



Neutral Citation Number: [2023] EWHC 755 (IPEC)

Claim No: IP-2021-NCL-000002

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN NEWCASTLE UPON TYNE**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

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

Date: Tuesday, 25 April 2023

**Before:**

**MS. PAT TREACY**

(sitting as a Deputy High Court Judge)

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**Between:**

- (1) Photobooth Props Limited  
(2) Lily's Prints Limited

**Claimants**

- and -

- (1) NEPBH Ltd  
(2) Quinn UK Limited  
(3) Claire Quinn  
(4) Reece Quinn  
(5) Michael Quinn  
(6) Your Print Supplies Limited  
(7) Your Photobooth Props Limited  
(8) Michael Connor Quinn

**Defendants**

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**APPROVED JUDGMENT**

*This judgment was handed down remotely at 10.30am on 25 April 2023 by circulation to the parties or their representatives by email and released to the National Archives.*

## **DEPUTY JUDGE TREACY:**

### **Overview**

1. This is a claim for copyright infringement, breach of contract, and fraudulent misrepresentation.
2. This judgment deals with the Claimants' application for an 'unless' order in view of the Defendants' failure to pay by the due date (2 March 2023) an interim payment ordered in respect of the costs for certain interim applications. The applications in question were dealt with at the initial CMC in February 2022.
3. The order sought is that, unless the Defendants make the interim payment by 4pm seven days from the date of the order, the Defence of all Defendants shall be struck out.
4. The Claimants initially asked the Court to make the order sought without a hearing. The Defendants requested a hearing and the Claimants subsequently reiterated their request to have their application dealt with without a hearing.
5. I have decided not to make the order sought by the Claimants. My reasons are set out below. I therefore consider this to be a case in which, exceptionally, the Court can dispose of a contested application without the consent of all the parties as this is the appropriate and proportionate course.
6. As the Defendants have not agreed that the Court should proceed without a hearing, CPR 3.3(5) applies. A party affected by the order may apply to have it set aside, varied or stayed. The order to be drawn up must contain a statement setting out this right.

### **Relevant procedural history**

7. The claim was brought on 29 June 2021. The original CMC was heard by Recorder Kimbell KC, sitting as an IPEC judge, on 24 February 2022. The trial date was set for November 2022 at which the necessary directions to trial were given. Three further interim applications were also heard.
8. Recorder Kimbell KC's written judgment was given on 1 April 2022. The subsequent approved judgment on costs recorded:

*“The Claimants’ application was under CPR 24.2(a)(ii) for judgment on the pleaded issues of substance, ownership and infringement by the Sixth and Seventh Defendants in respect of eight Assigned Works and five New Works (as defined in the Particulars of Claim). The application succeeded only in respect of the New Works”.*

9. The Claimants also succeeded on both of the Defendants’ applications.
10. The Claimants sought immediate payment of costs under CPR 63.26. This was refused in a judgment handed down on 27 June 2022.
11. The trial had been listed to take place in early November 2022, about four months after that judgment but, owing to the illness of one of the Defendants, was adjourned. The trial will now take place in November 2023.
12. A further CMC took place on 2 February 2023 to address the relisting of the trial, consequential directions and an application from the Claimants for an interim costs order in respect of the issues on which they had succeeded.
13. In brief, the Claimants’ position was that the applications in respect of which an interim award was sought were made around a year before the second CMC and the relevant judgment given around ten months before that hearing. The order reserving costs was made when the parties and the Court expected the trial to take place in less than six months’ time, with costs dealt with shortly afterwards.
14. The Claimants argued that, owing to the postponement of the trial, they now had no prospect of recovering any money in respect of their success at the interim stage until at least 18 months after the initial successful application was made. This was said to be a very unusual circumstance unforeseen by the IPEC rules, at odds with the overall design of the IPEC regime and contrary both to the spirit of IPEC and to the overriding objective. This change in circumstances was argued to be sufficiently material to engage the Court’s inherent ability to vary interim orders and sufficiently unusual to justify a departure from the normal rule under CPR 63.26(1) and to exercise the Court’s remaining general discretion as to costs under CPR 44.

