

PATENTS ACT 1977

CLAIMANT Kwix UK Ltd

DEFENDANTS Matthew Murphy
and
Ann Nilsson and Patrick Lannagon
as Joint Trustees of the Bankruptcy
Estate of Matthew Murphy

PROCEEDINGS References under sections 8 and 12 in
respect of:

UK application GB1107673.4
PCT application PCT/GB2012/051012
EP application EP12725871.3

HEARING OFFICER H Jones

Date of case management conference: 21 October 2020

PRELIMINARY DECISION

Introduction

- 1 Patent application GB1107673.4 entitled “A pipe straightener” was filed on 9 May 2011 in the name of Matthew Murphy (the first defendant). Mr Murphy was the sole inventor. The application was withdrawn, but served as a priority application for PCT application PCT/GB2012/051012 filed on 9 May 2012, also in the name of Mr Murphy. This gave rise to an application at the European Patent Office - EP12725871.3. The European Patent Office has issued a notification of intention to grant, but the grant is stayed pending the outcome of these entitlement proceedings.
- 2 An equivalent US patent US9751121 has already been granted to Mr Murphy.
- 3 Kwix UK Ltd (“Kwix”) initiated entitlement proceedings before the comptroller on 15 May 2019 challenging Mr Murphy’s entitlement to the UK and EP patent applications.

Background

- 4 It will be helpful to set out some of the background to these proceedings to provide some context for what follows. I should note that the claimant and the first defendant have somewhat different recollections of events, but I do not think there can be any disagreement over this brief overview.

- 5 Mr Murphy, a heating engineer by trade, began to develop a pipe straightening tool and filed a UK patent application, with professional assistance from Appleyard Lees, Patent and Trademark Attorneys.
- 6 At around that time Mr Murphy's father-in-law introduced Mr Murphy to Peter Allen, a businessman, who in turn introduced Mr Murphy to Keith Ford, another businessman with whom Mr Allen had a working relationship. These men agreed to work together in business with a view to capitalise on Mr Murphy's idea for the pipe straightening tool. The precise nature of that agreement is at the heart of these entitlement proceedings. In brief, the claimant asserts that Mr Murphy agreed that the partnership would own the rights to the original patent application and any subsequent applications, with Mr Murphy, at least initially, holding those rights on behalf of the partnership. Mr Murphy asserts that the agreement only covered the manufacture and sale of the tool. This agreement was never reduced to writing.
- 7 In March 2012 Wilson Gunn, Patent and Trademark Attorneys, were instructed to file a PCT application claiming priority from the earlier UK application. The UK application was later withdrawn. There is a disagreement as to who was instructing Wilson Gunn. Mr Murphy says that he was instructing Wilson Gunn in his personal capacity. Kwix say that they were the client, and that both Mr Murphy and Mr Allen were instructing Wilson Gunn on behalf of Kwix. What is not in dispute is that the application proceeded in the name of Matthew Murphy. In due course the PCT application gave rise to an application at the European Patent Office; this is the application mentioned above which is waiting to be granted.
- 8 In May 2012 the partners formalised their partnership by incorporating Kwix UK as the vehicle through which they would operate their business. The partners were all shareholders in this business, to differing degrees. There were a few other shareholders, and the share ownership would change over time, as I will explain later. Work on development and manufacture of the tool continued and a number of sales were made.
- 9 On 30 July 2015 Mr Murphy was made bankrupt. The significance of this will be explored later in this decision, but at this stage I will simply point out that this is the reason that Ann Nilsson and Patrick Lannagon, as Joint Trustees in Bankruptcy (JTIB), are listed as co-defendants in these entitlement proceedings. The JTIB have adopted a neutral stance, save for asserting the effect of Insolvency Law in this matter, i.e. any interests that Mr Murphy held in the patent applications at the date of his bankruptcy order now vest in the JTIB. After his automatic discharge from bankruptcy, after a year, Mr Murphy continued his involvement in Kwix. No assets re-vested in Mr Murphy upon discharge.
- 10 The relationship between Mr Murphy and Kwix, and in particular Peter Allen, began to deteriorate from about September 2017. Both claimant and first defendant have made various allegations as to the reason for this breakdown, but the reasons are not crucial to my decision. This culminated in Mr Murphy asserting to Kwix, in late 2018, that he owned the patent and that Kwix should stop manufacturing and selling the tool. Kwix responded by filing these entitlement proceedings.
- 11 There is one other important person I must introduce – Linda Murphy, who is Mr Murphy's mother. Mr Murphy claims that he entered into an agreement with his mother in 2010 and that it is she who owns the patent. Kwix knew of this claim before filing these entitlement proceedings and they refer to it in their statement of case, but

