

HIGH COURT**COMMERCIAL****[2014 No. 806 P]****[2014 No. 13 COM]****BETWEEN****SONY MUSIC ENTERTAINMENT (IRELAND) LIMITED****UNIVERSAL MUSIC IRELAND LIMITED****WARNER MUSIC IRELAND LIMITED****PLAINTIFFS****AND****UPC COMMUNICATIONS IRELAND LIMITED (No. 2)****DEFENDANTS****JUDGMENT of Mr. Justice CREGAN delivered the 21st day of May, 2015****Introduction**

1. On 27th March, 2015, I delivered my substantive judgment in this matter. This judgment is supplemental to that judgment. A number of issues were held over for further submissions. In particular I sought further submissions from the parties on the issue of whether there should be an independent arbitrator as well as Norwich Pharmacal Orders. There were also other matters which were the subject of an exchange of correspondence between the parties.

2. Unfortunately this exchange of correspondence between the parties, instead of narrowing the issues, seemed to enlarge them. New issues emerged which then became the subject of detailed correspondence. It appeared as if there was little or no agreement between the parties on any of the supplemental issues. Indeed even on the issue of "liberty to apply" there appeared to be disagreement between the parties about when such an application could be invoked. The result of this exchange of correspondence about the form of the draft order meant that both parties (for their own reasons) seemed to envisage an order of immense complexity which is completely unnecessary on the facts of this case.

3. The essence of the injunction which I have granted against the defendant is that the defendant should write two cease and desist letters to its customers (who are engaged in copyright infringement on the defendant's internet service) and that the defendant should tell the plaintiff when it receives a notification that one such customer has committed a third infringement. The defendant has always indicated that it would consent to any Norwich Pharmacal type applications brought by the plaintiffs against the defendant. It is completely unnecessary, in my view, to set out an appendix to the order detailing what should be in each of these communications. What should be contained in these letters to its subscribers is clear from the judgment.

4. I turn now to consider the issues which were raised in the hearing before me.

Whether there should be an independent adjudicator

5. During the course of the hearing, the plaintiffs, in the exchange of correspondence between the parties, raised the issue of whether an independent adjudicator – not arbitrator – could be appointed who might review all correspondence in relation to a particular subscriber and who might make a decision in respect of that subscriber as to whether his/her internet service connection should be suspended or terminated. The purpose of such an adjudicator was to comply with the provisions of Article 1 (3a) of the Framework Directive 2002/21/EC which provides that "a prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned....."

6. This suggestion by the plaintiffs appeared to have been given a guarded and reserved welcome by the defendant who submitted that the idea seemed to have some merit but that they wished to reserve their position. Subsequently however the idea faded away. I indicated in my judgment that the idea seemed to have some merit but that I would hold over for further submissions the exact interplay between the appointment and role of an independent adjudicator and the issue of Norwich Pharmacal orders. I did not, in my first judgment, make any decision that an independent adjudicator should form part of the court injunction but rather that I saw certain merit in that idea and that I would leave it over for further submissions. This was because the issue had not been fully argued before me.

7. Mr. McDowell SC, for the plaintiffs, submitted that the plaintiffs could operate the Graduated Response System with the Norwich Pharmacal orders but that they would prefer an independent adjudicator. His arguments in favour of the appointment of such an adjudicator were (i) that it would fulfil the requirements of Article 1 (3a) of the Framework Directive that there should be a prior, fair and impartial procedure, (ii) that it would be a more efficient use of the plaintiffs', the defendant's, and indeed the subscriber's time and resources than proceeding straight to court to obtain a Norwich Pharmacal order, (iii) that the Norwich Pharmacal procedure might be more severe on the defendant's subscribers, (iv) that it would be better for the courts if the courts did not have to deal with numerous Norwich Pharmacal applications and that it would be preferable to avoid a court based solution if possible. All of these submissions, in my view, have considerable force.

8. Mr. Ferriter SC, on behalf of the defendant, however argued that the defendant believed that it was fairer for all parties and the subscribers that the procedure should move directly to a Norwich Pharmacal procedure. He submitted that Article 1 (3a) of the

Framework Directive not only required that a prior, fair and impartial procedure shall be guaranteed but also that the "right to effective and timely judicial review" should be guaranteed also. In the defendant's view, the appointment of an independent adjudicator, followed, if necessary, by a Norwich Pharmacal type procedure established an overly complex and bureaucratic layer to the entire process. It set out two elements in the suspension/termination process when there only needed to be one. If the independent adjudicator process did not work in respect of particular subscribers, then the process would have to move to the Norwich Pharmacal procedure in any event. In the defendant's view, it would be better if it moved directly to the Norwich Pharmacal procedure and skipped the independent adjudicator process. He also submitted that the establishment of an independent adjudicator would mean that detailed rules and guidelines would have to be established for the appointment of such an adjudicator. This would all be irrelevant if a subscriber wished to have his day in court and wished to obtain a court hearing. The defendant also submitted that the court could not, and should not, force such a process on the defendant by means of a court injunction. There is considerable force to that argument. It is not appropriate, in my view, that a court should enjoin parties to partake in an independent adjudication process against their will. The essential point however is that the defendant argued that the appointment of an independent adjudicator added a wholly unnecessary layer to the Graduated Response issue. The defendant did not want it, it was not practical and it was better to move directly to the court process via the Norwich Pharmacal procedure.

