



CONTRACTS

Court of Appeal of England and Wales Considers “Best” and “All Reasonable” Endeavours

The Court of Appeal of England and Wales in *Jet2.com Limited v Blackpool Airport Limited* [2011] EWHC 1529 (Comm) has provided guidance on the enforceability of “best endeavours” and “all reasonable endeavours” clauses. In doing so, a distinction was drawn between a clause in which the object is so uncertain that the clause would be incapable of creating a binding obligation and a clause that is imprecise in scope but is binding as its object can be placed in context.

BACKGROUND

The case concerned the contents of a “letter agreement” (the agreement) between Blackpool Airport Ltd (BAL) and low cost airline Jet2.com Ltd (Jet2). The agreement, which was to remain in force for 15 years, set out the terms under which Jet2 would operate its services from Blackpool Airport. Under clause 1 of the agreement, the parties agreed to use their “best endeavours” to “promote” Jet2’s services from Blackpool Airport. BAL further agreed to use “all reasonable endeavours” to provide a cost base to facilitate Jet2’s low cost pricing. The parties agreed that for the purposes of the case the two expressions were to be treated as synonymous.

During the first four years of the agreement, BAL allowed Jet2 to operate services to and from Blackpool Airport outside the airport’s normal opening hours. This was important to Jet2, as the flexibility allowed the airline to keep costs as low as possible. When BAL ended this arrangement, Jet2 brought the present case on the basis that BAL was in breach of its obligations under clause 1. BAL maintained that the use of “best” or “all reasonable endeavours” did not require BAL to act against its own commercial interests.

The first instance judge, in finding in favour of Jet2, considered that to “promote” Jet 2’s services in clause 1 should be read as to “advance” in general terms Jet2’s business, and that “best

endeavours” limited BAL’s freedom to rely on its own commercial interests. BAL appealed.

DECISION

In a majority decision, the Court of Appeal upheld the first instance judgment. Each judge emphasised the need for certainty with regard to “endeavours” clauses. They agreed that clause 1 of the agreement should only be enforceable if the object of clause 1 could be defined sufficiently. The judges differed in opinion on whether this was the case in the present circumstances.

Moore-Bick and Longmore LJ considered that the object of clause 1 was sufficiently precise to be enforceable. At first instance, weight was given to evidence that the parties were both aware of the need for flexibility in scheduling for a low cost airline to succeed. Accordingly, flexible airport opening hours could be considered as falling within the scope of “promoting” the airline as required under clause 1.

Dissenting, Lewison LJ reached the opposite conclusion. He pointed towards the detailed list of obligations on the parties under clause 2 of the agreement, which made no mention of opening hours. He considered that as the agreement did not specifically address opening hours, regardless of their proven importance, the agreement could not be said to include them. If the agreement was to cover opening hours, Lewison LJ argued, this would have been evident from clause 2.

COMMENT

Moore-Bick LJ drew a distinction between a clause in which the object is so uncertain that the clause would be incapable of creating a binding obligation, and a clause that is imprecise in scope but is binding as its object can be given practical context. In this case, the majority considered that clause 1 of the agreement fell within the latter definition. The dissenting opinion of Lewison LJ demonstrates, however, how fine the divide is between the two in practical terms.

When entering into an agreement containing a clause requiring best or reasonable endeavours, it would be in both parties’ interests to elaborate their respective obligations as much as possible. It is clear from this case and from previous authorities that best endeavours can include the requirement for a party to

act against its own financial interests. All the more reason to set out with clarity what are the agreed limits of a party's endeavours.

TRADE MARKS

Court of Justice of the European Union Provides Ruling on Keyword Jurisdiction

The Court of Justice of the European Union (CJEU), in *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* C-523/10, has ruled that under Article 5(3) of the Brussels Regulation, an advertiser that uses a keyword that infringes a national trade mark on a country-specific top-level domain (TLD) of a Member State other than the Member State where the national trade mark is registered, can be sued in its Member State of establishment.

