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CH-2018-000075  
CH-2018-000224

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**

On appeal from the orders of Chief Master Marsh, made pursuant to judgments [2017] EWHC 3150 (Ch) and [2018] EWHC 550 (Ch)

Rolls Building  
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Tuesday, 21 May 2019

**Before:**

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

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**Between:**

**CHRISTOPHER WHEAT**

Claimant

- and -

**(1) GOOGLE LLC**  
**(2) MONACO TELECOM SAM**

Defendants

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**Mr CHRIS PEARSON** appeared on behalf of the Claimant  
The Defendants did not appear and were not represented

Hearing date: 21 May 2019  
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**Approved Judgment**  
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**MR JUSTICE MARCUS SMITH:**

1. I have before me applications for permission to appeal two decisions of Chief Master Marsh, refusing in the case of each of the Respondents to this claim to allow the Appellant permission to serve out of the jurisdiction. The Appellant is a Mr Christopher Wheat, who is the owner and operator of a website which is known as “theirearth.com” and which I shall describe as the “Website”.
2. The Defendants are Google LLC (“Google”) and Monaco Telecom SAM (“Monaco Telecom”). In two decisions, [2017] EWHC 3150 (Ch) and [2018] EWHC 550 (Ch), Chief Master Marsh refused permission to serve out of the jurisdiction and/or he set aside service out of the jurisdiction that had wrongly been ordered. The applications for permission to appeal seek to revisit the question of service out, and it is contended by Mr Wheat that permission to serve out of the jurisdiction should be given in each case.
3. It is evident from what I have said that this is not a Brussels Regulation case, but a case of service out of the jurisdiction under the old common law rules. The requirements for permission to serve out of the jurisdiction are well known, but I articulate them now
  - a. First, the claimant – the party seeking to serve out – must satisfy the court that in relation to the foreign defendant in question there is a serious issue to be tried on the merits, that is to say, a substantial question of fact or law or both.
  - b. Secondly, the claimant must satisfy the court that there is a good, arguable case that the claim falls within one or more of the “gateways” under which service out of the jurisdiction is permitted. These gateways are set out in CPR PD 6B §3.1
  - c. Thirdly, the court must be satisfied that England and Wales is clearly and distinctly the proper forum for the trial of the claims.
4. There is naturally and unsurprisingly a close nexus between these three requirements. None of the thresholds is so high as to require a “mini-trial” or a trial-within-a-trial: but they are of course of substance.
5. I must also remind myself that this is an application for permission to appeal orders refusing permission to serve out. When applying my mind to these tests, I simply need to consider whether there are reasonable grounds for success on an appeal, and no higher standard than this. Mr Pearson of counsel, who appeared for Mr Wheat, stressed that I should not conduct a trial-within-a-trial, particularly where permission to appeal was sought, and I accept that submission. It is necessary to take an appropriately broadbrush view of the merits of the points being advanced, and that is what I propose to do in this case.
6. In each case, Chief Master Marsh declined to authorise service out of the jurisdiction or permission to serve out of the jurisdiction on all three of the requirements that I have identified. Additionally, in the case of the claim against Monaco Telecom, he found

that there had been a material non-disclosure or misrepresentation by Mr Wheat, which he also relied upon to set aside the service out that had been ordered.