they strenuously deny that they knew of it until 2019. I will say more about Mrs Murphy later, but for now I will just point out that Mrs Murphy has chosen not to become party to these proceedings despite having a *prima facie* proprietary interest.

Preliminary issues

- 12 Both the claimant and first defendant have raised preliminary issues. Mr Murphy says that Kwix's statement of case should be struck out on account of Mr Allen not being authorised to file the entitlement proceedings on behalf of Kwix. Kwix, for its part, submits that I should issue summary judgment against Mr Murphy on the grounds that Mr Murphy has no reasonable prospect of defending the case.
- 13 My original intention was to deal with these preliminary issues during a hearing on the substantive case of entitlement, but in the process of arranging the hearing it became clear that there were practical difficulties due to the various coronavirus restrictions in force which affected the IPO and the parties on the proposed hearing date. A hearing in person was out of the question, and a hearing by video conference presented issues relating to the adequate supervision of witnesses. A case management conference through Skype® was therefore convened to discuss the best way to proceed. Both claimant and defendant were in full agreement that, in the circumstances, I should hear arguments on the preliminary issues and decide on those first so that the issues regarding witness supervision could be deferred, or perhaps avoided altogether.
- 14 Kwix were represented at the video-conference by Matthew Kime (Counsel) of Cobden House Chambers, and by Tom Hutchinson of Hutchinson IP Ltd. Mr Murphy's counter-statement was filed with professional assistance but by the time of the hearing he was a litigant-in-person and therefore represented himself, with some limited assistance from his partner, Ms Wendy Bradbourn. The JTIB indicated that they did not intend to be represented at the video-conference and restated their position that they take no position on the merits of either the claimant's or the first defendant's position in the matter.

The first defendant's case for striking-out the claimant's statement of case

- 15 The statutory provisions for striking out a statement of case are set out in rule 83:

83 - (1) A party may apply to the comptroller for him to strike out a statement of case...

(2) If it appears to the comptroller that -

(a) the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) the statement of case is an abuse of process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) there has been a failure to comply with a section, a rule or a previous direction given by the comptroller,

he may strike out the statement of case.

(3) ...

- 16 Mr Murphy's case for strike-out is first set out in his counter-statement of 26 June 2019. At that time he was represented by Appleyard Lees, Patent and Trademark Attorneys.