BACKGROUND

Wintersteiger AG is an Austrian company that manufactures and distributes ski and snowboard servicing tools. It has held a national trade mark registration for WINTERSTEIGER in Austria since 1993. Products 4U is established in Germany, where it develops and distributes worldwide ski and snowboard servicing tools. It sells, amongst other products, accessories for the tools manufactured by Wintersteiger, although Wintersteiger does not supply its products to Products 4U.

Products 4U purchased the word "Wintersteiger" as a keyword on a German search engine, *i.e.*, a search engine using the TLD .de, that can also be accessed in Austria. When an internet user searches for "Wintersteiger" on the search engine, this keyword generated a sponsored link directing the user to a section of the Products 4U website entitled "Wintersteiger Accessories".

Wintersteiger sought to prevent the use of the keyword by way of an injunction in the Austrian courts, on the basis that it infringed Wintersteiger's rights in its Austrian trade mark.

The Austrian Supreme Court referred the case to the CJEU for guidance on Article 5(3) of the Brussels Regulation (44/2001/EC) as to whether it had jurisdiction to consider the case. Advocate General Villalón was of the view that the response to the Austrian Court should be that, where conduct that is liable to infringe a national trade mark occurs *via* the internet, Article 5(3) must be interpreted as meaning that it attributes jurisdiction both "to the courts of the Member State in which the trade mark is registered and to the courts of the Member State where the means necessary to produce an actual infringement of a trade mark registered in another Member State are used".

DECISION

The CJEU began its discussion of the referred questions by noting that the special jurisdiction rule under Article 5(3) should be dependent on a "particularly close connecting factor between the dispute and the place where the harmful event occurred." The application of Article 5(3) should be in the interests of the administration of justice and the efficacy of the conduct of proceedings.

Applying these principles to the facts, the CJEU ruled that Article 5(3) conferred jurisdiction on either the courts of the Member State of registration of the trade mark, or the courts of the Member State of the establishment of the advertiser, when a keyword is used on a country-specific TLD of a Member State that is not the Member State where the trade mark is registered. The CJEU considered that relying on the place of establishment of the advertiser, as definite and identifiable place, allowed for an application of Article 5(3) that would facilitate the conduct of proceedings.

COMMENT

The CJEU did not offer an interpretation of Article 5(3) that was as broad as Advocate General Villalón had proposed. Advocate General Villalón suggested that Article 5(3) should be interpreted as granting jurisdiction to the courts of the Member State corresponding to the TLD, whereas the CJEU restricted this to the courts of the Member State of the advertiser's establishment. Had the opinion of Advocate General Villalón been followed, trade mark holders would have enjoyed broader powers to select a jurisdiction in which to sue an infringer. As the CJEU did not follow Advocate General Villalón, this ruling serves as a reminder for trade mark owners to carefully consider the scope of their national trade mark protection in Europe.

DATA PROTECTION

International Chamber of Commerce UK Cookie Guide

The International Chamber of Commerce (ICC) has issued guidance to help website operators and users understand and apply the changes to the Privacy and Electronic Communications Regulations 2003 relating to cookies that will come into force in the United Kingdom on 25 May 2012.

BACKGROUND

In May 2011, the United Kingdom implemented changes to the Privacy and Electronic Communications Regulations 2003, which now require any person placing cookies or similar

tracking technology on a third party's equipment to obtain the user's prior consent. Consent will only be achieved if the user is given clear and comprehensive information as to the use of the cookie. The Information Commissioner's Office (ICO), which is the UK Regulator, has provided a 12 month grace period allowing operators to make changes required to comply with the law. The grace period expires on 25 May 2012.

In order to assist with the transition to compliance, the ICC has published its UK Cookie Guide. The guide is aimed at website operators and the ICC hopes that if the guide is adopted widely by operators, users will benefit from the familiarity of being given consistent information about the use of cookies.

CONSENT

In order to obtain consent, clear and comprehensive information about the cookie must be provided. What this information will be depends on the type of the cookie and the use made of the information gathered. The guide divides cookies into four categories: cookies that are strictly necessary, performance cookies, functionality cookies and targeting or advertising cookies. The ICC notes that this division is neither definitive nor exhaustive but assists with an understanding of the intrusiveness of the technology deployed and its impact on the privacy of users.

