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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT (ChD)
[2018] EWHC 3742 (IPEC)



No. IP-2018-000101

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 18 December 2018

Before:

HIS HONOUR JUDGE HACON

(Sitting as a Judge of the High Court)

B E T W E E N :

DISTINCTIVE WHOLESAL LIMITED

Claimant

- and -

(1) CLAYTON HORSNELL LIMITED

First Defendant/
Part 20 Claimant

(2) C W COMMERCE LIMITED

(3) PETER CLAYTON

Defendants

- and -

(1) ESSENTIAL E-COMMERCE LIMITED

(2) ROBERT AMIR JAMSHID NEZARD

Third Parties

J U D G M E N T

APPEARANCES

DR A. LOMAS (instructed by Stobbs IP) appeared on behalf of the Claimant and Third Parties.

MR J. MUIR WOOD (instructed by Birketts Solicitors) appeared on behalf of the Defendants.

JUDGE HACON:

- 1 The third parties in these proceedings have an application today to strike out allegations against them made by the defendant. In the main claim the claimant (which I will call 'DWL') alleges that the first and second defendants have infringed DWL's copyright and database rights.
- 2 DWL is a wholesale distributor of bathroom fixtures and fittings. Its direct customers are retailers. A consumer, a member of the public, selects a product and places an order with a retailer. The order is forwarded to DWL, which arranges for the product to be delivered to the consumer. The retailer then pays DWL for orders thus fulfilled.
- 3 To assist in this arrangement, DWL provides its customer retailers with images of the products it offers to be shown to consumers. DWL says that it commissioned the creation of these images from three companies in Serbia and now owns copyright in the images. DWL also says that it has created a database in the collection of data relating to the products it sells.
- 4 The first and second defendants are retailers of bathroom products and are former customers of DWL. The third defendant is the sole director and shareholder of the first defendant. He is said to play a role in the running of the second defendant, or possibly used to, although the precise nature of that relationship is in dispute, I believe.
- 5 Simplifying DWL's allegations a little, DWL says that the first and second defendants were licensed to use its copyright images and its database only while they were buying products from DWL. DWL says that the images and database have been used outside the licence and that the first and second defendants have infringed DWL's copyright and database right. The third defendant is alleged to be jointly and severally liable.
- 6 Today's application concerns a third party claim. The first defendant (which I will refer to hereafter as 'Clayton') says that it engaged the first named third party (which I will call 'Essential') to run Clayton's e-commerce business under a contract between those parties. Clayton also says that if (which it denies) it has infringed DWL's copyright and/or database right, that happened because of what Essential did on its behalf. Clayton goes on to assume, though I am not sure this is currently part of DWL's pleaded case, that there was a contract between DWL and Clayton governing Clayton's right to use DWL's copyright works and database. Clayton pleads, in its additional claim, that if there was such a contract and Clayton was in breach of that contract (which Clayton denies) such a breach was induced by Essential.
- 7 The second string to Clayton's claim against Essential is that, again on the denied assumption that Clayton was in breach of a contract with DWL, the procurement of Clayton's breach by Essential also amounted to an unlawful interference with the economic interests of Clayton.
- 8 There is also an allegation that the second named third party, Mr Nezard, is jointly liable with Essential for both procurement of breach of contract and unlawful interference. I can leave that to one side.
- 9 Mr Muir Wood, who appeared for the defendants, said that DWL and the third parties had not complied with the rules in Part 24, in particular the timetable for evidence set out in that

rule, and that the applications should not be heard today. I disagree. As I will come on to explain, the points taken by Mr Lomas, who appeared for DWL and the third parties, are points of law. They do not require evidence and make it appropriate for me to deal with the application solely under CPR 3.4(2).

- 10 The points of law taken by Mr Lomas are these. Firstly, with regard to procuring a breach of contract, for a party to succeed in an allegation of procurement of breach of contract it must show (1) that there was a contract between that party and another second contracting party; (2) that the second contracting party has acted in breach of the contract, and (3) that a third party procured that breach. If those are established the first contracting party has, at least potentially, a claim against the third party for procuring a breach of contract. Here Clayton is relying on its own breach of contract between DWL, Clayton and alleges that Essential procured Clayton's own breach. Mr Lomas said that this was not sustainable in law.
- 11 Mr Muir Wood argued that it did not matter which party to the contract was in breach, that provided there was a procurement and a breach that was sufficient. I do not agree. That would be a radical expansion of the law on procurement of breach of contract, as I understand it, and it does not seem to me to be an argument that could ever be sustained at trial.
- 12 I should say that, in relation to the law on this topic I was referred to *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1, and a review of what the House of Lords said in that case in *Palmer Birch (A Partnership) v Lloyd* [2018] EWHC 2316 (TCC).
- 13 I turn to the allegation of unlawful interference. An allegation of unlawful interference against Essential would, in my view, require Clayton to show that Essential carried out an unlawful act which led to the interference relied on. Clayton's pleading alleges that Essential's procurement of Clayton's breach of its contract with DWL was the unlawful act which led to the unlawful interference with Clayton's economic interests. Since I have found that there is no sustainable claim for procurement, there is nothing left by way of an unlawful act by Essential on which Clayton can rely. I therefore take the view that there is no real prospect of Clayton succeeding either in its claim for procurement of breach of contract or unlawful interference and both claims will be struck out.

CERTIFICATE

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This transcript has been approved by the Judge