



Neutral Citation Number: [2024] EWHC 3210 (Ch)

Case No: IL-2022-000014

IL-2023-000161

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Thursday, 21st November 2024

Before:

MR. JUSTICE FANCOURT

Between:

EASYGROUP LIMITED
- and -
(1) EASYFUNDRAISING LIMITED
(2) THE SUPPORT GROUP (UK) LIMITED
(3) IAN WOODROFFE
(4) PALATINE PRIVATE EQUITY LLP

Applicant

Respondent

JAMIE MUIR WOOD (instructed by **Edwin Coe LLP**) appeared for the **Claimant**.

CHRIS AIKENS (instructed by **Hansel Henson Ltd**) appeared for the **Defendants**.

Approved Judgment

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MR. JUSTICE FANCOURT :

1. I am asked now to decide whether the costs of this claim and counterclaim that I have already ordered to be paid by the claimant to the defendants counterclaim should be assessed in detail on the standard basis or on the indemnity basis.
2. I have been taken through in some detail but extremely helpfully by Mr. Aikens on behalf of the defendants and Mr. Muir Wood on behalf of the claimant the right approach in principle to whether an award for indemnity costs should be made, the factors that may be relevant and how they apply on the facts of this particular case.
3. Having heard that argument, I am satisfied that this is a case where an order for costs to be assessed on the indemnity basis is appropriate, for a combination of factors that were at play in this litigation and in particular that way that the way that the claimant conducted it.
4. It is of course well known that the test, in short summary, is whether a party has conducted the litigation in such a way as to take it “out of the norm” or, as is perhaps rather more helpfully expressed, outside the ordinary and reasonable conduct of proceedings. What I am therefore concerned with is whether or not the claimant has conducted its claim in an unreasonable way that is not the ordinary way of conducting proceedings of this type. I accept that in proceedings of this type, there is often a degree of strength of feeling on one side or the other, or both sides, which can mean that the litigation is very hard fought in commercial terms. That of itself is clearly not sufficient to justify indemnity costs.
5. Mr. Aikens referred me specifically to a decision of Tomlinson J, now almost 18 years old, called Three Rivers DC v Governor and Co of the Bank of England [2006] Costs LR 714. The judge summarises a number of previous cases addressing the issue and the terms of the Civil Procedure Rules, which give the court a broad discretion, taking into account the conduct of the parties, and then summarised the principles that he considered should apply. I will not read them all because they are somewhat lengthy, but amongst the principles are that the question is not whether the conduct in question is sufficient to attract moral condemnation (though that would be a stronger case for indemnity costs), but rather the criterion is rather unreasonableness of the conduct. The court can look at conduct before and during the trial, and the question of whether it was reasonable to raise and pursue particular allegations in the way that they were pursued. Where a claim is speculative, weak, opportunistic or thin, a claimant may be at risk of an order for indemnity costs, if it fails. Then there is a collection of various issues that are indicative of a case that is being conducted “out of the norm”, including the following: where the claimant advances and aggressively pursues allegations, despite the lack of any foundation in the documentary evidence for them, and maintains them to the bitter end; where a claimant pursues a claim which is thin and in some respects far-fetched, and the following factor:

"Where a claimant commences and pursues large scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant and during the course of the trial of the action the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

Mr Aikens submits that that description is directly applicable to this case.