The guide contains no prescriptive formula or instruction on how consent should be obtained and, much like the guidance issued recently by the ICO, the guide emphasises that the issue of obtaining consent is one that can be addressed in a number of different ways. These different options include obtaining user's consent in the course of acceptance or re-acceptance of website terms and conditions; settings-led consent, being consent obtained as users choose website settings; feature-led consent, being consent obtained as users turn on website features; function-led consent, being consent obtained as users activate website functions; or notice and choice mechanisms, such as pop-ups or header bars.

The guide includes advice on who should be responsible for placing or obtaining consent with regard to the placing of the cookie. This is especially helpful in relation to third party advertising cookies where the chain of responsibility can become complicated.

The ICC also discusses the possibility of using icons on a uniform basis so that users become familiar with and understand what those icons mean with regard to cookies and the use of their data. One suggestion is the Institute of Advertising Bureau's current cookie icon.

It is interesting to note that, in order for consent to be obtained, it must be given freely and have the option to be withdrawn at

any time. As a result, anybody placing cookies must also give a method for withdrawal of consent by the user.

As with the ICO's most recent guidance on privacy notices, the guide promotes the virtues of using a layered approach to providing users with information. This layered approach enables users to decide how much detail they require to make an informed decision, with each layer accessed providing more detail than the one before.

COMMENT

Although the ICC has categorised cookies, they are aware that these categories must be flexible as the types and use of cookies develop. It is noteworthy that the ICC guide only covers cookies and does not cover web beacons or web bugs, including transparent or clear gifs, despite the fact that these technologies are actually covered by the Privacy and Electronic Communications Regulations 2003.

DATA PROTECTION

Working Party Opinion on The European Commission's Data Protection Reform Proposals

The Working Party on the Protection of Individuals with regard to the Processing of Personal Data (the Working Party) has adopted an opinion on the European Commission's proposals for reform of current data protection law. The opinion highlights a number of concerns and suggested improvements, but in general the Working Party welcomes the proposals.

BACKGROUND

The Working Party was set up under Article 29 of the Data Protection Directive 95/46/EC (the Directive), which outlines the current data protection regime for the European Union. The Working Party is tasked with monitoring the uniform application of the Directive by examining questions relating to data protection and privacy and then issuing recommendations, opinions and working documents. Earlier this year, the European Commission published its proposals for a revised data protection legislative framework consisting of a new regulation and directive (the reforms).

THE REFORMS

The Working Party concluded that the proposed framework has the potential to meaningfully strengthen data protection across Europe by reducing existing fragmentation. On the whole, the Working Group embraced the increased clarity of the law set

out in the reforms and reacted favourably to numerous aspects of the proposed provisions including:

- Strengthening the rights of data subjects in relation to data access, data portability, data deletion and remedies for breach of these rights.
- Enhancing the responsibility and accountability of data controllers for the processing of personal data throughout the information life cycle.
- Provisions incentivising investment in systemic data protection, including data protection by default, data protection by design and data protection impact assessments.
- Amplifying and harmonising the powers of national and international supervisory authorities, including the ability for them to impose significant fines and the obligation to be consulted on legislative measures.

Despite the mostly positive attitude toward the reforms, the Working Party concluded that certain features require improvement. The Working Party urges the European Parliament and European Council to use the forthcoming round of legislative negotiations to enhance the reforms to provide the best protection possible. In particular, the Working Party commented that:

- The proposals should be set out in a single, comprehensive legal document.
- There should be a stricter deadline for the revision of other legal instruments to ensure alignment of provisions; the proposed three year review period is too indulgent.
- Further clarification is required in relation to deciding where a multinational company has its main establishment to enable the effective functioning of the proposed system of determining which national data protection authority should be the “lead authority”.
- It would be more appropriate to measure the relief threshold for small and medium-sized enterprises using criteria that take the nature and extent of data processing into account, rather than using the proposed employee number threshold.
- The reforms omit vital provisions relating to the accuracy of personal data, limitations on data retention periods and mandatory deletion of data by third parties upon a data subject’s request.
- The scope of derogations in relation to international transfers is too wide.
- There is a need for stronger provisions in regard to data protection rules for police and judicial cooperation in criminal matters.

