Neutral Citation Number: [2022] EWHC 1620 (Ch)

Claim No. IL-2020-000040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 29th March 2022

Before:

MR. JUSTICE MARCUS SMITH

Between:

(1) GENIUS SPORTS TECHNOLOGIES LIMITED (previously known as Genius Sports Limited) **Claimants**
(2) BETGENIUS LIMITED
(3) GENIUS SPORTS SERVICES LIMITED
(4) GENIUS SPORTS ANZ PTY LIMITED (a company organised and existing under Australian law)
(5) GENIUS MEDIA INC (a company organised and existing under the law of Delaware)
(6) GENIUS SPORTS EOOD (a company organised and existing under Bulgarian law)
(7) GENIUS SPORTS SERVICES EESTI OU(a company organised and existing under Estonian law)
(8) GENIUS SPORTS SERVICES COLUMBIA SAS (a company organised and existing under Columbian law)
(9) GENIUS SPORTS NETWORK ApS (a company organised and existing under Danish law)
(10) GENIUS SPORTS DANMARK ApS (a company organised and existing under Danish law)
(11) DATA PROJECT SRL (a company organised and existing under Italian law)
(12) GENIUS SPORTS LT (a company organised and existing under Lithuanian law)
(13) GENIUS SPORTS ASIA PTE LIMITED (a company organised and existing under Singaporean law)
(14) GENIUS SPORTS CH SARL (a company organised and existing under Swiss law)
(15) GENIUS SPORTS GROUP LIMITED

- and -

(1) SOFT CONSTRUCT (MALTA) LIMITED (a company organised and existing under Maltese law) **Defendants**
(2) ROYAL PANDA LIMITED (a company organised and existing under Maltese law)
(3) VIVARO LIMITED (a company organised and existing under Maltese law)
(4) SOFT CONSTRUCT CJSC (a company organised and existing under Latvian law)
(5) SOFT CONSTRUCT UKRAINE LLC (a company organised and existing under South African law)
(6) SOFT CONSTRUCT LIMITED (A company organised and existing under Peruvian law)

- and -

FOOTBALL DATACO LIMITED **Proposed Ninth Defendant**

MISS LINDSAY LANE QC (instructed by **Fieldfisher LLP**) appeared for the **Claimants.**
MR. PHILIP ROBERTS QC (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Defendants.**
MR. HENRY EDWARDS (instructed by **DLA Piper UK LLP**) appeared for the **Proposed Ninth Defendant**

Approved Judgment

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MR. JUSTICE MARCUS SMITH:

Application for alternative service

1. I have before me an application for alternative service in relation to two parties, who I shall refer to as "D10", that is Liga Super Basketball, a private organisation, organised and existing under Brazilian law, and "D12", which is Federatiei Romane de Volei, an entity organised and existing under Romanian law.

2. The position is that I have already ruled that these two parties are appropriate to be joined to these proceedings as representative parties, so that the issues which arise in relation to basketball and volleyball, and other attributes of these particular defendants, can be resolved at trial in a manner that will bind the entire class.

3. The question regarding D10 and D12 is not whether I should grant permission to serve out of the jurisdiction. That is something that the claimants can in this case do as a matter of right. The question, rather, is whether the process of service out of the jurisdiction should be varied by way of alternative service. It is important to note that the countries in which both D10 and D12 are domiciled are subject and signatories to the Hague Service Convention. As is well known, that is the Convention that constitutes the primary route by which service is to be effected according to the agreement between the nations involved. As is also well known, the Hague Service Convention takes its time in order to effect service, and in this case it is anticipated that it will be a period of some 10 months before service could be effected on D10. The relevant period may be a little shorter in the case of D12. That, it goes without saying, is a considerable disrupter in the course of any form of trial proceedings.

4. However, as is clear from the case law, and I will refer in this regard to the recent decision that I handed down in *Nokia Technologies OY v OnePlus Technology (Shenzhen Co., Ltd) and Ors*, [2022] EWHC 293 (Pat), the mere fact that the Hague Service Convention causes delay cannot give rise to either special or exceptional circumstances so as to justify an order for alternative service. It seems to me that any party contemplating service out of the jurisdiction in respect of a nation that is a signatory to the Hague Service Convention must budget for the delays that occur by reason of the Hague Service Convention and cannot say, by reason of those delays alone, that special or exceptional circumstances exist so as to justify a form of alternative service that would, undoubtedly, be quicker.