15. The Claimants also referred to evidence given by the Defendants of their declining financial position. The Claimants did not accept that that evidence painted a full picture of the Defendants' financial position.
16. The Defendants, who were unrepresented, did not make submissions on the legal issues.
17. Judgment was given orally at the end of the hearing. Regrettably, the approved judgment is not yet available.
18. In brief, having been taken to various relevant authorities by counsel for the Claimants, I considered that the changes in the circumstances since Recorder Kimbell KC's Order reserving the costs of the interim applications were sufficiently significant to justify a variation in that order and that the situation justified the exercise of the residual discretion under CPR 44.2.
19. That conclusion was based on the substantial and unforeseen delay which faced the Claimants, going far beyond the usual timeframe within IPEC. Such a delay would not have been in the mind of Recorder Kimbell KC or the parties when the original order was made.
20. In making that decision I did not take the financial position of the Defendants into account. There was evidence from both parties on that issue which it was not possible to consider in detail at the time. The Claimants' position was that the Defendants' witness evidence did not present the full picture, although the Claimants accepted that the financial health of the Defendants appeared to be in decline.
21. I declined to order costs summarily assessed, as the Claimants had primarily sought, preferring to follow the approach adopted by Recorder Campbell KC in *Scomadi Ltd v RA Engineering Co Ltd* [2017] EWHC 2907 (IPEC) (followed in *Madine (t/a Nico) v Phillips (t/a Leanne Alexandra)* [2018] 1 Costs L.O. 103 by Recorder Michaels). That enabled the claimants to have the opportunity to recover some of the costs that they had incurred, in the light of the unusual situation, while avoiding the risk that a summary assessment of an interim costs award might have significant effects on the overall costs position.

22. I therefore ordered an interim payment on account in respect of the Claimants' costs in defending the two applications made by the Defendants, pending the costs assessment process to take place after the trial. That order was made subject to the undertaking offered by the Claimants' counsel that the Claimants would repay some or all of the interim payment if that ultimately became necessary after trial (a similar undertaking had been given in both *Scomadi* and *Madine*).
23. The approval and sealing of the order following the hearing on 2 February has been delayed pending finalisation of the trial date, but I note that the draft order provided to the Court on 10 February 2023, and to the Defendants on the same day, contains an oversight as it does not reflect the undertaking referred to above.
24. During the hearing on 2 February 2023, the Defendants asked for a direction that they should be given time to pay or that any award should be payable in instalments. Mr Michael Quinn submitted orally that the Court should take into consideration that the delay in the trial caused by his ill-health was not a matter over which he had any control and stated that the Defendants would have very significant difficulties in paying costs at this stage. As mentioned above, the Defendants had provided some (contested) witness evidence about their financial situation. However, no application had been made, nor was there any suggestion as to the level at which instalments might be paid or the timing of such instalments.
25. The Claimants' counsel submitted that it would be premature to grant the Defendants' request for an order for payment by instalments, not least as the financial information provided in the Defendants' witness statements was not supported by documentary evidence.
26. In the light of the dispute as to the Defendants' financial position and the lack of any draft order or proposal as to the amount or scheduling of such payments, no direction for payment by instalments was made. Instead, the normal order (with an extended deadline of 28 rather than 14 days for payment) was made.
27. On the same day as the hearing (2 February 2023), the Defendants applied using form N245 for an instalment order.

28. The Claimants replied on 17 February resisting the application on multiple grounds, including that the application was in fact an appeal; that an inappropriate procedure was being used; that the application was in any event not made in accordance with the Court rules nor supported by sufficient evidence; and that there was at the time no warrant of execution or instalment order in place meaning that the application sought a variation to an order that had not been made.
29. On 1 March 2023, the Defendants' applications were dismissed on the basis that they were premature and inappropriate insofar as they sought a reconsideration of the costs order made on 2 February 2023. In dismissing the applications, I had regard to (among other things) the Claimants' submissions that no enforcement steps had yet been taken; that there remained a dispute as to the adequacy of the Defendants' evidence; and that, if necessary to address the issue of the Defendants' lack of funds, further evidence would be required.
30. On 13 March 2023, the Claimants sought an 'unless' order in respect of the Defendants' failure to make the interim payment on 2 March 2023. That application also sought an 'unless' order in respect of certain disclosure issues. The disclosure-related application was subsequently withdrawn. The 'unless' order is now sought in respect only of the Defendants' failure to make the interim payment ordered on 2 February 2023.

