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Case No: IL-2018-000094

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: 29/01/2020

Before:

MRS. JUSTICE FALK

Between:

(1) TAKE-TWO INTERACTIVE SOFTWARE INC
(a company incorporated under the laws of the State of
Delaware, USA)

(2) ROCKSTAR GAMES INC
(a company incorporated under the laws of the State of
Delaware, USA)

Claimants

- and -

(1) MR. NATHAN JAMES
(2) MR. JORDAN SALVATO
(3) MR. PARIS STEER
(4) MR. CAMERON BONESS
(5) MR. JONATHAN EKE

Defendants

MR. JAANI RIORDAN (instructed by **Bird & Bird LLP**) for the **Claimants**

THE FOURTH DEFENDANT appeared **In Person**

THE FIFTH DEFENDANT appeared **In Person**

THE FIRST, SECOND AND THIRD DEFENDANTS did not appear and were not
represented

Approved Judgment

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MRS. JUSTICE FALK:

Background

1. This is my decision on an application by the claimants for summary judgment in respect of their claim for, among other things, breach of contract and copyright infringement. The claim relates to the development, distribution and sale of cheat software for use with a well-known video game called Grand Theft Auto V ("GTAV"). The summary judgment application was heard at the pre-trial review, prior to what would have been the first stage of a trial that was to be split between issues of liability and quantum. This decision is concerned with liability only, and does not determine quantum.
2. GTAV is the best-selling video game of all time, having sold over 85 million copies. The claimants are, respectively, the publishers and developers of the game.
3. The claims that are still outstanding at the date of this hearing are those against the fourth and fifth defendants. Claims against the first, second and third defendants have been settled by way of consent orders.
4. The claims against the fourth and fifth defendants relate to cheat software called Epsilon. Both defendants admit that they were involved in developing Epsilon but deny liability.
5. Epsilon is cheat software of a kind known as a "mod menu". Mod menus are software programs which alter the operation of a game while it is being played so as to enable players to gain various advantages in gameplay, such as "spawning" copies of weapons, vehicles or ammunition, generating "spoofed" virtual currency for use in the game, and interfering with other players' gameplay experience.
6. While the claim is broad enough to extend to the game when played by a single player, it relates more relevantly in terms of its commercial impact to the version of the game which is played online. I understand that GTAV can be played online by up to 30 players at a time. The claimants say that if one or more players have the benefit of the Epsilon software, that seriously harms the gameplay experience for other players. They say that it also allows cheating players to generate virtual goods and currency which they would otherwise either have to buy using real money or "earn" during the course of (legitimate) play.
7. Although both the fourth and fifth defendants served defences settled by counsel, they are now acting in person and appear before me in person. Until very recently they had not served any evidence as required by the costs and case management ("CCMC") order, nor had they otherwise engaged in the proceedings in a meaningful way since they ceased to be represented.
8. On 13 January 2020 the claimants applied either for strike-out under CPR 3.4(2)(c) on the basis of failure to serve evidence as required by the CCMC order, or alternatively for summary judgment under CPR 24.2(a)(ii) on the basis that there was no real prospect of successfully defending the claim and no other compelling reason why the case should be disposed of at trial. Very shortly after the application was made some evidence was filed by the fourth and fifth defendants. As a result of that evidence

being filed the claimants do not pursue their claim for strike-out, but do pursue their claim for summary judgment.

Basis of claim

9. The causes of action pleaded by the claimants are as follows. First, they allege breach of contract. They say that the fourth and fifth defendants have breached various terms of the end user licence agreement ("the EULA") as well as the terms of service and online code of conduct to which all players of GTAV must agree in order to install and play the game.
10. Secondly, the claimants say that the fourth and fifth defendants have knowingly induced breaches of contract by the defendants' own customers, the users of the Epsilon mod menu. They say they have done so by encouraging Epsilon users to breach their own contracts with the claimants (strictly, with the second claimant, who I understand is the contracting party).
11. Thirdly, the claimants claim copyright infringement. This falls into three broad categories:
 - i) The claimants say that the fourth and fifth defendants have copied parts of the GTAV computer program, that is the executable file and libraries that form part of GTAV. In broad terms the executable file contains instructions to run the game on the player's computer, and the libraries provide the graphics, sound and other artistic material used in the game. The claimants say that the fourth and fifth defendants copied these, at least during the development of the Epsilon mod menu, contrary to s 16(1)(a) of the Copyright Designs and Patents Act 1988 ("CDPA"). They also claim that they have made adaptations, contrary to ss 16(1)(e) and 21 CDPA.
 - ii) Secondly, the claimants say that copyright was infringed by the fourth and fifth defendants authorising infringements of copyright (in the form of copying and adaptations) committed by users of the Epsilon mod menu, contrary to s 16(2) CDPA.
 - iii) Finally, the claimants say that they have a claim under s 296 CDPA on the basis that Epsilon incorporated a circumvention of technical devices built into GTAV which normally protect its operation against unauthorised tampering and hacking. Under s 296 this is to be treated as akin to copyright infringement.
12. The defendants deny liability. However, as already mentioned, they do not dispute that they were involved in the development of the Epsilon product, and there appears to be little dispute overall about exactly how the Epsilon mod menu operates to allow modification of gameplay.
13. Neither defendant denies that he had entered into a contract with the second claimant. However, the fifth defendant says that the contract is not enforceable against him because he was a minor when he entered into it. (I should note here that the fifth defendant turned 18 in March 2019, having previously appeared in these proceedings by a litigation friend.)

