned by ILR Safety (please visit www.ilrsafety.co.za and www.safe-t-punch.co.za).

Snapxit (owned by Safe-T-System) has stolen our drawings and designs and is making copies of our product in China. Our product is Safe-T-PunchTM and has been in production since 1991. SnapXit has only existed for a few months (he has created many other names for his **copied product** prior to this in an attempt to evade legal action).

We kindly request you to retract this article as **these designs are stolen from the original manufacturer, ILR Safety CC, in South Africa.**

...We hope that your magazine, which represents SUSTAINABILITY, will act ethically and honestly and retract your support and exposure of the **stolen designs.** We will be happy to hand over documentation **to prove our IP ownership.** Please note that we reserve our rights in this regard.”

(passages in bold are those particularly complained of)

18. The particulars of claim summarises their effect as being that:
 - (1) STS’s devices are unlawful copies of ILR’s devices, which infringe ILR's IP rights;
 - (2) In consequence, ILR are or may be able to prevent or interfere with the distribution and sale of STS’s devices by instigating legal proceedings.
19. The claim itself is for breach of clause 5 of the Settlement Agreement, it being alleged that the Communications are false and defamatory within the meaning of section 1 of the Defamation Act 2013.
20. The PoC alleges that both statements set out in paragraph 18 above are false, on the grounds that any IP rights owned by ILR either do not apply to STS’s devices or have expired. This is not, however, a ground on which summary judgment is sought.
21. The PoC also alleges that the statements are false on two further grounds, on both of which summary judgment is sought. Both involve questions of the meaning and scope (interpretation) of the relevant clauses in the Settlement Agreement.
22. First, it is said that ILR is precluded by clauses 7 and 8 of the Settlement Agreement from complaining about
 - (1) STS’s devices, since they formed part of the underlying facts relating to the Dispute and the Additional Claims, or
 - (2) any allegedly actionable acts or activities of STS relating to its devices, including breach of contract, before the date of the Settlement Agreement, since any claims or complaints in respect of them were released and forever discharged by the Settlement Agreement.It is said, therefore, that it is not open to ILR to make the statements complained of and contend that they are true.
23. Secondly, it is said that ILR is precluded by clauses 7 and 8 of the Settlement Agreement from bringing proceedings in respect of STS’s devices. Any actions, claims, rights, demands or set-offs, in any jurisdiction, whether or not known to ILR at the time, were, it is said, released and forever discharged by those provisions. Accordingly, it is said, ILR are not able to prevent or interfere with the distribution and

sale of STS's devices by instigating legal proceedings, and statements that they are so able are false.

24. The relief sought includes injunctions preventing ILR from
- (1) making any statements stating or implying that STS acted unlawfully or actionably, or that their products were unlawful, infringed any of the Defendant's rights, ... before the date of the Settlement Agreement;
 - (2) otherwise breaching clause 5 of the said Settlement Agreement by publishing any comment to any third party regarding the Claimants or Mr Iversen which is false and defamatory within the meaning of Section 1 of the Defamation Act 2013.

ILR's Defence and Counterclaim

25. ILR's Defence is rambling, diffuse and inconsistent (and includes 11 attachments totalling 129 pages). The following allegations can be discerned from it, and ILR's Response dated 7 June 2021 to STS's Request for Further Information:
- (1) ILR owns patents, copyright in design drawings, design registrations, and know how and confidential information relating to ILR's devices;
 - (2) STS in making and selling its devices has infringed and continues to infringe those rights;
 - (3) STS is also bound by clause 5.4 of the Distribution Agreement, and accordingly is obliged not to use ILR's Know-How and Confidential Information;
 - (4) Clause 5.4 survives the termination of the Distribution Agreement and the Settlement Agreement;
 - (5) The Settlement Agreement was entered into under economic duress and is void or voidable;
 - (6) STS is itself in breach of the Settlement Agreement;
 - (7) ILR admits that the Communications were sent and that they contain statements having the effect summarised in paragraph 18 above;
 - (8) Those statements are true and ILR is entitled to contact STS's customers and industry publications to make such statements.
26. As to the breaches of the Settlement Agreement alleged by ILR, these are said to be:
- (1) by making exact copies of ILR's products using its drawings, passing off STS's products as ILR's, notwithstanding its branding – in breach of clause 3.1(b)(iii);
 - (2) not disclosing to ILR at the time of entering into the Settlement Agreement, that STS were already, in breach of the Distribution Agreement, making their own product in December 2017 –in breach of clause 21;
 - (3) taking action in South Africa to claim ownership of patents owned by ILR – in breach of clause 8;
 - (4) failing to transfer the domain name Safetpunch.world to ILR – in breach of clause 3.3;
 - (5) statements recorded in an email dated 5 February 2021 from Mr Iversen to his father – in breach of clause 5.
27. ILR's Counterclaim alleges:
- “The products manufactured by [STS] in China are “Patented” in Europe and China and are stolen copies of the original drawings of the device by [ILR].”

