

ENGLAND AND WALES / JUDGMENT

Flitcraft Limited & Ors v Philip Price & Anor

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Neutral Citation Number: [2024] EWCA Civ 136 Case No: CA-2023-001496 CA-2023-001519 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES INTELLECTUAL PROPERTY LIST PATENTS COURT Nicholas Caddick KC sitting as a deputy High Court Judge

[2022] EWHC 3381 (Pat); [2023] EWHC 695 (Pat); [2023] EWHC 1222 (Pat)

[2023] EWHC 1746 (Pat) Royal Courts of Justice Strand, London, WC2A 2LL Date: 27 th February 2024 Before : THE MASTER OF THE ROLLS LORD JUSTICE NUGEE and SIR CHRISTOPHER FLOYD Between :

(1) FLITCRAFT LIMITED

(2) GARRY FLITCROFT

(3) THOMAS FLITCROFT

- and -

(1) PHILIP PRICE

(2) SUPAWALL LIMITED Appellants/ Respondents Respondents/ Appellants Giles Maynard-Connor KC (instructed by Primas Law) for Flitcraft Limited and Messrs Flitcroft Peter Knox KC and Daniel Goldblatt (instructed by RHF Solicitors) for Mr Price and Supawall Limited
Hearing date: 31 January 2024 Approved Judgment This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives. Judgment Approved by the court for handing down. Price v Flitcraft (No 2) Sir Christopher Floyd : 1. 2. 3. 4. 5. There are two appeals before the court against judgments and orders of Mr Nicholas Caddick KC sitting as a deputy judge of the High Court. They arise in litigation over a variety of intellectual property rights between the claimants, Mr Price and Supawall Limited (“Supawall”), and the defendants Flitcraft Limited, Garry Flitcroft and Thomas Flitcroft (to whom I will refer collectively as “Flitcraft”). Mr Price and Supawall sued Flitcraft for infringement of two patents (GB 2415714 and GB 2436989 – “the 714 patent” and “the 989 patent” respectively), infringement of copyright in photographs and passing off. In his first judgment, handed down on December 20 2022, the judge found that all the causes of action relied on by Mr

Price fell to be dismissed. That left only a patent infringement claim by Supawall, who claimed to be the holder of an exclusive licence from Mr Price under the patents. The judge held that Supawall's claim in relation to the 714 patent was entitled to succeed in part but for the failure to join the true proprietor of the patent, which on his findings was not Mr Price but, because Mr Price had been made bankrupt, the Official Receiver ("the OR"). Section 67(3) of the Patents Act 1977 requires that, in any action by the exclusive licensee, the proprietor of the patent must be joined as a party. In a subsequent judgment handed down on 26 May 2023 ("the section 67 judgment") the judge granted an application by Supawall to amend to join the OR as a party. Supawall was, accordingly, entitled to relief for patent infringement against Flitcraft. Mr Price, by contrast, was not entitled to any relief. In the course of his judgments the judge made some very serious adverse findings about the evidence which had been given on behalf of the claimants by Mr Price and by Mr Middleton, a director of Supawall, and their conduct in pursuing the claim by Mr Price to be proprietor of the patents. The judge then proceeded to deal with the costs of the litigation. These he dealt with in a judgment handed down on 3 April 2023 ("the costs judgment"). The order which he made apportioned the costs between the patent, copyright and passing off aspects of the claims. He further apportioned the costs of the patent infringement claim as between the claim made by Mr Price as patent proprietor and Supawall as exclusive licensee. Having done that, he awarded Flitcraft its costs on the indemnity basis of the claim brought against them by Mr Price and awarded Supawall its costs of its claim against Flitcraft, subject to a reduction to take account of issues on which Supawall lost and Supawall's conduct in giving untruthful evidence in support of Mr Price's claim. In the first appeal ("Flitcraft's appeal"), Flitcraft assert that the judge should not have permitted Supawall to amend to join the OR as a party, and that, having refused permission to amend, he should have dismissed Supawall's claim. Alternatively, Flitcraft contend that, if the amendment is to be allowed, it should be on terms that Supawall pay all the costs of the action down to the date of the amendment. There is a further discrete point concerned with the construction of the exclusive licence, which is said to extinguish Supawall's claim. In the second appeal ("the costs appeal") Mr Price and Supawall contend that the judge erred in the costs order which he made. They contend that, viewed collectively, Mr Price and Supawall had been successful in the patent litigation and should have Judgment Approved by the court for handing down. Price v Flitcraft (No 2) been awarded all their costs subject only to a deduction to take account of issues on which they lost. The issues at trial and the judge's conclusions 6. 7. 8. 9. 10. 11. For the purposes of these appeals it is only necessary to set out the issues which the judge was required to decide at trial in relation to the allegations of patent infringement. Mr Price claimed to be the proprietor of the patents. Mr Price's case was that he was the original proprietor but that, on 28 March 2011 (shortly before he was made bankrupt) he assigned the patents to Fred Bridge who assigned them back on 14 July 2016 (after Mr Price was discharged from bankruptcy). Supawall claimed to be an exclusive licensee of the patents under a written licence granted by Mr Price on 14 October 2008. Mr Price and Supawall asserted that the Patents had been infringed by Flitcraft's dealings with their "Old Injectawall Product", which was marketed and sold up to around June or July 2019, and with

