

IN THE HIGH COURT OF JUSTICE - CHANCERY DIVISION

[2018] EWHC 3864 (Ch)

Case No: BL-2018-000224

Courtroom No. 4

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Wednesday, 10th October 2018

Before:
HIS HONOUR JUDGE PEARCE

B E T W E E N:

EXCEL-EUCAN LTD

and

SOURCE VAGABOND SYSTEM LTD

MR A LOMAS (instructed by MICHAEL MARKHAM) appeared on behalf of the Claimant
MR LONGSTAFF appeared on behalf of the Defendant

JUDGMENT
(Approved)

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HHJ PEARCE:

1. This is an application within the first case management conference in these proceedings for the case to be taken out of the shorter trial scheme, in accordance with the objections that the defendant has raised to the claim being dealt with under the shorter trials scheme. The claim arises from the relationship between the claimant, which owns a patent in the so called link tail bag, an ammunition carrying bag used by armed forces in a number of countries, and Source which, pursuant to a licence, is the manufacturer of the bag pursuant to the patent.
2. It is Source's contention that Excel was in repudiatory breach of the licence by reason of an email sent to the Ministry of Defence Infantry Trials Development Unit on 14 February 2017. Excel denies that anything said in that email amounted to a breach of the licence or, in any event even if in breach of the licence, amounted either individually or cumulatively to repudiatory breach of the licence.
3. The issues as appear on the statements of case in their current form go some way beyond the issue of repudiatory breach. I have at tab 16 of the bundle before me the claimant's draft list of issues as the list stood when it was crafted for the purpose of this case management conference. I have at tab 20 of the bundle the defendant's list of issues. They include, as well as issues relating to the alleged repudiatory breach of the licence, issues relating to whether the claimant's patent is breached, infringed by a redesigned version of the bag manufactured by the defendant and/or whether, in any event, the defendant is obliged, pursuant to the licence, to make payment to the claimant upon sales of the bag or the redesigned bag. Though the issues are put differently in terms of those two lists, they are, as one would expect, broadly speaking, consistent.
4. In his skeleton argument, for the purpose of this case management conference, counsel for the claimant, Mr Lomas, has said that the issues in the case amount to these: a) is the licence still in force; b) is the 2017, that is to say the redesigned bag, royalty bearing; and c) does the 2017 bag infringe or does it not infringe the claimant's patents? It is right to say that though the main issues in the case can be summarised in that kind of way they each, it seems to me, raise rather more complicated issues. In his submissions Mr Longstaff for the defendant has pointed out the fact that having stated the issues simply, Mr Lomas then fleshes them out at some little length within his skeleton argument.
5. I have referred already to the state of the statements of case because it is the defendant's wish to amend the defence and counter claim. That is an amendment to which the claimant consents, though I understand that the actual form of the proposed amended defence and counter claim is slightly different than that in the bundle before me. Certainly, given that the parties are in agreement in respect of that issue, I see no reason for the court to stand in the way of such an amendment and I will happily make an order that permits such an amendment in due course.
6. The amended document raises issues about infringement which need further fleshing out on the part of the claimant. In consequence of the amended defence and counter claim I understand that the claimant is to have permission to file an amended reply and defence to counter claim. That, once filed, will no doubt give rise to a need on the parties to discuss further the relevant issues. Those issues are, broadly speaking, defined at this stage.
7. The defendant's objection to this case proceeding in the shorter trial scheme arises out of contentions as to the complexity of the case, the need for disclosure and the likely length of trial. The shorter trial scheme is a valuable scheme that has been piloted and, in my understanding, has done much in accordance with its aim to reduce costs and delays in trials within this building. It is inevitable that there is an interrelation between that pilot and the pilot in respect of disclosure due to come into force on 1 January of next year. For example, even if a case like this were not within the shorter trial scheme, under the disclosure pilot at the first case management conference the court would be looking with care at what level of

disclosure is required. When one considers disclosure it is, in the current ethos, as demonstrated both within the Practice Direction relating to the shorter trials pilot scheme, Practice Direction 51, and the Practice Direction relating to the disclosure pilot. It is the case that courts are encouraged to look with care at the extent of disclosure, the underlying philosophy being that in particular commercial disputes have had a tendency to become bogged down and excessively expensive because of disclosure.

