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 (ChD)
MR DAVID STONE, SITTING AS A DEPUTY JUDGE OF THE HIGH COURT
Claim No. IL-2024-000036
Neutral Citation: [2025] EWHC 2172 (Ch)

B E T W E E N:

MRS MARIYA VASILYEVNA LISH

Claimant/Appellant

-and-

(1) THE NORTHERN BLOCK LIMITED
(2) MR JONATHAN HILL

Defendants/Respondents

REPLACEMENT DATED 11/03/2026 OF APPELLANT'S SKELETON ARGUMENT FOR PERMISSION TO APPEAL, DATED 7/11/2025

References to the appeal bundles where applicable are in the format [Volume/Tab/p.page/ §paragraph]. The Core and Supplementary Bundles are referred to respectively as "CB" and "SB".

Introduction

1. This is an appeal against an order striking out part of this claim as an abuse of process, made following the judgment ("**Judgment**") of David Stone **[CB / Tab 5 / p.36-58]**, sitting as a Deputy Judge of the High Court (the "**Judge**").

2. The appellant, Mrs Lish, is a designer of typefaces. She entered into a contractual relationship with the Respondents ("**TNB**") in 2012. There was a dispute as to whether or not that was an employment relationship, but it is common ground that (at least in part) it was governed by a written Distribution Agreement (the "**2012 Agreement**") **[CB / Tab 7 / p.85-88]**. It is also common ground that the terms of that 2012 Agreement entitled Mrs Lish to 60% of the sums received by TNB for the exploitation of typefaces she created and provided to them (the "**60% Payments**").

3. It is also common ground that in 2015 Mrs Lish and TNB changed the way in which she would be paid. Mrs Lish says the change was that, rather than receiving those 60% Payments quarterly, she would be paid a fixed amount each month calculated on past

performance, and any further amount due to make up the entitlement to 60% Payments at the year end. D2 sent emails to TNB's bookkeeper recording that arrangement: the emails said that any shortfall from the entitlement to 60% Payments would be paid to Mrs Lish at the year end. The emails called that balancing payment a "bonus", but nothing turns on that terminology: the emails recorded the amount she was due was still 60% **[CB / Tab 7 / p.98-99]**.

4. Mrs Lish's as-yet untested evidence is that (until the events at para 9, below) she believed that she had received that amount.

5. On 17/05/2022 Mrs Lish invoked the provisions of the 2012 Agreement that entitled her to terminate it **[CB/ Tab 7 / p.90]**. Termination was effective from 20/09/2022. TNB said that they owned the copyright in the typefaces Mrs Lish had designed and that after termination they would continue to exploit them. They did continue to exploit them.

6. Mrs Lish issued proceedings (the "**Newcastle Proceedings**"[1]) **[SB / Tab 1 / p.3-69]** for a declaration as to her ownership of the copyright and to restrain infringement. She said 1) she was not an employee, but 2) even if she had been, the 2012 Agreement meant that she owned the relevant copyright[2].

7. Once the dispute about copyright ownership that led to the Newcastle Proceedings had arisen, Mrs Lish (who believed TNB's stance in that dispute was entirely unreasonable, and that TNB were mistreating her) was caused to wonder whether TNB had also mistreated her by failing properly to pay her all the 60% Payments that were due. But, as her evidence recorded, she did no more than wonder. She had no basis to conclude otherwise. When the Defence was filed in the Newcastle Proceedings**[CB / Tab 7 / p.92-234]**, it set out the emails to TNB's bookkeeper described above and stated that TNB had complied with their

[1] The County Court at Newcastle-upon-Tyne is the parties' local court. It was also the closest court with a Chancery District Registry, and so it was proper to issue copyright infringement proceedings there: r.63.13(c) and PD63A para 16.

[2] i.e. it was (if she were an employee) an "agreement to the contrary" within the meaning of s.16(2) of the Copyright Designs and Patents Act 1988 that displaced what would otherwise be the effect of that section – i.e. that an employer owns the copyright in works created by an employee in the course of their employment.

obligations as set out in the agreement recorded by those emails. Mrs Lish took that to confirm that she had properly been paid.

