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COMMERCIAL

Consumer Remedies for Faulty Goods: The Right to Reject

In November 2008, following a request from the Department of Business, Enterprise and Regulatory Reform (as it then was), the Law Commission and the Scottish Law Commission published a joint Consultation Paper on Consumer Remedies for Faulty Goods. Responses to the Consultation revealed widespread support among consumer and business groups for retaining the consumer's right to reject goods that do not conform to the contract. This right appeared to come under threat in October 2008 when the European Commission published its proposals for a new Consumer Rights Directive. The Law Commissions have now published their Report on Consumer Remedies for Faulty Goods, which sets out a number of recommendations to improve and clarify the current law on consumer remedies. Not surprisingly, these include retaining the right to reject, in the context of the current debate about the proposed Directive.

Domestic consumer protection laws are under the microscope, particularly as the proposed Consumer Rights Directive threatens to throw them into disarray, a process that is arguably well under way thanks to the Consumer Sales Directive. Consumer remedies for faulty goods are an area of particular concern, owing largely to the lack of synergy between the consumer sales regime derived from EU law and traditional remedies such as the right to reject.

The UK Government has already made clear on a number of occasions that it wishes to retain the right to reject. Even within the European Union itself, concerns have been raised about the potential erosion, as a result of the maximum harmonisation approach under the proposed Consumer Rights Directive, of consumer rights in Member States like the United Kingdom that have taken advantage of the minimum requirement approach under the current EU consumer protection law to maintain higher levels of protection.

Something therefore has to give at EU level. If the proposed Directive does go through as a maximum harmonisation measure then the hope is that the EU legislature will be persuaded to incorporate the right to reject, something that is by no means guaranteed in that such a right is not universally a European concept. Alternatives, the Law Commissions' Report suggests, would include a scheme of "differentiated harmonisation" involving targeting areas of consensus but leaving the right to reject, for example, outside the scope of maximum harmonisation.

It is ironic that, at a time when the law on consumer remedies for faulty goods is considered in need of review for lack of certainty and consumer understanding, the aspect of the current regime that provides most certainty, namely the right to reject, is under threat. There have been attempts at providing assurance to Member States that traditional remedies like the right to reject will not be affected by the new Consumer Rights Directive. Such assurances suggest that a programme of "differentiated harmonisation" is a possibility. These, however, are hard to reconcile with the overriding objective of the European Commission's proposals, which is to eliminate inconsistencies between Member States so as to provide greater legal certainty throughout the European Union in order to improve confidence in cross-border trading.

"The Battle of the Forms"

BACKGROUND

The parties involved in *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209 (19 November 2009) were part of a chain of suppliers of engine control and had been doing business for many years. Tekdata manufactured cable harnesses for internal wiring and required connectors from Amphenol.

CLAIM AND ISSUES

The first "form" was the purchase order generated by Tekdata. This stated that the purchase was to be on Tekdata's own terms and conditions and required delivery 26 weeks from date of order. Tekdata claimed connectors were delivered late and were not fit for purpose or of merchantable quality. Amphenol's purchase order said that the contracts were on the terms of a second "form", namely its acknowledgement, which it claimed excluded or limited liability for breaches of contract.

FIRST INSTANCE

The earliest date at which a contract could be made was when Amphenol acknowledged the purchase orders. The acknowledgement stated that Amphenol's terms and conditions were to apply. On a traditional analysis, without further

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documentation and if Tekdata took delivery, they would have applied. However, because of the following reasons, the judge held that the parties always intended Tekdata's terms to apply:

- The connectors were items of considerable sophistication and any departure from agreed times of delivery or, even more importantly, the quality of degree of materials and workmanship as specified in the purchase order could have "catastrophic consequences".
- A short time before the purchase orders were concluded, Amphenol had made contractual obligations to the party beyond Tekdata in the supply chain on terms that corresponded largely to those of Tekdata.
- At no time before Amphenol served its defence did they mention their own terms.
- Amphenol appealed.

DECISION

The Appeal was allowed. The traditional offer and acceptance analysis must be adopted unless the documents passing between the parties and their conduct showed a common intention that other terms were intended to prevail. This traditional analysis pointed to Amphenol's terms as the ones on which the parties contracted.

In coming to this decision the court found that

- The judge at first instance had concentrated more on what ought to have happened rather than what did happen.
- The context of the parties' relationship was important, but the factors relied upon did not justify the conclusion.
- While delivery times and quality control were essential to the good relationship of the parties, this was true for many commercial relationships and was no more than a background factor.
- Although some of Amphenol's actions complied with some of Tekdata's conditions, parties to contracts often do things that they might not strictly be obliged to do.
- Although Amphenol made no reference to their own terms and conditions until their defence, reasonable businessmen do not necessarily resolve their problems by making legal assertions. The terms of the post-dispute correspondence did not carry the matter very far.

COMMENT

A long term relationship and the conduct of the parties can never be so strong as to displace the result that a traditional offer and acceptance analysis would dictate. It will, however, always be difficult to displace the traditional analysis in a battle of forms case, unless there is a clear course of dealing between the parties.

Exclusion Clauses: Reasonableness and Severability

In *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2009] EWHC 1919 (TCC), on a claim for damages for defects in a printing press designed and manufactured by the first Defendant, Heidelberg, and hired from the second Defendant, Close Asset Finance (CAF), Mr Justice Ramsey ruled that the unreasonableness of a sub-clause excluding liability for direct loss and damage in an exclusion clause that was otherwise reasonable rendered the whole clause "unreasonable".

The purported effect of the exclusion clauses in the warranty agreement between Lobster and Heidelberg was to exclude all liability for damage so that Heidelberg's liability was limited to replacing or repairing the defective part in the printing press. In assessing reasonableness, the judge considered that the following factors were of importance. First, Lobster and Heidelberg were reasonably substantial commercial entities, experienced in the industry and there was evidence that Lobster had standard terms, although there was no evidence as to their scope or effect. Second, Lobster and Heidelberg had been involved previously in the provision of another printing press. Third, absent the warranty, Heidelberg would have had no contractual liability for defects in the press. Finally, Lobster would be best placed to know what losses it might suffer if its business was affected by problems with the press. There was also evidence that they had some insurance although the terms and scope were not in evidence.