the “New Injectawall Product”, which was marketed and sold thereafter. Flitcraft challenged Mr Price’s claim to be the proprietor of the patents. Their primary case was that Mr Price held the patents on trust for a partnership called Maple Timber Frame of Langley (“MTF”), and that as a result of a number of further transactions the beneficial interest in the patents had become vested in Flitcraft Limited, the first defendant. In the alternative, Flitcraft contended that as a result of certain dealings with a Mr David Rich-Jones, Mr Price’s interest in the patents had been assigned to a company called Lightpeak Limited (“Lightpeak”) and that Supawall’s exclusive licence had been terminated. In the further alternative Flitcraft argued that, if the 2011 assignment to Mr Bridge was ineffective, the patents had vested in Mr Price’s trustee in bankruptcy after Mr Price was made bankrupt on 27 July 2011. Flitcraft accepted that if, contrary to their contentions, Mr Price was the proprietor of the patents, then the Old Injectawall product infringed. They denied infringement by the New Injectawall product. Lastly, Flitcraft asserted that, to the extent that they are liable for infringement, any sums recoverable fell within the terms of a charge over intellectual property rights dated 3 November 2009 which Mr Price gave to North West Transitional Investment Fund LLP (“the NWTIF charge”) the benefit of which had been assigned to the third defendant, Gary Flitcroft. The principal witnesses who gave evidence to support the allegation that the patents had been assigned to Mr Bridge were Mr Price and Mr Middleton. As to Mr Price the judge said this at paragraph 67 of the judgment: “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, it is possible that ... 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 Judgment Approved by the court for handing down. Price v Flitcraft (No 2) 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 ... ” 12. Accordingly, the judge concluded that where Mr Price’s evidence was not corroborated by other evidence or by known facts, it was to be treated with considerable caution. 13. As to Mr Middleton, the judge concluded at paragraph 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..."

14. 15. As to Mr Bridge, the judge said at paragraph 69 that he was inclined to believe that his evidence was "due to a mistaken recollection and not knowingly false". He added that "the fact that [Mr Bridge] appears to have [played] 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" (my emphasis). The judge decided the issues about title to the patents in the following way. First, he held that the patents were not held on trust for MTF. Secondly, he held that the dealings with Mr Rich-Jones had not resulted in a concluded assignment of the patents to Lightpeak or in the termination of Supawall's exclusive licence. Thirdly, he held that the purported assignment of the patents to Mr Bridge in 2011 had not taken place. These findings led the judge to the conclusion that, immediately prior to Judgment Approved by the court for handing down. *Price v Flitcraft* (No 2) Mr Price's bankruptcy, the patents remained vested in him. It followed that, on becoming bankrupt, the patents became vested in Mr Price's trustee in bankruptcy, at that time a Mr Craig. It is common ground that, Mr Craig and his successor in that office having been discharged, the patents are now the property of the OR. 16. These conclusions meant that Mr Price's claim for patent infringement fell to be dismissed for want of title. The judge then turned to Supawall's claim as exclusive licensee under the patent. Here the judge identified two further issues, namely whether Supawall had the right to bring infringement proceedings under the licence and secondly whether Flitcraft had infringed the patent. As to the first issue, the judge held that, as the exclusive licence had not been terminated in the course of the dealings with Mr Rich-Jones and as it was also unaffected by the dealings with Mr Bridge, it remained in force. Supawall had the right under section 67 of the Patents Act 1977 to bring proceedings as an exclusive licensee. The judge also rejected (at paragraph 122) a submission that Supawall's claim was not within the scope of the licensed rights, but had been retained by Mr Price. This argument is renewed before us as the subject of ground 2 of Flitcraft's appeal. 17. The judge himself identified a further reason, not argued by any of the parties up to that point, why Supawall might not have the right to bring infringement proceedings. Section 67 of the Patents Act 1977 provides: "(1) Subject to the provisions of this section, the holder of an exclusive licence under a patent shall have the same right as the proprietor of the patent to bring proceedings in respect of any infringement of the patent committed after the date of the licence; and references to the proprietor of the patent in the provisions of this Act relating to infringement shall be construed accordingly."

- (2) In awarding damages or granting any other relief in any such proceedings the court or the comptroller shall take into consideration any loss suffered or likely to be suffered by the exclusive licensee as such as a result of the infringement, or, as the case may be, the profits derived from the infringement, so far as it constitutes an infringement of the rights of the exclusive licensee as such.
- (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.” Judgment Approved by the court for handing down. Price v Flitcraft (No 2) 18. 19. As, on the judge’s findings, it was Mr Price’s trustee in bankruptcy and not Mr Price who was the proprietor of the patents, it followed that the terms of section 67(3) had not been complied with. The judge expressed the preliminary view that it would not be right to dismiss Supawall’s claim for non-compliance with section 67(3) and invited the parties to make further submissions as to the appropriate way forward before making any order to give effect to his judgment. The judge then turned to the question of whether Flitcraft’s products infringed the patents. The infringement claim under the 989 patent was abandoned in the claimants’ closing speech, leaving only the claim under the 714 patent. So far as that patent was concerned, it was common ground that the Old Injectawall Product infringed. The New Injectawall Product was materially different, however, and dealings in it did not infringe. The section 67 judgment 20. The section 67 judgment was handed down on 26 May 2023, after a hearing on 16 March 2023. The judge granted an application by Supawall to join the OR. He recorded the fact that in an email dated 19 January 2023 it had been confirmed on behalf of the OR that the OR was now aware of the December 2022 judgment and had no intention or interest in bringing any proceedings in respect of the patents or in seeking to vary or alter that judgment. It was also confirmed that the OR had no intention of seeking to be a party but had asked to be kept informed of the outcome.
21. Mr Price and Supawall had submitted that the judge should permit the OR to be joined pursuant to CPR r. 19.2 on terms that the earlier judgment and order would bind the OR unless the OR applied to set them aside or vary them. Flitcraft submitted that the judge should refuse permission to join the OR. The judge granted permission. His decision to do so is the target of ground 1 of Flitcraft’s appeal. 22. The essence of the judge’s reasoning for allowing the amendment was as follows: i) ii) Section 67(3) needed to be read in the context of other sub-sections of section 67 which, by sub-section (1), gave the exclusive licensee the “same right” as the proprietor to bring proceedings and, by sub-section (2), enabled the exclusive licensee to recover its own losses or its share of the infringer’s profits. Viewed in context, he held that section 67(3) operated to ensure that the issue of remedies awarded against a defendant is determined in circumstances where the claims of both the exclusive licensee and the proprietor of a patent can be taken into account. Further, the sub-section prevents a defendant who has been sued by an exclusive licensee from being exposed to a further action by the proprietor. Although section 67(3) was mandatory in its effect, and in this respect was different from corresponding provisions for other intellectual property