8. On 05/05/2023 Mrs Lish made a Part 36 offer in the Newcastle Proceedings **[CB / Tab 7 / p.236-237]**. That was to forego damages for copyright infringement between the termination of the 2012 Agreement and the acceptance of the offer, in return for confirmation that she was the copyright owner and, on certain terms, to prevent further infringement of her copyright by TNB.

9. A week later, on 12/05/2023, TNB proposed an amendment to their Defence, and proposed a counterclaim **[SB / Tab 2 / p.70-128]**. One proposed amendment to the Defence stated that Mrs Lish had not been paid the 60% Payments since December 2015 **[SB / Tab 2 / p.85 / §18C(c)]**. That was the first occasion on which Mrs Lish had a basis to believe, and did believe, that there had been any underpayment.

10. Correspondence ensued. Key aspects of it were that Mrs Lish's solicitors sought information about those alleged unpaid royalties. That was rebuffed on the basis that no allegation about unpaid royalties was part of the Newcastle Proceedings. Mrs Lish's solicitors said in a letter of Friday 09/06/2023 **[SB / Tab 14 / p.240-241]** that she would seek to amend the Newcastle Proceedings to add such a claim. TNB's next communication, on Tuesday 13/06/2023 (i.e. 1 clear day later), accepted the Part 36 offer thus staying the Newcastle Proceedings **[SB / Tab 14 / p.242-243]**. Those proceedings were at an early stage: there had been a procedural application, but there had not yet been a CMC.

11. Unable, because of that stay, to add a claim for unpaid royalties to the Newcastle Proceedings, Mrs Lish commenced this claim. By the time it commenced she had (because of information provided under the terms of the Part 36 offer in respect of ongoing licences that TNB had granted) some more information about the sums that her designs for typefaces generated. She also made infringement claims about other copyright works she had created, and sought to resolve a dispute about TNB's compliance with the Part 36 offer.

12. TNB applied to strike out the whole claim, either because (they said) it had been compromised by the acceptance of the Part 36 offer, or because they said it was an abuse of process to bring fresh proceedings raising the unpaid royalties claim. TNB also sought summary judgment on the claim regarding non-compliance with the Part 36 offer. The summary judgment application was rejected, but the strike out succeeded: while the Judge

held that the Part 36 offer did not relate to and did not compromise the underpayment claim, he nevertheless held that it was an abuse of process to allow that Part 36 offer to be accepted, and then to issue proceedings in respect of matters it did not relate to **[CB / Tab 4 / p.34-35]**.

13. Mrs Lish submits that decision was wrong. She sought permission to appeal from the Judge, but that was refused. She now seeks permission to appeal from this court.

The Standard of Appeal

14. Before addressing the Grounds of Appeal on which Mrs Lish seeks permission, it is relevant to address the approach to appeals of decisions finding (or rejecting allegations) that an abuse of process of the type found to arise here exists (i.e. an abuse on the principles explained *Johnson v Gore Wood & Co* [2002] 2 AC 1).

15. The question of whether or not such an abuse of process arises is a binary one. In *Stuart v Goldberg Linde*, [2008] 1 WLR 823, Lloyd LJ held as follows at [24] (emphasis added):

> 24 The court's power to strike a claim out is discretionary, but it does not seem to me that on an application to strike out a claim based on the proposition that the proceedings are an abuse of the process of the court, on the principle of *Johnson v Gore Wood & Co* [2002] 2 AC 1, the case is likely to turn on the exercise of a discretion, at any rate if the court decides in favour of the application. Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out, on this ground, unless the court is satisfied that the claim is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536 Lord Diplock spoke of the court's inherent power to prevent misuse of its procedure and of the court's "*duty (I disavow the word discretion) to exercise this salutary power*". I note that Longmore LJ has expressed the same view, agreeing with Thomas LJ, in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR , para 38.