28. The remedies sought include:

- “56. The injunction to sell and distribute any and all further product as copied from the stolen copyright drawings.
57. Injunction to procure and import any further product made in China which are listed as patented or have a design registration in China.”

29. The Response to the RFI however states:

“[STS] infers that we intend to bring a claim for patents and/or registered design to the courts which is neither relevant nor fact. The reason for the counterclaim is in line with the **intent of the settlement agreement** and clearly it cannot be disputed that it was to stop duress and to stop [STS] from abusing the Defendants know-how, intellectual property and copyrights.”
(emphasis as in original)

30. STS has served a Reply and Defence to Counterclaim responding in detail to ILR’s case, to which I return as necessary below.

Grounds of the application

31. The grounds of the application are set out in the witness statement dated 18 June 2021 of Rosemary Burbidge. They are limited to:

- (1) the points taken by ILR in its Defence and Counterclaim and Part 18 Response are precluded by the release in the Settlement Agreement – so that the Counterclaim should be struck out under CPR 3.4(2)(a);
- (2) the Counterclaim discloses no reasonable grounds for bringing the claim for the reasons given in paragraphs 23 to 28 of the Reply and Defence to Counterclaim – so should be struck out under CPR 3.4(2)(b);
- (3) The Settlement Agreement precludes ILR from making the statements in the Sustainable Bus Email and Letter; and ILR has no real prospect of showing that the statements were not made by it – so STS should be granted summary judgment in respect of that claim.

Legal principles

Striking out and summary judgment

32. CPR 3.4(2) provides, so far as relevant:

“3.4— Power to strike out a statement of case

- (2) The court may strike out a statement of case if it appears to the court—
 - (a) that the statement of case discloses no reasonable grounds for bringing ...the claim;
 - (b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings;”

33. CPR 24.2 provides, so far as relevant:

“The court may give summary judgment against ... a defendant on the whole of a claim or on a particular issue if –

- (a) it considers that –

...

- (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

34. The Practice Direction to Part 24 provides at para 2(3)(a):

- “(3) The application notice or the evidence contained or referred to in it or served with it must –
 - (a) identify concisely any point of law or provision in a document on which the applicant relies”

35. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including *AC Ward & Sons v Catlin (Five) Limited* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477. Since ILR is an unrepresented party, I set them out:

- (1) The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
- (2) A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- (3) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;
- (4) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
- (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
- (7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the

case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

36. As to striking out for no reasonable grounds, as noted in the White Book (para 3.4.21), there is a considerable overlap between the court's powers under CPR Part 24 and r.3.4; and the court has a discretion to treat an application made under CPR 3.4 (2)(a) as if it were an application under Part 24. In this case, there is no practical distinction in the test to be applied.

Interpretation of the Settlement Agreement

37. STS's counsel did not refer me to any authorities on the principles to be applied when determining the meaning and effect of the Settlement Agreement.
38. The first principle, derived from *BCCI v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [26] is that no special principles apply to the interpretation of contractual releases, and they are governed by the general principles applicable to all agreements.
39. As those principles, the judgment of Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 contains at [17]-[19] a convenient summary:

“17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

- (i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed,

and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

- (ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;
- (iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;
- (iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;
- (v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;
- (vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."
40. As to the approach to be taken to the overall purpose of a general release, this is found in the speech of Lord Nicholls in *BCCI v Ali* at [27] to [28]:
- "27. ... The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given, the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.
28. This approach, however, should not be pressed too far. It does not mean that, once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had

undermined the foundations of his neighbouring partner’s house. Echoing judicial language used in the past, that would be regarded as outside the “contemplation” of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not “under consideration”.”