- 17 The Tribunal invited submissions on this strike out issue in September 2019. In view of those submissions the Tribunal informed the parties in November 2019 that I was minded to refuse the request to strike out at that point, and directed that the proceedings move to the evidence rounds. There was no objection to this at the time.
- 18 Although I had initially indicated that I was minded to refuse the request to strike out Kwix's statement of case, I must now reach a firm conclusion on this and accordingly I have heard the parties on the issue. Mr Murphy also provided a somewhat lengthy skeleton argument in advance of the hearing, not all of which assisted me in understanding precisely what his argument is.
- 19 If I can express Mr Murphy's argument (at least in his original counter-statement) in the most simple terms it is this: Mr Allen had no authority to commence these entitlement proceedings on behalf of Kwix because Mr Murphy, as a director of Kwix, had not been provided the opportunity to oppose the course of action at a meeting of directors, or otherwise. To put it more formally, Mr Murphy says that the decision to file the entitlement proceedings was contrary to Kwix's Articles of Association and Company Law.
- 20 I should point out that Mr Murphy's legal standing as a director of Kwix is not entirely clear. He could not have been a director while his bankruptcy remained undischarged, but there does not appear to be any record of Mr Murphy being formally reinstated by Kwix, though Mr Allen made it clear to Mr Murphy that there would be no problem with Mr Murphy being reappointed once discharged from bankruptcy. That said, Mr Murphy has been acting as if he were a director and is named on the register of directors at Companies House, and Kwix appears, at least to some extent, to have accepted that fact by inviting him to participate in directors' meetings.
- 21 Mr Kime's response on behalf of Kwix is that the matter is easily resolved with reference to a principle of Company Law - the so-called *Duomatic principle*. The essence of the *Duomatic principle* is that if all the shareholders of a company reach an agreement to follow a course of action then strict compliance with formal procedures, e.g. as set out in the company's Articles of Association, is not necessary. At the time of commencing the entitlement proceedings, Mr Allen was a director of Kwix and was the registered holder of all 200 of Kwix's shares. Accordingly, Mr Kime's submission is that as sole shareholder Mr Allen gave his unanimous consent to commencing entitlement proceedings and as a director he implemented that course of action, and therefore (in view of *Duomatic*) Mr Allen did indeed have the authority to do what he has done.
- 22 Kwix further argues that the decision to file the entitlement proceedings was ratified by a meeting of directors on 28 July 2019 which passed a resolution empowering a sub-committee of the company to be formed with the objective of protecting, managing and maintaining Kwix's intellectual property rights. The dispute between Mr Murphy and Kwix is mentioned in the minutes of this meeting, which have been submitted as evidence. I should note that there were three directors present at this meeting: Peter Allen, Matthew Murphy, and Sier Schravessande.
- 23 From Mr Murphy's perspective the matter is not as black and white as Mr Kime submits, as he sought to explain at the hearing. Mr Murphy's submission is that Mr Allen has gained his status as sole shareholder within Kwix by underhand means, and further that Mr Schravessande, an associate of Mr Allen, was appointed as a

company director merely to enable Mr Murphy to be out-voted at the aforementioned meeting of directors. I think the underlying grievance that Mr Murphy has here is that after his bankruptcy he feels that he has been effectively shut out of Kwix, the company that he helped to form in order to make money from the tool that he invented.

- 24 There is nothing about the issue of share ownership in the case for strike-out set out in Mr Murphy's counter-statement (a point that Mr Kime was keen to highlight) but Kwix clearly saw this argument coming (Mr Murphy's representatives, Appleyard Lees, had raised it on behalf of Mr Murphy in February 2019) and had already addressed it in some detail in their earlier submissions on the strike-out issue in September 2019, to which Mr Kime referred at the hearing. I do not intend to repeat Kwix's argument at length here, save to say that their submission is that in view of Kwix's Articles of Association and the Companies Act 2006, then for the purpose of *Duomatic* the shareholders who must give their unanimous consent are those whose names are recorded in Kwix's register of members. The register contains only one name - Mr Allen.
- 25 Notwithstanding Kwix's submission above I have nevertheless considered the evidence before me regarding the ownership of the shares. Mr Allen, in his witness statement, somewhat briefly explains the changes in share ownership over time by saying that a number of the original shareholders decided that they no longer wanted to have any involvement in the business for various reasons. Mr Murphy alleges that Mr Allen orchestrated these transactions for his own benefit, but by his own admission in his skeleton arguments states that he does not know how exactly Mr Allen acquired all of his shares, in particular those that had been held by Mr Ford (or rather by his company Millennium Coupling Company Ltd).
- 26 It seems to me that the most contentious and interesting point is what has happened to the 90 shares held by Mr Murphy. Both parties place significant weight on a Nominee Shareholder Arrangement (NSA) dated 16 July 2015. This was just a couple of weeks prior to the date of Mr Murphy's bankruptcy. An NSA is an agreement whereby one person (the beneficial owner, Mr Murphy in this case) does not wish to have the shares registered in his/her own name and therefore appoints another person (the nominee, Mr Allen here) to become the registered owner of shares which are to be held for the benefit the beneficial owner. There is a disagreement about who instigated the NSA, and over its validity. Mr Allen says that it was instigated at Mr Murphy's request, but Mr Murphy asserts that Mr Allen 'sold' the idea to Mr Murphy as a convenient way of avoiding Mr Murphy having to buy shares in Kwix following his discharge from bankruptcy, and Mr Murphy claims not to have signed it. I must say that there is a lack of clarity and consistency over Mr Murphy's position here. Mr Murphy claims that the NSA is invalid, but has nonetheless tried to rely upon it to regain his 90 shares after his discharge from bankruptcy; his solicitor wrote to Mr Allen's solicitor on 9 July 2019 to this effect. Mr Allen's position is equally unclear. He certainly believed that the NSA was valid, and back in August 2018, before the commencement of these entitlement proceedings, had instructed his accountant to give back to Mr Murphy the shares that he had held on trust since 2015. Apparently that did not take place, but I am at a loss to understand why not on the basis of the evidence and the witness statements of Mr Allen and Mr Murphy.
- 27 I must also mention the JTIB, the passive defendant, at this point. Prior to the hearing Kwix's solicitors contacted the JTIB's legal representatives and asked the