- An independent assessment of the increased costs for data protection authorities is required to ensure operation under the new framework is feasible.
- It has concerns about the strong role of the Commission in relation to the use of delegated and implementing acts and in individual cases that are to be dealt with by the supervisory authorities in the European Data Protection Board.

The Working Party has indicated that it may yet produce additional opinions exploring specific provisions of the reforms in more detail.

PATENT

Drug Formulation Patent Found to be Invalid in the United Kingdom but Valid in Other Jurisdictions

Mr Justice Arnold’s decision in *Teva and others v Astrazeneca AB* [2012] EWHC 655 (Pat) invalidated Astrazeneca’s patent for a sustained release formulation of the anti-psychotic drug quetiapine in the United Kingdom, on the grounds of obviousness, just days after the same patent was found to be valid in the Netherlands.

BACKGROUND

Teva and others (the Claimants) sought revocation of Astrazeneca’s European patent for a sustained release formulation of quetiapine, marketed by Astrazeneca under the trade mark Seroquel XR. The Claimants timed their action to coincide with the expiry of the supplementary protection certificates for a different European patent that relates to the immediate release form of quetiapine, in order to clear the way for generic drug production.

DECISION

Arnold J held that it was common knowledge that it was desirable to keep psychotic symptoms under control with as few doses as possible so patients and their carers could benefit from the convenience of less frequent administration. Prior art showed that quetiapine is capable of being efficacious if administered in once or twice daily doses. Arnold J held that it would be obvious for a person skilled in the art to achieve this by creating a sustained release formulation and that it was within the competence of an ordinarily-skilled formulator at the time.

Astrazeneca claimed that a person skilled in the art would have thought that quetiapine’s high first-pass metabolism would prevent the successful development of a sustained release form

of the drug. However, Arnold J determined that a person skilled in the art would only have thought that high first-pass metabolism would be a problem for developing a sustained release form if liver enzymes were shown to be saturated by a clinical dose.

Routine testing and prior art would have revealed linear pharmacokinetic data for quetiapine, so the skilled team would not have been concerned about saturation of first-pass metabolism. As such, Arnold J held that there was nothing to discourage the use of a sustained release formulation and, as a suitable formulation could have been achieved without excessive experimentation, the invention was obvious.

Arnold J concluded his judgment by expressing regret that different European courts considering the validity of the same patent should reach opposite conclusions. As such, he carefully considered the Dutch court's judgment that held the patent to be valid. Despite the desire for uniformity in judgments, Arnold J could not be persuaded, noting that there were marked differences in the evidence, arguments and prior art cited in the English and Dutch cases. The central difference was that the Dutch court accepted that there were real problems to overcome in the development of a sustained release formulation of quetiapine, namely high first-pass metabolism, high serum protein binding and pH-dependent solubility. The first of these factors was considered by Arnold J to be illusory, while the last two were not advanced as arguments in the English court.

COMMENT

The case hinged on “expectation of success” arguments that are by their very nature highly subjective and so frequently litigated. Only a few days after this decision, the US District Court for New Jersey found Astrazeneca's US formulation patent for Seroquel XR to be valid. As future decisions emerge, it will be interesting to see whether this determination of invalidity resulted from the choice of arguments and evidence advanced, or whether it is a consequence of English courts having a less liberal attitude in relation to obviousness.

COPYRIGHT

Cross-Border Sales: Tension Between Copyright Distribution Rights and Free Movement Rules

Advocate General Jääskinen has concluded that there is a distribution by sale in a Member State if a seller targets consumers and enables the purchase of copyright-protected works in that State. In addition, he has found that compliance

with copyright protection in this context does not result in a disproportionate effect on the free movement of goods.

BACKGROUND

Italian company, Dimensione Direct Sales SrL (DDSS), advertised and sold reproduction furniture and designs in Germany. The items were delivered to German buyers by an Italian company called In. Sp. Em Srl (ISES). Under German law, the items were considered to be copies of works protected by copyright, but in Italy either no copyright protection existed or it was unenforceable.