8. That of course is not to say that the shorter trial scheme prevents appropriate disclosure taking place simply that the usual rules of Part 31, and in particular standard disclosure, do not apply to the proceedings. Rather, the parties must tailor requests for disclosure which, to my mind, comes some way similar to that which the disclosure pilot is aimed to achieve. The provisions of Practice Direction 51a state that the shorter trial scheme will not normally be suitable for, 'b) cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence'. Paragraph 2.4 provides that, 'The length of trials in the scheme will be no more than four days including reading time'.
9. Therefore, in considering the appropriateness or otherwise of this case for the shorter trial scheme, it seems to me that I must have particular regard to the issues as to the extent of disclosure, the extent of expert evidence and probably, most importantly, the likely length of the trial or, perhaps more accurately put, the cap on the length of the trial of four days provided for by paragraph 2.4 of the Practice Direction.
10. It is right to say, as is pointed out by Mr Longstaff in his skeleton argument, that the Practice Direction supposes simplicity and brevity within the statements of case whereas the statements in case in this claim, without being critical of them, are lengthy. The amended defence and counter claim, goes a little bit beyond that anticipated in the Practice Direction. It seems to me that that kind of complexity should not blind the court to the reality of what the shorter trial scheme is about which is whether the case can properly be contained within the trial estimate of no more than four days and whether it truly requires extensive disclosure and/or reliance upon extensive witness or expert evidence.
11. It is contended on behalf of the claimant and Mr McLean, who is I believe also a shareholder in the Claimant and is backing this claim through giving security for costs on behalf of the claimant, that the claim should not be forced out of litigation through the case being transferred out of the shorter trial scheme or through a desire for extensive disclosure. One of course has sympathy with the individual in the position of Mr McLean but if more expensive, longer litigation is required to do fairness to the issues between the parties, then that fact cannot stand in the way of the case being transferred out of the shorter trial scheme. In general terms of course the overriding objective requiring as the court to have regard for the need to deal with cases proportionately and in a cost efficient manner and so the overriding objective, regardless of the particular circumstances of Mr McLean and/or the claimant, leaves the court to consider with care whether costs can properly be contained by the use of the shorter trial scheme.
12. I have been referred to a number of authorities within skeleton arguments and I have had one case *Cantel v Arc Medical Design* [2017] EWHC 1202 referred to me during the course of the oral submissions. Counsel agree that each case turns on its own facts and I think it would be a mistake for me to become too bogged down in decisions that other Judges have made in other cases. Certainly there is nothing about this case which by definition makes it unsuitable for the shorter trial scheme; I accept that contention. I accept that for example *Cancel v Arc Medical* was a case with different issues and was probably a more complex case than that before this court. I must look at the issues in this particular case.
13. It is perhaps somewhat unfortunate that I am hearing the case management conference but almost certainly will not be the trial Judge in the case. Therefore it is slightly harder for me perhaps to make controversial decisions which rebound not on me but on the Judge who hears the trial in due course. That is not what is anticipated within the shorter trial scheme but it is, as I understand it, the reality of the demands of listing within this building.

14. I turn then to consider the issues of complexity within the case. On the issue of disclosure, I am very grateful to Mr Longstaff who has produced a document headed, 'Defendant's Issues Of Fact For Disclosure' which sets out issues as it states on its face and identifies what is said to be potential disclosure relating to those issues. On behalf of the claimant Mr Lomas agrees that some of this disclosure may well be relevant although he contends, in particular in respect of some of the items under paragraph one, that documents may not exist. In respect of item 1E, 'Any documents that support or harm either party's case any concerns raised by Mr McLean in the ITDU emails' that that is an extensive phishing exercise which offends against authorities such as the Peruvian Guana case. He may well be right about that but certainly Mr Lomas's document is helpful to understand the kind of disclosure that may be sought and may be said to be relevant.
15. In my judgment, the kind of disclosure that is being referred to by the defendant is the kind of disclosure that can properly be accommodated within the shorter trial scheme and within the regime referred to in paragraphs 2.39 to 2.43. It appears to me likely in fact that there will be a degree of agreement on the disclosure issue and I do not see that as a bar to this case remaining in the shorter trial scheme.
16. As regards witness evidence, I am told that the current intention is for two witnesses on behalf of the claimant and three witnesses on behalf of the defendant. There is a possibility of expert evidence but at this stage I am not asked to give permission for it. On the basis of five witnesses that is not a number, or it seems to me in the basis of the documents before me, a complexity which in and of itself should take the case out of the shorter trial scheme. I therefore come back to what I consider to be really the central issue in any application of this kind which is whether this case can be properly be accommodated within a four day trial estimate to include reading time. This is the point where I am most conscious that a decision that I make has an effect on another Judge. As I see the issues within the case they are not of such complexity as to need this trial to require a time estimate of as much as six days as suggested by the defendant or indeed even five days. In my judgment, a trial estimate of four days including reading time is one extra for a case of this kind.
17. In those circumstances, given my comments on the other issues within the case, I conclude that this is a proper case to remain within the shorter trial scheme. It is of course always possible that developing issues may mean that that no longer remains the case in the future but that will be a matter for consideration in due course. If I anticipated more strongly that it was unlikely to be suitable to remain in the shorter trial scheme in the future I would transfer it out now but for the moment as things stand it seems to me that that is unlikely and for those reasons I direct that the claim remain in the shorter trial scheme.

End of Judgment

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This transcript has been approved by the judge.