9. In my view, the defendant's submissions on these points are correct. I do not believe it would be appropriate for a court, by means of an injunction, to order a reluctant defendant to take part in a quasi-judicial procedure. There is also merit to the defendant's submission that it would be simpler if the process moved directly to a Norwich Pharmacal procedure without the necessity of the intervening layer of an independent adjudicator. I would therefore conclude that the independent adjudicator should not form part of this process nor should it form part of any court order.

10. However, having said that, that is not to say that the parties could not agree among themselves to establish an independent adjudicator at some stage in the future should they so wish. However any such process would be as a result of an agreement between the parties rather than under the direction of a court injunction.

The issue of business users

11. This issue is that the plaintiffs are of the view that the first letter should be sent to business users whereas the defendants believe that all business users should be excluded entirely from the scheme.

12. At page 28 of my first judgment, in summarising the evidence of Mr. Willie Kavanagh the chairman of EMI and the chairman of IMMA, who gave evidence on behalf of the plaintiff, I stated as follows:

"However the graduated response system agreed between the plaintiffs and Eircom is subject to a number of exceptions. It does not apply to business users, it does not apply to mobile broadband. However it is common case between the parties that these would also be excluded in the current proceedings."

13. Mr. McDowell S.C. for the plaintiff pointed to a letter from the defendant dated 21st January 2015 which suggested that the defendant was in effect consenting or proposing that it would send two educational letters to all its customers including its business customers but that no further step would be required for UPC business customers. The plaintiffs submit the defendant should be required to write a first letter to business users but accepted that such a letter should not be a cease and desist letter. Moreover, the plaintiff accepted that no further steps need be or should be taken against business users. Thus, there would be no second cease and desist letter or Norwich Pharmacal procedure against business users.

14. The defendant submitted however that the letter of 21st January, 2015, was written in the context of an exchange of correspondence between the parties but that they did not believe that it was either necessary or appropriate to write such letters to business users. It also submitted that what the plaintiff was proposing was in effect the creation of two separate regimes – one for ordinary subscribers and one for business users. In the defendant's view, this would add to the complexity of the process as there would have to be two separate regimes established – in the type of letter sent and in the fact that only one letter was going to be sent. Moreover given that the entire process would be the subject of automation this could add to the costs and complexity of the software systems. The defendant also submitted that at a level of principle there was no need for the establishment of a Graduated Response System for business users. Thus, the defendant submitted that there would be extra costs imposed on the defendant for setting up a separate regime for business users but very little benefit would accrue to the plaintiffs from such a situation. The defendant did however accept that although the capital expenditure would not be affected, the operational expenditure would increase.

15. Having heard submissions from both parties I am of the view that business users should be excluded from the terms of this injunction. I say this because the thrust of the GRS injunction being sought by the plaintiffs was directed primarily at non-business users of the defendant's network; secondly, because it is clear that the plaintiff is not seeking a Graduated Response against business users – but only that one educational letter should be sent. This creates therefore a separate regime for business and non-business users. This in turn would increase the operational costs and complexity of the scheme for the defendant. I do not believe that this is necessary. It is more appropriate in my view that there should be a clear dividing line between business and non-business users and that business users should be excluded from the scope of the injunction for the time being. However I would also say that I do not regard this issue as *res judicata* and it can be reviewed at a later date, in the light of experience.

The amortisation of costs

16. In my first judgment, I held at para. 259 that the plaintiff should be required to contribute 20% of the defendant's capital costs and capital expenditure on the project. It is noted that the defendants could amortise this capital expenditure over a period of eight years and I stated that I would hear further submissions over whether the contribution should be paid over eight years or over a shorter period of time.

17. The plaintiffs' submission is that because the defendant can amortise the costs over eight years that the plaintiffs should be entitled to pay this over a period of eight years. It is submitted that because the implementation would also be over a number of years, the benefit to the plaintiff would be spread over a number of years and therefore the costs should also be spread over a number of years.

18. The defendant submitted that it incurred the capital expenditure at the start of the process and it was an accounting exercise that the monies would be amortised over a period of years. In fact, it appears that the monies are amortised over five years in the company accounts. In its view the contribution should be paid by the plaintiff over a period of three years.