The German authorities prosecuted Mr Donner (the manager of ISES and its majority shareholder) for aiding and abetting the distribution of the items in Germany in breach of German copyright law. Mr Donner was found guilty and appealed to the German Federal Court, claiming that the prosecution was in breach of Article 34 of the Treaty of the Functioning of the European Union (TFEU) as it resulted in a measure equivalent to a quantitative restriction on imports between Member States. The German Federal Court referred the issue to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

DECISION

Advocate General Jääskinen considered that there was a distribution by sale in a Member State if a seller:

- Targeted consumers in that Member State. In this case, DDSS advertised in Germany and had a German language website.
- Put in place a delivery and payment system to allow consumers to purchase copies of copyright-protected works in that Member State. In this case, the relationship of DDSS with ISES fulfilled this criterion.

As a result, Advocate General Jääskinen concluded that the items had been distributed in Germany in infringement of the exclusive distribution right under Article 4(1) of the Directive 2001/29/EC on the harmonisation of copyright and related rights in the information society (the Directive).

Next, Advocate General Jääskinen considered whether Article 36 of the TFEU placed a disproportionate restriction on the free movement of goods. He concluded that there would be no unlawful partitioning of national markets if the permission of copyright holders was obtained by commercial enterprises before engaging in acts that amounted to a distribution by sale in a Member State. He stated that any restriction on the free movement of goods could not be disproportionate if it ensured compliance with European copyright law. While this is the case for distribution by sale, Advocate General Jääskinen highlighted the fact that if Article 4(1) of the Directive had been interpreted to cover hauliers that acted independently of the seller, the copyright-monitoring obligation would have been so onerous so as to create a disproportionate restriction.

Finally, the issue of criminal sanctions was considered. Advocate General Jääskinen noted that European law does not prevent Member States from imposing proportionate criminal penalties in relation to the behaviour described in this case, and as such it is a matter for the national court to determine whether the punishment is proportionate.

COMMENT

Advocate General Jääskinen is aware of the difficulties internet trading poses for copyright owners. He has taken the position that the law should be interpreted to ensure that copyright is afforded full protection in an e-commerce context. This opinion should reassure copyright owners that their protection will not be undermined by arguments based on the free movement of goods. It also provides helpful guidance on cross-border distance-selling arrangements, stressing that the key element of Article 4(1) of the Directive is the existence of targeted sales and provision of delivery to buyers, not the mode of delivery.

CONFIDENTIALITY / COPYRIGHT

The High Court of England and Wales Rules on Formula One Confidentiality and Copyright Infringement

In *Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD and others* [2012] EWHC 616 (Ch), the High Court of England and Wales ruled on claims for contractual and equitable breach of confidence and copyright infringement brought by one Formula One (F1) race team operator against another. The judgment deals with quantum as well as liability.

BACKGROUND

The case involved a claim for contractual and equitable breach of confidence and copyright infringement arising from the use of computer-aided design (CAD) files for a wind tunnel, a structure used to test the aerodynamic efficiency of designs for F1 racing cars. Force India had entered into an F1 car-development agreement with two of the Defendants, which are companies that specialise in the aerodynamic design of such cars. Under the agreement, the Defendants created confidential CAD files. After termination of the agreement, the Defendants immediately started work for a rival team and used Force India's CAD files as a starting point for formulating the rival design.

BREACH OF CONFIDENCE

Arnold J held that the two defendant companies operating the rival team had infringed Force India's copyright by downloading electronic copies of the new designs, which

incorporated a substantial part of Force India's designs. The initial copying by the design company was done in Italy and therefore outside the Court's jurisdiction.

The judge also found that employees of the two defendant companies had misused the confidential CAD files only by using them as a shortcut as they had not reproduced the information in their new designs.

QUANTUM

It was common ground that the Defendants had not made a profit from the use of the Force India CAD files.