Duress

41. STS’s counsel referred me to the recent decision of *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40, [2021] 3 W.L.R. 727, in which the Supreme Court confirmed the elements of duress:
 - (1) an illegitimate threat (or pressure exerted) by the defendant;
 - (2) that that illegitimate threat (or pressure) caused the claimant to enter into the contract, and
 - (3) the claimant must have had no reasonable alternative to giving in to the threat (or pressure).(see [78]-[79])
42. Duress may be exerted by lawful or unlawful acts. *PIAC* itself was concerned with whether lawful act duress exists and, if so, its scope: [62]. The dispute was as to the legitimacy of a lawful threat or pressure. It was not in dispute that the claimant could show causation, and that it had no reasonable alternative to giving in to the threat: [80].
43. In this claim, ILR alleges pressure exerted as result of unlawful acts, namely, in breach of contract, withholding payment for devices supplied, and unlawfully selling devices which infringed ILR’s IP rights. Thus, the passages in *PIAC* to which STS’s counsel referred me as to the legitimacy of lawful acts are not relevant to this claim.

“Serious harm” within the Defamation Act 2013

44. As noted, clause 5 of the Settlement Agreement refers to s.1 Defamation Act 2013, which provides:
 - “1.— Serious harm
 - (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
 - (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.”
45. The leading case on section 1 (to which I was not referred) is the Supreme Court decision of *Lachaux v Independent Print Ltd v Media Lawyers Association* [2019] UKSC 27, [2020] A.C. 612, in which it was held that the application of section 1 is to be determined by reference to the actual facts about its impact, and not just to the meaning of the words: [12].
46. At [14], this was explained by Lord Sumption (with whom the others agreed):

“section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it “has caused or is likely to cause” harm which is “serious”. The reference to a situation where the statement “has

caused” serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is “likely” to be caused.”

47. At [15], he discussed section 1(2):

“Section 1(2) is concerned with the way in which section 1(1) is to be applied to statements said to be defamatory of a body trading for profit. It refers to the same concept of “serious harm” as section 1(1), but provides that in the case of such a body it must have caused or be likely to cause “serious financial loss”. The financial loss envisaged here is not the same as special damage, in the sense in which that term is used in the law of defamation. Section 1 is concerned with harm to reputation, whereas (as I have pointed out) special damage represents pecuniary loss to interests other than reputation. What is clear, however, is that section 1(2) must refer not to the harm done to the claimant's reputation, but to the loss which that harm has caused or is likely to cause. The financial loss is the measure of the harm and must exceed the threshold of seriousness. As applied to harm which the defamatory statement “has caused”, this necessarily calls for an investigation of the actual impact of the statement. A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstances and the reaction of those to whom it is published. Whether that financial loss has occurred and whether it is “serious” are questions which cannot be answered by reference only to the inherent tendency of the words.”

Application to strike out ILR’s Counterclaim

Abuse of process

48. STS’s counsel submitted that all of ILR’s claims about its devices were self-evidently “claims arising out of or connected with ... the underlying facts relating to the Dispute”, so that clause 7 of the Settlement Agreement discharged and released them, and, accordingly, he said, clause 8 prohibits ILR from bringing further claims in respect of them by ILR.

49. Before turning to the meaning and effect of clause 7, it is necessary to consider ILR’s arguments that it is not bound by the Settlement Agreement.

Settlement Agreement entered into under duress

50. ILR assert in a number of places that the Settlement Agreement was entered into (in July 2020) ‘under severe duress’ (e.g. Defence para 16). The factual basis of the allegation is that:

- (1) STS deliberately placed a large order for ILR’s devices for which it then deliberately did not pay;
- (2) In breach of the non-compete clause, STS sold its devices, which deprived ILR of its usual trading income;
- (3) STS made “unsubstantiated counterclaims” in the first claim, driving up ILR’s litigation costs.

