



Neutral Citation Number: [2025] EWCA Civ 653

CA- 2025-000161 and CA-2025 000164
Applications CA-000161-Y, CA-000161B,
CA -000161A and CA000164-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: Wednesday, 14th May 2025

Before:

LORD JUSTICE LEWISON

Between:

SHORTS INTERNATIONAL LIMITED

Appellant /
Claimant

- and -

GOOGLE LLC

Respondent /
Defendant

SIMON MALYNICZ K.C. and SAMUEL CARTER (instructed by **Sheridans Solicitors**)
appeared for the **Appellant/Claimant**.

IONA BERKELEY (instructed by **Fieldfisher LLP**) appeared for the **Respondent/Defendant**.

Approved Judgment

This judgment was handed down ex tempore on 14th May 2025.

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LORD JUSTICE LEWISON

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LORD JUSTICE LEWISON :

1. This claim for trade mark infringement started life in the Intellectual Property Enterprise Court ("IPEC"). IPEC and its predecessor, the Patents County Court, was set up to assist small and medium-size enterprises in enforcing and litigating intellectual property disputes. One of the important ways in which it does that is by capping recoverable costs at first instance. The current costs cap is set out in CPR 46.21 and is £60,000 for a trial on liability. Although this claim started in IPEC, it was transferred to the Intellectual Property list of the Business and Property Courts. The transfer order, made on 3rd February 2023, recorded the parties' agreement that despite the transfer, the costs cap applicable in the IPEC should continue to apply to the claim following the transfer.
2. The claim came on for trial before Mr. Michael Tappin KC who, after a seven-day trial, dismissed it in a judgment dated 31st October 2024. Mr. Tappin granted Shorts permission to appeal on grounds 1-5 of its draft grounds and refused permission on grounds 6-8. He also granted permission to cross-appeal to Google on its draft grounds despite the fact that Google was the successful party at trial. Shorts' grounds of appeal were subsequently amended and the grounds on which Mr. Tappin had granted permission to appeal were renumbered as grounds 4-8. Shorts asked for permission to appeal on its renumbered grounds, 1-3 and 9-12, and on 25th March 2025, Arnold LJ granted permission to appeal on those additional grounds.
3. The order which Arnold LJ made on that occasion is an unusual form of order, and I am bound to say not one which I have seen before. It arose out of a suggestion in the Statement of Reasons for refusing permission that if permission were to be granted, it should be granted on the basis that security for costs should be ordered as a condition of the grant of permission. What the Statement of Reasons said was this: "In the alternative, if permission is granted, Google contends that any permission should be conditional on Shorts paying a certain sum into court for Google's costs in respect of the appeal on those additional grounds." Arnold LJ's order stated in paragraph 1 that permission to appeal on grounds 1-3 and 9-12 was granted "subject to paragraph 2 below". Paragraph 2 provided: "The Defendant's application for permission to appeal... to be made conditional upon the provision by the Claimant of security for costs, the Defendant's application... for security for costs... to the extent that the judge granted permission and the Claimant's application... for a costs capping order shall be listed together for an oral hearing." It is those applications which have come before me today.
4. Google assert that Arnold LJ has already decided in principle that security for costs should be ordered in respect of the additional grounds for which he granted permission and I do not understand Mr. Malynicz KC to dispute that. The only question for me, therefore, on the question of security for costs, is how much.
5. I have been presented with voluminous and often highly tendentious evidence in which each side makes strong criticisms of the other and goes into what I consider to be unnecessary detail about the conduct of the trial below so I propose to concentrate on what seems to me to be essential for the determination of these two applications and no more.

6. The first of those applications is Shorts' application for a costs capping order. It is common ground that that needs to be dealt with first. The principal rule is CPR 52.19, which provides: "1. Subject to rule 52.19A, in any proceedings in which costs recovery is normally limited or excluded at first instance, an Appeal Court may make an order that the recoverable costs of an appeal will be limited to the extent to which the court specifies.