In these circumstances, where Heidelberg undertook a limited obligation to replace or repair defective parts, the judge did not consider that there was anything unreasonable about Heidelberg excluding liability other than the obligations to remedy defects. Nor did he consider that the exclusion of liability in respect of matters arising from Lobster's incompetence or negligence was in any way unreasonable.

The judge did, however, consider that the exclusion for damages for "immediate loss" was unreasonable, as was the exclusion of liability for any increased costs or expenses and direct damage. The judge considered, for instance, that if Heidelberg failed to replace or repair a defective part then, at the very least, it was unreasonable that Lobster should not be able to recover damages for breach of contract to cover the "immediate loss" or "increased costs or expenses" or "direct damage" suffered in paying others to remedy the defects.
The judge considered that the exclusion of immediate loss and of increased costs or expense and direct damage rendered the sub-clauses in which they appeared unreasonable "and in doing so the unreasonableness goes to the whole of the provision" (*Stewart Gill v Horatio Myer* [1992] QB 600 applied).

Implication of Contract: Necessity and Restitution

A recent decision from the Court of Appeal of England and Wales, concerning a dispute in which one party supplied services to another in contemplation of signing a formal written contract, highlights the courts' reluctance to find that parties entered into a binding agreement by conduct. The case in question is *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189.

Prior to January 2006, Hollywood undertook distribution and warehousing services for United Cinemas International (UCI) and Blockbuster Stores, which it subcontracted to Trailers Limited. In 2004, the Terra Firma Group purchased the UCI and Odeon cinema chains. As part of the restructuring, Hollywood invited tenders for its distribution services and Whittle was the successful tenderer. The invitation to tender was expressed to be "subject to contract" and contemplated the execution of a formal written agreement.

Negotiations took place and a letter of intent was issued on 29 November 2005. On 2 December 2005, Hollywood faxed an "interim agreement" to Whittle. On 23 January 2006, notwithstanding the lack of a formal written contract, Whittle started performing the services and invoiced subsequently at a price per pallet commensurate with a long term contract.

About a year later, with no draft contract forthcoming and Hollywood up for sale, UCI sent an email to Whittle saying that "The interim agreement was based on the old Trailers' contract which could be terminated by either side based on 6 months' notice." Accordingly, in May 2007, Hollywood gave six months' notice determining the "interim agreement".

At trial, Whittle contended primarily that by conduct the parties had entered into a long term contract. Hollywood argued that by conduct the parties had entered into an interim contract terminable on six months' notice. Neither side put as its primary case that there was no contract. HHJ Raynor QC found no long term contract and held that the parties had by conduct concluded an interim contract terminable on six months' notice. He found Whittle bound by the prices negotiated for the long term contract.

On appeal, Whittle's position was that no contract was concluded and it was entitled to a restitutionary remedy; it sought a declaration accordingly. It claimed that Hollywood had been unjustly enriched by only having paid prices fixed by reference to a long term contract during the short period for which Whittle supplied services.

Waller LJ found the judge's reasoning that no long term contract had been concluded "unassailable". There was neither complete agreement on important terms nor any indication that either party was resiling from the requirement that negotiations were subject to contract. The parties had neither expressly nor impliedly waived the requirement for a formal written agreement.

Referring to Goff J's judgment in *British Steel Corporation v Cleveland Bridge* [1984] 1 All ER 504, Waller LJ said that while parties are negotiating a contract under which they will, if the contract is concluded, enter into reciprocal obligations binding each other as to future performance, it is highly unlikely that by conduct they will conclude in the interim an executory contract containing terms still subject to negotiation.

It is more likely that they will have entered into what Goff J referred to as an "if" contract, *i.e.,* a contract under which if one party supplies, the other agrees to pay a reasonable remuneration. However, even an "if" contract would not have been entered into if important terms were still under negotiation. In such cases the proper answer was "no contract" but a restitutionary remedy to the extent that one party has been unjustly enriched. The court should not strain to find a contract because a restitutionary remedy can solve most problems. As regards the implication of an interim contract, Waller LJ stressed that no contract will be implied unless necessary.

In Waller LJ's view, it was unnecessary to construct an executory contract, particularly one fixing the price at a rate that Whittle would have been unlikely to accept. There was also a difficulty and no necessity in finding an "if" contract because terms as to performance were still under negotiation. All negotiations were subject to contract and no binding arrangement was to come into existence until a formal document was signed. It did not follow that if services were provided before the contract was signed Whittle was not entitled to some remuneration. The receipt of remuneration did not of itself dictate that there was a contract.

Waller LJ considered it arguable that Hollywood had been unjustly enriched. Both parties were taking the risk that a long term contract would not be signed. Having accepted services before the contract concluded, Hollywood was bound to pay a reasonable sum for them. If the sum received was reasonable then Hollywood would not have been unjustly enriched, but if Whittle received less than a reasonable price then Hollywood would have been unjustly enriched. Although Whittle's primary case asserted a long term contract, it made clear that, if there was no contract, a restitutionary remedy was claimed. Therefore Whittle could assert "no contract" on appeal and seek a restitutionary remedy.

The case highlights the risks and uncertainty associated with entering into a letter of intent and subsequently acting as if an agreement is in place without signing formal documentation to that effect.

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COMMUNICATIONS AND NEW MEDIA

Digital Economy Bill: Key Measures Overview

The Digital Economy Bill (DEB) was released on 20 November 2009, published jointly by the UK Department for Business (BIS) and the UK Department for Culture, Media and Sport (DCMS). The DEB takes forward the recommendations under Lord Carter's Digital Britain: Final Report published in June 2009.