### **The application for an 'unless' order**

31. The order sought is that, unless the Defendants make the interim payment by 4pm seven days from the date of the order, the Defence of all Defendants shall be struck out. The application is supported by a witness statement by the Claimants' solicitor, Mr Turley of Mc Daniel & Co Solicitors. Mr Turley also wrote to the Court on 14 March 2023 responding on the Claimants' behalf to various points made in the evidence of Mrs Claire Quinn (the Third Defendant).
32. As far as concerns the 'unless' order, Mr Turley's evidence is that:

*"The Defendant's argued at the hearing against the interim costs awarded to the Claimant's. Those arguments were rejected by the Court. They subsequently sought payment of those costs in instalments, this again was rejected by the Court, and was*

*indeed rejected on two occasions when the Defendants sought to get around the decision of the Court through the filing of N245's."*

33. The Claimants' position is that the Defendants are in breach of the Order and that this is unfair to the Claimants, not least because the Defendants have stated that "*they had no intention of paying the costs order but would instead seek to enter bankruptcy proceedings*". In the circumstances, the Claimants' position is that they face extreme prejudice; that they should not be forced to incur further costs in pursuing the case as the Defendants have not paid the interim costs; and that the only possible course is for the Court to make an order in the terms sought.
34. The evidence of Mrs Claire Quinn (the Third Defendant) reiterated the Defendants' position that they are in a precarious financial position, having neither assets nor savings, and that it is not possible for them to make the interim costs payment unless they can do so in instalments. Mrs Quinn states that if the Defendants are forced to pay all the costs awarded at once they will be forced into bankruptcy proceedings. She further states that the way in which the Defendants' position has been described by the Claimants is inaccurate and unfair.
35. Neither party referred to the legal position or to any authorities which might be relevant.
36. The Claimants appeared to regard it as self-evident that any failure to abide by any court order should inevitably be followed by the sanction of an 'unless' order, and asked the Court to make that order without a hearing. As mentioned above, that request was reiterated in Mr Turley's letter of 14 March 2023.

### **Assessment**

37. The Defendants have failed to comply with an order to make an interim payment in respect of costs.
38. That order was itself somewhat unusual in the context of IPEC proceedings where orders for costs of interim hearings are very much the exception rather than the rule. As the IPEC guide explains: "*Costs of the case management conference or any other interim hearing will almost always be reserved to the conclusion of the trial (Part 63 rule 26(1))*". The order was for an interim payment only given that the costs position

could not be fully resolved until after the trial; an undertaking to repay some or all of the costs awarded was offered by the Claimants to reflect that fact.

39. Had the costs position remained as it was before the Claimants' application for an interim payment, the Claimants would have had no prospect of recovering any payment in respect of costs until after the trial. The order made at the second CMC is unusual in that it gives the Claimants the right to a sum of money on an interim basis. The Claimants have not sought to enforce the order.
40. The Court has at its disposal various options to ensure that litigation is dealt with in accordance with the overriding objective and that its orders are complied with. Here, the Claimants asked the Court to order that, unless the outstanding costs are paid, the proceedings may be stayed or struck out. Of course, this possibility arises only where proceedings are continuing. It is therefore very rare for such an order to be made in respect of non-payment of interim costs in IPEC, as such costs are only exceptionally ordered.
41. The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion, pursuant to the inherent jurisdiction of the Court. The underlying principles were summarised by Sir Richard Field (sitting as a deputy judge of the High Court) in *Michael Wilson & Partners v Sinclair* [2017] EWHC 2424 (Comm) at 29 as follows:
- “(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court’s inherent jurisdiction.*
- (2) The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.*
- (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings*



*in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.*

*(4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.*

*(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.*

*(6) If the court decides that a debarring order should be made, the order ought to be an 'unless' order except where there are strong reasons for imposing an immediate order."*

42. Each of factors (2) to (5) is considered in turn below. As an unless order has been applied for, factor (6) requires no further comment.

#### Factor (2) Policy

43. In this instance, it is necessary to have regard both to the normal policy in respect of the imposition of costs orders made payable within a specified period of time before the end of the litigation as mentioned in *Michael Wilson* and to the specific position in IPEC, where such orders are the exception rather than the rule. I consider that the particular context of the normal costs position in IPEC reduces the overall weight to be given to the policy factor in favour of granting the order sought and rather weighs against making it.
44. The underlying rationale for the costs position in IPEC may involve multiple considerations. It possibly involves a desire to avoid satellite applications such as the current request by the Claimants.