Where a claimant is unable to prove orthodox financial loss as a result of the breach of a contractual term restricting the defendants' activities, a different type of damages can be awarded, known as Wrotham Park damages, gain-based damages or negotiating damages. These damages are assessed on the basis of an amount the claimant could have demanded as the price for agreeing to relax the contractual restriction in question. When assessing such damages, one should consider what price the parties would have arrived at through negotiation, bearing in mind their respective bargaining positions, the information available to them and the commercial context at the time of the notional negotiation.

Arnold J considered that a reasonable licence fee for use of Force India's CAD files agreed between a willing licensor and a willing licensee would have been €25,000. This sum was towards the top end of the range calculated by experts, as the judge found that a premium would be negotiated to reflect the fact that Force India would not want to assist a potential new competitor.

COMMENT

The judgment provides a useful summary of the law on compensation for breach of confidence. It is also a reminder that the outcome of proceedings for breach of confidence can be difficult to predict as it always turns on the facts. It additionally acts as a reminder that when pleading a case for breach of confidence, it is vital to particularise the information alleged to be confidential as precisely and detailed as possible.

REGISTERED COMMUNITY DESIGNS

High Court of England and Wales Rules on Threats and Jurisdiction in Declaration for Non-Infringement

In *Samsung Electronics (UK) Ltd and others v Apple Inc* [2012] EWHC 889 (Ch), the High Court of England and Wales considered several preliminary issues in a case involving Apple's registered Community design for a tablet computer.

BACKGROUND

In an ongoing dispute between Samsung and Apple, in which Apple has asserted one of its registered Community designs against the Samsung Galaxy tablet computer in infringement proceedings in Netherlands and Germany, Samsung has brought proceedings before the Office of Harmonization for the Internal Market (OHIM) claiming that Apple's design is invalid. In this case, Samsung Electronics UK Ltd and its Korean parent Samsung Electronics Co Ltd (SEC) applied for declarations that the Galaxy tablet did not infringe Apple's registered design and also applied for an injunction restraining Apple from making threats to sue for infringement.

JURISDICTION

Mann J ruled that the High Court had no jurisdiction to hear the claim for a declaration of non-infringement in the United Kingdom as neither SEC nor Apple was domiciled or had an establishment in the United Kingdom, as required by Article 82(1) of the Community Designs Regulation (6/2002/EC). Samsung argued that, based on the point raised in the German proceedings that Samsung Germany was an establishment of SEC, Apple was estopped from claiming that Samsung UK was not an establishment of SEC within the jurisdiction of the High Court. This argument was rejected by the High Court on the basis that the principle of estoppel applied only if the other party wished to assert or deny establishment, which was not the case before the Court.

DECLARATION OF NON-INFRINGEMENT

Apple argued that the claim should be stayed pending the outcome of Samsung's invalidity proceedings before OHIM as the claim involved issues of "scope of protection" that were common to a claim for a declaration of non-infringement and validity.

Mann J found that OHIM did not have exclusive jurisdiction on validity. He also noted that validity could be raised in national courts if infringement proceedings were started, but if a claimant wished to raise a validity point without being sued first, that action had to be taken in OHIM. Article 91 the

Community Designs Regulation exception did not apply as actions for declarations for non-infringement could continue even if validity was already at issue in OHIM.

THE THREATS ACTION

Mann J noted the threats action was based on English law provisions contained in the Community Design Regulations 2005 (SI 2005/2339). He ruled that Samsung failed to establish that they had a good arguable case on the threats action. Samsung relied on several factors in support of its claim that threats had been made: Apple's assertions in separate proceedings in Germany, its failure to respond to an invitation to consent to a declaration of non-infringement and various statements by Apple officials alleging that Samsung was involved in copying Apple's products. However, Mann J ruled that on the facts none of Apple's actions amounted to a threat of proceedings and there was no good, arguable case.

COMMENT

The case considered only preliminary issues and did not involve any consideration of substantive Community design law. The existing law on groundless threats remains unchanged and it is difficult to see how Samsung could have succeeded on the alleged threats.

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[Obstacles to Non-EEA Multinationals' Transfers Of Employee Personal Data Outside The EEA Under Existing EU Law And The Commission's Proposed Data Protection Regulation](#)

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