14. The claimants say that such positive defences as have been raised by the defendants are hopeless or irrelevant, or can be determined as short points of law. They also make the point that it is important to recognise that allowing the case to proceed to trial would involve significant further cost and may well represent a pyrrhic victory for the claimants, because it is by no means apparent that they would be able to recover their costs at trial were they to succeed.

Summary judgment test

15. The test for summary judgment is well known, namely that the claim or defence has no real prospect of success and that there is no other compelling reason for the matter to proceed to trial. As to the meaning of a "realistic prospect of success", in essence that means something more than fanciful, see *Swain v Hillman* [2001] 1 All ER 91.
16. There is a recent useful summary of the principles to apply in Cockerill J's judgment in *Aquila WSA Aviation Opportunities II Ltd v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm) at [27]. Without detracting from the fuller summary there, a claim is fanciful if it is entirely without substance. Conversely, a realistic prospect of success is one that carries some degree of conviction and not one that is merely arguable. Short points of law and construction can be suitable for summary determination if the court is satisfied that it has before it all the evidence necessary for a proper determination of the question and the parties have had an adequate opportunity to address it in argument. Essentially, the object of the rule is to winnow out cases that are not fit for trial.

Factors that potentially weigh against summary judgment

17. In reaching a decision about whether to give summary judgment I considered a number of reasons why it might not be appropriate to do so in this case.
18. First, I am conscious that a trial judge will usually have a better grasp of the case as a whole than a judge at the stage at which summary judgment is sought, because of the added benefits of hearing the evidence tested, receiving more detailed submissions and having more time to digest and reflect on the materials: see the judgment of Mummery J in *The Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd* [2006] EWCA Civ 661 at [5].
19. I was conscious when reading the papers that, while there seemed to be little dispute about how Epsilon operated, a number of the factual aspects were quite complex, or at least technical, and in preparing for this hearing it seemed to me that the extent of the factual dispute was unclear. There is a real challenge for the court to be sure in those circumstances that it has sufficiently understood the facts at this stage, when there has been limited time available to pre-read and prepare and no opportunity to hear oral evidence. So there would ordinarily be a concern about whether a fuller investigation of the facts is appropriate.
20. However, that is the case where the facts are unclear or in dispute. Having heard the arguments and heard from the fourth defendant in particular, who spoke on his own behalf and on behalf of the fifth defendant, I am now much more comfortable that the facts are sufficiently established and not in dispute to be able to make the findings

I need to make to grant summary judgment on key aspects of this case, such that it will not be necessary to proceed to trial in order to decide those questions.

21. Secondly, it is highly relevant that the defendants are litigants in person. Before the hearing today I was concerned that in reality their evidence could well be enlarged on materially at trial, and that they might also wish to cross-examine the claimants' witnesses on matters material to the questions I needed to decide, which the court would assist with under CPR 3.1A(4) and (5). For that reason, I had concerns about granting summary judgment at this stage. However, again having heard from the fourth and fifth defendants, I am satisfied that there is no real dispute on the key factual questions I would need to decide, and that I am therefore in a position to make a decision.
22. Finally, I also raised with counsel for the claimants a concern I had that one of the claimants' two witnesses was put forward as an expert, with his evidence stated to be compliant with Part 35. In fact, the individual concerned is employed by the claimant group as the person responsible for running the team which monitors and addresses cheating activity. That gave rise to a question in my mind about the individual's independence, because of the potential conflict of interest to which that individual may be subject. This in turn gave rise to a concern that that witness's evidence would need to be considered very carefully to determine to what extent it covers matters of fact rather than opinion (noting that a substantial proportion of that witness's evidence appears to relate to matters of fact, albeit of a technical nature) and, if the evidence was admitted, to decide whether to give any weight to those elements that comprise opinion rather than fact.
23. Again, my concern on this point has been addressed. I have been able to make this decision without reference to that witness's evidence and instead on the basis of the other evidence I have heard, and in particular the defendants' own evidence.

