

Neutral Citation Number: [2015] EWHC 2632 (IPEC)

Case No: IP-2014-000003

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 17/09/2015

**Before :**  
**HIS HONOUR JUDGE HACON**

**Between :**

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|-------------------------------------------------|--------------------------|
| <b>ABSOLUTE LOFTS SOUTH WEST LONDON LIMITED</b> | <b><u>Claimant</u></b>   |
| <b>-and -</b>                                   |                          |
| <b>(1) ARTISAN HOME IMPROVEMENTS LIMITED</b>    |                          |
| <b>(2) DARREN MARK LUDBROOK</b>                 | <b><u>Defendants</u></b> |

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**Michael Hicks** (instructed by **Donald Pugh, Solicitor**) for the **Claimant**  
**Thomas Jones** (instructed by **Schofield Sweeney LLP**) for the **Defendants**

Submissions delivered on paper

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**Judgment**

## Judge Hacon :

1 On 14 September I handed down judgment in these proceedings. I ordered the defendants to pay the Claimant (“Absolute Lofts”) the sum of £300 by way of compensatory damages and a further £6,000 pursuant to art.13(1) of Directive 2004/48/EC (“the Enforcement Directive”). In the usual way the parties received a draft of the judgment some days in advance and each side helpfully suggested amendments of typographical and other obvious errors.

2 The day after the judgment was handed down I received a written application from Absolute Lofts requesting reconsideration of the judgment. Its reasons were as follows. My award of £300 compensatory damages was assessed by reference to the sum paid by the Second Defendant (“Mr Ludbrook”) to a photographic library called ‘Shutterstock’ for images of loft conversions to put on the website of the First Defendant (“Artisan”) in place of the photographs which infringed Absolute Lofts’ copyright. The licence under which the Shutterstock images were used was in evidence at trial – or rather, as it now turns out, part of the licence was.

3 In his written submissions Mr Hicks, for Absolute Lofts, stated that after judgment had been handed down it was noticed that part of the licence, which in the view of Absolute Lofts contained relevant terms, had not been before the court because the trial bundle was missing a page.

4 There is a section in those terms headed ‘Part II’ which begins “YOU [the licensee of the images] MAY NOT”: Among the prohibitions imposed on the licensee are these, now relied on by Absolute Lofts:

“12. Use an Image in a manner that infringes upon any third party’s trademark or other intellectual property, or would give rise to a claim of deceptive advertising or unfair competition. ...

18. Use any Image (in whole or in part) as a trademark, service mark, logo or other indication of origin, or as part therefore, or to otherwise endorse or imply the endorsement of any goods and/or services.’

19. Falsely represent, expressly or by way of reasonable implication, that any Image was created by you or a person other than the copyright holder(s) of that image.

5 Mr Hicks pointed out that Mr Ludbrook had used the Shutterstock images on the Artisan website in a manner which suggested they showed loft conversions carried out by Artisan. He submitted that the images were therefore used in breach of clauses 12 and 18 of the Shutterstock licence. It follows that the licence was not a true guide to what Mr Ludbrook would have had to pay to replace the infringing photographs on the Artisan website with photographs which Artisan could lawfully use.

## *The Law*

6 Birss J recently reviewed the jurisdiction of a court at first instance to reconsider a judgment after it has been handed down and, where that may done, the matters relevant to the exercise of the court’s discretion so to do, see *Vringo Infrastructure Inc v ZTE (UK) Limited* [2015] EWHC 214 (Pat). Having considered the several authorities in some detail he said this:

“[38] I can summarise the principles in this way. The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind as in here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court’s resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the *Ladd v. Marshall* factors are also likely to have real significance.

[39] As regards principles applicable to amendments, the modern view is probably the Court of Appeal in *Swain v. Hillman* [2001] All ER 91. If the court would not have permitted the amendment before trial, it is hard to see how it is likely to be admitted after trial, apart from some very unusual circumstances. Nevertheless, just because a court would have permitted the amendment sought before, or even during the trial, if it had been raised at that stage, it does not mean that it should be permitted after judgment.

[40] As to *Ladd v. Marshall*, the trial judge is in some ways in a better position than the appellate court to assess the significance of a new point and new evidence. In any case, at this stage the *Ladd v. Marshall* factors should be applied more leniently to an applicant than they might be applied in an appellate court; but, all the same, the *Ladd v. Marshall* factors are clearly relevant because the application is an attempt to call new evidence after judgment. If those factors, even applied more leniently, are against the applicant, it is likely that powerful factors in the applicant's favour will be needed to justify the application."

7 In the present case Absolute Lofts is not applying to amend its pleadings. Mr Hicks submitted that there is no request to introduce new evidence either. I don't accept that. The application requires me to consider evidence which was not before the court at trial. Consequently while the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489 are not decisive they are highly relevant. They are: "First, it must be shown that the evidence could not have been obtained without reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

8 Absolute Lofts' main difficulty is the first of these requirements. It concedes, as it must, that the parts of the Shutterstock licence now relied on were just overlooked until very recently and so not put before the court. I take the view that this engages the overriding principle of the Civil Procedure Rules in an important way. It is essential to the saving of expense, ensuring that a case is dealt with expeditiously and fairly and allotting an appropriate share of the court's resources to a case that the parties bring all relevant evidence before the court at the trial. Where a party fails to do that and has no reasonable excuse for that failure, it will have to overcome a high barrier to satisfy the court that the circumstances are sufficiently unusual to permit the proceedings to be reopened with fresh evidence after judgment has been handed down. It is possible that a court could be persuaded, for example, where the second *Ladd v Marshall* requirement is resoundingly satisfied (bearing in mind that *Ladd v Marshall* is to be applied in attenuated form, as contemplated in *Vringo*). In other words if the fresh evidence unarguably puts the issues considered in the judgment into a bright and truly compelling new light, that might be enough to tilt the exercise of the court's discretion.

9 That is not the case here. It may be that the Shutterstock licence is a less precise guide to what Mr Ludbrook would have had to pay in order to populate Artisan's website with lawful images of loft conversions than it appeared to be at trial. But that is a long way from showing that Mr Ludbrook could not have obtained images he could use for a few hundred pounds, using one photographic library or another.

10 I am not satisfied that the circumstances are such that Absolute Lofts is entitled to a reconsideration of my earlier judgment. I decline to do so.