rights such as copyright, registered designs and trademarks, this did not mean that proceedings taken whilst the proprietor was not joined were a nullity. iii) Given the purpose of section 67(3), there was no reason why the court should not exercise its powers to join the true proprietor after judgment, particularly Judgment Approved by the court for handing down. Price v Flitcraft (No 2) iv) v) vi) vii) where the judgment had been solely in relation to liability as opposed to quantum. As to discretion, the joinder of the OR did not mean that Supawall would be allowed to pursue a claim on a new and inconsistent basis or that to allow such a claim would require a wholesale amendment of Supawall's case. Supawall's claim was based on the exclusive licence which was granted before Mr Price's bankruptcy. Supawall's claim was not dependent on Mr Price's false claim to be the proprietor of the patents. Supawall's acceptance that the OR is now the proprietor was not inconsistent with how its claim was argued at trial. In this respect the requirement of section 67(3) was more procedural than substantive. The fraudulent nature of the claim being advanced by Mr Price that there had been an assignment to Mr Bridge did not affect Supawall's claim. It would be wrong for the court to decline to exercise its powers under the rules to allow joinder simply to punish Supawall or to deprive Supawall of its separate rights. This was so even though Mr Middleton had given evidence to support Mr Price's false claim – evidence which the judge had held it was unlikely that Mr Middleton thought was true. In Summers v Fairclough [2012] UKSC 26, a case where the claimant had falsely exaggerated his personal injury claim, the Supreme Court had held that it would take a very exceptional case to strike out the whole claim on the grounds of abuse. By analogy with that case, it would be wrong to refuse permission to join the OR and thereby effectively defeat Supawall's claim, which was separate from Mr Price's false claim. 23. Flitcraft had an alternative position if it be held that the OR was to be joined as a party. Flitcraft submitted that permission to join the OR should be on terms that Supawall be deprived of its costs of its claim and pay Flitcraft's costs of the claim up to the date of joinder. The judge declined to impose such terms, although he ordered Supawall to pay the costs of the application to join the OR. His decision is the target of ground 3 of Flitcraft's appeal. In summary, his reasons for declining to make such an order were these: i) ii) iii) iv) It was not inevitably the case that, where a claim would have failed but for an amendment, the amending party will always have to pay the costs down to the date of the amendment. It all depends. The fact that the OR was joined late did not in any meaningful way add to the costs of the action (other than as regards the costs of the joinder application). Section 67(3) was primarily relevant to quantum rather than to the trial on liability. This was not an amendment which substantially altered the case which the defendants had to meet. It made no difference to meeting Supawall's case who exactly was the proprietor. Every other aspect of the claim remained the same. Judgment Approved by the court for handing down. Price v Flitcraft (No 2) v) vi) vii) There was every reason to think that if the trustee in bankruptcy had been joined at an earlier stage Supawall's claim would have been vigorously resisted. On this basis it would be unfair to deprive Supawall of its costs and even more unfair to order it to pay the other side's costs up to the date of joinder. The observations of Lord Clarke in Summers v Fairclough concerning costs founded on false evidence were not particularly relevant to the present case. Supawall's case was not founded

on the false evidence and was likely to be resisted in any event. viii) Mr Middleton's conduct in giving false evidence to support Mr Price's claim would be adequately dealt with by a reduction in the costs recoverable by Supawall, rather than by the penal order suggested by Flitcraft. The costs judgment 24. 25. The broad outline of the judge's decision on costs has already been indicated. At the costs hearing both parties invited the judge to look at the case "in the round". Needless to say, the parties were far apart on where this "in the round" approach would lead. The judge first apportioned the parties' overall costs of the claim between the various intellectual property rights relied on. He concluded that the patent claims were by far the most important in terms of value and in terms of time spent. He accordingly apportioned 75% to the patent claims, 20% to copyright and 5% to passing off. No complaint is made about this stage of the apportionment. 26. Next the judge turned to the cost of the patent claims. He said at paragraph 14: "As I have mentioned, there were two separate claims, one by Mr Price as proprietor, the other by Supawall as exclusive licensee and, it seems to me, that I have to deal with those claims separately not least because Mr Price's claim failed whereas Supawall's claim succeeded in part. Further, I should not make an order that would result in Mr Price paying the Defendants' costs of unsuccessfully defending Supawall's claim. Nor do I think that it would be fair to make an order that the costs of the two patent claims be set off against each other or that there should be no order as to costs of these claims." 27. The judge considered that a 50/50 split would not be correct. He acknowledged (at paragraph 16) that there were elements common to both Mr Price's claim and to Supawall's claim (i.e. the need to establish that Mr Price was the inventor and that he had not held the patents on trust for MTF and to show that the defendants' actions constituted an infringement). He went on to say that: "... there were other and very substantial issues fought at trial which related solely to Mr Price's patent claim (such as the purported assignment to Mr Bridge and the various dealings Judgment Approved by the court for handing down. Price v Flitcraft (No 2) with the patents involving Mr Craig, FEBL and the Defendants). Somewhat more difficult was the issue of the purported assignment of the Patents to Lightpeak. The evidence on this issue was principally directed to the issue of Mr Price's title to the Patents. However, it was also relevant to Supawall's claim, because of the issue whether Supawall's exclusive licence had been terminated in the course of the dealings with Lightpeak (an issue on which Supawall succeeded)." 28. Putting these points together, the judge concluded that he should apportion the costs of the patent issues as to 60% to Mr Price's claim and 40% to Supawall's claim. 29. As to the costs of Mr Price's claim the judge declined to make any further deductions: "As regards the costs of Mr Price's failed claim, it is clear that the Defendants are the successful parties and so, under the general rule, they would be entitled to their costs from Mr Price. I can see no reason why there should be any adjustment on this to reflect aspects of that claim on which Mr Price succeeded (such as my finding that he had not held the Patents on trust for MTFP). As regards the issue whether Mr Price had assigned the Patents to Lightpeak, although Mr Price succeeded on this issue, my findings on this issue were of importance to my conclusion that the purported assignment to Mr Bridge was a fiction (a key issue on which the Defendants succeeded)." 30. 31. He added that as Mr Price's claim was founded on the purported