JTIB if it was willing to disclose to the Tribunal what Mr Murphy had said to the Official Receiver about his shares in Kwix at the time of his bankruptcy in 2015. Bankrupts are required to provide the information needed by the Official Receiver in a Preliminary Information Questionnaire (IPQ). A redacted copy of Mr Murphy's PIQ has been provided, together with a copy of Mr Murphy's Narrative Statement produced at an interview with the Official Receiver. In these documents, Mr Murphy claims that he resigned from Kwix as director and sold his shares in early 2014. Clearly this is hard to reconcile with the version of events that Mr Murphy sets out in his witness statement. It simply adds further to the confusion over what happened to Mr Murphy's 90 shares.

- 28 Notwithstanding Mr Kime's carefully set out submission that it must be the registered shareholders that must give their unanimous consent, I will confess to some hesitancy in agreeing with Mr Kime that the *Duomatic principle* applies here in view of the significant and unresolved confusion over share ownership I have set out above.
- 29 That brings me to the issue of the decision of the Kwix board of directors in its meeting on 28 July 2019. Mr Kime's submission is that this meeting, and the resolution that was agreed, ratify Mr Allen's legitimate decision to file the entitlement proceedings. But one can go further than that. Even if I were to accept that the entitlement proceedings were instituted without the proper authority (and I am not saying that I do accept that) then Kwix could nevertheless have retrospectively ratified that action through a resolution of its board of directors. That authority is set out in *Danish Mercantile Co v Beaumont*¹ in which it was held that when legal proceedings are started in the name of a claimant without proper authority then it is open to the claimant to adopt those proceedings, and where that is done it is not open to a defendant to object.
- 30 Mr Murphy did not agree to ratify the action of Mr Allen in starting these proceedings, of course, but the other two directors did. It is the third of those directors, Mr Schraivesande, that I need discuss here.
- 31 Mr Schraivesande was appointed as a director on 1 July 2019, just prior to the directors' meeting discussed above, but as I understand it he had been working as a salesman for Kwix since 2014. It is clear that Mr Murphy is not at all happy at Mr Schraivesande's appointment. He alleges that Mr Schraivesande worked for another of Mr Allen's companies, and that Mr Allen paid for and/or loaned accommodation and a vehicle to Mr Schraivesande. That may all be true, but I am struggling to see anything inherently wrong in it. The nature of Mr Murphy's argument here is somewhat unclear to me but I assume he is trying to say that Mr Schraivesande was to some degree beholden to Mr Allen. Mr Murphy accuses Mr Schraivesande of being a conflicted director. Company directors are of course legally obliged under section 175 of the Companies Act 2006 to avoid conflicts of interest where possible, but I am not sure precisely what conflict Mr Schraivesande is supposed to be guilty of. Is Mr Murphy suggesting that Mr Schraivesande has put his personal interests (his salary, accommodation, vehicle) before those of Kwix? To my mind there is no evidence of that here. In fact, all that Mr Schraivesande has done is to approve a course of action which seeks to protect any intellectual property that might belong to Kwix, and that most certainly cannot be said to be contrary to the interests of the company.