6. Mr. Aikens identified eight factors that he relied on to justify an overall conclusion that an award of costs on the indemnity basis was appropriate. The first two are the long history and build-up to the issue of the claim form in February 2022. There had originally been a letter before action in April 2011, written by the claimant to the defendants, making some of the allegations of infringement that were eventually pursued at trial. As a result of that, the parties engaged and appear to have come close to a satisfactory settlement on the basis that the defendants would change the signs that they were using in connection with their business to distance their business from the easyGroup's licensees. For no reason identified, there was no response from the claimant to the final terms put forward by the defendants in December 2012, based on what had already been agreed.
7. There was then inaction by the claimant until March 2013, at which time the claimant's solicitors indicated they could not get instructions. There the matter lay for a further four and a half years before, out of the blue, a new letter before action was written on behalf of the claimant on 19 December 2017, threatening proceedings afresh. Once again, negotiations ensued, and the defendants attempted to persuade the claimant they could formalise the agreement that had almost been reached previously; but it is evident that was no longer satisfactory so far as the claimant was concerned.
8. A final offer was made on a without prejudice save as to costs basis by Sir Stelios on 10th March 2020 to pay £500,000 for the defendants' intellectual property rights, on the basis of a licence back incorporating the defendants within the easyGroup. The claimants were not willing to sell up and become part of the easyGroup.
9. Matters then went into abeyance for a further period of almost two years before, once again out of the blue, a claim form was issued and served on the defendants in February 2022. There was no letter before action, no indication that the matter was to be revived. I find that surprising, and certainly extraordinary in its literal sense, given that twice previously there had been a threat of proceedings and then negotiations had taken place which had been dropped at a relatively late stage.
10. Mr. Muir Wood said that the letter before action written in December 2017 could be taken as the letter before action for the February 2022 claim. I disagree with that. The threat of proceedings had clearly lapsed, given that nothing was done when agreement was not reached and the negotiations ended. It seems to me it was obviously incumbent on the claimant before serving a claim form to indicate why the matter was being revived at that stage and to give the defendants reasonable notice. The March 2020 e-mail from Sir Stelios, which was sent on a without prejudice save as to costs basis, had stated that if the offer was not accepted, proceedings would be started within a week or after a week had expired, but nothing happened for two years. I think it is inappropriate and unreasonable for the claimant to have simply served a claim form in those circumstances without any notice. It is bullying and intimidatory behaviour.
11. The fact that negotiations took place and conclusion was not quite reached, but then, much later, negotiations took place on a different basis is not, in my view, itself unreasonable. I accept Mr. Muir Wood's suggestion that is properly explicable by the

fact that by 2017 and 2018 the defendants' business had become substantially larger, so the circumstances in which a deal was sought to be struck were changed.

12. The next factor relied on by Mr. Aikens is the fact that from 2011 the claimants were aware that its own licensees were advertising on Easyfundraising and that nothing was done about that at the time or for the following 12 years. I am not sure exactly what point is sought to be made on the basis of that, except perhaps an inference that the claimant was playing fast and loose in so far as it alleged that the defendants' business was doing it damage. I do not find that factor on its own justifies indemnity costs, though it certainly was significant on the question at trial of whether the defendants' use of their signs was damaging the claimant.
13. The next factors relied upon by Mr. Aikens were the serial changes in the basis of the case that was advanced by the claimant, relying on different trade mark registrations from time to time, over the lengthy period of 2011-2022, at which time the claim was first issued. Then a series of amendments to the basis of the claim, including new trade marks relied upon and others excluded, which resulted in a number of trade marks being relied upon in different respects at the trial, and meant that there were 112 different claims of infringement that the defendants had to address and the court had to cope with. This was undoubtedly a burdensome claim for the claimants to have brought. It is said by Mr Aikens that it was unreasonable for the claimant to have pursued such a broad basis of allegations and challenges when it was unnecessary and unreasonable to do so, and then to keep changing the marks relied on and the allegations made.
14. So far as the changing of the case that was advanced is concerned, this is particularly by reference to the allegations of infringement under section 10(3) of the Trade Marks Act. In the original claim, allegations of detriment to repute as a result of the use of the defendants' signs was alleged, as was an allegation of taking unfair advantage of the claimant's marks, or riding on their coat tails, as it is sometimes put.
15. At the first attempt to amend the claim, the allegations of detriment to repute were entirely dropped. It appeared that the claimant could not think of sufficient particulars to attach to the allegation, despite the fact that the claim had been brought on that basis. However, on the second amendment of the claim, almost a year later, the allegations of detriment to repute were reinstated. There was, however, at trial no evidence at all adduced by the claimant to support the allegations of detriment to repute. They sought only to establish their case by cross-examining the defendants' witnesses to seek to establish that there was some misleading or wrongdoing in relation to the charitable status of the defendants' business. The allegations of detriment to repute in those circumstances were a very weak allegation to have raised, then dropped, and then pursued again. Riding on the coat tails is a serious allegation to make, because it amounts to an allegation of commercial dishonesty, deliberately seeking to get a free commercial benefit by taking the benefit of the publicity and renown of the trade marks.
16. This allegation was pleaded and remained pleaded and was agreed to be one of the issues for trial, appearing on a list of issues, but then mysteriously was not addressed in the claimant's skeleton argument for the trial. It was only in the course of opening that it became apparent that the claimant was not in fact pursuing the allegation. That, it seems to me, is a wholly inappropriate and unreasonable way to deal with an