7. Mr Wheat's application for permission to appeal the orders of Chief Master Marsh have not been dealt with on the papers. Arnold J and Roth J, in the case of each separate application for permission to appeal, ordered that both applications for permission be determined at a single oral hearing, and this is that hearing.
8. Although the claims against the Defendants are multiple, they essentially fall into three groupings:
  - a. The first grouping concerns self-standing claims against Google involving – and I shall expand on this in a little detail below – the “caching” of images and the hotlinking of those images to other websites. These claims are made against Google alone, and they do not involve Monaco Telecom.
  - b. The second and third grouping of claims involves claims against Monaco Telecom and Google. These claims arise out of the allegedly unauthorised cloning of the Website by Monaco Telecom. The primary claims – comprising the second grouping – are therefore against Monaco Telecom.
  - c. However, Mr Wheat contends that Google was told about the cloned website and nevertheless continued to index the cloned copy of the Website without Mr Wheat's consent. It is therefore said that both Defendants have infringed Mr Wheat's copyright. The claims against Monaco Telecom comprise the second grouping and the claims against Google comprise the third grouping.
9. I should say that the claims falling within these groupings are framed in various different ways: but the case primarily advanced by Mr Wheat is based upon allegations that his copyright under the Copyright, Designs and Patents Act 1988 has been infringed.
10. I will begin with the first grouping of claims, that is the self-standing claims against Google described in paragraph 8(a) above. These claims involve the following factual background. As is well known, Google, amongst other things, is involved in indexing the web. The search engine that it operates worked by “trawling” web content and indexing it, so that returns on searches using Google's search engine may be returned quickly.
11. “Trawling” includes the caching of images that are contained upon websites that are available for access to Google's web robots. What happens is that, to take an image as the example, that image is “cached”. That is to say, a small version of that image is produced in response to a search on the Google search engine. The internet searcher can then click on that cached image and jump to what one would think is the website that is promoting and containing that image, and which has the rights to it.

12. The Website operated by Mr Wheat contained just over 370 images. Surrounding those images was accompanying text. Mr Wheat, so he says, owned the copyright in those images. These images were indeed indexed and cached by Google. But they were not linked to the Website. Rather the link was created with what are known as “aggregator websites” or a “link farms”. Such websites – which (on the facts advanced by Mr Wheat) – have no intellectual property rights in the images, contain hotlinks to the images on Mr Wheat’s Website and doubtless to many thousands of other images on other websites. The outcome of a Google search – that is, when the cached images are presented on screen – is that the cached image links not to the website of the owner of the copyrighted image (here Mr Wheat’s website), but rather links to the aggregator website or link farm.
13. It is in this way the benefits of putting images on the web are lost to the owner of the copyright in those images. To take an example involving the parties here, were I to invoke a search that produced an image to which Mr Wheat claims copyright, my click on that image would not take me to the Website but rather would take me to the aggregator website or link farm. That, it is said, causes real disbenefits to claimants like Mr Wheat. When I click on the cached image, Mr Wheat’s website is not accessed: that of the aggregator website or link farm is. That, in turn, has implications in terms of both the profile of his own website and the revenue that he might gain from such matters as advertising revenue via Google’s operated AdSense. As is well known, the revenue that is generated by way of advertising is directly linked to the volume of access to websites and the number of clicks that one receives on the website and the images and/or pages within it.
14. That, in a nutshell, is the factual background to the self-standing claims against Google comprising the first grouping. It is said by Mr Wheat that Google’s conduct in caching images for the purposes of delivering search results constitutes an infringement of the Copyright, Designs and Patents Act 1988 because Mr Wheat has not consented to his images being used in this way. (Matters would be different if the search results linked to the Website: Mr Wheat accepted that he had given his consent to this.)
15. It is said by Mr Wheat that this is an infringement of his rights and that these rights are in fact governed by English law. It is first necessary to explore why Mr Wheat contends that this question of infringement is governed by English law at all. It is, inevitably, very difficult to link operations on the world wide web to specific jurisdictions. In a manner rather analogous to some defamation cases, the problem is that the world wide web has no particular locus, and the upshot is that one has the potential for many different laws to govern a particular cause of action. I was referred to the decision of Birss J in *Omnibill (Pty) Ltd v Egpsxxx Ltd* [2014] EWHC 3762 (IPEC). This was a case involving the alleged infringement of copyright in photographs on a website in South Africa. The question was whether there was (as here) an infringement of the Copyright, Designs and Patents Act 1988. The court held that there was such an infringement. The South African website was communicating reproductions of the claimant’s artistic works to the public in the UK, and as a result there was an infringement under section 20 of the 1988 Act. That, according to Mr Wheat, is exactly what is happening here.