¹ *Danish Mercantile Co. Ltd. and Others v Beaumont and Another*, [1951] Ch. 680

- 32 Having set out and considered the relevant facts above I must now decide on the issue of strike-out. If I am to strike out Kwix's statement of case it must necessarily be on one of the three grounds set out in rule 83. I am certainly not persuaded that there are "no reasonable grounds" (rule 83(2)(a)) for Kwix bringing their entitlement claim. On the contrary, quite apart from any argument about whether the entitlement claim should have been brought by Mr Allen, it is abundantly clear from the statement of case that Kwix might possibly have an interest in the patents. And I can see no suggestion that Kwix has been guilty of any "failure to comply" (rule 83(2)(c)). If Mr Murphy is to rely on anything at all it is that the statement of case is an "abuse of process" (rule 83(2)(b)), in this case some breach of Company Law. In my view Mr Murphy does not come close to making out a persuasive case for this. He has done little more than to raise a number of unanswered questions and to make a series of unsubstantiated allegations (some of which are actually very serious), and I do not need to discuss these here. Even viewed generously, the best that could be said is that he has cast doubt over whether Mr Allen has treated him fairly. But, ultimately, he has presented scant evidence to support his case. I am therefore of the opinion that the case for strike out has not been made at least for the reason that the action to bring the entitlement proceedings has been retrospectively authorised through a resolution of Kwix's board of directors.
- 33 I am further persuaded that it would not be right to strike out Kwix's statement of case upon consideration of rule 74, which sets an overriding objective for the comptroller to deal with cases justly and expeditiously. If I were to strike out Kwix's case it would essentially be on a legal technicality. One can readily envisage that Kwix could then seek to resolve that legal technicality, should one actually exist, and re-file its case. Striking out, in these circumstances, would seem to be at odds with the overriding objective, not least having regard to the additional expense, in money, time and resources, that such a course of action would lead to.

The claimant's case for summary judgment against the defendant

- 34 The statutory provisions for summary judgment are set out in rule 83:

83 - (1) A party may apply to the comptroller for him ... to give summary judgment.

(2) ...

(3) The comptroller may give summary judgment against a claimant or defendant on the whole of a case or on a particular issue if -

(a) he considers that -

*(i) that claimant has no real prospect of succeeding on the case or issue, or
(ii) that defendant has no real prospect of successfully defending the case or issue;
and*

(b) there is no other compelling reason why the case or issue should be disposed of at a hearing.

- 35 I am grateful to Mr Kime for providing me with skeleton arguments on the claimant's preliminary issues in advance of the hearing. Mr Kime relies upon rule 83(3)(a)(ii). He submits that Mr Murphy has no real prospect of defending the case. It can be said that there are two strands to Kwix's argument, and I will deal with them each in turn.