assignment to Mr Bridge which he had found to be “a fiction created to keep the Patents out of the hands of Mr Price’s trustee in bankruptcy” Mr Price should pay these costs on an indemnity basis. As to Supawall’s claim, the judge held that Supawall was the successful party, even although it had lost on the issue of infringement by the New Injectawall Product and had abandoned its claim in relation to the less important 989 patent. The judge considered that this was an appropriate case to make an order under CPR r. 44.2(6)(a) that Supawall recover only a proportion of its costs to allow for those issues on which it had not succeeded and to take account of the conduct of Supawall’s director Mr Middleton in giving evidence to support Mr Price’s claim to have assigned the patents to Mr Bridge “evidence which I found it was unlikely that Mr Middleton believed to be true”. It seemed to the judge to be simpler and more appropriate for the court to take that conduct into account by way of reduction in the proportion of Supawall’s recoverable costs rather than for the court to order Supawall to pay some part of the Defendants’ costs of Mr Price’s claim. 32. One other aspect of the judge’s costs decision is relevant. He made an interim costs order in favour of Flitcraft in the sum of £12,775.50 on the non-patent claims. Given that Flitcraft are liable to pay damages to be assessed as well as a proportion of the costs of Supawall’s patent claim, which were each bound to exceed this sum, Flitcraft did not seriously resist this minor aspect of the judge’s orders being set aside. Flitcraft’s appeal Judgment Approved by the court for handing down. *Price v Flitcraft (No 2)* 33. It is convenient to take grounds 1 and 3 of Flitcraft’s appeal together. These are in summary: i) ii) the judge should not have allowed Supawall to amend in order to join the OR and satisfy section 67(3) of the Patents Act 1977; alternatively, the judge should have ordered Supawall, when permitting it to join the OR, to pay Flitcraft’s costs of the Supawall patent claim up to the order permitting the joinder. 34. It is common ground that the court has power to allow an amendment to add a party, even after judgment: see *In re Pablo Star Limited* [2017] EWCA Civ 1768; [2018] 1 WLR 738 at [51]. There is also no dispute that the power to allow joinder at any stage involves an exercise of judicial discretion as does the decision as to any terms which the court sees fit to impose on the permission which it grants. It is well settled that, in an appeal against an exercise of discretion, this court will not interfere unless the exercise of the discretion is flawed. In *ABP Technology Limited v Voyera Turtle Beach Inc* [2022] EWCA Civ 594 Birss LJ, with whom Coulson and Nicola Davies LJJ agreed, approved the following summary by Saini J in *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) as to the principles to be applied: “50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the following errors: (i) a misdirection in law; (ii) some procedural unfairness or irregularity; (iii) that the Judge took into account irrelevant matters; (iv) that the Judge failed to take account of relevant matters; or (v) that the Judge made a decision which was “plainly wrong”.

51. Error type (v)... means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.

52. ... The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter... It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge."
35. Mr Giles Maynard-Connor KC who appeared for Flitcraft submitted that the judge's exercise of discretion was indeed flawed. He submitted that the judge had been wrong to treat section 67(3) as more procedural than substantive, and thus proceeded on an incorrect understanding as to the purpose of section 67(3). Failure to join the proprietor of the patent as required by section 67(3) deprived Supawall of "standing". He further submitted that both Supawall and Mr Price had maintained throughout the Judgment Approved by the court for handing down. *Price v Flitcraft (No 2)* case that Mr Price was the proprietor of the patent. Accordingly the failure to join the OR was not a mere procedural oversight by Supawall, but a conscious decision not to support Flitcraft's case that the patents had passed to the trustee in bankruptcy. The amendment to join the OR was wholly inconsistent with Supawall's case. Finally the judge should not have reasoned by analogy from *Summers v Fairclough* as that case was concerned with striking out: a case need not be exceptional for permission to be refused under CPR r. 19(2), where the applicant for joinder is seeking an indulgence from the court. In any event the present case was exceptional when one had regard to the conduct of the claimants. 36. I turn first to the purpose and effect of section 67(3). The substantive right of an exclusive licensee to sue for infringement is granted by section 67(1) which provides that such a licensee shall have the same right as the proprietor to bring proceedings for infringement. Section 67(3) then requires that, in any such proceedings, the proprietor is to be made a party. Given the structure of the section as a whole, which first confers the substantive right and then imposes requirements as to the conduct of proceedings, it seems accurate to regard section 67(3) as more procedural than substantive. It is true that the sub-section can have a substantive effect, in that, given its mandatory terms, the court would not grant an exclusive licensee final relief without joinder of the proprietor. Many procedural provisions can, however, have substantive consequences without detracting from their essentially procedural nature.
37. Mr Maynard-Connor, in his written submissions, relied on *British & International Proprietaries Ltd v Selcol Products Ltd* [1957] RPC 3. That was a case decided on an interim application for an injunction to restrain the defendant company from holding itself out as licensed under a named British patent. The injunction was sought in proceedings which were based both on infringement of the patent and on the alleged false representation. In the course of refusing the application and directing that the action should proceed to trial, Upjohn J said at page 6 line 33: "The first claim in this writ is for infringement of patent: but it is common ground that, having regard to Sec. 63 of the Patents Act 1949 [the predecessor of section 67], the Plaintiff Company cannot claim relief for infringement at this stage, if