16. Then at [43], referring to a statement in the judgment below, which was itself an appeal from a decision of a Master:

> it suggests that, although he does not say so in terms, the judge was treating the

> master's decision as one reached in the exercise of a discretion, only to be discharged on the very limited basis on which an appellate court can interfere with such an exercise. If that was his view, it was wrong, for reasons given in para 24 above. Of course, the judge was correct to say that for the appeal to be allowed the master's order had to be shown to be wrong: see CPR r 52.11(3)(a)[3]. On a question of abuse of process of this kind raised at a preliminary stage such as this, with no oral evidence, it seems to me that the appellate court is often likely to be, and in the present case is, in as good a position as the court below to assess whether the proceedings are or are not an abuse of the process.

17. As mentioned in *Stuart* at [24], Longmore LJ expressed the same view in *Aldi* – the full citation is [2008] 1 WLR 748. At [38] he explained: "*it would be troubling if two different judges could come to different conclusions on whether the same facts constituted an abuse of process and yet both be right*". That was (as *Stuart* noted) in agreement with Thomas LJ, who at [16] said of the first instance decision under review (emphasis added) that, "*It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process*."

18. Thomas LJ did note in *Aldi* at [16] that this court would have a *reluctance* to interfere without some error; and *generally* would not do so. That, however, is merely consistent with this court conducting a *review* of the decision below. In *Stuart* at [76] Sedley LJ dealt expressly with Thomas LJ's use of those words ("reluctant", "generally"), noting that they indicated the broader role of this court to intervene, absent any error of mistaken inclusion or exclusion or a perverse conclusion, where the decision arrived at was "plainly wrong". Sir Anthony Clarke MR gave a judgment to the same effect at [81], with which Sedley LJ expressly agreed.

19. While "plainly wrong" was the language used in *Stuart* at [76] and [81] in describing this court's approach, the Supreme Court has subsequently explained (although in a different context) in *Re B* [2013] UKSC 33, [2013] 1 WLR 1911, that "plainly" adds nothing useful: see e.g. Lord Wilson JSC at [44]: "*What does "plainly" add to "wrong"? Either the word adds nothing or it serves to treat the determination under challenge with some slight extra*

[3] Now r.52.21(3)(a)

level of generosity apt to one which is discretionary but not to one which is evaluative. Like all other members of the court, I consider that appellate review of a determination whether the threshold is crossed should be conducted by reference simply to whether it was wrong.".

20. An appeal from a decision on an abuse of process therefore does not, in order to succeed, need to demonstrate that a multifactorial assessment has gone wrong, for one of the ways identified (for example) by the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] Bus LR 532 at [46]-[50] (Lord Briggs and Lord Kitchin) and *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc* [2025] UKSC 25 at [94]-[95] (Lord Briggs and Lord Stephens). In other words, if a majority of judges in a constitution of this court concludes that they would have reached a different decision about the existence of abuse, then the Judge's decision would be wrong, and the appeal would succeed.

Test for Permission to Appeal and its application in this case

21. The test for the grant of permission is, of course that the appeal would have a real prospect of success, (or there is some other compelling reason to grant permission). "Real prospect" has the same meaning that it does in Part 24: that there is a real, as opposed to fanciful prospect of success.

22. In this dispute, given the previous section of this skeleton, the test becomes whether or not there is a real, as opposed to fanciful, prospect that the Court of Appeal will conclude that there has been no abuse.

23. In addition, and in any event, Mrs Lish does say that the Judge made numerous material errors of analysis in reaching his conclusion that there was an abuse.

The Grounds of Appeal

24. The decision to strike out the unpaid royalties claim ("**URC**") was wrong for several reasons. First, it was made on the basis of errors of analysis. They form Ground 1 of the Mrs Lish's proposed grounds of appeal (those grounds are of course provided with the Appellant's notice. They are also set out in the italicised headings, below).