- 36 Before I do that, I must first point out a rather obvious problem with Mr Murphy's case, and it is this: it is not clear what his case actually is. The case that Mr Murphy repeatedly pleads in his counter-statement of 28 June 2019 is that the patents belong to him, in his personal capacity. He does not mention his mother, Mrs Linda Murphy, despite Kwix raising the issue of her standing in their statement of case. By the time he filed his witness statement of 26 August 2020 (which somewhat unorthodoxly takes the form of a point-by-point response to Mr Allen's witness statement), his case had changed. Instead he argued that his mother was the beneficial owner of the patents and that they were held by him on trust for his mother. His evidence includes a written agreement purportedly dated 2010. Mrs Murphy provided a witness statement to this effect. I will deal with the consequences of the apparent contradiction in Mr Murphy's case in what follows.
- 37 To understand the first strand of Kwix's argument I must return to the subject of Mr Murphy's bankruptcy. According to section 283 of the Insolvency Act 1986, any property belonging to or vested in Mr Murphy at the commencement of his bankruptcy forms part of the bankruptcy estate, and section 436 makes clear that "property" is to be regarded sufficiently broadly so as to include intellectual property. So the simple thrust of Kwix's argument is that Mr Murphy cannot win anything in these proceedings, because even if he did own the patent at the date of his bankruptcy (though Kwix submits that he did not) then that patent would now vest in the Joint Trustees in Bankruptcy (JTIB).
- 38 For the sake of completeness I must make one more point regarding the Insolvency Act. Section 283 makes perfectly clear that anything Mr Murphy held in trust for another person does not form part of his estate. Mr Murphy says that he held the patent in trust for his mother. Kwix say that Mr Murphy held the patent in trust for them. If either of those were true, then the patents would not now vest in the JTIB. It is only if Mr Murphy were to be found to be the owner in equity that the patents would vest in the JTIB.
- 39 And so to the second strand of Kwix's argument, which is all about the defendant's claim that Mrs Murphy is the owner of the patents. Mr Kime gives two reasons why I should not allow Mr Murphy to pursue this line of argument. The first reason is that he ought not to be allowed to abandon the pleaded case as set out in his counter-statement and instead adopt a clearly conflicting case. Mr Kime submits that changing his case in this way is in clear contravention of rule 74 which sets out a procedural code with the overriding objective of enabling the comptroller to deal with cases justly and expeditiously. His point is that allowing Mr Murphy to change his case mid-proceedings is against the entire ethos of having a defined set of procedures that both parties must follow to ensure that a fair and expeditious conclusion is reached.
- 40 The second reason is that it would amount to an abuse of process because Mrs Murphy must be treated as supporting Kwix's case in accordance with rule 77(9).
- 41 The relevant portions of rule 77 read as follows:

77 - (1) ...

(2) ... *the comptroller may notify any persons who appear to him to be likely to have an interest in the case that proceedings have started.*

(3) ...

(4) The comptroller must send the relevant form and the statement of grounds with the notification under paragraph (1) or (2).

(5) In that notification, the comptroller must specify a period within which the persons notified may file a counter-statement.

(6) Any counter-statement must be filed in duplicate before the end of the period specified under paragraph (5).

(7) ...

(8) In such oppositions, any counter-statement must be filed in duplicate before the end of the period of four weeks beginning immediately after the date of the relevant notice.

(9) Where –

(a) a person was notified under paragraph (1) or (2); and

(b) that person fails to file a counter-statement under paragraph (6) or (8),

the comptroller shall treat him as supporting the claimant's case.

(10) ...

- 42 When it became clear to Kwix's representatives, Hutchinson IP, that Mr Murphy intended to claim that his mother had a proprietary interest in the patents, they quite rightly prompted the Tribunal to provide Mrs Murphy with the opportunity to file her own counter-statement. In correspondence between the Tribunal and Mr Murphy's representative at the time, Appleyard Lees, she was afforded this opportunity, but Appleyard Lees confirmed that her decision, clearly with the agreement with her son, was not to be added to these proceedings.
- 43 Both Kwix and Mr Murphy are well aware that I directed at that time that rule 77(9) applied, and that Mrs Murphy's actions are such that she must now be treated as supporting Kwix's case.
- 44 Mr Kime, at the hearing, was keen to remind me of the Tribunal's previous decision under rule 77(9) and argued both in his skeleton arguments and at the hearing that for Mr Murphy to be allowed at this stage to argue that his mother was the beneficial owner of the patents would amount to a clear abuse of process.
- 45 Mr Murphy's only response to the two reasons Kwix gives that he ought not to be allowed to plead that his mother is the owner of the patents was to say that his professional representatives at the time advised him in full knowledge of his mother's position. He says that his representatives told him that the details relating to his mother's ownership need not form part of his counter-statement and could be introduced in the evidence rounds, and that they did not apprise him of the consequence of Mrs Murphy's decision not to file a counter-statement.
- 46 There is no way for me to know what advice Mr Murphy received. If he was indeed poorly advised then that is unfortunate, but it is irrelevant. He has filed his counter-statement and, as Mr Kime put it, "he has nailed his colours to that mast". Mr Murphy cannot now nail his colours to a different mast. But even if he could then I would have to treat Mrs Murphy's evidence as affirming that the patents belong to Kwix (even though it is plainly intended to say precisely the opposite).