16. The test is whether the website or webpage is targeted to a particular country and that, as Birss J pointed out, is a multifactorial question which depends upon all the circumstances, including the content of the website itself, the elements arising from the inherent nature of the services offered by the website, the number of visitors accessing the website from the UK and so on. I have, I confess, some doubts as to the precise translatability of this test, which obviously involved the publication of an image on a particular website, to this case, which involves the use of a cached image to facilitate a search on the worldwide web. However, it seems to me that, for purposes of this hearing, I must accept that this contention has a reasonable prospect of success: what Google is doing, in particular in relation to searches that are produced by way of google.co.uk (the search engine directed to users in the UK), the cached images are indeed being targeted at a particular country (namely, the UK), so as to make it sufficiently arguable for purposes of the merits test that I am applying to say that English law applies and that there is an infringement of section 20 of the Copyright, Designs and Patents Act 1988. So I am satisfied that there is a good, arguable case on appeal that this test can be satisfied, and I need for present purposes go no further than that.
  
17. I turn to the second requirement, question of whether Mr Wheat has established that his case falls within an appropriate gateway. The gateway relied upon was gateway (9) in CPR PD 6B §3.1. Gateway (9)(a) provides that the court may permit service of a claim out where a claim is made in tort (as this one is), where “damage was sustained, or will be sustained, within the jurisdiction”. It was contended on behalf of Mr Wheat that, because he was operating his business in the jurisdiction, the loss of advertising revenue and the financial loss caused by the lower profile of his website than would otherwise have been the case caused damage to him within this jurisdiction. Again, it seems to me that that is something which is arguable with reasonable prospects of success on an appeal. I also consider that gateway (9)(b), which refers to damage that has been or will be sustained from an act committed or likely to be committed within the jurisdiction, is perhaps the more appropriate gateway. Taking the test expounded by Birss J in *Omnibill*, it is possible to contend that the act of communication (that is to say, displaying the search results and the cached image on, as it were, an England and Wales monitor) is something which is an act within gateway (9)(b). So, for both those reasons, I am satisfied that there is a good, arguable case that these claims against Google fall within both limbs of gateway 9.
  
18. The last question is one of forum. As I noted, I must be satisfied that England and Wales is clearly and distinctly the proper forum for the trial of the claims. It seems to me that, as regards these claims, this requirement too is satisfied. This is, given the conclusions I have reached, a claim governed by English law involving an infringement of copyright under the 1988 Act. The claimant, Mr Wheat, is resident in the jurisdiction. The defendant is not, self-evidently, but the defendant I consider is going to be remarkably indifferent as to where it is sued in terms of its own convenience. The fact is that Google is a worldwide corporation with a significant presence within this jurisdiction, albeit not a servable presence. It seems to me that the advantages of suing in another jurisdiction are very difficult to discern. The question of witnesses, documents and experts in a sense all have an England and Wales focus, largely because of the fact that England and Wales is the law that is applicable. It

therefore does seem to me that, so far as this group of claims is concerned, it is at least arguably appropriate that England and Wales is the most convenient forum.

19. So, for all those reasons, it seems to me that there is a good, arguable case on appeal that permission to serve out would be granted and that the decision of the Chief Master as regards this claim would be set aside and permission to serve out of the jurisdiction allowed. So far as this grouping of claims is concerned, I give permission to appeal.
20. I turn then to the next two groupings of claims, which (as I have described) are claims against both Defendants, Monaco Telecom and Google. All claims arise out of the alleged cloning of the Website by Monaco Telecom. So far as I can discern from paragraph 2.5 of the Amended Particulars of Claim – which is not at all clearly pleaded – the cloning of the Website occurred between 2007 and 2011. Ordinarily, that would suggest that limitation might be an issue. However, and somewhat surprisingly, this claim was in fact originally issued on 2 September 2013, which suggests that Mr Wheat’s claims are just about in time, at least in relation to some of the claims advanced by Mr Wheat. Moreover, Mr Wheat relies upon a lack of capacity for a period of time, some two and a bit years, to extend the time limits that would ordinarily apply. It seems to me that I should not allow these difficult questions of limitation to preclude what might otherwise be a good claim going forward. Whether these claims should go forward, is a matter I continue to consider in the following paragraphs.
21. By way of further clearing of the decks, the Chief Master found that there had – in the case of the Monaco Telecom claims – been either a misrepresentation or a non-disclosure by Mr Wheat in relation to the permission to serve out in relation to Google. What occurred (and I can understand the confusion) is that Deputy Master Arkush gave permission to serve out of the jurisdiction not the claim against Google but the application to serve out. That engendered in Mr Wheat’s mind a confusion between permission to serve an application out of the jurisdiction and permission to serve a claim out of the jurisdiction. Mr Wheat then misarticulated, at the hearing before Chief Master Marsh, what Deputy Master Arkush had in fact ordered as a result of which it may be said he obtained, for a short period of time, a permission to serve a claim out of the jurisdiction that he should not have had. Again, it seems to me that that this question of material non-disclosure or misrepresentation is not a matter that I should allow to prevent permission to appeal to take place if otherwise satisfied that permission to appeal should be given. It seems to me that there whilst Mr Wheat’s confusion before the Chief Master is no justification for any misstatement or misrepresentation made, it is an explanation for his conduct.
22. Turning, then, to the three requirements that I have already articulated in relation to the first grouping of claims, the cause of action alleged is the same. It is alleged that there is an infringement of copyright. The difficulty, as I see it, and the significant difference between the claims against Monaco Telecom and Google in the second and third groupings, and the claims against Google alone in the first grouping, is the fact that there is a question, as I see it, about consent. Unsurprisingly, there is and was a contract between Mr Wheat and Monaco Telecom. That contract is exhibited to a statement of a Mr Jack Thorne, who gave evidence on behalf of Monaco Telecom. The contract, in English and French (and I am looking at the English version), is, as one would expect, a fairly comprehensive document. The contract is not addressed in any great detail in