The following is a snapshot of the key aspects of the DEB.

FILE SHARING

The DEB will provide a legal base for the Government's scheme to tackle unlawful peer-to-peer file sharing. See "Illicit P2P File-Sharing: Draft Legislation" for a review of this aspect.

FUTURE PROOFING

The Bill will amend the Copyright Design and Patents Act to enable the Secretary of State to make provision for an order to amend the Act for the purpose of preventing or reducing online copyright infringement. The idea is to allow remedies to be developed and implemented more quickly and flexibly to keep pace with and provide protection against new communications technologies that may be developed that allow copyright work to be unlawfully copied in new ways.

ORPHAN WORKS AND EXTENDED LICENSING

The Bill introduces a power for the Secretary of State to make regulations authorising the use of orphan works and extended licensing as well as the regulation of licensing bodies.

PUBLIC LENDING RIGHTS

The Bill will extend public lending rights to include digital material such as audio and e-books.

OFCOM DUTIES TO ENCOURAGE INVESTMENT

Other key proposals would strengthen the UK's communications infrastructure such as superfast broadband, *via* the introduction of new Ofcom (the Office of Communications: the independent regulator and competition authority for the communications industry) duties to encourage investment. In this respect, Ofcom will be required to make a formal assessment of the United Kingdom's communications infrastructure every two years. Additionally, Ofcom will be required to encourage investment in public service content.

CHANNEL 4

The Bill introduces provisions that extend the functions of Channel 4 in relation to media content. These will require Channel 4 to participate in the making of a broad range of high quality content that appeals to the taste and interest of a culturally diverse society and to broadcast or distribute such content on a range of different delivery platforms.

BROADBAND

The Bill contains provisions designed to enable development of next generation mobile broadband services by allowing for the charging of periodic payments, such as Administered Incentive Pricing, on auctioned spectrum licences and allowing Ofcom to levy monetary penalties for failure to meet certain licence conditions.

VIDEO GAMES

The Bill also provides the legislative basis for a new system of classification for video games by making age ratings compulsory for all boxed games designed for those aged 12 or above.

DOMAIN NAMES

The Bill introduces new powers in relation to internet domain names and registries. These are designed specifically to combat the unfair use of domain names or the use of unfair practices by registries, registrars and users of domain names or where registries have failed adequately to deal with complaints.

DIGITAL RADIO UPGRADE

Finally, the Bill provides the regulatory framework necessary to facilitate the move to digital switchover for radio by 2015.

Regulation of Investigatory Powers Act 2000: Inadequate Safeguards and Sanctions

On 29 October 2009, the European Commission announced that it has moved to the second phase of the infringement proceedings against the United Kingdom for failing to implement EU e-privacy and data protection rules relating to the privacy of online communications. The Commission decided to take action against the United Kingdom in the wake of the secret trials conducted in 2006 and 2007 by BT of controversial behavioural advertising technology - Webwise, developed by Phorm - that enables participating organisations to track and to profile internet use. The Commission is concerned specifically by the lack of an independent national authority in the United Kingdom for interception of communications and what it considers inadequate safeguards and sanctions in the Regulation of Investigatory Powers Act 2000 (RIPA).

BACKGROUND

The European Commission launched the first phase of the action against the UK Government on 14 April 2009. Its concerns were prompted by BT's trials of Webwise and it claimed that the United Kingdom had failed to protect internet users against the unlawful interception of communications data, specifically with regard to the profiling of user behaviour for online behavioural advertising.

Webwise works by mirroring a user's request to visit a website at the moment he requests to enter it. This data is then profiled and anonymised to erase any trace linking the data to the user, *e.g.*, the IP address. A randomly generated ID is allocated to the user and, along with the anonymised data, is sent to a Phorm managed server, which categorises the data so that it can be linked with relevant advertising through its OIX advertising exchange platform. The result is that advertising targeted to the user appears on his computer screen.

Despite the Information Commissioner's Office (ICO) indicating that there had been no breach of any UK laws by BT or Phorm, the European Commission completed its own inquiries and has threatened to take the UK Government to the European Court of Justice for allowing the trials to operate and for failing to take appropriate action.

The relevant regulation in this area derives from the e-Privacy Directive (2002/58/EC), which requires EU Member States to ensure confidentiality of the communications and related traffic data by prohibiting unlawful interception and surveillance unless the users concerned have consented to this (Article 5(1)). The Data Protection Directive (95/46/EC) specifies that user consent must be "freely given, specific and informed" (Article 2(h)), and Member States are to establish appropriate sanctions in case of infringement and independent authorities must be charged with supervising implementation.

THE SECOND PHASE

In the Commission's press release announcing the second phase (IP/09/1626), it stated that it is maintaining its position on the United Kingdom failing to comply with EU rules provided in the e-Privacy Directive. Specifically, the Commission has identified three "gaps" in UK rules governing the confidentiality of electronic communications.

First, there is no independent national authority to supervise interception of communications. Second, RIPA authorises interception of communications when the person intercepting the communications has "reasonable grounds for believing" that consent to do so has been given, which does not comply with EU rules defining consent as freely given, specific and informed. Third, RIPA provisions do not tally with EU law which ensures sanctions against any unlawful interception regardless of whether committed intentionally or not.

COMMENT

The UK Government had until 29 December 2009 to reply to this second stage of the infringement proceeding. If the Commission is not satisfied with the response, it may refer the case to the European Court of Justice.

Telecommunications Reforms

The European Parliament and the Council of Ministers have reached agreement on the European Union's package of telecommunications reforms, comprising five directives that include provisions relating to internet access, cookies and data security breaches.

INTERNET ACCESS

The new Framework Directive provides that restrictions on end-users' internet access, in particular to deal with online copyright infringement, may "only be imposed if they are appropriate, proportionate and necessary within a democratic society". Such measures may only be taken "with due respect for the principle of presumption of innocence and the right of privacy" and as a result of "a prior, fair and impartial procedure" guaranteeing "the right to be heard… and the right to an effective and timely judicial review".