45. In any event, in her skeleton argument for the second CMC, the Claimants' counsel suggested that:

*“The IPEC costs rules were designed to provide certainty, and to place litigants on an equal footing. It cannot have been the intention of the IPEC costs principles to put the Claimants in the situation in which they now find themselves. Both the Overriding Objective and the spirit of the IPEC regime strongly indicate that the costs order sought should be made unless this Court is prevented from doing so by the IPEC rules.”*

46. The order for which the Claimants have now applied would have the automatic consequence that if the Defendants did not comply the Defendants would lose the right to continue to defend the action. In my view, it is unlikely that this is the outcome envisaged by the IPEC costs rules which, to paraphrase the words of Ms Wickenden, cannot have had the intention of placing the Defendants in the situation in which they now find themselves.
47. This factor weighs against making the order sought by the Claimants.

Factor (3) All relevant circumstances

*Article 6(1)*

48. The potential loss of the Defendants' possibility to defend the action may engage Article 6(1) of the European Convention on Human Rights as mentioned in *Michael Wilson* and applied by Arnold J as he then was in *Harb v Aziz* [2017] EWHC 258 (Ch), at paragraph 25.
49. That issue has not been raised here, nor was it raised during the second CMC. It appears not to have been in the contemplation of either party that the consequence of making the interim payment award sought by the Claimants could be the loss of the Defendants' right to defend this action. This weighs to some extent against the making of the order sought by the Claimants, although I have in mind that strong evidence would ultimately be required to rely on Article 6(1) rights.

*Alternative means of enforcement*

50. There are alternative means to enforce the order (as with any money judgment). All of the potential options to enforce payment could then be considered in the round. This is not, in itself, a reason to refuse an ‘unless’ order in appropriate circumstances. However, given the way in which this application came about, and the surrounding circumstances, it is a factor which has some weight against making the order sought by the Claimants.

*Appropriateness of making a costs order payable before the conclusion of the proceedings – submissions*

51. The IPEC context militates against such an order, as noted above. During the second CMC, the Claimants’ submissions were directed only towards the reasons for granting such an order. The factual position was said not to be particularly significant but, to the extent that any finding was necessary, it was submitted by the Claimants that the “*Court should prefer the evidence of the Claimants to the extent necessary to make a factual decision*” while noting that if the costs were not dealt with, at least on an interim basis, “... *there is a real risk they will become irrecoverable permanently either [...], or because of the Defendants’ unrelated gradual financial decline.*”
52. The Claimants’ overall position on the costs order, as summarised in their counsel’s skeleton argument, was that “... *the court’s general discretion as to costs should be exercised in view of the Overriding Objective, including the need to ensure that parties are on an equal footing, to save expense, and to deal with the case in a manner proportionate to the parties’ financial positions*”.
53. There was no suggestion that the order might be inappropriate, nor was there any suggestion that it might lead to the Defendants being deprived of the right to defend the action or the trial being unnecessary.
54. When the Defendants requested a direction that they be permitted to satisfy the interim payment order by instalments, the Claimants submitted that it was premature and insufficiently supported by evidence. There was no detailed consideration of the substance of the Defendants’ evidence as to their financial position. The order for an interim payment was accompanied by the Claimants’ agreement (through counsel) to

undertake to repay any costs to any extent necessary at the conclusion of the trial. This implied strongly that the costs order was not an impediment to trial and that the undertaking would ultimately be relevant.

55. When the Claimants' counsel was asked during the hearing if any authorities dealing with the relevant principles applying to making orders that costs be paid in instalments came to mind in the light of the Defendants' request at the hearing for such a direction, none was mentioned. This may have been because the Defendants had asked for that direction only orally and thus the issue had not been considered. However, the Defendants' lack of means was raised explicitly in the Defendants' evidence (albeit that evidence was disputed) and the risk of insufficient money ultimately being available to pay outstanding costs after trial was put forward by the Claimants as a reason to grant the order sought.
56. The Defendants made no submissions at the second CMC other than factual submissions.
57. Taken in the round, the submissions made during the hearing leading up to the making of the interim payment order addressed only the IPEC specific aspects of (exceptionally) making a costs order payable before the conclusion of the proceedings.
58. When the Defendants applied using form N245 to have their financial position considered and seeking an order for payment by instalment, the Claimants resisted those applications primarily on procedural grounds including that the applications were premature as no warrant of execution or instalment order had been made.