Breach of contract claim

24. Turning to the reasons for my decision and my findings, I consider first the claim for breach of contract. I will deal with this point in general terms first and then come back to the point that the fifth defendant was a minor at the date the contract was entered into. Subject to that point, in my view there was a clear breach of contract. The particulars of claim contain relatively full details and extracts of relevant contractual provisions. There are a number of provisions which it is claimed were breached, but the most obvious one is a specific prohibition both on cheating in any form and on providing guidance or instructions to any other individual or entity on how to cheat. That comes from an extract of the "License Conditions", which is conveniently set out at paragraph 9 of the particulars of claim. That reads:

"You agree not to, and not to provide guidance or instruction to any other individual or entity on how to..."

There then follows a list which includes copying and reverse engineering, and at paragraph (k):

"cheat (including but not limited to utilizing exploits or glitches) or utilize any unauthorized robot, spider, or other

program in connection with any online features of the Software;"

and at paragraph (l):

"violate any terms, policies, licenses, or code of conduct for any online features of the Software".

25. In my view, it is clear that this provision of the contract was breached. It is obvious from the short witness statements of both defendants, which are in identical form as to their substance, and indeed from video evidence I have seen, that what Epsilon does and is intended to do is to enable cheating. Those witness statements refer to Epsilon throughout as "Epsilon cheat". It is not denied that cheating is its function. Therefore, and subject to the following point, the breach of contract claim is made out.

Relevance of fifth defendant being a minor

26. The fifth defendant was under 18 at the date that he first used GTAV, and it is said that for that reason he is not bound by the contractual terms and cannot be sued for breach of contract. I have concluded that, in relation to this issue, the claimants' case is not established to summary judgment standard. In other words, I am not persuaded that the fifth defendant has no real prospect of successfully defending the claim for breach of contract.
27. The general principle is that, except for contracts for so-called "necessaries", contracts with a minor are voidable at the minor's option. However, those voidable contracts divide into two further classes, the first being contracts granting an interest in property which are binding on the minor unless he repudiates them during his minority or within a reasonable period after attaining majority (i.e., becoming 18), and the second being contracts that are not binding on the minor unless ratified after attaining majority (*Chitty on Contracts*, 33rd ed. at 9-007).
28. The claimants have two arguments. The first argument is that the contract in this case falls into the first category of voidable contract. They say that the contract grants an interest in property, being the licence to use the game, and is therefore binding unless repudiated. The fifth defendant has not suggested that he has repudiated the contract, and he is therefore bound.
29. I am not wholly persuaded by this. *Chitty* deals with this question in most detail at paragraph 9-036 onwards. It does not appear to be the case that every contract conferring an interest in property falls within this category. Paragraph 9-036 refers to contracts involving the acquisition of an interest in property "of a permanent nature". This is qualified at paragraph 9-037 by a statement that there does not seem to be a general principle to the effect that *any* contract conferring an interest in a subject matter of a permanent nature is valid until repudiated. The same paragraph goes on to say that there appear to be four types of case which fall into this category, and that it is not clear whether they are exhaustive. The types of contract listed are contracts to lease or purchase land, marriage settlements, contracts to subscribe for or to purchase shares, and partnerships.

30. Counsel for the claimants suggested that the licence to use GTAV is permanent in nature, is analogous to the types of contract listed in *Chitty*, and that it should be treated as falling within the same category. I am not prepared to agree that that is an argument that is so strong that it meets the summary judgment standard. It is simply not clear what the precise scope of the rule is as a matter of law, and I did not hear full argument on the point. As *Chitty* notes at paragraph 9-037, the concept of contracts conferring an interest of a permanent nature appears to have been limited to certain types of case. There might also be some argument in this case as to whether the licence was in fact of a permanent nature, noting that it was revocable on its terms, and indeed the claimants say that it was revoked by virtue of the defendants' breaches.
31. The second category that the claimants rely on is that this contract is a contract for a so-called "necessary", and therefore binding on the fifth defendant for that reason. In one sense computer games might be regarded as necessary for a certain age group. However, that does not mean that they are "necessary" as a matter of law.
32. Again, I do not think that the claimants have made out their case on this point to summary judgment standard. Referring again to *Chitty*, this time at paragraph 9-011, the concept clearly extends beyond such matters as necessary food, drink and clothing, and it has been used to denote articles purchased for real use. *Chitty* refers to some case law on this, and in particular to a test that the items in question were suitable to the actual requirements of the individual. The claimants rely on this. However, without hearing more argument I am not prepared to conclude that that test is necessarily the right test to apply in this case. The main case referred to by *Chitty* as authority for this test (*Nash v Inman* [1908] 2 KB 1) relates to goods, and it considered a specific definition in the Sale of Goods Act 1893 which referred to the "actual requirements" of the minor. It is not apparent to me that that definition would apply here, where what is provided is services rather than goods.
33. I am therefore not prepared to grant summary judgment against the fifth defendant for breach of contract. However, the rules governing whether contracts are binding on a minor do not apply to other aspects of the claim. In particular, they have no application to the tort of inducing breach of contract or in relation to the copyright infringement claim. Counsel for the claimants also confirmed to me on instruction that, if I did not reach a conclusion on the breach of contract claim in respect of the fifth defendant, that would not mean that the claimants would wish to pursue the case to trial on that point alone.