only for the reason that they are not the patentees but only the exclusive licensees, and there can be no action for infringement unless the patentees are Defendants in the action. That appears from Sec. 63(2): “In any proceedings taken by the holder of an exclusive license by virtue of this section, the patentee shall, unless he is joined as plaintiff in the proceedings, be added as a defendant.” Therefore, I am not concerned in this case at this stage with an action for infringement...” (emphasis added) 38. This is a rather frail foundation for Mr Maynard-Connor’s submission. First, the passage is simply recording common ground. Secondly I do not think that Upjohn J meant to suggest that section 67(3) has a substantive effect, in the sense that the action for infringement does not exist until the proprietor of the patent is joined. It is to be noted that Upjohn J qualified what he said by the phrase “at this stage” and allowed the case to go to trial, presumably on the basis that later joinder of the proprietor would be possible, and cure any defect in the proceedings prior to that date. Thirdly, as the injunction sought was not to restrain infringement, but to restrain the making of Judgment Approved by the court for handing down. Price v Flitcraft (No 2) 39. 40. 41. 42. 43. 44. a false representation to be the holder of the licence, it is difficult to see why the point arose at all. I should also not be taken as endorsing Upjohn J’s view that it is not possible to grant interim injunctive relief for infringement to an exclusive licensee without joinder of the proprietor. I can, as presently advised, see no reason in principle why the court could not protect the exclusive licensee’s interest on an interim basis, perhaps on the basis of an undertaking to join the proprietor. We did not, however, hear argument on this point and it is not necessary to decide it for the purposes of this case. I would add that I also do not think it assists to describe section 67(3) as giving the exclusive licensee “standing”, which simply raises further questions about what is meant by that term. It seems to me that, in exercising the discretion to allow joinder, the court should have primary regard to the purposes of the sub-section. The sub-section is designed to secure the twin objectives identified by the judge, namely ensuring that the court or tribunal which assesses damages has both the exclusive licensee and the proprietor before it so as to allocate any claimed financial relief between them, and ensuring that the defendant is not exposed to a subsequent action by the proprietor. In a case where those objectives can still fairly be achieved by joinder of the proprietor then, subject to other discretionary considerations, the court should be willing to allow it. Turning to those other considerations I do not consider that Flitcraft are correct to assert that the joinder of the OR allowed Supawall to pursue a claim “on a totally new, inconsistent basis”. The claim of a party to be an exclusive licensee under a patent is not in any sense founded on the identity of the proprietor. Ownership of the patent may change one or multiple times without affecting the status of a party as an exclusive licensee. Supawall’s claim to be an exclusive licensee was not altered in any material way by the finding that the OR and not Mr Price was the proprietor. For similar reasons it would be wrong to refuse permission to join the OR simply because Mr Price had falsely maintained throughout the proceedings that he was the proprietor. The findings of the judge as to the ultimate ownership of the patent destroyed the very foundation of Mr Price’s claim, but had no impact at all on Supawall’s. I agree with Mr Maynard-Connor that Summers v Fairclough (supra) is not dealing with an exactly analogous procedural situation

to that faced by the judge. One can see from the judgment of the Supreme Court, however, that they were careful not to find that, except in a very exceptional case, bad conduct in relation to one part of a case (the fraudulently exaggerated claim for damages) should take away rights in relation to another part of the case where there was a valid claim. Beyond that point the analogy breaks down, as Summers was dealing with an application to strike out whereas the present case is concerned with the exercise of a discretion to allow late joinder of a party. Moreover, in the present case, in contrast to the claimant's case in Summers, the bad conduct concerned was simply not material to Supawall's claim. I have no doubt that the judge was entitled to hold that Supawall's conduct did not justify the refusal of the application to join the OR. Judgment Approved by the court for handing down. Price v Flitcraft (No 2) 45. I turn therefore to the question of whether the judge should have penalised Supawall in costs as suggested by Flitcraft, by ordering it to pay Flitcraft's costs up to the date of joinder. As can be seen from the summary given above, the judge's reasons for declining to make the costs order suggested by Flitcraft were similar to those he gave for not refusing the joinder. I need only add a few observations given the reliance on *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137 and *Summers v Fairclough* (supra). 46. In *Beoco*, at page 154 A-C, Stuart-Smith LJ said: "As a general rule, where a plaintiff makes a late amendment as here, which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the costs of the action down to the date of the amendment. There may, of course, be special reasons why this general rule should not be applied. An example of this is to be *Osterreichische found Warrenhandelsgesellschaft C. G. L. Handelsgesellschaft m.b. H.* [1993] 2 Lloyd's Rep. 1, 9, where the judge was satisfied that, even if the amendment had been made earlier, the action would have been vigorously resisted. The judge disbelieved the defendant's witnesses and the plaintiff received substantial damages" *Kaines (U. K.) Ltd. v. (formerly in 47. Stuart-Smith LJ's "general rule"* obviously has no application in a case like the present where the amendment is not in reality material to the claimant's case. Even if it were, the judge found that the case would have been vigorously defended if the amendment had been made earlier, and we have no reason to suppose that he was incorrect. 48. In *Summers* at [53] Lord Clarke said: "As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the court that the prospect of such orders is likely to be a real deterrent" 49. The principle expressed by Lord Clarke is a salutary one. The judge in our case was, however, entirely justified in treating that principle as not being of particular relevance to Supawall's claim against Flitcraft. As the judge found, the false evidence which Mr Price gave, assisted as it was by Mr Middleton, did not impact the case which Supawall made against Flitcraft. Mr Price had been ordered to pay the costs of his claim on the indemnity basis. It was Mr Price's claim which was the part of the process which had been caused by the fraud or dishonesty. 50. The judge did not ignore the dishonest evidence which Mr Middleton gave when deciding on the costs order to

be made in Supawall's claim. He took it into account in Judgment Approved by the court for handing down. *Price v Flitcraft* (No 2) assessing the proportion of its costs which Flitcraft was to pay. The weight to be given to the bad conduct of Supawall, and the extent of the punishment to be meted out to it for that conduct, are matters which lie wholly within the proper discretion of the judge. They are matters with which this court, applying the principles to which I have referred, is not justified in interfering. 51. 52. It follows that I reject grounds 1 and 3. Ground 2 of Flitcraft's appeal concerns the construction of clause 9 of the exclusive licence agreement. This is a common form of clause in a patent licence agreement, which deals with what is to happen when the parties to the licence learn of third parties who are suspected of infringing the licensed patent. Under clause 9.1, Supawall agreed to notify Mr Price of infringements of which it becomes aware. Clause 9.2 and 9.3 then provided that: "(2) [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. "(3) 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."