"2. In making such an order, the court will have regard to (a) the means of both parties; (b) all the circumstances of the case; and (c) the need to facilitate access to justice." I omit 3 and go to 4: "An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise."
7. In chapter 34, paragraph 3.8 of his final report on civil litigation costs, Sir Rupert Jackson recommended that if costs were capped in IPEC, in order to give to the underlying policy there ought to be "commensurate caps upon recoverable costs in appeals" from the IPEC. Sir Rupert's view is, in my opinion, supported by the commentary to CPR 52.19 in the White Book and also by Professor Zuckerman in Civil Procedure 4th Edition, paragraph 25.269.
8. Google take the point that the trial in fact took place in the Intellectual Property list in the Chancery Division where costs are not normally capped. Therefore, they say, CPR 52.19 does not apply at all. Bearing in mind that the transfer from IPEC was ordered on the basis that the IPEC costs capping regime should remain in place, this is at best a highly technical point. The point here under the rule is not that the appeal comes from a forum in which costs are normally capped, but it is an appeal in proceedings in which costs are normally capped. In my view, the proceedings are the claim for trade mark infringement which began in IPEC and they are the kind of proceedings in which costs are normally capped. I do not regard the transfer from IPEC into the intellectual property list of the business and property courts as altering the fundamental nature of the proceedings. In my judgment, therefore, CPR 52.19 continues to apply to the appeal.
9. In the alternative, Mr. Malynicz relied on CPR 3.19 which is a more general power to make a costs capping order, but that does not apply in the same way as CPR 52.19 and, as Christopher Clarke LJ held in *Black v Arriva Northeast Limited* [2014] EWCA Civ 1115, it is not to be used in order to facilitate access to justice. Unlike CPR 52.19, whose object is indeed to do just that.
10. Another point that Google has taken by way of preliminary is that the application was not made as soon as practicable and therefore that CPR 52.19(4) should militate against the making of a costs capping order. The request for costs cap was made in correspondence and I accept that there had to be some investigation of the possibility of funding the appeal before a formal application should be made. To the extent that there has been delay, I do not regard that as a significant feature.
11. What then has changed since the trial at first instance? Well, a number of things have changed. The first of course is that the claimant has lost. The second is that the normal position is that if a claimant chooses to appeal against an adverse judgment the normal position is that the unsuccessful party is at risk of paying the successful party's

costs. Unlike the position at first instance in IPEC, costs capping in this court is not automatic. Even where permission to appeal has been granted, the prospect of an adverse costs order is intended to be a potential deterrent in pursuing an appeal (see *Glass v Freyssinet Limited* [2016] EWCA Civ 1120), where in fact the application failed because insufficient information about the appellant's means was put before the court.

12. Nevertheless, the further specific factors mentioned in CPR 52.19 refers to the facilitation or access to justice as a "need" and where something is described as a need I regard that as an indication that is to be given substantial weight.
13. Shorts's costs of the appeal are estimated at about £400,000 and Google's costs are estimated at about the same amount. Absent a costs cap, Shorts face the prospect if the appeal fails of paying both Google's costs and its own. An important consideration in both applications is the effect which the refusal of a costs capping order on the one hand or an order for the provision of security for costs on the other would have on the prospects of this appeal proceeding. Whether that is properly described as stifling I need not trouble with for the moment, but the same considerations are relevant to both applications.
14. How to deal with the financial consequences of that kind of order is determined by the decision of the Supreme Court in *Goldtrail Travel Ltd v Onur Air* [2017] 1 WLR 3014. There are a number of points arising out of Lord Wilson's judgment in that case which are relevant. 1. To stifle an appeal is to prevent an appellant from bringing it or continuing it, if an appellant has permission to bring an appeal it is wrong to impose a condition which has the effect of preventing him from bringing or continuing it. 2. A party's participation in proceedings can be as much stifled by an order for security for costs as by an order for payment into court of a sum claimed or awarded. 3. The objection that it would stifle the continuation of an appeal represents a contention which needs to be established by the appellant and although it is hypothetical it is to be established on the balance of probabilities. I will come back to that point in a little while because it is not without its difficulty. 4. Even where the appellant appears to have no realisable assets of its own with which to satisfy it, conditions for payments will not stifle its appeal if it can raise the required sum. 5. When in response to the claim of a corporate appellant that a condition would stifle its appeal, the respondent suggests that the appellant can raise money from its controlling shareholder, the court needs to be cautious. The question should never be can the shareholder raise the money, the question should always be, can the company raise the money. The ultimate question is, has the appellant company established on the balance of probability that no such funds will be made available to it whether by its owner or some other closely associated person as would enable it to satisfy the requested condition. 6. The evidence must be full and frank and the court should regard with some scepticism bare assertions about the financial position of the respondent to an application for security for costs.
15. Evidence of Shorts's means has been given by Mr. Pilcher in two witness statements, one of 12th March 2025 and one on 24th April 2025. In both those statements he gives financial details but the precise figures he refers to are confidential and there is no need for me to disclose them in what is after all a public judgment.

