Neutral citation [2022] CAT 37

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1342/5/7/20
1409/5/7/21 (T)
1410/5/7/21 (T)

AND

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

Claim Nos: IL-2021-000002
IL-2021-000003

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28 July 2022

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(President of the Competition Appeal Tribunal)

Sitting as a Tribunal in England and Wales and as a Judge of the High Court of England and Wales

BETWEEN:

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED

Claimants

- v -

(1) FOOTBALL DATACO LIMITED
(2) BETGENIUS LIMITED
(3) GENIUS SPORT GROUP LIMITED

Defendants

- and -

(1) SOFT CONSTRUCT (MALTA) LIMITED
(2) SOFT CONSTRUCT CJSC
(3) SOFT CONSTRUCT UKRAINE LLC

(4) SOFT CONSTRUCT LIMITED
(5) VIVARIO LIMITED

Interveners

(The "Sportradar Claim")

AND BETWEEN:

FOOTBALL DATACO LIMITED

Claimant

- v -

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED
(3) PETER KENYON
(4) ISAIAH GARDNER
(5) FLOYD MARCH
(6) NICK MILLS
(7) PRZEMYSLAW DUBININ

Defendants

(The "FDC Claim")

AND BETWEEN:

BETGENIUS LIMITED

Claimant

- v -

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED
(3) PETER KENYON
(4) ISAIAH GARDNER
(5) FLOYD MARCH
(6) NICK MILLS
(7) PRZEMYSLAW DUBININ

Defendants

(The "Genius Claim")

Heard remotely on 28 July 2022

RULING (DISCLOSURE)

APPEARANCES

Ronit Kreisberger QC, Alan Bates and Ciar McAndrew (instructed by Sheridans) appeared on behalf of the Claimants in the Sportradar Claim and the Defendants in the FDC and Genius Claims.

Kassie Smith QC and Henry Edwards (instructed by DLA Piper UK LLP) appeared on behalf of the First Defendant in the Sportradar Claim and the Claimant in the FDC Claim.

Tristan Jones, Ian Mill QC and Tom de la Mare QC (instructed by Macfarlanes LLP) appeared on behalf of the Second and Third Defendants in the Sportradar Claim and the Claimant in the Genius Claim.

Aidan Robertson QC (instructed by RPC) appeared on behalf of the Interveners in the Sportradar Claim.

1. At this pre-trial review, various matters have been raised by the parties and disposed of by me in the course of the hearing. The basis for the various orders that I have made appears from the transcript, and my orders will be drawn up in due course. This ruling deals specifically with an application for what is, in effect, specific disclosure. It is an application advanced by the Claimants ("Sportradar") against one of the Defendants ("Betgenius" or "Genius", as I refer to them). The application seeks to obtain disclosure of internal documents which would inform the nature of Genius' negotiations, in particular its subjective thinking regarding those negotiations, with an entity Perform Content Limited ("Perform"), concerning a secondary supply licence.

2. Applications for specific disclosure in the context of electronic documents that have been the subject of a specific and carefully framed disclosure regime are extraordinarily difficult to maintain. It is important that I explain to the parties why that is the case.

3. In this case, the disclosure has a long history, beginning with my order of 29 July 2021. In due course, the parties produced a substantially agreed disclosure schedule, containing multiple issues in relation to which disclosure was to be given, and stating the proposed model of extended disclosure in relation to each issue. Although the disclosure schedule was "substantially agreed", a number of issues arose which needed to be, and were, resolved by the Tribunal. Disclosure took place in accordance with my order and the disclosure schedule, although a number of issues arose in relation to the disclosure process, which it was necessary for me to resolve. Whilst the detail of the disclosure process is irrelevant for present purposes, it is important to stress that the documents reviewed were substantially electronic, and not in hard copy.

4. In the past, when the disclosure process was paper or hard copy based – where documents were contained in filing cabinets or lever arch files – disclosure (or "discovery", as it was then known) involved identifying the file storage practices of the disclosing party, identifying the relevant files within that universe, and reviewing those files by looking through them, using the "eyeballs" of a qualified person to ascertain that which was relevant and that

which was not relevant, according to a pre defined standard that was general in nature. The issues against which a search was to be conducted were not generally set out. There was no need. The issues were stated in the pleadings, and there was no purpose of defining precisely how the search was to be conducted because an in-person "eyeball" review was the only way.

5. When once the disclosure process was complete, it would not be looked behind, questioned or re-visited unless good reason could be shown. One such reason might be the inadequacy of the original process. But generally speaking, the Tribunal or Court would not look behind the list of documents or disclosure statement produced by the disclosing party.