This is a watered down version of the European Parliament's original proposal that no restriction should be applied without a prior ruling by judicial authorities and was agreed following conciliation between the Parliament and the Council.

E-PRIVACY

In relation to storage of cookies on a user's terminal, the e-Privacy Directive is to include a provision that this is only permitted on condition that the subscriber or user concerned has given his or her consent. However, this does not prevent storage and access to information for the sole purpose of carrying out the transmission of a communication, or as strictly necessary to provide a user with a service requested explicitly by the user.

Requiring prior consent for use of a cookie that is not "strictly necessary" may, for example, mean that users will be presented with pop-up messages or other alerts requesting consent to storage of a cookie. However, Recital 66 of the Directive states that "the user's consent to processing may be expressed by using the appropriate settings of a browser or other application".

With respect to data breaches, the e-Privacy Directive requires communications providers to inform the data protection authority and their customers about data security breaches that are likely to affect them, such as data loss that could result in identity theft.

Further changes include the possibility for any person affected negatively by spam, including ISPs, to bring effective legal proceedings against spammers.

OTHER REFORMS

A new European telecommunications authority, named BEREC (Body of European Regulators Electronic Communications), is to be established with the aim of ensuring fairer competition and more consistency of regulation on telecoms markets.

New rules will also give national telecoms authorities the power to set minimum quality levels for network transmission services so as to promote "net neutrality" and "net freedoms" for European citizens. New transparency requirements mean that consumers must be informed, before signing a contract, about the nature of the service to which they are subscribing.

As well as information on the minimum service quality levels, consumers will be entitled to better information on compensation and refunds if such levels are not met.

The UK Council for Child Internet Strategy: Click Clever Click Safe

The UK Council for Child Internet Strategy (UKCCIS) was set up in September 2008 to implement the recommendations set out in the Byron Review, Safer Children in a Digital World. On 8 December 2009, UKCCIS published *Click Clever Click Safe*, its first strategy report (the Report) on its activities so far and its future objectives.

The Report is confident that improvements have already been made to the online security of children. For example, 82 per cent of children said that they had been taught about online safety at school. However, with over half of children who came across inappropriate content saying that they did not report it and nearly a third of 12-15 year olds having no privacy settings enabled on social networking sites, UKCCIS still has work to do.

UKCCIS' achievements so far include overseeing the inclusion of material on online safety in the revised National Curriculum, introduced in September 2008, ensuring that schools inspections cover the teaching of online safety in primary schools and the provision of electronic safety resources for primary school teachers and parents.

UKCCIS is working with a number of organisations, including the Child Exploitation and Online Protection centre, social networking sites and information industry players. Its goal is to bring about "effective self-regulation" in line with the Digital Britain Report. UKCCIS is also working with the British Standards Institution to develop a kitemark for parental control software to enable parents to manage their children's online activity.

FUTURE OBJECTIVES

The Digital Britain Report identifies three aims for UKCCIS in the future:

- •Creating a safer online environment.
- •Giving everybody the skills, knowledge and understanding to help children and young people stay safe online.
- •Inspiring safe and responsible use and behaviour.

The Report notes that certain children may be more vulnerable online than offline because they are seeking out risky experiences, or because their technical skills are ahead of their ability to make sensible judgements about risk. In order to understand this better, UKCCIS has established a practice group to conduct research into the factors that affect children's vulnerability, how children develop and how that development affects their vulnerability.

COMMENT

It is clear from the statistics set out in the report that many parents feel that their children are more technically advanced than they are. They also have concerns about keeping on top of their children's online behaviour. UKCCIS aims to ensure that parents have access to simple tools to enable them to implement basic controls on their children's activities as well as empowering children by developing their understanding of the risks and giving them the skills to avoid and overcome them.

INTELLECTUAL PROPERTY

Illicit P2P File-Sharing: Draft Legislation

The Digital Economy Bill (DEB) was introduced into the House of Lords on 19 November 2009. Among the legislative measures contained in the DEB, it provides the legal basis for the UK Government's anti-file-sharing and online piracy strategy.

OVERVIEW OF ISPS' OBLIGATIONS

The DEB will introduce new sections into the Communications Act 2003 imposing obligations on internet service providers (ISPs) known as "initial obligations". The first obligation is to notify subscribers if the ISP receives a copyright infringement report (CIR) about the IP address associated with the subscriber from a copyright owner. The notification from the ISP must inform the subscriber that the account appears to have been used to infringe copyright, and it must provide evidence of the apparent infringement, direct the consumer towards legal sources of content and provide other advice.

The second requires ISPs to keep a record of the number of CIRs linked to each subscriber and compile, on an anonymous basis, a list of some or all of those who are reported on. After obtaining a court order to obtain personal details, rights owners will then be able to take action against those included in the list. Explanatory notes to the DEB state that the intention is for the code to set out a threshold number of CIRs, for example 50, above which a subscriber will be considered a serious repeat infringer.

These obligations will be underpinned by a code either approved by Ofcom (Office of Communications: the independent regulator and competition authority for the communications industry) or, if no industry code is put forward for approval, made by Ofcom and the initial obligations will not have effect until there is a complementary code in force. The code will set out in detail how the obligations must be met, such as a process by which infringements are detected, the standard of evidence that the copyright owner must meet before an ISP must send a notification, the format of CIRs, and the routes of appeal for subscribers.

Should these initial obligations prove insufficient to reduce significantly online copyright infringement, the DEB also grants the Secretary of State the power to impose further obligations known as "technical obligations" on ISPs, requiring them to take measures to limit internet access to certain subscribers. These technical measures, which will be used against serious repeat infringers only, will be likely to include bandwidth capping or shaping and suspending the service provided to the subscriber. In relation to these technical measures, Ofcom is also required under the DEB to prepare a code setting out the procedural mechanisms to give effect to the obligations on ISPs.