51. ILR then asserts that the fact that the Settlement Agreement was “forced upon” it by STS causes it to consider it null and void.
52. STS’s counsel criticised the Defence for not setting out the elements of its duress claim as identified in *PIAC*, but in my judgment, the elements are sufficiently identified in the Defence, particularly paragraph 16.
53. As to (1), this is unsupported by any detailed evidence (such as accounts) as to actual financial pressure i.e. as to ILR’s financial position, and the impact of the non-payment on that position: it is a bare assertion. In particular, since the relevant sum was worth about £67,000, there is no evidence of the impact of this shortfall on ILR’s ability to conduct litigation in the IPEC. The only evidence is a letter dated 18 January 2021 written by Mr van Spaendonck stating that “in September 2019 the company has again turned profitable”, which indicates that at that time (some 9 months before the Settlement Agreement) ILR was not under financial pressure. So on the available evidence, I am not satisfied that ILR has a real prospect of showing it was under financial pressure at the relevant time.
54. ILR’s primary difficulty, however, is one of causation. Since the claim for that sum was effectively undisputed, ILR could have sought summary judgment in respect of it, and recovered the funds at an early stage.
55. As to (2), ILR has no real prospect, in my judgement, of showing that STS’s trading activities in its devices were carried out to exert pressure on ILR, as opposed to for its own commercial purposes. As to (3), ILR provides no details as to why the counterclaims were unsubstantiated; they do not plainly lack merit on their face. Even if they were, bringing them was not in my judgment an illegitimate means of exerting pressure on ILR.
56. ILR has, therefore, in my judgment no real prospect of showing that its entering into the Settlement Agreement was caused by illegitimate pressure exerted by STS.
57. In addition, ILR’s position in relation to the Settlement Agreement has been inconsistent:
 - (1) In its answer to Request 7 of STS’s RFI, ILR states that the counterclaim is founded on the Settlement Agreement, which it understood would stop infringements taking place after settlement;
 - (2) ILR alleges various breaches of the Settlement Agreement in its counterclaim – set out in para 26 above – thereby affirming it;
 - (3) ILR acknowledged on 17 May 2021 that it was itself in breach of the Settlement Agreement by not ceasing to use the Pictograms within 9 months. This resulted in an agreed 3 months extension for compliance, again affirming and varying the Settlement Agreement.
58. It follows from the above, that, in my judgment, ILR has no real prospect of showing that STS is not entitled to rely upon the Settlement Agreement.

Meaning and effect of clause 7 of the Settlement Agreement

Natural and ordinary meaning

59. As to the words “the underlying facts”, in their natural and ordinary meaning they refer to the factual matters which formed the basis of the first claim and “the Additional Claims”. These are, of necessity, facts existing, or events which had already occurred at the date of the Settlement Agreement. Indeed, the definition of “the Additional Claims” expressly confines the claims to those arising out of statements made prior to the Settlement Agreement, so that the underlying facts of the Additional Claims necessarily exclude statements made after it.
60. The underlying facts relating to the Dispute clearly include the making and selling by STS of its devices of which complaint is made in the first claim. The question arises whether it extends to future acts of making and selling those devices occurring after the Settlement Agreement.
61. Clause 7 also includes a provision that the released claims are ones “whether or not presently known to the Parties or to the law” – again, this is apt to refer to claims arising out of facts existing at the date of the Settlement Agreement; and not apt (or at least, less apt) to refer to entirely new claims arising after the Agreement – because whether or not something can be known is premised on its existing to be known about.
62. This is particularly relevant in this case because of the nature of claims for infringement of IP rights: each infringing act gives rise to a new cause of action. The question therefore arises as to whether, in addition to releasing all claims arising from infringing acts at the date of the Settlement Agreement, it also releases claims based on future infringing acts i.e. occurring after the Settlement Agreement.
63. I note that clause 7 refers to claims that the parties “may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with ... the underlying facts relating to the Dispute.” The word “hereafter” looks to the future and indicates claims arising after the Agreement.
64. In addition, the expression “underlying facts” may also have a meaning which is temporally neutral: i.e. the sale of its devices by STS (at whatever time this occurs). This is, it seems to me, a more natural meaning in the context of a settlement agreement.