5. In this case, it is, in my judgment, clear that the nettle regarding joinder of these defendants should have been grasped much sooner than it was. I say that in part because of section 102 of the Copyright, Designs and Patents Act 1988, but also because of the general principle that where the rights of third parties to the proceedings are in play, or are going to be the subject of some form of a judicial determination at the trial, those parties must be before the court either as a claimant or as a defendant. The problem that the claimants face is that this particular nettle was not grasped until November last year. It then resulted in a failed application to join, as non-representative parties, a number of persons,

including D10 and D12. That fact was prayed in aid by Ms Lane on behalf of the claimants, who suggested that the fact that D10 had elected to participate as a non-representative defendant in some way suggested that there were sufficiently exceptional circumstances so as to presume the consent of D10 to a process of alternative service. That seems to me to be a *non sequitur*. If D10 were inclined to join in these proceedings with a minimum of fuss, as it was in relation to the earlier failed attempt to join them, then they would have signed up.

6. I am sure that Ms Lane is right that D10 is not regarding these proceedings as at the very top of its list of things to do. However, the fact is that involvement in these proceedings can, it may not but it can, involve onerous obligations of disclosure. It seems to me that the consent of D10, or D12, to being joined expeditiously in these matters is not something that I can presume.

7. What I am being asked to do is make an order that is significantly adverse to the interests of these defendants in the sense that I am telescoping the times for service that would ordinarily pertain under the Hague Service Convention into something that is much shorter. I do not consider that I can do so on the basis that they would consent, because they have not, nor that they would be non-participating in these proceedings, because I am not confident that that is true. It may be, but time will tell when we get on to disclosure.

8. So, it seems to me that this is not a case where there are either special or exceptional circumstances in which I would be justified in derogating from the ordinary rule of service, which I stress should have been taken into account from the get-go in this case. It therefore follows that the application for alternative service ought, *prima facie*, to be refused. That is because, as I have indicated, the interests of comity seem to me in this case to weigh quite strongly.

9. Against this, there is of course the procedural question of disruption to proceedings that have been long-running and long-established. They have been going on for some time, about two years, and, quite rightly, the claimants would like action being taken in order to ensure that the trial of these issues comes before the court as quickly as is possible. Quite clearly, if there is going to be a delay of 10 months in which nothing happens, the disruption in the process is going to be considerable. That is also a matter that I must weigh in the balance against the question of comity.

10. The route by which I am going to square this particular circle is that I am going to oblige, *pro tem*, the parties to pursue a process whereby the amendments to the pleadings are cascaded down and a form of agreement or disagreement on the list of issues, which will inform disclosure, take place. I have no sense as to the appropriate time frame for these steps, certainly not as to when the list of issues can be framed. However, it seems to me that those times need to be computed by reference to the fact that the defendants, presently joined, may not have done very much by way of examination of the list of issues because. They have, quite understandably, declined to take steps in relation to an action that is, as I find, not properly constituted as matters stand. That position is being rectified, and it seems to me that we must proceed, at least *pro tem*, on the basis that whilst D10 and D12 will not be formally joined for some time, they can be

effectively parked to see how far we can go in the meantime with the existing, joined, defendants. It seems to me that there may well be some force in Ms Lane's point that they truly are persons who only need to be joined so as to be bound and that their role will not go beyond that. I do not say that as being inevitably right, it may well be wrong, but it seems to me that it is right, at this stage, to progress matters, even though D10 and D12 will not for some months yet be party.

11. Accordingly, what I am going to direct is that the parties give some thought as to next steps in the course of this litigation, but that the application for alternative service is refused, for the reasons that I have given. Essentially, I consider that the question of comity in this case outweighs the procedural importance of speedier joinder.

12. However, I have endeavoured to square the conflict between comity and procedural process by directing that the parties consider how matters can move forward. I am certainly not saying that I would be automatically going to dismiss a future application for alternative service if it should prove that the position, and participation of D10 and D12, was so important that it was positively disrupting and causing an effective 10-month delay in the trial of this matter. So I am not saying that the application would automatically be granted, but I am equally not saying that I would close it out as having been dealt with today never to be urged again. I would hope that we can, in the way I have suggested, square the circle of respecting comity between nations whilst at the same time ensuring that these proceedings move appropriately forward.