Inducing breach of contract

34. Turning to the test for inducing breach of contract, the leading case is *OBG Ltd v Allan* [2008] 1 AC 1. The necessary ingredients of the tort that the claimants must establish are as follows:
 - i) There was a breach of contract by, in this case, the purchaser of the Epsilon mod menu who installed and played GTAV and had thereby agreed to be bound by the EULA, the terms of service and code of conduct. That requirement is met: users of Epsilon cheated, and as a result breached the terms of the licences they held to use GTAV.

- ii) Persuasion, procurement or inducement by the defendants, causing the contracting party to breach his contract. I am satisfied that that requirement is met. Epsilon is or was marketed and supplied for the express purpose of allowing or encouraging individuals who acquired it to cheat, and so breach their contracts.
 - iii) The third element is knowledge. There has to have been knowledge on the part of the defendants that what they were doing was inducing a breach of contract. However, it is clear (see in particular Lord Hoffmann's judgment at [39] to [41]) that it is not necessary to know the precise terms of the contract. Awareness of the contract and a deliberate decision not to enquire into its terms – what is known as “blind-eye” knowledge – is sufficient. Wilful blindness is enough.
 - iv) There must be an intention to procure a breach of contract (see for example Lord Nicholls' judgment at [192]). But again, for this purpose, it is sufficient to have knowledge of the existence of the contract and turn a blind eye.
35. Finally, in order for an actionable tort to be established, damage must have been suffered. I am satisfied from the witness evidence that damage was suffered by the claimants.
36. As to requirements iii) and iv) above, both the fourth and fifth defendants admit knowledge of the existence of the contract. It is also clear that the defendants were aware that players to whom they provided Epsilon were regularly, as they say in their witness statements, getting “bans” from playing the game. I am satisfied in the circumstances that the fourth and fifth defendants must have been aware not only of the existence of the contract but that what was being done was unauthorised and was a breach, and that the necessary element of intention is established.

The claim for copyright infringement

37. Turning to the claim for copyright infringement, the claimants' evidence clearly establishes ownership of the copyright. I am satisfied that copyright in the GTAV game is vested in the first claimant. I understand the second claimant to be a licensee.
38. As regards the various elements of the copyright infringement claim, I have concluded that I am satisfied to summary judgment standard, and based on the defendants' own evidence, in relation to at least one aspect. That is that, by providing the Epsilon cheat to consumers to whom they have sold it, the fourth and fifth defendants have authorised copying of the GTAV program or substantial parts of it.
39. Under s 16 CDPA copyright is infringed if, without a licence from the copyright owner to do so, a person either does or authorises another to do various acts, which include copying. Section 16(3) makes it clear that infringing copyright can relate to the whole work or to a substantial part of it. Section 17(6) expressly provides that copying includes the making of copies which are “transient”. That is important because a key part of the defendants' defence is that using Epsilon does not involve any copying of a lasting nature, or indeed any permanent or lasting change to anything on a player's hard drive. The GTAV game continues to exist unaltered on the

hard drive. What Epsilon does is to make changes to the game in operation, that is the running program.