53. Mr Maynard-Connor submitted that, under the terms of clause 9, it is only if Mr Price has notified Supawall that he does not intend to take proceedings for infringement that Supawall would have that right. There was no evidence that any such notification had been given in the present case. He described this as the licence giving supremacy to Mr Price. He also submitted that this meant that Supawall's rights in respect of any infringement of the patents were limited in that it has no actionable claim for monetary relief save to the extent that such relief exceeds the amount of the unpaid sums under the NWTIF charge. 54. The judge did not agree. I leave aside a dispute over whether the allegation was properly pleaded (the judge thought it was not). In relation to the substance, he said: "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 Judgment Approved by the court for handing down. *Price v Flitcraft* (No 2) as meaning that, in other circumstances, [Supawall] 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" 55. I did not find Mr Maynard-Connor's submissions on this ground as clear as those which he made in relation to his other two grounds. Supawall derive their right to bring proceedings for

infringement from section 67(1) of the Act. This they do by proving that they are an exclusive licensee. As the judge held, clause 9 of the licence agreement simply regulates the bringing of proceedings as between Mr Price and Supawall. What it provides is that, normally, the two parties will co-operate, but if they cannot agree then Supawall can bring proceedings on its own. Obviously, in those circumstances, Supawall would have to join Mr Price, or the current proprietor, as defendant. The present case is obviously one where the parties have both brought proceedings under clause 9.2. The clause says nothing at all about who will recover damages or the “supremacy” of Mr Price. 56. The NWTIF charge does not seem to have much to do with any of this. The charge could only bite on sums in Mr Price’s hands. I do not follow how it could bite on any recovery by Supawall. 57. I would reject ground 2 as well. It follows that I would dismiss Flitcraft’s appeal The costs appeal 58. I agree with Nugee LJ that the costs appeal should be dismissed for the reasons he gives. Lord Justice Nugee 59. 60. I am grateful to Sir Christopher Floyd for setting out the background so clearly. I agree with him that Flitcraft’s appeal should be dismissed for the reasons that he gives and do not wish to add anything on that part of the case. The costs appeal is brought as he has explained by Mr Price and Supawall. Mr Knox helpfully identified which aspects of the judge’s judgment on costs he challenged and which he did not, as follows: i) ii) iii) The judge apportioned the costs 75% to the patent claims, 20% to the copyright claims and 5% to the passing off claims (paragraph 12). This is not challenged. The judge then dealt with the patent claims where he said that Mr Price had failed and Supawall had succeeded in part. He said that he had to deal with those claims separately (paragraph 14, set out by Sir Christopher Floyd at paragraph 26 above). Mr Knox takes issue with this. The judge then apportioned the overall costs of the patent claims 60% to Mr Price’s claim and 40% to Supawall’s claim (paragraphs 15 to 17). Mr Knox also takes issue with this. Judgment Approved by the court for handing down. Price v Flitcraft (No 2) iv) v) vi) vii) viii) ix) The effect of these decisions was that he ordered Mr Price to pay Flitcraft’s costs of his failed patent claim, being 60% of 75% of the Defendants’ total costs (paragraph 19). Mr Knox challenges this on the basis already referred to (that is, both in principle and as to the 60% apportionment). The judge also ordered Mr Price to pay such costs on the indemnity basis, his claim being founded on the fictitious assignment to Mr Bridge (paragraph 19). If Mr Price is liable for costs at all, that is not challenged. The judge then dealt with the costs of Supawall’s patent claim. He held that Supawall was the successful party, and under the general rule would be entitled to its costs (paragraph 20). Mr Knox unsurprisingly agrees. He then (paragraph 21) decided that Supawall should not receive 100% of the costs of its patent claim but only a proportion, namely 75%, because of issues on which it had lost and Mr Middleton’s evidence in support of Mr Price’s fictitious claim, as explained by Sir Christopher Floyd at paragraph 31 above. Mr Knox does not challenge that aspect of his decision. The judge made Supawall pay the costs of and associated with its late application to join the OR (paragraphs 22 and 28). That is entirely to be expected and is not challenged. The overall effect of the above decisions was that Supawall would recover 30% (that is 75% x 40%) of 75% of the claimants’ total costs of the action other than the costs of the joinder (paragraph 27). It can be seen that of these figures Mr Knox only challenges the 40%,

accepting both the 75% apportionment of the total costs to the patent claims, and the 75% recovery to reflect the patent issues on which Supawall had lost and its support for Mr Price's fictitious assignment. 61. 62. These decisions were given effect to in an order dated 25 April 2023. It is perhaps worth identifying the practical effect. Mr Price and Supawall were jointly represented. Of the overall costs they incurred, they would recover from the defendants 22.5% (that is the 30% x 75% attributed to Supawall's patent claim), assessed on the standard basis. The defendants were also jointly represented. Of the overall costs that they incurred, they would recover (i) 45% from Mr Price assessed on the indemnity basis (that is the 60% x 75% attributed to his patent claim); (ii) a further 20% from Mr Price assessed on the standard basis (attributed to the copyright claims); and (iii) a further 5% assessed on the standard basis from both Mr Price and Supawall (attributed to the passing off claims). It can be seen that the defendants were left to bear 30% of their costs themselves, which represents the 40% x 75% of their costs attributable to Supawall's patent claim. In a subsequent judgment handed down on 13 July 2023 (and given effect to by a further order of that date), the judge ordered Mr Price to pay £178,857 to the defendants by way of interim payment, calculated by taking 70% of the defendants' approved costs budget figure, and then awarding 90% of that. This is challenged, but solely on the basis that the appeal against the substantive costs orders should be allowed. The judge also ordered Supawall to make an interim payment of £12,775.50, calculated by taking 5% of the defendants' costs budget figure Judgment Approved by the court for handing down. Price v Flitcraft (No 2) (attributable to the passing off claims) and again awarding 90%. This is challenged on the basis that Supawall will overall be a net recipient. Ground 1 – treating Mr Price's and Supawall's patent claims separately