allegation of that seriousness, which should never have been made in the first place without a proper basis to plead it and pursue it. I am not persuaded that the abandonment of that issue was justified by what emerged in disclosure. It was simply a case where there was no proper basis for making the allegation and pursuing it in the first place.

17. I do therefore find that, with particular reference to the section 10(3) infringements alleged, they were raised, amended and pursued in an unreasonable way by the claimant, and that the claim as a whole was maintained in an unnecessarily complicated and burdensome way.
18. The sixth matter relied upon by Mr. Aikens is the rather extraordinary approach that the claimant took to the evidence in this case. I set out at an early stage in my judgment that the defendants relied on the fact that the claimant had failed to call what one might have thought was material and important evidence to support its case. That evidence included evidence from anyone at easyGroup itself to explain what they said was the effect of the alleged infringements, either on easyGroup or on easyGroup's licensees, and as I have already said, there was no evidence to explain the damage that is alleged to have been caused to easyGroup by the alleged infringements.
19. There was not, in my view, a claim supported by evidence that could be regarded as anything other than weak in the circumstances of this case. I ultimately had no difficulty in rejecting the allegations of infringement, even though the judgment had to go through a large number of complex issues, making it lengthy and rather unwieldy, to deal with all the different claims of infringement that were alleged. This was a case, especially in relation to the section 10(3) claim, where the claims were weak from the outset.
20. The seventh point relied upon is the joinder of the fourth defendant, Palatine Private Equity LLP. It was joined on the basis that it was a significant investor in the other defendants' businesses and was alleged to be a joint tortfeasor alongside the other three defendants. The basis for that allegation of joint tortfeasance was never properly established, even apart from the issue of knowledge on the part of the directors of Palatine Private Equity LLP. In my judgment, there was no proper basis for the allegation of joint tortfeasance.
21. I am entirely satisfied that Palatine was joined as a defendant in order to exert commercial pressure on the other defendants to drop their opposition to the claim that the claimant had brought. There is clearly a degree of animus between Sir Stelios and the Chief Executive Officer of Palatine and it may be that that also goes to explain why, improperly, Palatine was joined as a defendant. The case against it was hopeless, even before the Supreme Court handed down its decision in May 2024, a month or so before the trial, and it should have been dropped, if not before that stage then at that stage. Instead of which it was pursued right through the trial and resulted in a resounding defeat.
22. The eighth factor that Mr. Aikens relies upon is some of the content of articles published by Sir Stelios on easy.com, in which allegations of lying, bad faith and being a "brand thief" were made against the defendants. Although this is unsavoury

and unattractive, it is not, in my judgment, of itself sufficient to justify indemnity costs.

23. Nevertheless, all the factors that I have identified as being sufficient, in my view, amply justify an overall award of indemnity costs in this case. This is indeed, as Mr Aikens submitted, a case exemplified by the observation of Tomlinson J that I have quoted in para 5 above.
24. Standing back, I remind myself that the difference between standard basis assessment and indemnity basis is, first, that the onus of proving that costs were reasonable or unreasonable shifts to the paying party. Given the very significant expense to which the claimant put the defendants and the increase in costs resulting from the way that the claim was pursued, and in view of the factors that I have identified, that strikes me as entirely appropriate. Second, on an indemnity basis assessment there is no criterion of proportionality. Given the commercial objective that the litigation pursued and the increase in costs resulting from the conduct issues identified above, in my view the defendants were justified in defending this claim irrespective of any identifiable value to them of Easyfundraising remaining independent of easyGroup control, and the non-application of a proportionality requirement in relation to its costs is justified for that reason.