16. In his first statement he explained that Shorts had raised the costs of the claim at first instance from a variety of sources, including investors, family and other companies. He went on to say that Shorts's estimated costs of the appeal would be some £400,000. Shorts itself does not have anything like that amount of money. Mr. Pilcher goes on to explain that most of the investors who contributed to the costs of the trial are unwilling to fund an appeal and that ATE insurance which was available at trial is no longer available.
17. I am bound to say I do not find it surprising that investors who were prepared to finance a trial at first instance, which could have been won, are unwilling to fund an appeal when the trial has been lost. Mr. Pilcher goes on to say he is negotiating an agreement with solicitors and counsel to mitigate some of Shorts's potential expenditure in the appeal.
18. In his witness statement of 4th April 2025 Mr. Rose, Google's solicitor, raised a number of queries and criticisms about Mr. Pilcher's evidence. Mr. Pilcher has done his best to answer them in his second witness statement. In that statement, he gave further information about Shorts's shareholders, both of which are corporations, and about the individual investors in those corporations. The upshot is that they are not willing or not able to fund the appeal. Mr. Pilcher also gave more information about Shorts's subsidiaries, none of which individually or collectively is able to fund the appeal. He explained his own financial position and that of his fellow director, Mr. Schneider. Mr. Pilcher's means do not realistically allow him to fund the appeal but he was then in the process of negotiating a further investment for Mr. Schneider which, if successful, would go a long way towards covering Shorts's own costs of the appeal, but even if successful those fundraising efforts would not raise enough to pay Google's costs as well in the event that the appeal fails.
19. Ms. Berkeley, for Google, has made a number of detailed criticisms about gaps in the evidence given by Mr. Pilcher. In my judgment, this kind of application is not intended to be a state trial in which every conceivable piece of information is put before the court, particularly where, as here, the evidence is primarily directed in support of the costs capping application which is likely to be at least very influential, if not determinative, of the application for security for costs.
20. So far as Google's means are concerned, there can be no doubt of its ability to fund an appeal or indeed to pay Shorts's costs in full in the event that the appeal were to succeed. Nor can I see any particular hardship to Google if it had to bear an irrecoverable shortfall in costs in the event that the appeal were to fail.
21. So far as the circumstances of the case are concerned, this was hard fought litigation. Each side has trenchantly criticised the other's conduct of the trial in a number of interim applications that were made, but this is not the time to go into that. The scale of the litigation in this court illustrated by Google's schedule of costs for these two applications alone, which amount to £90,000, Shorts's costs of these two applications are of the same order. I am bound to say that I find expenditure on this scale astonishing and it does cast some doubt on Shorts's protestations of impecuniosity.
22. On the other hand, both the trial judge and Arnold LJ have concluded the grounds of appeal have real prospects of success and it is not appropriate for me to go behind that evaluation.

23. The real question in my view is the question of access to justice. As I have said, IPEC was established in order to facilitate access to justice by SMEs, and that facilitation of justice is expressed in the rule as a need. The application of the balance of probabilities standard of proof to an application decided on written evidence, which has not been tested by cross-examination, is not an easy one to apply. In general, the court does not disbelieve a witness whose written evidence has not been tested by cross-examination, even though there may be evidential gaps in Mr. Pilcher's evidence. Considering his evidence as a whole about the state of Shorts's finances, his efforts to raise money for the costs of an appeal, the steps he has taken to explore ATE insurance, his approaches to investors, family and friends, I am as satisfied as I can be on written evidence that the refusal of a costs capping order would fail to facilitate access to justice and the appeal would be likely to be abandoned.
24. In my judgment, therefore, the need to facilitate access to justice tips the balance. I consider that this is a case in which a costs capping order should be made. That leads on to the next question: in what amount to cap the recoverable costs?
25. Ms. Berardi, Shorts's solicitor, proposes a cap of £20,000. The only reason given for that is that the trial costs were far greater than the applicable costs cap of £60,000, and that a costs cap of £20,000 in this court would be proportionate. In his written statement of 14th February 2025, made in support of Google's application for security for costs, Mr. Rose rejects the idea of a costs cap, but in that witness statement he advanced no fallback position in the event that a costs cap were to be imposed. In his witness statement of 4th April Mr. Rose again rejects the idea of a costs cap. He also takes issue with Ms. Berardi's figure of £20,000, and suggests that the figure should be far higher, more closely reflecting the costs that the parties are likely to incur. He does not in that statement descend to pounds and pence and there is still no real figure put forward by Google for an actual amount for a costs cap.
26. I am bound to say that I cannot see any principled justification for Ms. Berardi's figure of £20,000. Although Shorts's ability to pay is one factor, it is not the only one. If a higher costs cap has a modest deterrent effect on proceeding with the appeal, that is indeed part of the normal litigant process. On the other hand, it seems to me the Rules Committee may be taken to have struck a balance between facilitating access to justice by SMEs and not giving them a free ride.
27. In my judgment, therefore, taking into account all the circumstances of this case, the appropriate cap on the recoverable costs is the same cap that applied to the first instance proceedings. I will therefore order that the recoverable costs of the appeal and the cross-appeal will be limited to £60,000.
28. I turn then to Google's application for security for costs. The general rules contained in CPR 25.13, but CPR 25.15 deals with security for costs of an appeal, the court may make such an order where the appellant is a limited company and there is reason to believe that it will be unable to pay the costs of the other parties to the appeal, should its appeal be unsuccessful. There can be no doubt at all that that condition has been satisfied. Indeed, it is the very basis of Shorts's application for a costs capping order. The question resolves itself to one of discretion.
29. The amount which Google has asked for is £200,000, a reduction from its original request of £274,000, but since I have capped the costs at £60,000, it would in my

judgment make no sense at all for me to order security for costs in any higher amount. As I have said, however, I take the view (with which Mr. Malynicz does not disagree) that Arnold LJ has already ordered the provision of security for costs. The appropriate amount for security is the amount of the capped recoverable costs and I therefore order that security for costs be provided in the sum of £60,000.

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