- 47 Having considered all this I agree entirely with Kwix. Mr Murphy's case is indeed hopeless. He cannot plead that his mother owns the patents, for the two reasons set out above. That leaves him, as it must, with his original pleaded case; that he himself owns the patents. And on that case, due to his bankruptcy, he simply cannot win.
- 48 I will make one final observation on Kwix's skeleton arguments on their preliminary issue. Mr Kime argues that Mr Murphy's case is doubly hopeless because the evidence he has filed on 26 August 2020 is in conflict with his pleaded case in the counter-statement and there is no evidence in support of his originally pleaded case. I am not so certain that this is an entirely fair characterisation of Mr Murphy's evidence. It is true that it includes the alleged agreement between him and his mother, but there is a great deal of evidence besides, at least in the sense of sheer volume, that speaks to Mr Murphy's role in the partnership/Kwix and his dealings with the patent attorneys, which at least in principle could be used to advance a case that it is Mr Murphy who owned the patent prior to his bankruptcy. But it is not a case that Mr Murphy can make. Only the JTIB could have made that case, but they have not.

Conclusions

- 49 For the reasons I have set out above, Mr Murphy has been unable to show that there are grounds for striking out Kwix's statement of case.
- 50 Kwix have shown that Mr Murphy has no real prospect of succeeding in defending Kwix's case and I am therefore issuing summary judgment against Mr Murphy. I order that Mr Murphy should no longer be a party to proceedings as I have found that he has no interest in the entitlement case brought by Kwix. His involvement can only be as a witness to any discussions held regarding the intellectual property in his invention.

The position of the Joint Trustees in Bankruptcy

- 51 Mr Murphy is not the only defendant in this case. The JTIB clearly have a potential interest in the patents, and that is the reason they were invited to become a party to these proceedings. But they were, at that point, in a somewhat difficult position, as they explained in correspondence. They had no involvement in or direct knowledge of what happened between Mr Murphy and Kwix, and had insufficient information to determine whether it was in the interests of the general body of unsecured creditors as a whole for them to actively pursue the entitlement proceedings.
- 52 Mr Kime, for Kwix, argues that the JTIB cannot play an active role in these proceedings by virtue of being inseparable from their counter-statement in which they say that they will adopt a neutral stance, but I think I should say a little more about what they mean by that and what their intentions were. It is clear from their counter-statement and from their other correspondence that the JTIB were under the expectation that the Tribunal would reach a definitive view on what rights in the patents Mr Murphy had at the date of his bankruptcy. I think it fair to say that all parties were expecting the same, at least at the point in the proceedings when the JTIB filed their counter-statement. In a sense the JTIB were content to stand by and allow Mr Murphy to make their case for them. But, in issuing this decision solely on the preliminary issues, I have essentially decided that I will not allow Mr Murphy to make that case. It is unlikely that the JTIB could have foreseen that.

- 53 Kwix wish the hearing on the substantive issue to take place, but that would be a very short one-sided hearing now that I have decided that Mr Murphy's case cannot succeed. No one would contest Kwix's case and I would be bound to find in their favour, but that would not provide the definitive answer that the JTIB expect and deserve. To enable me to provide that answer someone needs put the case that Mr Murphy owned the patents at his date of bankruptcy, and the only party that can potentially do that are the JTIB. In view of the overriding objective to deal with cases justly, including ensuring that the parties are on an equal footing, I will therefore give the JTIB an opportunity to decide if they wish to take an active role in these proceedings.
- 54 The Joint Trustees in Bankruptcy have six weeks from the date of this decision to decide how they wish to proceed. If they wish to become an active party in these proceedings then a hearing on the substantive issues will be appointed. If they do not then I will simply treat Kwix's case as uncontested, and a short decision will be issued without a hearing being necessary.