Penalties that may be imposed on an ISP for the contravention of its initial obligations or obligation to impose technical measures are specified as a maximum of £250,000.

The DEB also requires appeals processes to be set up as part of the underpinning codes. These include the right to appeal decisions of ISPs to impose technical measures before a person independent of Ofcom, with a further right of appeal to the First-tier Tribunal.

COMMENT

Not surprisingly, major rights holders have welcomed the DEB. The British Recorded Music Industry (BPI) has described the introduction of the DEB as "an important milestone towards a sustainable future for British music in the digital age".

SPORT

Report on UK Free-to-air Listed Events

13 November 2009 saw the publication of the United Kingdom’s Report on the Review of Free-to-air Listed Events (the Report).

BACKGROUND

Events of "national interest" are listed following a consultation by the Secretary of State in accordance with the Broadcasting Act 1996. In addition, Article 3 of the European Audiovisual Media Services Directive (2007/65/EC) establishes a mutual recognition system enabling EU Member States to enforce their list of major events in any EU Member State.

The purpose of the Report is to provide the Secretary of State with an independent review of the current list of major events (adopted in 1998) prior to the launch of the statutory process. The current list divides up major events into an "A" list and "B" list with events on the A list to be shown live and those on the B list to receive secondary coverage (*e.g.,* highlights). A broadcaster must be able to reach at least 95 per cent of the audience to be a "qualifying channel". Only five channels in the United Kingdom meet this requirement: BBC 1, BBC 2, ITV, Channel 4 and Five.

FINDINGS OF THE REPORT

The Report outlines its conclusions against the background of a changing media landscape in Britain. In particular, the Report notes the increased uptake of pay TV, with the five main terrestrial channels capturing just 64 per cent of the market, down from 97 per cent in 1998.

Also noted is the "privileged position" that the listing regime grants the BBC, particularly in light of the "limited" ambitions of ITV, Channel 4 and Five with regard to bidding for sports broadcasting rights. This is further highlighted by the observations of certain sports governing bodies that there is an absence of competition for listed events rights, which places the BBC in "an overwhelmingly beneficial position" and has led to a decline in the value of such rights over the past five years (by up to 70 per cent in some cases). However, the Report comments that were listing to be abolished, this would not necessarily lead to fiercer competition and a value increase for the rights, on the basis that most listed events would likely continue to be featured on the main terrestrial broadcasters. In particular, for the FIFA World Cup, it acknowledges the popularity of matches involving the home nations but notes that some other matches are watched by so few people that delisting would have little impact. The Report considers that listing the entire Wimbledon tennis championship is not likely to have much of an impact, whilst in relation to the proposition of listing the entire Rugby World Cup it considers that the value of the rights may fall as a result. Cricket is a rare example of where the impact of listing is quantified, with an estimate of a significant reduction in funds if test cricket is listed.

Additionally, an economic report commissioned by BSkyB examines the impact of broadcasting on the funding of sports governing bodies to fulfil their remit. This report notes that broadcasting revenues allow the governing body to invest in and develop the sport at the elite and grassroots levels. Moreover, broadcast coverage of sports provides important exposure for the game, which impacts on the level of awareness and overall engagement with the sport. Such coverage and increased exposure provides a key tool for the governing body to leverage sponsorship and commercial values.

RECOMMENDATIONS OF THE REPORT

The Report has recommended criteria for listing as follows:

In order to be eligible to be listed, an event must have a special national resonance and not simply a significance to those who ordinarily follow the sport concerned.

Such an event is likely to fall into one or both of the following categories:

- *•It is a pre-eminent national or international event in sport.*
- *•It involves the national team or national representatives in the sport concerned.*

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It should also be likely to command a large television audience.

Based on these criteria the Report has recommended the following new list:

- •The Summer Olympic Games
- •The FIFA World Cup Finals Tournament
- •The UEFA European Football Championship Finals Tournament
- •The Grand National
- •The Open Golf Championship
- •Cricket's Home Ashes Test matches
- •The FA Cup Final should be listed in England, Wales and Northern Ireland.
- •The Scottish FA Cup should be listed in Scotland.
- •Wales matches in the Six Nations Rugby Championship should be listed in Wales.
- •Home and away qualification matches in the FIFA World Cup and UEFA European Football Championships should be listed in the Home Nation to which they relate.
- •The All-England Wimbledon Lawn Tennis Championship should be listed in its entirety.
- •The Rugby Union World Cup Tournament should be listed in its entirety.

Off-Field Sportswear Licence Agreement: Implied Duty of Cooperation

In a dispute (*Hudson Bay Apparel Brands LLC v Umbro International Ltd* [2009] EWHC 2861 (Ch)) between Umbro International Ltd and Hudson Bay Apparel Brands LLC, one of Umbro's U.S. licensees, Mr Herbert QC, sitting as a deputy High Court judge, has ruled that Hudson Bay had operated outside the scope of its licence to supply off-field apparel by supplying on-field products, but that Umbro had breached its obligations by failing to respond to requests for product approvals. The deputy judge held that there was an implied duty of cooperation in the licence agreement, such that it was not able to refuse to consider requests for approval.

BACKGROUND

Umbro, the British sportswear manufacturer, granted two licences to manufacture and distribute clothing in the United States under its trade marks: one in respect of on-field wear to a company called Dick's Sporting Goods and the other in respect of off-field wear to Hudson Bay. In practice, the main visual difference between the ranges was the presence or absence of pockets. Umbro reserved to itself the market for "teamwear", the actual football kit supplied to competitive teams.

One of the distribution channels granted expressly to Hudson Bay was the "advertising specialities" market, the members of which produce replica sports strips for companies to present to staff. Hudson Bay's main customer in this category was a company called S&S.