Ground 1 – The Judgment made several errors of analysis:

Ground 1(a) – the Judgment was wrong to hold that admissions about copyright ownership, made as part of accepting the Part 36 offer, adversely affected the Defendants' ability to defend the Unpaid Royalties Claim.

25. At paragraph 81, the Judgment held that TNB had "*made admissions as to copyright ownership that ran contrary to their pleaded case that Mrs Lish was an employee: they might not have done so had they known they were facing a claim for unpaid royalties*" and that TNB "*are, in effect, now facing this claim with one hand tied behind their backs given the admissions made to settle the Newcastle Claim*" **[CB / Tab 5 / p.56]**.

26. Those findings were central to the conclusion that the URC was abusive. However, they were wrong for several reasons.

    26.1. First, TNB did know that they faced a further claim. There were expressly on notice before the acceptance of the Part 36 offer that Mrs Lish intended to bring it. Her initial intention was to add it to the Newcastle Proceedings. TNB had no reason to think her intention to bring that claim ended when they accepted an offer of settlement that did not relate to or settle it, but stayed the existing part of the Newcastle Proceedings.

    26.2. Secondly, as the Judgment notes, the only admission that arose as a consequence of the acceptance of the Part 36 offer was about copyright ownership. There was no admission about Mrs Lish's entitlement to royalties. Nor is it part of her case that the acceptance of the Part 36 made any admission in respect of the underpayment of royalties that fell due prior to that acceptance.

    26.3. Nor is it part of Mrs Lish's case that the admission on copyright ownership has any bearing on the entitlement to the 60% Payments. It does not: that entitlement to the 60% Payments arose under the terms of the 2012 Agreement **[CB / Tab 7 / p.85-88]** regardless of copyright ownership. TNB retain an unfettered entitlement and ability to defend the URC on the basis that Mrs Lish was an employee (if they wish to say that makes a difference), or that she had agreed to forego such licence payments, or for any other reason.

    26.4. That the admission as to ownership of copyright has no bearing on the defence to the

URC can be seen, for example, from the pleadings in the Newcastle Proceedings **[SB / Tab 1 / p.3-69]**, and the admissions made in TNB's defence in those proceedings (the "**Newcastle Defence**") **[CB / Tab 7 / p.92-234]**. Mrs Lish's claim was that, even if she was an employee, she still owned the copyright because of the terms of the 2012 Agreement. TNB's Newcastle Defence admitted at [5] **[CB / Tab 7 / p.94]** that the obligation to pay Mrs Lish 60% of its receipts from exploitation of typefaces she created was in place as part of what they said was an employment arrangement (see also, e.g. paragraphs 10 and 11 of that Newcastle Defence) **[CB / Tab 7 / p.95-96]**. It was admitted in TNB's RFI response (Response 1) that the 2012 Agreement was the source of that obligation to make the 60% Payments. Those admissions were made despite TNB's claim that Mrs Lish was an employee and despite its denial that Mrs Lish owned any copyright works. It has never been in dispute that, regardless of whether or not she was an employee, and regardless of whether or not she owned any copyright, that Mrs Lish was at one time entitled to royalties calculated on the 60% Payment basis she seeks. The issue in the URC is whether her entitlement ceased, or she became disentitled (or, perhaps, whether she was in fact paid all she was owed).

26.5. As a consequence, the finding that the admissions made to settle the Newcastle Proceedings would mean TNB faced the URC with "*one hand tied behind their backs*" **[CB / Tab 5 / p.56 /§81]** had no foundation. It was wrong.

26.6. Finally, TNB did not submit that the acceptance of the Part 36 offer, or any admission about copyright ownership, hampered their ability to defend the URC. As the point was (rightly) not asserted by TNB, the reasons why it would have been wrong were not explained to the Judge.

26.7. As a minimum, for the purposes of this application, there is a real prospect that it had no foundation and was wrong, and that there was no abuse for the reasons found (or at all).

27. In addition to that significant error, there were further errors in paragraph 81 **[CB / Tab 5 / p.56]** (which is the paragraph where many of the findings on which the decision to strike out was based were made).

