



Neutral Citation Number: [2022] EWHC 2903 (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 Building
Fetter Lane,
London, EC4A 1NL

Date: 15 November 2022

Before:

THE HONOURABLE MR. JUSTICE MARCUS SMITH

Between:

- (1) GENIUS SPORTS TECHNOLOGY 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 SPORTS 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 COLOMBIA SAS (a company organised and existing under Colombian 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) BET CONSTRUCT LLC (a company organised and existing under Latvian law)
(5) SOFT CONSTRUCT SA (PTY) LIMITED (a company organised and existing under South African law)
(6) SOFT CONSTRUCT LIMITED (a company organised and existing under Peruvian law)
(7) BASKETLIGAEN (an association organised and existing under Danish Law)
(8) IMG DATA LIMITED
(9) FOOTBALL DATACO LIMITED
(10) LIGA SUPER BASKETBALL (a private association organised and existing under Brazilian Law)
(11) BOSNIA AND HERZEGOVINA FOOTBALL FEDERATION (an entity organised and existing under the law of Bosnia and Herzegovina)
(12) FEDERABIA ROMÂNĂ DE VOLEI (an entity organised and existing under Romanian law)

After receiving submissions on the papers

Further Ruling

This further ruling was handed down by the Judge remotely by circulation to the parties or their representatives by email and by release to The National Archives. The date and time for hand-down is deemed to be NB 16.30pm on 15 November 2022.

MR. JUSTICE MARCUS SMITH:

1. This short judgment is supplemental to my ruling in these proceedings reported under Neutral Citation Number [2022] EWHC 2637 (Ch). In that ruling (the **Ruling**), which I take as read, and whose terms and abbreviations I adopt, I set out the broad outlines of a specific disclosure regime to apply in these proceedings. Those outlines were subsequently crystallised in an order, approved by me.
2. At various points in the Ruling, I indicated that if the operation of the regime could not be agreed, the matter in disagreement should be referred to me, to be resolved on the papers. One such matter is that set out at [14] of the Ruling, where each party is to identify “custodians, repositories and collections of documents that will be searched, together with any date ranges that will be applied to exclude or include material.” I indicated that “[i]n defining the universe of documents to be searched, each Producing Party should err on the side of over-inclusion”.
3. An issue has arisen as to how “custodians, repositories and collections of documents” to be searched are to be identified. For convenience, I shall use the abbreviation **Custodians**. The Defendants have applied the test laid down (in a different context) in *Goodale v. Ministry of Justice*, [2009] EWHC 841 (QB), which states that “custodians” are “key custodians...known to hold documents likely to be relevant to the issues” (my emphasis). The Claimants contend that this is too narrow a test, and invite me to state what is the correct approach given the terms of [14] of my Ruling, and indeed the terms of the Ruling generally.
4. The approach I laid down in the Ruling was intended to save, rather than increase, the costs of disclosure. It follows that there must be some limits to the Custodians searched pursuant to [14]. However, I am satisfied that the *Goodale* test is too narrow for the purposes of the regime laid down in the Ruling, in its emphasis on “key” custodians “known” to hold relevant documents. The notion of “key” custodians has no place in the regime set out in my ruling, and knowledge of what is held can only be material after due inquiry has been made.
5. In order to comply with [14], the Producing Party must:
 - i) Apply their mind to the range of possible – not likely – custodians liable to hold relevant material on a *Peruvian Guano* test. A number of custodians will be excluded on this basis – but I stress that this is, and is intended to be, a low threshold, erring on the over-inclusive.
 - ii) If the documents held by these “possible” custodians can easily and with minimal cost be incorporated into the universe of documents to be searched electronically, then that should be done, in accordance with the general tenor of the Ruling. That will then be the end of the question so far as Custodians are concerned.

- iii) If, however, cost (in terms of time and money) is liable to render the process disproportionately expensive, then the exclusion of “possible” custodians can be explained and justified on grounds that the over-inclusive process will not (in the judgement of the solicitor making the statement/affidavit) materially add to the corpus of relevant disclosure (defined as disclosure that is responsive to the *Peruvian Guano* standard) that will ultimately be provided at the end of the process given:
 - a) The potential for duplication;
 - b) The nature of the documents liable to be held by the “possible” custodian; and
 - c) The difficulties (which must be explained) in incorporating the “possible” custodian’s material into the universe of documents to be searched.
6. I have incorporated this clarification into a ruling, because it augments the Ruling itself.