PROPOSAL TO LIMIT HUDSON BAY'S LICENCE

On 19 February 2008, TLC, Umbro’s agent, wrote to Hudson Bay, complaining about the products in the S&S catalogue on the basis that they competed directly with Umbro's teamwear business. It attached a proposed amendment to the licence agreement, the main effects of which were to expand the description of on-field wear, require that Hudson Bay's products should have larger branding and visible pockets and require that advertising speciality products must be approved annually by Umbro. Hudson Bay objected to the proposed amendments to its licence.

Umbro also wrote to Hudson Bay, stating that it considered that the products supplied by Hudson Bay to S&S were on-field football kits. Umbro required the withdrawal of the S&S products and Hudson Bay's agreement to the new terms proposed by TLC before it would grant any approvals in respect of Hudson Bay's new products.

The relationship between the two businesses deteriorated, with Hudson Bay seeking direction and approvals regarding the design of new collections and Umbro being slow to respond and insisting upon changes to the advertising speciality clothing with the result that Hudson Bay could no longer sell to that market.

Hudson Bay issued proceedings, claiming first that Umbro had allowed Dick's to market off-field wear in breach of Hudson Bay's exclusive licence and second, that Umbro wrongly hindered Hudson Bay from exploiting its off-field licence. Umbro counterclaimed, complaining that the material marketed by Dick's was on-field wear and that Hudson Bay has acted in breach of its contract by marketing pocketless shirts and shorts that resembled teamwear.

DECISION

Mr Mark Herbert QC held that certain of the articles of clothing marketed by Dick's were off-field wear and as such were covered by Hudson Bay's exclusive licence. In permitting Dick's to market such items, Umbro was in breach of the Hudson Bay licence. Mr Herbert QC also accepted an alternative claim by Hudson Bay that, to the extent that the two exclusive licences granted by Umbro overlapped in their scope, Umbro had breached a warranty given to Hudson Bay that it was entitled to enter into the agreement with them.

The judge concluded that the removal (or non-addition) of pockets in the S&S products made a difference that was, in the end, decisive. The judge rejected Hudson Bay's defence that the S&S products had been approved. Since the products supplied to S&S were items of on-field wear, they did not fall within the scope of Hudson Bay's licence.

Turning to Hudson Bay's second claim, that Umbro had prevented it from exploiting its licence, Mr Herbert QC accepted Hudson Bay's submission that an implied duty of cooperation was necessary. Otherwise, Umbro could refuse to approve products whilst at the same time claiming entitlement to guaranteed royalties and a right to terminate the licence for failure to meet sales targets. Mr Herbert QC held that, whilst Umbro could refuse to grant approvals within the terms of the agreement, it could not refuse to consider requests for product approval.

COMMENT

Hudson Bay, at least, intends to continue its relationship with Umbro, as was apparent from its request for specific performance of the exclusive licence agreement. It is not clear how the relationship between the parties can be made to work following such a bitter dispute, but it is not unheard of for commercial differences to be solved by court intervention resulting in a new understanding between parties.

COPYRIGHT

Modchips: Substantial Part of a Copyright Work

On 9 November 2009, the Court of Appeal of England and Wales upheld convictions in Worcester Crown Court against Christopher Gilham for a number of offences under Section 296ZB of the Copyright, Designs and Patents Act 1988 in relation to the sale and importation of modchips. These allow users to circumvent copy protection measures in order to play pirate video games on consoles like the Xbox, Playstation and Gamecube.

During the playing of a game, data is taken from the disk into the Random Access Memory (RAM) of the console. As the game is played, the data in the RAM is over-written by different data from the disk. The Court accepted that, at any one time, only a very small percentage of the data on the disk would be present in the RAM. The screen or monitor displays images of scenes, characters and objects that have been created by the designs of the games. The digital instructions for the display of those scenes, characters and objects and for the production of the sounds and music would be on the DVD and taken into the RAM temporarily to be over-written by other data on the DVD as the game moves on. The issue on appeal in *R v Christopher Gilham* [2009] EWCA Crim 2293 was whether the playing of a counterfeit DVD on a games console constituted copying of a substantial part of a copyright work.

COURT OF APPEAL DECISION

Substantial copying was the only issue on appeal and in this respect it was submitted that the judge had wrongly directed the jury as to the meaning of “substantial”. Burnton LJ dismissed the appeal and upheld the convictions. He agreed, however, that the application of the substantial part test was more complex than was indicated by the judge’s direction. Burnton LJ noted that the authorities, both judicial and academic, recognised the problem that arises when a defendant regularly takes a small amount of material from the claimant’s work: the “little and often” problem.

Burnton LJ held that in the current case, if the only copyright work that was copied was the game as a whole, the “little and often” would be material and the correctness of Laddie J’s judgment and of Jacob LJ’s dicta would have to be decided. However, the game as a whole was not the sole subject of copyright. The various drawings that resulted in the images shown on the television screen or monitor were themselves artistic works protected by copyright. The images shown on the screen were copies - and substantial copies at that - of those works. It followed that even if the contents of the RAM of the game console at any one time were not a substantial copy, the image displayed on screen was. It was irrelevant that a substantial copy of the copyright work could be seen only for an instant as Section 17(6) CDPA expressly provides that a transient copy is a copy. It followed that Mr Gilham had been rightly convicted.

Finally, it is noteworthy that Burnton LJ thought it appropriate to “repeat with emphasis” the point made by Jacob LJ in Higgs that difficult copyright issues, such as whether a copy is a substantial part of a copyright work, should be tried in the Chancery Division before specialist judges and not before a jury. The assumption being that an untrained jury may not be able to appreciate the complexity and subtlety of law in this area.

TRADE MARKS

Interim Injunction: Adwords Evidence

In *Wasabi Frog Ltd v Miss Boo Ltd* [2009] EWHC 2767 (Ch), Mr Justice Warren granted an interim injunction to Wasabi Frog, proprietor of the womenswear website boohoo.com, to restrain a new website from retailing female fashionwear under the name Miss Boo.

BACKGROUND

Wasabi Frog, an online retailer of women's fashion, has traded since November 2006 through the website boohoo.com and by reference to the mark BOOHOO. Its target market comprises young women aged 17 to 25 and it has built a reputation as a vibrant, glamorous but affordable brand.