6. A Tribunal or Court might, however, order a further, specific, search for a particular document or class of document in the appropriate case. That would not involve a "re-run" of the original process, but a specific and targeted review for a limited set of documents. That was a process that the nature of paper files could accommodate.

7. The position with electronic disclosure is extraordinarily different. There is a great deal of front loading in terms of the documents that are isolated and then reviewed. I am not going to go into the detail of the disclosure process undertaken in this case. I am going to illustrate my point by reference to a hypothetical process that is (broadly speaking) typical of today's disclosure exercises:

    (1) In the first place, it is necessary to isolate the relevant electronic files. That may be done by reference to the computers operated by various "custodians" and/or by reference to the servers and/or back up held by the disclosing party. The universe of documents so produced is generally speaking vast and an "eyeball" review to differentiate between relevant (disclosable) documents and irrelevant (non-disclosable documents) is almost always not practicable or cost-efficient as a first step.

    (2) Instead, the volume of material produced for "eyeball" review is slimmed down or reduced through the use of information technology.

That is possible because electronic disclosure is readable electronically. Keyword searches or other forms of electronic review are used to effect this slimming down or reduction (electronic sifting).

(3) The nature of the electronic sifting to be applied is almost always discussed between the parties and is usually highly contentious. That is because documents that are discarded as a result of the electronic sift are never reviewed by a competent (human) professional and – of course – the computer does not apply its mind to the question of relevance. It simply carries out the sifting process that it has been instructed to undertake. As a result, if (for example) the keywords selected do not cause a highly relevant document to be retained rather than discarded, then that document will never be considered by a competent professional.

(4) The slimmed down universe of documents produced as a result of the electronic sift is then subjected to an "eyeball" review, so as to further exclude irrelevant or non-disclosable (i.e. privileged) material. To reiterate, for the point is important, the material that is excluded from disclosure as a result of the electronic sift – which will typically be vast (hence the electronic sift) – is not further reviewed and will never be produced on disclosure.

8. Self-evidently, it is important that the process of review – in particular the electronic sift – is done appropriately from the beginning. I use the word "appropriately" advisedly, for it will never be the case that the process will be perfect. The electronic sift is a binary tool that either excludes or does not exclude, and it does not (at least, not at the moment) exercise a form of judgement. Documents that are excluded from professional review will never see the light of day, and (since no process is perfect) that will include some relevant documents. That is why it is necessary to consider the process at the outset and that is why this Tribunal, on this occasion, took considerable time and effort to set out a series of issues which were debated by the parties, according to which the parties then conducted their search.

9. It will take a great deal to persuade this Tribunal to conduct a re-run of such an exercise. That is because such a re-run will typically require a revised electronic sift (not, in itself, an issue: such processes are fast and relatively inexpensive) followed by a further "eyeball" review, which will be expensive and time-consuming.

10. I am not prepared to contemplate such a review at this stage of these proceedings. Inevitably, that means that certain documents which might exist, and I underline "might", and which, had the electronic searches been differently structured, might have been uncovered will not be uncovered for purposes of disclosure at trial. We all must recognise that the disclosure process in this jurisdiction is one of the foremost tools for getting at the truth and for producing important documentary evidence for the courts to consider. We must also recognise that it is one of the most significant cost centres in litigation and that is a bad thing.

11. The fact is that when a process, in this case done under the close supervision of the Tribunal and the Court, has been completed, it may well be, and almost certainly will be, that there are gaps because the search process, with hindsight, could have been differently done. In such circumstances, absent the exceptional case, this Tribunal and Court must make do with what has been produced. It is, of course, completely open to both sides to say that certain inferences can be drawn from the fact that certain documents might or might not exist, and what they would say if they did.

12. That is one of the fact-finding functions of the Tribunal or Court. It is the function of the Tribunal or Court to decide the issues in dispute, according to the evidence that is produced before it. That evidence includes not merely that which is, but that which is not. I want to be very clear that in trying matters where the documentary record is incomplete, as it almost always will be, this Tribunal and Court will draw inferences from the totality of the facts.

13. I am in little doubt that – with the clear benefit of hindsight – internal communications of Genius regarding Perform might have been better searched for using a different process. But that is not enough to persuade me to order a

re-run of the process (in whatever form). Indeed, Sportradar's application falls well short of what is needed to bring the specific disclosure regime into play.

14. The disclosure process in this case has been carefully considered and thorough. I am completely satisfied that it would be disproportionate to revisit matters now. Sportradar's application is refused.

The Hon Mr Justice Marcus Smith
President

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 28 July 2022