Other relevant provisions

65. One turns therefore to other provisions of the Agreement. Clause 8.2, by providing that claims for breach of the Settlement Agreement are not within the Release, supports the conclusion that claims arising after the Agreement are intended to be included, since this express provision is required to exclude them.

Overall purpose of the clause and the contract

66. The overall purpose of the clause and the Agreement is recorded in the recitals set out above as having agreed terms for full and final settlement of the Dispute, and wishing to record those terms in the Agreement.

Facts and circumstances known or assumed by parties at the date of the Agreement

67. These are primarily to be found in the statements of case in the first claim. It is clear from these that ILR knew:
- (1) that STS was arranging the manufacture of and selling its devices;
 - (2) that it intended to continue to make and sell its devices.
- Indeed, the first claim included a claim about STS making and selling its devices (as being in breach of the non-compete clause). ILR must in my judgment be taken to have known of any claims for infringement of other IP rights held by it arising from these acts – particularly since it was advised by specialist IP counsel and solicitors.
68. In particular, STS relies upon the fact that STS’s devices about which ILR now complains are the same devices of which it complained in the first claim. ILR’s Part 18 Response lists STS’s devices complained of. Paragraph 6 of the Reply contains a table listing those devices, in each case with a photograph of the device and, in the next column, a photograph from the first claim of what is said to be the same device. It is not possible to discern from the photographs themselves whether this is so.
69. However, ILR accepts that STS’s devices are materially unaltered from those with which the first claim was concerned. Paragraph 19 of the PoC alleges

“Pursuant to the obligations in clause 3.1(b) [of the Settlement Agreement], [STS’s devices] were renamed as “SnapXit” as aforesaid, but have otherwise remained materially unaltered.”

to which ILR responds at para 19 of its Defence

“They are materially unaltered and hence they are unlawful and illegal.”

70. STS also relied upon the fact that the sum paid under the Settlement Agreement was ZAR 1.2 million (about £56,379 in July 2020), whereas only ZAR 867,000 (about £40,734 in July 2020) was claimed in the first claim for devices supplied by ILR to STS. However, there is no evidence as to how this amount was arrived at, and in circumstances where STS was conceding any entitlement to the Trade Marks, the additional amount could reflect, for example, a contribution to ILR’s costs of the first claim.

Commercial common sense

71. In my judgment (and bearing in mind the cautionary words of both Carr LJ and Lord Nicholls), in this case commercial common sense points towards a settlement of all claims arising out of the sale of its devices by STS. The parties cannot in my judgment have intended that all claims for infringement of IP rights in respect of the manufacture and sale of STS’s devices were released; but claims in respect of these acts in the future were not. Commercial common sense points in my judgment towards resolution of all claims in respect of STS’s manufacture and sale of its devices i.e. to a meaning of “underlying facts” that does not carry a reference to a specific time when they are happening.
72. I therefore conclude that ILR’s counterclaim falls within the Released Claims within the meaning of clause 7 of the Settlement Agreement, so that it has released those claims under the Settlement Agreement, and is prohibited from bringing the counterclaim.