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Wasabi Frog had registered BOO, BOOHOO and BOOHOO.COM as Community trade marks (CTMs) in respect of cosmetics, clothing, accessories and footwear; 80 per cent of the clothing and 30 per cent of the footwear sold through the website is branded boohoo.com. Wasabi Frog also owns a number of domain names including the words boohoo and missboohoo, all of which redirect to the main website at boohoo.com.

On 1 September 2009, Miss Boo launched a website at www.missboo.co.uk, selling women's clothing which was similar to that of Wasabi Frog but, according to Wasabi Frog, of cheaper quality. Miss Boo's director, Gulfraz Mohammed, gave evidence that the name had been chosen to include "Miss" because the range was targeted at young women and "Boo" because this was a word for loved ones in popular culture. Miss Boo had carried out searches prior to selecting the name and had found no companies of the name, no website and, when it sought registration as a UK trade mark, the UK Intellectual Property Office had informed certain companies, but not Wasabi Frog. The reason for this omission was not clear.

As part of its effort to limit any damage caused to its brand by Miss Boo, Wasabi Frog purchased "Miss Boo" as a Google Adword. Google Analytics Reports showed that 15 per cent of the traffic to the Boohoo.com website was redirected from users who had searched for Miss Boo, representing the fourth largest source of traffic to the site.

Wasabi Frog applied to restrain Miss Boo from trade mark infringement and passing off, seeking an interim injunction.

DECISION

Warren J accepted Wasabi Frog's submission that Miss Boo had been aware of the boohoo.com website when it launched its business, but noted that whether Miss Boo's conduct could be said to be calculated to pass off its goods as those of Wasabi Frog must be judged objectively.

Warren J accepted that Wasabi Frog had goodwill and reputation in the marks BOOHOO and BOOHOO.COM, but held that the same could not be said of its BOO mark, although he acknowledged that it had registered this mark as a CTM.

The judge accepted Mr Mohammed's evidence that the target market of the two websites were young girls who were "very, very savvy" when it came to fashion. However, the judge noted that he did not need to determine the matter of confusion one way or the other, for the purposes of this application, merely to determine whether or not there was a triable issue. Having heard evidence of an actual incidence of confusion, in the form of an events promoter who contacted Wasabi Frog in an effort to sell advertising space at one of its events and, in doing so, twice referred to Wasabi Frog as Miss Boo, he held that if somebody like that could be confused, even a "very, very savvy" young woman might be confused. Warren J also found the evidence relating to the Miss Boo Adword gave rise to an arguable case.

Warren J held that damages would not be an adequate remedy for Wasabi Frog, since Miss Boo was a new and impecunious business. On the other hand, he considered that although damages would not be a complete remedy for Miss Boo, they would prove adequate if it transpired that an interim injunction had been wrongly granted. Miss Boo had not been trading for long enough to build up significant reputation in the name and could change its name with a loss only of the investment it had made to date in advertising. Significantly, its stock, which was not branded Miss Boo, could still be sold, whatever the outcome of this dispute.

COMMENT

As in the recent *Strip* case, the balance of convenience will generally favour an established business over a newcomer which can usually be compensated with monetary damages, since it has little more to lose than the money it has invested in launching a new brand. The existing business, on the other hand, typically has higher stakes, with the risk of damage to the brand resulting from confusion on the part of its customers.

It is interesting to see a claimant using keywords to its advantage, in this case not only registering the Miss Boo as a keyword to limit any diversion of sales from Wasabi Frog to Miss Boo, but also using the statistical report generated by Google as evidence of confusion.

Unfair Advantage Post *Whirlpool*

In *Daimler AG v Sany Group Co Ltd* [2009] EWHC 2581 (Ch), Susan Prevezer QC, sitting as a deputy High Court judge, dismissed claims by Daimler AG that its famous three pointed star was infringed by Sany’s use of a three pointed star logo on construction machinery and vehicles.

BACKGROUND

Sany, a China based company that designs, manufactures and sells vehicles, machinery and equipment used primarily for road building, commenced its business in China in 1989 and has expanded internationally since 2003. Its annual sales outside China for 2007 amounted to £110 million.

Sany has used its logo since 1995 on promotional materials and products. The word SANY is a transliteration of a Chinese word meaning "three one" which was selected to convey the company's "three pointed mission" to establish a first class enterprise, to cultivate first class people and to make a first class contribution. In August 2006, Sany applied to register its logo as a United Kingdom trade mark in respect of construction equipment and vehicles.

Daimler brought an action for infringement of four UK registered trade marks and two Community Trade Marks in respect of Mercedes' three pointed star. Daimler also opposed Sany's UK trade mark application. The parties agreed to stay the proceedings pending the outcome of the current dispute.

In May 2009, Geoffrey Hobbs QC, sitting as a deputy High Court judge, refused Daimler's application for summary judgment on its claim for infringement under Section 10(2) of the Trade Marks Act 1994 and Article 9(1)(b) of the Community Trade Mark Regulation (40/94/EC).

Daimler's original claim included a claim under Section 10(3) of the Act (Article 9(1)(c) of the Regulation), complaining of "detriment" to Daimler's mark, and a claim for passing off, both of which Daimler abandoned together with its claim under Section 10(2) and Article 9(1)(b). This left only a claim for infringement under Section 10(3) and Article 9(1)(c) based on "unfair advantage".

Sany counterclaimed for partial revocation of the trade marks, arguing that Daimler had not genuinely used the three pointed star in relation to all goods covered by its registrations for a period of five years following their registration. Daimler conceded that some goods should be deleted from its specifications, but otherwise sought to maintain broad specifications, arguing that it could demonstrate genuine use of the three pointed star in the United Kingdom and Community in the relevant period.