19. In my view I believe that a fair resolution of this issue is that the plaintiff should be required to pay this cost over a period of five years and this will be reflected in the order.

The duration of the order – “A sunset clause”

20. The defendant also submitted that the order should only last for a period of four or five years. It submitted that it was not appropriate that there should be a perpetual injunction in place against the defendant in respect of this issue.

21. The plaintiffs however submitted that the injunction should last as long as the problem lasts and that it would be absurd to expect the plaintiff to have to reargue the entire issue in five years time if the problem still existed in its current form. It also submitted that given that there was liberty to apply, the defendant, or indeed the plaintiff, could come back to court at any time to argue that the terms of the injunction should be varied or discharged.

22. I was also referred to *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354, in which Arnold J. granted an injunction in a web blocking case with a sunset clause of two years. However in my view, a web blocking case is a different type of case to the problem I have to deal with in this case.

23. Counsel for the defendant also referred to the SABAM case, (*Scarlet Extended SA v. SABAM*, C – 70/10 [2011] I-11959) where the CJEU expressed some concern with permanent injunctions (although in a different context).

24. In the light of these considerations, I am of the view that it is not appropriate that the injunction should expire in four or five years time. Indeed the injunction should continue for as long as it is required. However I am mindful of the defendant's concerns in this regard and indeed any concerns that might have been expressed by the CJEU. In the circumstances I believe that it would be appropriate that the matter would come before the court again in five years time so that the situation can be reviewed at that time. This, in my view, gives some comfort to the defendant, that it is not a perpetual injunction and that the process will be monitored as required by the courts. However I wish to state clearly that that is not in any way to suggest that the injunction would only last for a period of five years. That is most definitively not the case. The injunction will continue as long as the problem remains but it seems that the defendant is concerned that the “liberty to apply” provision may not give them sufficient comfort and I believe therefore that it would be appropriate that this matter could be reviewed by the court in five years time.

Reporting/auditing

25. Another issue which arose in the correspondence subsequent to my judgment, but did not seem to arise during the course of the trial was that the plaintiff sought that the defendant should report on a regular basis to the plaintiff – either on a monthly, or on a quarterly basis. The defendant objected strenuously to this, saying this was not appropriate. The defendant would be the subject of a court injunction and it would conform to the terms of the court injunction (subject of course to any appeal). The defendant submitted that the idea that some party, independent of the court should audit the defendant, was entirely inappropriate.

26. I agree with the defendant's submissions in this regard. The issues of the defendant reporting to the plaintiff and the issue of any auditing of the defendant's behaviour will not form part of the court order. It is not necessary.

The data protection clause

27. The plaintiff also sought to insert a data protection clause in the order. In my view this clause is also entirely unnecessary. It amounts, in effect, to a clause in the court order that both parties shall obey the Data Protection legislation. This in my view goes without saying. It shall therefore be left unsaid. It does not need to form any part of a court order.

Form of order

28. In the light of the parties approach to the court order, I have appended to this judgment a draft order and I will hear the parties on its terms.

Appendix 1

It is ordered, pursuant to Section 40 (5a) of the Copyright and Related Rights Act 2000, (as amended), that the defendant shall take the following steps, in order to prevent the use of the defendant's fixed broadband internet service by subscribers (for the purpose of infringing the copyright in the plaintiffs' sound recordings by the making available by subscribers of those recordings to members of the public through the internet

1. On receipt of all relevant infringement information from the plaintiffs (in respect of fixed broadband internet subscribers), the defendant shall, on receipt of a first copyright infringement notification from the plaintiffs, send its subscriber a first “cease and desist” letter.

2. On receipt of a second copyright infringement notification from the plaintiffs, the defendant shall send to that subscriber a second “cease and desist” letter.

3. Where the defendant receives a third copyright infringement notification from the plaintiffs, in respect of a subscriber, the defendant shall send to the plaintiffs a notification that the subscriber has been the subject matter of three such notifications.

4. In respect of subscribers (in respect of which the defendant has received a third copyright infringement notification) the plaintiffs (having been informed of the relevant IP addresses, dates and time stamps) may make a “Norwich Pharmacal” type application to ascertain the subscriber's identity and address and the plaintiffs may then seek an order for the termination of the subscriber's internet broadband service and/or such relief as the plaintiffs may wish to seek against the subscriber directly. Such applications will not be opposed or consented to by the defendant and no costs will be sought, by or against, the defendant of the proceedings or of compliance.

5. The plaintiff shall pay 20% of any capital expenditure incurred by the defendant, required by the defendant to operate the scheme. (The capital expenditure cost is to be capped at €940,000).

6. The amount of notifications shall not exceed 2,500 per month.

7. The above scheme shall exclude all business users and shall be in respect of fixed broadband internet subscribers only.

8. Liberty to apply.

9. The matter shall be listed for review on a date five years after the perfection of the order.