Ground 1(b) – the Judgment was wrong to conclude that the Newcastle Proceedings and the Unpaid Royalties Claim had the same issues, or the same remedies, or that it depended (in a relevant way) upon the same subject matter or same agreement.

28. The findings that the result of the URC was to "*commence further proceedings … in relation to the same arrangement and the same facts*" **[CB / Tab 5 / p.56 /§81]** and that this claim did not depend on different issues that were not in dispute or not central to the dispute in the Newcastle Proceedings, but instead that the "*the Unpaid Royalties Claim involves the same parties, the same subject matter, the same agreement, the same issues and the same remedies*" **[CB / Tab 5 / p.56 /§81]** were flawed:

    28.1. First, to be clear, it is not in dispute that this claim has the same parties and that the same agreement (i.e. the 2012 Agreement) **[CB / Tab 7 /p.85-88]** was relevant to the Newcastle Proceedings and to the URC. However, different aspects of it were in dispute.

    28.2. In the Newcastle Proceedings, the 2012 Agreement was relevant because aspects of it were relevant to whether or not Mrs Lish owned the copyright in her creations. In this action, different aspects of the 2012 Agreement are relevant to what sums (if any) Mrs Lish was due to be paid under the 2012 Agreement (whether she owned copyright or not).

    28.3. For the same reasons, the issues are different in the Newcastle Proceedings and in the URC: in the Newcastle Proceedings the issues concerned whether or not Mrs Lish was the owner of copyright works she created; the URC concerns whether she was paid what she was entitled to receive as a consequence of the exploitation of those works by TNB. As noted above, TNB admitted that she was (at least at the outset) entitled to 60% Payments under the 2012 Agreement, despite saying that she was an employee and that she never owned the copyright in the typefaces.

    28.4. Further, on the assumption that the Judge's reference to "*the same subject matter*" is a reference to the same typeface designs, it also not in dispute that the same typeface designs were relevant to the Newcastle Proceedings and the URC. However, they are not relevant in the same way or for the same reasons: in the URC, they are relevant because their exploitation is said to give rise to a contractual right to remuneration. In the Newcastle Proceedings the key issue was whether or not Mrs Lish owned the

copyright in them.

28.5. The proposition that the same remedies are sought in the URC and in the Newcastle Proceedings has no basis. They are clearly different. While the URC seeks a payment, and the Newcastle Proceedings sought a financial remedy, they are not the same payment and do not relate to the same acts, the same periods or to the same cause of action.

Ground 1(c) – the Judgment was wrong to hold that the Part 36 offer lacked clarity and wrong to hold that it was Mrs Lish's obligation to correct any lack of clarity.

29. The finding that Mrs Lish "*ought to have been clear to [TNB] that the Unpaid Royalties Claim was not included in the Part 36 Offer … that she no longer wished to settle the whole dispute*" **[CB / Tab 5 / p.56 / §81]** was also made in error. That finding had no basis and in any event was irrelevant.

29.1. First, as to its basis: the finding that she "*ought to have been clear…*" includes two sub-findings that 1) there was some lack of clarity about whether or not the Part 36 offer included the URC; and 2) that Mrs Lish was obliged for some reason to clear up any lack of clarity if it did exist.

29.2. Each of those sub-findings has no basis:

29.2.1. As the Judgment itself holds, the Part 36 offer **[CB / Tab 7 / p.236-237]** only related to the pleaded case in the Newcastle Proceedings. It was clear that it did not include the URC.

29.2.2. As there was no lack of clarity, there was nothing that required clarification.

29.2.3. Even if there had been a need for clarification of the terms of the Part 36 offer, TNB (who were on notice that Mrs Lish wanted to make the URC, and who knew that it was not part of the Newcastle Proceedings) should have sought clarification.