DECISION

Prevezer QC noted that the recent decision in *Whirlpool Corporation v Kenwood Ltd* [2009] EWCA Civ 753 summarised the law relating to claims for infringement under Article 9(1)(c). Accepting Daimler's submission that the three pointed star had been used since 1921 and that the average consumer knew what it looked like, Prevezer QC acknowledged that the principle of imperfect recollection would play less of a part than in other cases.

However, although the three pointed star was a highly distinctive mark and should earn a correspondingly wide scope of protection, in her view there was no "link" between the Sany logo and the Mercedes' three pointed star. Accordingly, Daimler did not overcome the first hurdle of establishing that a relevant "link" would be made by the average consumer between the Sany logo and the three pointed star, whether one took the average consumer to be a member of the public or a person in the construction industry with particular experience.

Although Daimler failed at the first hurdle, Prevezer QC expressed a view on the other elements of the claim. She held that the goods sold by Daimler and Sany respectively were highly similar.

There was an issue regarding a photograph of a Sany truck chassis in an online advertisement issued by Sany's former UK distributor, in which the Sany logo appeared on the engine grille in a similar position to the three pointed star on Daimler's truck chassis. However, she accepted the evidence of Sany's Assistant President, that the photograph had been used by the distributor without Sany's authorisation and that Sany had no intention of marketing the truck chassis in Europe.

Sany's own specification of goods in its trade mark application was broad, but Prevezer QC accepted Sany's submissions that the fact of an application in broad terms did not, without more information, define the scope of the threat to use the Sany logo on the market, nor demonstrate that Sany intended to sell truck chassis or cars in the United Kingdom.

Prevezer QC considered it difficult to express a view on "unfair advantage", having determined that there was no link established between the two marks. However, taking into account the *Whirlpool* principles, she would not have concluded that the calling to mind of the three pointed star would have had the effect of inciting consumer interest in Sany's goods and services by adding allure and prestige to Sany's goods. It would thereby give Sany an unfair advantage, or give rise to a serious risk of an unfair advantage being obtained by Sany.

Upholding Daimler's broad specification of goods, Prevezer QC followed *H Young (Operations) Ltd v Medici Ltd* (ANIMAL) [2004] FSR 19 in finding that a "fair specification" of goods identified and defined not the particular examples of goods for which there had been genuine use, but the particular categories of goods they should realistically be taken to exemplify and a terminology that accorded with the perceptions of the average consumer of the goods concerned. Prevezer QC concluded that there was genuine use by Daimler of the threepointed star to support these broad specifications.

Accordingly, Daimler's claim for infringement and Sany's claim for partial revocation (taking into account Daimler's concessions) were dismissed.

COMMENT

The decision is the first case on "unfair advantage" since *Whirlpool* and deals with the extent to which trade mark protection extends to marks with a reputation. It also provides more guidance on how English courts should interpret the concept of "unfair advantage" and shows that claimants must present a strong case in order to succeed.

PATENTS

Sandwich Packaging: *Windsurfing* and "Mosaicing"

Disregarding an admission of obviousness made by the patentee's expert witness during cross-examination in *Nampak Cartons Ltd v Rapid Action Packaging Ltd [2009]* BL O/342/09, a Patent Office hearing officer has refused an application to revoke a patent relating to sandwich packaging on the ground of obviousness because to do so would require him to work backwards from the invention.

BACKGROUND

Rapid Action Packaging Ltd was the proprietor of a patent for a sandwich carton in which the lid could be bonded to an out-turned flange by heat sealing. During prosecution, the patent was narrowed to cover only such a carton that had been adapted by way of what is known in the trade as "concora cuts" in the flange. Under this method, when the carton is opened, the flange delaminates, leaving part of the flange material bonded to the lid.

Nampak Cartons Ltd sought revocation of the patent on the grounds of obviousness.

Each party had experts who were cross-examined. Nampak's counsel led Mr Clough, Rapid Action's expert, through a series of questions that led to his agreement on the concora cuts in the flanges sounding "like a sensible approach". However, Mr Clough noted that, at the priority date, there would have been considerable prejudice against "interfering" with the flanges and that he himself would have avoided them.

INVENTIVE STEP: COMMON GROUND

The parties were in agreement that the notional skilled person was likely to be a team comprising a packaging designer and a packaging systems engineer.

The state of the art at the priority date was also agreed: triangular prism-shaped sandwich cartons made from cardboard were commonplace and the use of heat-sealing was well-known, as was the "concora" method of providing tear strips, although it was not widely used in sandwich packaging at the time. Instead, the experts agreed that it was more usual to use a single score line at the reflex angle of the fold lines.

DECISION

The hearing officer, Mr Probert, concluded that the inventive concept in Claim 1 was a cardboard sandwich carton with dual parallel lines of partial cut along the flanges, one being at the junction between the flange and the wall adjacent the inside of the flange so that the flanges could be split (*i.e.,* delaminate between the cuts) to allow the lid to be opened.

Mr Probert found himself unable to accept that putting the concora cuts in the flange was one of two alternatives that the skilled person would consider and that it would, indeed, be a sensible approach. He concluded that some of the things that Mr Clough agreed with in cross examination were, in the words of Moulton LJ in *British Westinghouse v Braulik* [1910] RPC 209, "arrived at by starting from something known, and taking a series of apparently easy steps."

Accepting Rapid Action's submissions on "mosaicing", Mr Probert noted that, whilst it was tempting to put together a combination of prior art documents to show how the inventor may have arrived at the inventive concept, this would require a significant degree of hindsight.

It was clear from *Pozzoli/Windsurfing* that the assessment of the prior art must be made "without any knowledge of the alleged invention as claimed" and that since there were no cross-references between the prior art documents, they must be taken separately.

Mr Probert found that the difference between each of the prior art documents and the inventive concept constituted one or more steps that would not have been obvious to the person skilled in the art at the priority date. Accordingly, the application to revoke the patent should not succeed.

COMMENT

The case provides useful revision on the *Windsurfing* test and yet another reminder that mosaicing, however tempting, is not allowed.

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