73. STS’s counsel also sought to rely upon the principles of *Henderson v Henderson* abuse of process by reference to the well-known cases of *Johnson v Gore Wood & Co (No. 1)* 2 A.C. 1 and *Aldi Stores Ltd v WSP Group Plc* [2008] 1 W.L.R. 748, referring me to the commentary to the 2021 White Book at para 3.4.5 where these principles are summarised. As noted, in *Aldi Stores*, the Court of Appeal confirmed that there is no distinction in law between cases where the original action concludes by settlement and where it concludes by judgment.
74. He submitted that ILR is attempting to re-litigate issues which should have been raised in the first claim; and that, adopting the broad merits-based judgment, taking account of all the public and private interests involved and all the facts of the case as required by *Johnson v Gore Wood*, it would plainly be unjust to allow ILR now to raise other complaints about STS’s devices: that would, he said, amount to clear oppression of STS by successive suits in respect of the same subject-matter.
75. As to this, it is in my judgment a point which should have been (and is not) identified in Ms Burbidge’s witness statement in compliance with CPR PD 24, para 2(3)(a). STS is not therefore entitled to rely upon it.
76. In addition, I note that the principles to be derived from *Johnson v Gore Wood* in *Aldi* include:
- “(iii) The burden of establishing abuse of process is on [the defendant in the second claim] (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.”
77. The issues which the court is required to address in deciding whether a claim is an abuse of process are not in my judgment, ones which are appropriate for summary judgment, being both fact based and multi-factorial.

No reasonable grounds for bringing the claim

78. STS submitted that the underlying causes of action in the Counterclaim are in any event hopeless, so that it should therefore additionally or alternatively be struck out under CPR 3.4(2)(a).

ILR’s case

79. The patents relied upon by ILR are not expressly identified in the Counterclaim. However, Annex II of the Defence and Counterclaim is a list of “Designs” and patents relied upon by ILR. This document was attached to a letter dated 19 April 2018 written by Spoor & Fisher (ILR’s South African patent attorneys).
80. As to patents, two would appear to have been granted. The first, granted in South Africa (PA109555/ZA) expired at the end of 2011, so that no claims can be brought based on it. The second (PA 160390/US) is listed as “Allowed”, and I assume that it is

valid and in force. All the other patents are listed as pending. However, this reflects the position in 2018.

81. Thus, the evidence includes a Patent Register Sheet recording that the South African patent 2016/07965 (listed as pending in Annex II) was granted on 25 July 2018; and indeed is the subject of a dispute as to ownership in the South African courts. The position as to the other patents listed as “pending”, and in particular, whether and if so, which ones have been granted since 2018, is unclear.
82. As to registered designs, the Annex II list includes 7 registered designs, which are said to have either been registered or granted.
83. As to copyrights, ILR’s evidence includes a “Copyright Assignment Agreement” dated 28 June 2019 in which the “Copyrighted Works” assigned to it are defined (at clause 1.2) as

“the artistic works being commissioned by [ILR] including engineering drawings, instruction stickers and other graphic artwork”

copies of which are said to be annexed to the assignment, but in the bundle are so poorly copied as to be virtually indecipherable in most cases.

84. In relation to these, STS relies upon s.51(1) Copyright Designs and Patents Act 1988, which provides that:

“51.— Design documents and models.

(1) It is not an infringement of any copyright in a design document or model recording or embodying a design for anything other than an artistic work or a typeface to make an article to the design or to copy an article made to the design.

...

(3) In this section—

“*design*” means the design of the shape or configuration (whether internal or external) of the whole or part of an article, other than surface decoration; and “*design document*” means any record of a design, whether in the form of a drawing, a written description, a photograph, data stored in a computer or otherwise.”

85. However, these provisions reflect the fact that under UK law (as under EU law) protection for designs is by unregistered design right, rather than copyright; and do not show that ILR has no protectable IP rights in the design drawings it relies upon.
86. If, therefore, I had not held that ILR was precluded by the Settlement Agreement from bringing its counterclaim, I would not have struck out the counterclaim, but given ILR a final opportunity properly to particularise it and identify the rights it relies upon. I am supported in this conclusion by the fact that STS, in relation to its summary judgment application, reserved for trial its position that its devices are and were not unlawful and do not and did not infringe ILR’s IP rights.²

² STS’s skeleton argument fn 20

Application for summary judgment

87. STS's skeleton argument identifies clause 5 of the Settlement Agreement as the basis on which summary judgment is sought in respect of the Sustainable Bus Email and Letter.
88. The elements of the claim under this clause are:
- (1) publishing of a comment
 - (2) to a third party within the industry
 - (3) by ILR
 - (4) falsity of the comment
 - (5) the publication causing or being likely to cause STS serious financial loss

Publishing

89. There can be no real doubt that sending the Sustainable Bus Email and Sustainable Bus Letter was publishing to a third party within the meaning of clause 5, as the operators of Sustainable Bus are within the industry.