Preliminary evaluation of the evidence

- 55 Mr Murphy and Kwix have filed their evidence and submitted their skeleton arguments, but as is clear from the above I have not had the benefit of hearing the witnesses cross-examined under oath. While I am not in a position to issue a definitive view on the matter of entitlement at the date of bankruptcy, it is within my power to issue a preliminary evaluation of the evidence (Tribunal Practice Notice TPN 3/2009²) in order that it may assist the JTIB to assess the strength of Mr Murphy's claim that he was the owner of the patents at the date of his bankruptcy. I should emphasise that this preliminary evaluation is not my final decision on Kwix's claim to entitlement nor does it bind me in any future assessment of the evidence or findings of fact.
- 56 The evidence submitted by both Mr Murphy and Kwix contains no written evidence of what was agreed with regards to the ownership of the existing UK patent application or any subsequent intellectual property generated once Mr Murphy entered into business with Mr Allen and the other shareholders. That lack of evidence does not necessarily mean that there was no agreement. There could have been a verbal agreement, or there could have been an implied contract. What we have is copious documentary evidence which points to the actions and conduct of the parties and which might help to paint a picture of whether an agreement was entered into in practice. Mr Murphy and Kwix have tried to use the evidence to paint different pictures, of course.
- 57 A significant quantity of that evidence relates to the processing of the PCT application and comprises correspondence between Wilson Gunn, Patent and Trademark Attorneys, and the parties. There are requests for instructions, instructions, notes of meetings and invoices, for example. All of these were sent to or from Kwix e-mail addresses, personal e-mail addresses and e-mail addresses associated with Mr Allen's other businesses. It seems clear to me from considering these documents that both Mr Murphy and Mr Allen were involved in instructing Wilson Gunn, even if Mr Murphy was apparently the primary point of contact. I must confess to wondering whether Wilson Gunn really had a clear understanding of who they were working for. In their defence, though, they did question on more than one

² <https://webarchive.nationalarchives.gov.uk/20140611101725/http://www.ipa.gov.uk/p-tpn-32009.htm>

occasion whether there ought to be change in name of the ownership of the intellectual property; they evidently had reason to think that this might be appropriate in the circumstances. Why this was not pursued and why no assignment took place I cannot be sure.

- 58 What seems absolutely clear is that all the invoices and official fees were paid by Kwix or by FDC Holdings Ltd (Mr Allen's other business), and not by Mr Murphy in his personal capacity. It is hard to explain this expenditure over the course of a number of years if Kwix did not think that it would result in ownership of the patents, or at the very least that the patents would be held on trust by Mr Murphy for the benefit of Kwix.
- 59 Mr preliminary view is that the evidence pointing to the involvement of Kwix in the pursuit of the patents (both the pending EP and the granted US), particularly the evidence that it covered the quite significant professional fees of Wilson Gunn, is more likely to support Kwix's case than Mr Murphy's case (that is, his originally pleaded case).
- 60 For the avoidance of doubt I should note that in reaching this provisional view I have disregarded any of the evidence that relates to alleged agreement between Mr Murphy and his mother, consistent with the decision above on the preliminary issues.

Costs

- 61 The claimants have won on their preliminary points and are in principle entitled to a contribution to their costs in accordance with the comptroller's standard scale. I will allow the parties an opportunity to make submissions on this point once it has become clear whether a full hearing is required. If a full hearing is necessary to decide the matter and it can be scheduled fairly soon then I am likely to invite submissions on costs at the hearing.

Appeal

- 62 Any appeal must be lodged within 28 days after the date of this decision.

Huw Jones

Deputy Director, acting for the Comptroller