29.3. Further, as to the basis of the finding that Mrs Lish should have said that she "*no longer wished to settle the whole dispute*", that also has no foundation. It relates to a comment made in the Part 36 offer letter **[CB / Tab 7 / p.236-237]**, explaining why

Mrs Lish was making the offer[4]:

29.3.1. First, "*the whole dispute*", in that context, can only have related to the pleaded claim in the Newcastle Proceedings. Mrs Lish did want to settle that.

29.3.2. Secondly, the reference to "*moving on…*" was not a part of the offer. It reflected Mrs Lish's desire at the time the offer was made.

29.3.3. Thirdly, it was clear that acceptance of the Part 36 offer would not resolve all the issues between the parties: the offer did not relate to the URC. Mrs Lish had, before the Part 36 offer was accepted, indicated in correspondence from her solicitors her intention to seek the underpaid royalties.

29.4. As to relevance, because the Part 36 offer did not in fact settle the URC, and because D2's evidence does not suggest that TNB thought it did, the clarity of its content was not relevant to the issues on this application.

Ground 1(d) – the Judgment was wrong to place any weight on the fact that Mrs Lish could have withdrawn the Part 36 offer and regrouped.

30. This ground addresses an earlier aspect of paragraph 81 of the Judgment **[CB / Tab 5 / p.56]**. That recorded an acceptance that Mrs Lish could have withdrawn the Part 36 offer before it was accepted. To the extent that was a factor in the Judge's finding of abuse (and the inclusion of it in paragraph 81 suggests that it may have been), placing reliance on it was wrong.

31. First, what Mrs Lish *could* have done does not equate to what she *should* have done, less still does it make the fact that she did not withdraw the Part 36 offer abusive, or a

[4] The letter said, in the preamble before the offer was made, "*Our client has confidence in her claim, as we have stated throughout. The only benefit realistically to our client in settlement now is to avoid the further costs of progressing to trial, a level of which will always be irrecoverable even when our client wins her case as expected. Further, our client simply wishes to move forward and progress with her own business rather than continue protracted litigation with your clients, as we have said previously. Therefore, we are instructed at this stage to make the following offer on Part 36 terms, and thus our client's offer is as follows:*"

contributor to any abuse.

32. Secondly, while Mrs Lish could have withdrawn the Part 36 Offer in the last days before it was accepted[5], there was no reason for her to do so: it did not relate to the URC. It did not provide for settlement of the URC.

Ground 2 – the Judgment was wrong to make factual findings adverse to Mrs Lish that were contrary to her evidence and made without cross-examination, or which did not take account of relevant factors

33. The Judgment made findings in paragraphs 79 and 80 **[CB / Tab 5 / p.55-56]** adverse to Mrs Lish. It does not appear that they were the basis for the finding of abuse (see opening line of paragraph 81 **[CB / Tab 5 / p.56]**), but it may be necessary for Mrs Lish to challenge them on appeal in the event that they are said to have contributed to the finding of abuse, or to provide an alternative basis for concluding that there was an abuse.

34. Those findings were:

    34.1. At [79]: "*it seems to me unlikely on the face of it that Mrs Lish would not have noticed that her payments, for a period of 7 years, were in rounded numbers*." **[CB / Tab 5 / p.55]** That finding did not take into account a relevant factors: first, as submitted at the hearing but not mentioned in the Judgment, TNB's Defence [11(b)] in the Newcastle Proceedings admitted that D1 always rounded up the sums it would pay to Mrs Lish in the period when TNB admit she did receive 60% Payments **[CB / Tab 7 / p.96]**; secondly, there is no reason in principle for round numbers to have made Mrs Lish suspicious. In any event, no suggestion that the payment in round numbers was curious was made until TNB's submissions for the hearing. Mrs Lish was not given an opportunity to address this in evidence.

    34.2. At [79]: "*having been caused to wonder in July 2022 whether she was being underpaid (as she admitted) an amount I am now told could be as high as £300,000, ...*" **[CB / Tab 5 / p.55]**. This finding appears to suggest that Mrs Lish had cause to wonder that she had been underpaid by £300,000; or that the information received in

[5] Mrs Lish could not have withdrawn the Part 36 Offer for 21 days after it was made, without the permission of the court (r.36.10).