Whether ILR published

90. As to whether the publishing was by ILR, the Sustainable Bus Email was sent by one of ILR's two directors, Pia le Roux, from her ILR email address (pia@ilrsafety.co.za). The footer to the email includes two references to it originating from ILR.
91. The Sustainable Bus Letter is written on ILR's headed paper and is expressly signed by "Mrs Pia le Roux, Director, ILR Safety".
92. ILR's Defence responds to the allegation (made at para 37 of the PoC) that the statements were made by saying that an incorrect email address was used in 'an honest mistake' and that the statements were made by PLR, not ILR (Defence, para 37). There is no articulation of the basis on which it is said that the statements were made by PLR or what the mistake was. The Defence does not engage with the use of ILR's headed paper or the way the Letter was signed. In my judgment, ILR has no real prospect of showing that the statements were not made by it.

Falsity

93. The question of the falsity of the statements in the Email and Letter requires careful consideration.
94. STS submitted that the statements to the effect that its devices are unlawful copies of ILR's devices, which infringe ILR's IP rights are false, because, by clauses 7 and 8 of the Settlement Agreement, ILR has expressly relinquished the right to complain that they are unlawful or infringe its rights.
95. I do not accept that on a proper construction of clauses 7 and 8, ILR is precluded from complaining to third parties. Those clauses are concerned with claiming against STS, not complaining to STS or to third parties. It is presumably for this reason that the Settlement Agreement includes clause 5, which provides as to what cannot be said to third parties.

96. STS did not seek to argue that that ILR had no real prospect of showing that its devices were and are unlawful, and infringed and continue to infringe ILR's IP rights. It accepted that these were matters for trial.
97. However, STS also submitted that the Sustainable Bus Email and Letter also make the false statement that ILR are or may be able to prevent or interfere with the distribution and sale of STS's devices by instigating legal proceedings. Such statements would be, it submitted false because ILR is precluded from instigating legal proceedings by the Settlement Agreement.
98. As to this, I have held that ILR is prevented from bringing claims in respect of STS's devices for infringement of its IP rights against STS. However, the Settlement Agreement does not preclude claims against third parties, and ILR cannot in my judgment be said to have no real prospect of success in such claims.
99. In addition, I do not accept that any of the statements in the Email and the Letter state that ILR is entitled to bring proceedings against STS. They refer to ownership of IP rights, and to copying and stealing, but do not refer to bringing proceedings.

Serious harm to STS's reputation: "has caused or is likely to cause the body serious financial loss"

100. STS relied upon para 47 of PoC:

"Each of the statements complained of has caused or is likely to cause serious harm to the reputation of, and serious financial loss to, STSH/STSL. Without prejudice to the generality of the foregoing, the stated intention behind the making of the statements is to cause customers of STS to cease doing business with STS and to do such business with ILR/PLR, thereby causing serious financial loss to STS."

101. Ms Burbidge's statement includes, in her description of the claim as a whole, a generalised allegation that ILR's statements have caused STS to lose customers and incur "considerable damage". However, she gives no detail as to this, and in particular, no detail or explanation of how the Sustainable Bus Email and Sustainable Bus Letter are said to have caused STS damage,
102. It will be apparent from the passages in *Lachaux* that whether serious harm has occurred is a factual matter, inherently unsuitable for summary determination. There is no real evidence to support STS's allegations of serious harm and serious financial loss; and if there were, it would be evidence that would need to be tested at trial. This is particularly so in the case of Sustainable Bus, which is not even a customer of STS, and where there is no evidence that the statements made to it were further published by it.
103. Accordingly, I reject STS's submission that ILR is clearly in breach of clause 5 of the Settlement Agreement, and its submission that ILR has no real prospect of successfully defending this element of the claim.

Conclusion

104. For the reasons set out above therefore, I will strike out the counterclaim, but the claimant's application for summary judgment on part of its claim is dismissed.