40. The answer to this is that, because copying expressly covers anything that is transient, the way the cheat works does, it seems to me, involve a breach of copyright in the form of making transient copies. To take an example, Epsilon would allow a player who is using it to access weapons or other objects which would not be available to a player in the same position if they were playing conventionally without cheating. The way that Epsilon does this is by taking information from the GTAV libraries in respect of the relevant object (for example, a weapon) and reproducing the image and functions of the object, instantiated in the game, so allowing the cheater to use it in gameplay. That, to my mind, clearly involves copying.
41. It may well be the case that the process I have just described also involves adaptation, which is a separate basis of copyright infringement. However, without fuller argument I was not convinced to summary judgment standard that the transient changes that are made to the way the program is operated necessarily fall within s 21 CDPA, which deals with the meaning of adaptation. I therefore I do not address that further.
42. The meaning of authorisation has been considered in a number of cases and was summarised by Kitchin J (as he then was) in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch) at [85] to [95]. At [90] he described authorisation as follows:

"The grant or purported grant to do the relevant act may be express or implied from all the relevant services. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances."
43. I agree with counsel for the claimants that it is clear that use of Epsilon by players results in infringement taking place when they activate the cheat software. The fourth and fifth defendants have supplied the means of infringement, namely the cheat. They have an ongoing relationship with purchasers of Epsilon, for example by providing patches, updates, instructions and assistance in getting it working. They clearly have a high degree of control over the features of Epsilon and its functionality. Further, when Epsilon is used by players as intended infringement of copyright by them is inevitable because Epsilon involves at least some element of copying of the software and so-called in-game assets.
44. Although the fourth and fifth defendants made a purported disclaimer of liability to Epsilon users in relation to its use in online play, I agree with the claimants that this is "mere window-dressing" of the kind disregarded by Arnold J (as he then was) in *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch) at [65]. I also

agree with the claimants that other points raised by the fourth and fifth defendants in their defences against copyright infringement do not offer any realistic prospect of a successful defence. In particular, they rely on having obtained the means to produce Epsilon by downloading information from other sites, including, they say, a popular and well-known public cheating site, from which they say they downloaded the source code. However, public availability of the means to infringe copyright is not a defence to copyright infringement.

45. The fourth defendant also raised a decompilation defence under s 50B CDPA. That is a provision that is intended to allow a computer program to be copied for limited purposes in the course of creating an independent program which may be operated either with the program decompiled – in this case with the GTAV program – or with another program. However, I am satisfied that the requirements of section 50B(1) are not met. That provision describes decompilation as the process of converting a computer program expressed in low level language into a version expressed in higher level language. That does not fit with the description of how the Epsilon product was produced that was given by the fourth defendant in court today.
46. Furthermore, what s 50B permits is incidental copying in the course of decompilation (as so described). Even if the defence were available to the defendants it would relate only to that process of decompilation. It would not provide a defence to what I have found to be a copyright infringement, namely authorising copying by persons to whom Epsilon was supplied.
47. The third limb of the claimants' copyright infringement claim relates to circumvention of so-called technological protection measures, which is said to fall within s 296 CDPA. That provision applies where a technical device has been applied to a computer program and, among other things, a person sells the means to circumvent the device.
48. I am not making a finding in the claimants' favour under s 296. It is not necessary for me to do so in order for the copyright infringement claim to succeed on the basis that I have described. Furthermore, this is one area where I consider that the defendants' evidence, or at least what was said in court today by the fourth defendant, is of real potential support to their case. The fourth defendant said that nothing they had done, or that Epsilon did, was designed to get around anti-cheating software included in the GTAV program.
49. In summary, I find that the defendants have authorised the copying of parts of the GTAV program by players who use the Epsilon cheat.

Other compelling reason to proceed to trial?

50. I consider that there is no other compelling reason for this case to proceed to a trial of liability. Earlier in this decision I set out potential concerns I had that might have indicated that the case should proceed to trial, and I addressed those. I do not think that there is any other matter I need to address. I have restricted my findings to those that I believe can be made based in key respects on the defendants' evidence, and certainly avoiding any area where I believe that there is or may be a genuine factual dispute. I have also concluded that I should not make a decision on one area of law which is unclear, relating to whether the contract was binding on the fifth defendant

as a minor, and have not made a decision in relation to s 296 CDPA, where I think there may be a real factual dispute.

51. I have also taken into account the fact that the costs of proceeding to trial are likely to be substantial. Overall, and having heard from the defendants directly today, I think justice is better served by granting summary judgment on the basis explained in this decision, rather than allowing this case to proceed to trial with further costs being incurred.

Conclusion

52. As already indicated, the trial that is currently listed was intended to be a trial of liability only. As a result of my decision a trial of quantum may still be required, but I am hopeful that that may prove unnecessary because the parties may reach agreement. However, despite the possibility remaining of a trial of quantum I am confident that substantial costs should be saved, and that it is appropriate to grant summary judgment on liability on the basis that I have described.

(For proceedings after judgment see separate transcript)