Costs

13. I have before me an application for costs to be paid by the claimants to the defendants. The application arises in the context of it being the first of two applications to procure the joinder of representative parties. The second of those two applications I have heard and disposed of today, and the question of costs in that application have been dealt with in the usual way of costs in the case, it being recognised that this is a case management application necessary for the good order of the trial and necessary to ensure that the right parties are before the court.

14. What I am concerned with is not this second application that has been dealt with by agreement but with the first. The first application was, if one is being charitable, a dry run. If one is being uncharitable, one would use another word. The fact is that the first application failed, and failed quite comprehensively, for reasons which I articulated in my judgment of 1 December 2021. Clearly, in those circumstances, there can be no question of the claimants recovering their costs against the defendants, either by way of an order, which is not being sought I stress, for immediate payment of costs or, indeed, for an order resulting in payment of costs if the claimants prevail after trial.

15. The real question is whether the defendants should have their costs of drawing to the court's attention certain case management deficiencies which rendered

the joinder of representative parties, in principle acceptable to the defendants, a bad idea because of the route that was being taken. I acceded to those submissions, and I stress the submissions were not that representative parties should not be joined, but that they should not be joined in this way. That was the substance of the argument that occurred before me on 1 December 2021. It was a long day, going beyond the end of the usual court day, but I am going to summarily assess the costs, because it seems to me that this is, so far as the representation issue was concerned, a matter that was just about a day's length, rather than more.

16. It is also fair to say that the statement of costs on summary assessment that is before me appears to have two barrels: representative parties and amendments. It also has, outlined in red, attendance figures for competition counsel, who were there, really, out of an abundance of caution in case the hearing went in a certain direction. It seems to me that the double-barrelled nature of the costs relating to amendment and the attendance of competition counsel are matters that I should reflect in reducing the costs that I consider should be awarded to the defendants by the claimants. However, they should not prevent me from making such an order, nor indeed prevent me from summarily assessing costs. It seems to me that on the issues that mattered before me on the day the defendants were unquestionably the winners, in the sense that they articulated quite root and branch difficulties with the approach that was being mooted. Those difficulties have been taken on board, to the claimants' credit, and as a result the second time round application has proceeded altogether more smoothly, and has resulted in a representative order being made. That, as it seems to me, underlines the points that costs should be the defendants' in any event, and it is a question of assessment how much those costs should be.

17. The costs have a grand total of £98,727. I am going to deduct, as I say, the EU counsel's figures in red. I am also going to make an adjustment for the fact that there would have been some costs directed purely and simply to amendments, and I also take account that, viewing matters in a proportionate way, a considerable amount of time was spent on the documents without preparing a witness statement on the defendants' own part. For all those reasons, I am going to reduce the grand total from just about £100,000 to £70,000, and that is the sum that I am going to order to be paid.

18. The question is when that sum should be paid. It is the usual course that costs be paid within 14 days. Absent the one point that Ms Lane very carefully articulated before me, that is the order I would be minded to make. The question, though, is whether I should stay any order of payment in the light of the fact that there is a further application for costs, which Ms Lane says will go the other way – I have no view on that because I do not know the substance – where it is at least on the cards, according to Ms Lane, that there will be a substantial costs order going the other way. It seems to me unfortunate, but it is not something that I can assist on today, that the question of costs regarding a strike out/summary judgment application of over a year ago remain at large. I am not able to deal with the costs in relation to this matter today because I simply do not know enough to reach any view, and I am going to have to deal with it on another day. I do not think it is appropriate to stay the costs of this matter. It

seems to me that, on this point, Mr. Roberts is right that costs are assessed on a pay as you go basis. That was the point of the Woolf Reforms: an application that was unsuccessful would be visited with costs against the unsuccessful party as and when things were determined, instead of rolling things up to be dealt with right at the end. It seems to me that I have not heard sufficient to cause that general approach to be displaced.

19. So for those reasons, I am going to order that the costs be paid within 14 days.

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