*Other relevant issues*

59. In support of this application, the Claimants now state that the Defendants' applications for an instalments order using form N245 was an attempt to circumvent the Court's previous ruling, that the Defendants' evidence was substantively considered and that it was dismissed twice.
60. As discussed above, no substantive consideration of the Defendants' evidence took place during the second CMC. The Claimants questioned its relevance and adequacy, but the underlying factual issues were not discussed, other than very briefly.

61. As to the Defendants' subsequent form N245 applications, those were dismissed as follows:

*"I have reviewed the applications made on form N245 by the Third, Fourth, Fifth and Eighth Defendants and the Claimants' responses to those applications.*

*The possibility of ordering payments by instalments was raised by the Defendants during the hearing on 2 February.*

*Having concluded that an interim payment was appropriate, I decided not to make an order that it should be payable in instalments.*

*Although the order following the hearing has not yet been drawn up, any request to reconsider the decisions taken during that hearing would be appropriate only in exceptional circumstances; reconsideration in other circumstances would undermine the appeals process.*

*No exceptional circumstances have been raised, and no material change of circumstances has been identified. To the extent that the applications seek a reconsideration of the costs order made at the hearing on 2 February, they are therefore inappropriate.*

*I understand that no enforcement steps have yet been taken. To the extent that the applications are intended to seek to vary an order made as part of any enforcement process they are premature.*

*In the circumstances, no hearing is necessary and would merely increase the burdens on the parties and the Court. The applications are dismissed."*

62. As previously, the Claimants had resisted any substantive consideration of the Defendants' evidence and none was undertaken.

63. I do not accept the Claimants' suggestion that the N245 applications were an attempt to abuse the process of the Court or to circumvent the interim payment order. A more plausible reason for the Defendants' conduct is that, as unrepresented litigants, they misunderstood the purpose of form N245 and that their applications were simply premature, as recorded in the brief Judgment of 1 March (above). This reflects

Mrs Claire Quinn's sixth witness statement about her lack of familiarity with the Court process and the fact that the applications were made on the same day as the hearing in the CMC. While a lack of familiarity with procedure does not excuse failures to do what is required, this is not such a situation. Such applications might have a legitimate place as part of an enforcement process, as was noted by the Claimants in their response to the applications.

64. In my view, the Defendants' premature use of the forms cannot be assumed to be an abuse of process, nor to have been an attempt to circumvent the interim payment order: it is more likely to have been a misuse of the forms owing to a misunderstanding of the correct process.

Factors (4) and (5) The evidence / Strong reasons not to order enforcement?

65. The Defendants have adduced evidence of their lack of means. The Claimants have several times discouraged the Court from reviewing it, on the basis that it was not necessary to do so. While the Claimants previously questioned the adequacy and accuracy of that evidence, they have never suggested that a substantive review was necessary to fairly dispose of the application. In the circumstances, the Defendants' evidence was not substantively assessed or rejected, either during the hearing of the Claimants' initial application for an interim payment award or when rejecting the Defendants' N245 applications. The strong inference from the Claimants' submissions was that the time for consideration of such evidence would be following an appropriate application during any enforcement process.
66. The Claimants have previously resisted any review of the Defendants' evidence and do not suggest that one is now necessary to decide the application. This means that if the order sought is made as requested, no consideration of the Defendants' financial position will have taken place, and they will be placed in the very difficult position of trying to resist a strike-out following a breach of an unless order.
67. That being the case, I do not regard factors (4) and (5) in weighing heavily in favour of granting the Claimants' application.

68. In the circumstances, this is not one of those general situations in which the absence of “*proper and sufficient evidence of impecuniosity*” weighs heavily in favour of requiring payment of a costs order in order to be allow to continue to contest the proceedings.

### **Conclusion**

69. Having considered all the circumstances in the light of the procedural context in IPEC and the overriding objective, I will not grant the order sought.
70. Contrary to the Claimants’ submissions, this does not negate the granting of the interim payment order. The Claimants have a right which can be enforced through the court system as with other money judgments; this would not have been possible before that order was made. Any issues and evidence relevant to enforcement can be considered most appropriately in that context.
71. If in future other orders are not complied with, the just result may be an ‘unless’ order. In this instance, however, the just order from a case management perspective, bearing in mind the relevant policy issues and the overriding objective, is to dismiss the Claimants’ application.