63. Mr Knox's first submission was that the judge was wrong to treat Mr Price's patent claim and Supawall's patent claim separately for costs purposes. He said that, although there were in one sense two claims, there was a significant overlap between them. Both largely had the same things to prove, and the same defences to disprove. That was illustrated by the judge's own summary of the issues in his first judgment (on liability) at [80] as follows: "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 [Supawall's] exclusive licence?
 - c. What was the [effect] (if any) of Mr Price's dealings with Mr Bridge?
 - d. Assuming Mr Price or [Supawall] has title to the Patents, have the Defendants infringed those Patents?" Of these issues, Mr Knox said, the claimants had won on (a), (b) and (d), and only lost on (c). They had brought the claims jointly and had won overall, subject to what he called the "bankruptcy point" (but which I prefer to call the "fictitious assignment" point), and in doing so had defeated Flitcraft's defence that they had actually acquired title via MTF,

and its defence based on the charge. Mr Price and Supawall taken together should therefore be regarded as the successful party and should recover their costs under the general rule (CPR r. 44.2(2)(a)), subject to a deduction to take account of Mr Price's failure on the fictitious assignment point. He suggested that that had only taken up a small part of the overall time and hence costs, and that such deduction should therefore be no more than 25%. 64. I do not accept this submission. It treats Mr Price's claim and Supawall's claim as if they were a single claim on which Mr Price and Supawall had overall been successful. But they were not. They were two separate and distinct claims. Mr Price brought his claim as proprietor of the patents. Supawall brought its claim as exclusive licensee. These are separate causes of action vested in separate claimants, and if successful would have resulted in separate judgments in favour of Mr Price and Supawall respectively. 65. This is not just a technical point. In many claims brought by more than one claimant the claimants are associated parties (members of the same corporate group, an individual and his company, members of the same family and their trusts, and the Judgment Approved by the court for handing down. *Price v Flitcraft* (No 2) 66. like), and even if the causes of action vested in each of them are technically distinct, economically their interests are aligned. In such a case it may, depending on the circumstances, make sense to regard substantive success by any claimant as success for the claimant interest overall. But the present case was not like that. Supawall had originally been Mr Price's company, but we were told by Mr Maynard-Connor that he had been replaced by Mr Middleton as majority shareholder (and sole director) in 2012/13, and Mr Knox did not suggest that was wrong. So Mr Price and Supawall had their own separate interests in their claims, and the fact that for convenience they joined forces to bring their claims in a single set of proceedings did not change that. I think the judge was right to regard their claims as separate and distinct. Once that stage has been reached, I see nothing wrong in the judge awarding Supawall its costs of the patent claim on the basis that it had succeeded (subject to the 25% deduction, which is not challenged, for the issues on which it failed and Mr Middleton's conduct), but making Mr Price pay the costs of his own patent claim on the basis that he had failed. The fact that Mr Price may have succeeded on a number of issues (whether he held the patents on trust for MTF, whether they had been assigned to Lightpeak, and (in part) whether there had been infringement) is nothing to the point. His claim was not partially successful, it was entirely unsuccessful because he had no title. Had he brought his own claim in a separate action and lost, there would be nothing surprising or unusual, let alone appealable, in an order that made him pay the entirety of Flitcraft's costs. A claimant who brings a claim and fails can normally expect to pay the defendant's costs even if he has won on some of the issues along the way to losing. I do not see that Mr Price is in any better position. I would dismiss this ground of appeal. Grounds 2 and 3 – 60/40 apportionment 67. 68. 69. The next question is whether the Judge was entitled to apportion the parties' costs of the patent claims as to 60% to Mr Price's and as to 40% to Supawall's. I have no hesitation in saying that he was. I will start with the question of general principle. Suppose two claimants, A and B, join forces to bring separate claims in a single action against a defendant C. A succeeds but B fails, and the judge orders C to pay A's costs of A's claim, but B to pay C's costs of B's claim. What we are interested in is how to identify

how much of the costs incurred by the claimants jointly have been incurred on A's claim as opposed to B's; and how to identify how much of the costs incurred by C in defending the claims have been incurred in defending B's claim as opposed to defending A's. There is no difficulty in principle if costs have been incurred (on either side) that are wholly attributable to only one of the claims. In the present case for example this was notably the case with the fictitious assignment issue which was crucial to Mr Price's claim but, as Sir Christopher Floyd has explained, did not affect Supawall's claim. But if the claims overlap there are likely to be issues which are common to both claims. That was the case here for example with the question whether Mr Price held the patents on trust for MTF, as if Flitcraft had succeeded on this they would have been able to defeat both claims. How are the costs incurred on such common issues to be apportioned between the two claims? Judgment Approved by the court for handing down. Price v Flitcraft (No 2)

70. Mr Knox's submission would in effect apportion the entirety of the costs incurred on common issues to A's successful claim and none to B's unsuccessful claim. He submitted that as Supawall had succeeded on common issues, it should have the costs of them, and Mr Price should not have to pay Flitcraft's costs of them. That would mean that Mr Price should only have to pay the costs of the issues on which he lost (ie the fictitious assignment issue). That was, he submitted, the only way to avoid what the judge himself said he should not do, namely 71. 72. "make an order that would result in Mr Price paying the Defendants' costs of unsuccessfully defending Supawall's claim." See paragraph 14 of the costs judgment, set out by Sir Christopher Floyd at paragraph 26 above. There may be cases where such an apportionment is appropriate: costs are, as has been said on numerous occasions, peculiarly fact-sensitive, and it is dangerous to seek to lay down prescriptive rules. Suppose for example, A's claim is what the litigation is primarily about, and B's claim is something of an add-on. It might well be appropriate in that case to apportion all the common costs to A's claim and only make B pay for the extra costs occasioned by the joinder of his unsuccessful claim. But there are other cases where there is no particular basis for apportioning common costs other than equally between the two claims. An example of that which we were shown is the decision of Henry Carr J in *L'Oréal SA v RN Ventures Ltd* [2018] EWHC 391 (Ch), [2018] Bus LR 1149. Here the proprietor of a patent (L'Oréal SA) and the exclusive licensee of the patent (its subsidiary L'Oréal (UK) Ltd) successfully sued for infringement of patent and registered design. The licence was granted in 2008, and extended to include the product the subject of the claim in 2012, but the licensee did not register its licence until 2016. In those circumstances it was common ground that s. 68 of the Patents Act 1977 prevented the licensee from recovering any costs of the patent infringement claim in respect of infringement before the licence was registered. The question was what that meant in terms of a percentage of the claimants' overall costs. The answer given by Henry Carr J was 17.5%, calculated as follows: (i) apportion the costs of the action between the registered design claim (20%), patent validity (30%) and patent infringement (50%); (ii) apportion the patent infringement costs between proprietor (50%) and licensee (50%); (iii) apportion the patent infringement costs between pre-registration infringement (70%) and post- registration

infringement (30%). The result is $50\% \times 50\% \times 70\% = 17.5\%$: see at [18]-[21]. 73. The relevant apportionment for present purposes is that I have labelled (ii) above, namely as between L'Oréal SA as proprietor and L'Oréal (UK) Ltd as exclusive licensee. On this Henry Carr J simply said (at [21]): "There were two claimants. Given that I have rejected the argument that the only cause of action was vested in the exclusive licensee, a 50/50 split in terms of costs between the first and second claimants is appropriate." In other words he split costs incurred by two claimants on common issues 50/50. Judgment Approved by the court for handing down. Price v Flitcraft (No 2)