2025 in respect of the size of the claim should have motivated action in 2022. Neither is correct. Mrs Lish did not have information on which she could have even concluded that there was an underpayment, and certainly no information to estimate its size, in 2022.

34.3. At [80]: "*It does seem to me likely that Mrs Lish was on notice from as early as 2022 that, since 2015, she had not been paid the 60% royalties under the 2012 Agreement.*" **[CB / Tab 5 / p.55]**. This finding is contrary to Mrs Lish's evidence in her witness statement at [13] **[SB / Tab 9 / p.185-186]**. That evidence has not been tested by cross-examination. She was not aware that she had been underpaid until the receipt of the proposed amended defence in the Newcastle Proceedings **[SB / Tab 2 / p.70-128]**. There was no material that showed, contrary to that evidence, that she was aware, and no basis in the context of this application to disbelieve it.

34.4. At [80]: "*It does seem to me that all the dots were there, and a reasonable person in Mrs Lish's position would have taken steps to join them*" **[CB / Tab 5 / p.55]**. If the "dots" go beyond i) being paid in round numbers, and ii) being caused to wonder, as a consequence of TNB's reaction to Mrs Lish terminating the 2012 Agreement, that they might have acted in another way adverse to her (i.e. by not paying her properly), it is unclear what they are, nor what the steps taken to have joined them would have been. If the dots are only those points, the conclusion that they could have been joined to identify underpayment was wrong.

34.5. In case there was some further reason for this finding that "all the dots were there", Mrs Lish requested further reasons at the hearing to settle the order consequential on Judgment[6]. The Judge declined to give such further reasons, holding that the reasons for the decision were clear. From that it must be inferred that all the reasons for that finding are contained in the Judgment. That reinforces the conclusion that the finding that "all the dots" were there, and that a reasonable person in Mrs Lish's position would have taken steps to join them, was wrong.

[6] In accordance with the duty to assist the court to achieve the overriding objective, and as recommended by the Court of Appeal in *English v Emery-Reimbold* – see White Book at 40.2.8, p.1272.

Ground 3 – in all the circumstances, the Judgment was wrong to find that bringing the Unpaid Royalties Claim after the acceptance of the Part 36 offer was abusive

35. This Ground is enhanced by the foregoing grounds, but arises even if those grounds do not succeed. There is a real prospect that this court will conclude that bringing the URC after the acceptance of the Part 36 offer was not abusive. In particular, (in addition to the grounds above) that is because:

    35.1. The URC was not part of the Newcastle Proceedings and was not within the Part 36 offer.

    35.2. In between making the Part 36 offer and its acceptance, TNB's proposed amended defence was served, stating that Mrs Lish had not been paid the royalites she says she was entitled to. Mrs Lish (through solicitors) wrote to seek more information about that allegation. More information was refused.

    35.3. Mrs Lish put TNB on notice that she intended to add the URC to the Newcastle Proceedings. One clear day later, the Part 36 offer was accepted, staying the Newcastle Proceedings. Those proceedings had not yet reached the CMC stage. Mrs Lish was therefore unable to bring the URC claim in that action, nor had she settled it. Her only option to pursue it was to issue a new claim.

Ground 4 – the Judgment was wrong to find, as an extension of the decision that the Unpaid Royalties Claim was an abuse of process, that the Infringements Claim was also an abuse of process.

36. The Infringements Claim is dealt with briefly in the Judgment at [85] **[CB / Tab 5 /p.57]**. The reasoning is that, having struck out the URC, the infringements claim can be in no better position, so it should be struck out too. If it was wrong to strike out the URC, there is a real prospect that the decision in respect of the Infringements Claim was also wrong.

Conclusion on Grounds of Appeal

37. As a consequence, Mrs Lish submits that permission to appeal should be granted on the grounds identified above.

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