74. Mr Knox sought to distinguish the case on the basis that it was concerned with the effect of s. 68 of the Act, but I do not think this affects the question. What s. 68 required was that the costs incurred by one of two claimants should be disallowed, and that required the costs (which had in fact all been incurred jointly) to be apportioned between them. It can be seen that in the absence of any reason to do otherwise Henry Carr J simply split them equally. That seems to me entirely orthodox. 75. 76. 77. 78. 79. So if all the costs in the present case had been incurred on common issues I think the judge would undoubtedly have been entitled to split them 50/50 between Mr Price's unsuccessful claim and Supawall's successful claim. In fact he did not do that for the reasons given by him at paragraph 16 of his costs judgment (set out by Sir Christopher Floyd at paragraph 27 above), namely that there were "very substantial issues" fought at trial which related solely to Mr Price's claim, which justified apportioning more of the costs to his claim than to Supawall's and hence a 60/40 split. If, as I think he was, he was entitled to start from a 50/50 apportionment and then adjust it to take account of the time taken at trial on issues relating solely to Mr Price's claim, then we have no basis to overturn his conclusion that such issues merited a 60/40 split. It was not suggested that he was wrong to say that time was taken up at trial on them, and the assessment of how that is to be reflected into a broad brush apportionment is quintessentially the province of the trial judge. What he has in effect achieved (although it is not spelt out like this) is the same as if he had apportioned 80% of the costs to common issues (split as to 40% for Mr Price's claim and 40% for Supawall's) and 20% of the costs to issues that concerned Mr Price's claim alone. It is impossible for us to say that this is wrong, or that there was no material justifying that. I think the 60/40 apportionment is not open to challenge and would therefore dismiss Ground 2 of the appeal which seeks to challenge this on the ground that there was no proper basis for it. Ground 3 is that the 60/40 split was inconsistent with what the judge had himself said in paragraph 14 of his costs judgment that he should not do, as it did in effect make Mr Price pay Flitcraft pay some of the costs of unsuccessfully defending Supawall's claim. There are two answers to this. One is that even if this is the effect of what he did, it was in any event justified for the reasons he gave, and if that is inconsistent with paragraph 14, so be it. It does not mean he was wrong to do it. But the other, and to my mind more satisfactory, answer is that properly understood his order was not inconsistent with what he had said in paragraph 14 at all. The effect of treating Mr Price's claims and Supawall's claims as separate is that the costs that Flitcraft spent had to be apportioned between the two claims. Once that has been done the costs apportioned are to

be regarded as the costs incurred by Flitcraft in defending Mr Price's claim and Supawall's claim respectively. Suppose for example, that Flitcraft had spent £100,000 in all. The effect of the judge's order is that £60,000 of this is to be regarded as spent on Mr Price's claim and only £40,000 on Supawall's. By making Mr Price pay the £60,000 (or such part of it as is recoverable on the indemnity basis) the judge is not therefore making him pay any part of the costs spent by Flitcraft on unsuccessfully defending Supawall's claim, as only the other £40,000 Judgment Approved by the court for handing down. *Price v Flitcraft (No 2)* is to be regarded as so spent. That seems to me both what the judge was trying to do, and what he did; and not in fact inconsistent with paragraph 14 of his judgment. 80. I would therefore dismiss Ground 3 as well. Ground 4 – interim payment as against Mr Price 81. Ground 4 challenges the interim payment of £178,857 that Mr Price was ordered to make. But it is dependent on one of the other grounds of appeal succeeding, and since I have held that they fail, I would dismiss this ground as well. Ground 5 – interim payment as against Supawall 82. Ground 5 challenges the interim payment of £12,775.50 that Supawall was ordered to make. The ground of appeal here is that, quite apart from any damages that they might be liable for, Flitcraft were ordered to pay 75% of Supawall's costs of its patent claim, which were almost certain far to exceed this sum, and it was therefore wrong to require Supawall to pay out money to Flitcraft pending assessment, when it would ultimately be the net recipient.

83. Mr Maynard-Connor accepted in terms that if his appeal did not succeed Flitcraft would be writing a cheque to Supawall in respect of costs. In those circumstances I think this ground (which as Sir Christopher Floyd says was scarcely resisted) is well- founded and I would allow the appeal to that extent. 84. I would therefore set aside the interim payment of £12,775.50 against Supawall but otherwise dismiss the costs appeal. The Master of the Rolls 85. I agree with both judgments. I would only add one point, just in case the heinous nature of what Mr Price and Mr Middleton have done is lost in the meticulous detail of the two main judgments above. It appears from what the judge found that (a) Mr Price deliberately instigated a false claim in the High Court founded on an allegation that he was the proprietor of the patents, when he was not, and (b) Mr Middleton deliberately supported that false claim. The court takes a very serious view of dishonest conduct of this kind. It undermines the integrity of the justice system.
86. Whilst *Summers* was a different kind of case on the facts as has been pointed out, the following part of what Lord Clarke said in *Summers* at [53] was relevant here: As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate ... to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the court that the prospect of such orders is likely to be a real deterrent. Judgment Approved by the court for handing down. *Price v Flitcraft (No 2)* 87. That was why the judge was right to order Mr Price to pay Flitcraft's costs on the indemnity basis, and to penalise Supawall in costs for Mr Middleton's false evidence. The court will take every appropriate step to deter those who

contemplate bringing false claims, and thereby practising an intolerable deception on the court itself.

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