Mr Wheat's Amended Particulars of Claim, and, giving every latitude to Mr Wheat (who, although represented at this hearing, has largely been acting as a litigant in person), I am afraid I think that is a serious shortcoming in the pleading. The reason I say that is because, as it seems to me, there has to be some kind of interrelationship between the permitted communication of copyright images and infringement of copyright. Permission obviously will arise pursuant to the contract whereby the web content of the claimant was put on the Monégasque servers. That consent, as it seems to me, is something which will affect the nature of any infringement that is being alleged. It seems to me it affects the matter or can affect the matter in one of a number of ways. First, there is the question of whether the existence of such a contract regarding this copyrighted material affects the applicable law. It seems to me that there is an extremely difficult question as to whether, having given consent pursuant to a contract like this, one can sidestep that consent, which would be a matter of Monégasque law, by claiming in tort under English law. Equally, the contract not only says that all contractual relations are governed by the principality of Monaco, but it also contains a jurisdiction clause which requires, first, any dispute regarding the execution or interpretation of the service agreement (that is to say, the agreement) to first of all be resolved by amicable agreement and, secondly, to be resolved in the Monégasque courts. That, as it seems to me, directly affects the nature of the claims that the claimant can bring.

23. What we have here is, in effect, an exclusive jurisdiction clause that may extend to this dispute. It depends on how widely one reads a dispute regarding the execution or interpretation of the service agreement. Equally, the existence of this contract does, as it seems to me, affect the question of targeting under the decision of Birss J in *Omnibill*. When I referred to that case in relation to the first grouping of claims, I indicated a degree of unease regarding the precise applicability of what was said in that case in relation to an infringement by a website of an image that was subject to copyright to this case, which concerns Google's use of caching. In the case of the first grouping of claims, I did not find that the analogy was so far stretched so as to prevent me from granting permission to appeal. However, I do consider that, as regards an infringement by the Monégasque company, there is a real difficulty in concluding that there is a targeting towards England and Wales by a provider of servers for the hosting of websites where that website is pursuant and no doubt in breach of that contract illicitly copied and through that copying arguably copyright-infringed. The argument turns on what law applies, and I am afraid I am unable to conclude that there is a strong enough case in relation to this point to hold that there is a serious issue to be tried on the merits in relation to this matter.
24. It seems to me that there are some extremely difficult questions of law arising out of this interrelationship between the contract with Monaco Telecom and the claims in tort that Mr Wheat seeks to advance. Normally, when a judge says this, that is an indicator that permission to appeal should be granted. However, in this case, it seems to me that the reverse pertains. That is because Mr Wheat's pleading in his Amended Particulars of Claim simply does not address these difficulties. Yet these difficulties exist. The precise interrelation between the contract and the alleged infringements is something that one cannot simply ignore, and the fact that they have not been addressed, as it seems to me, means that the claim is not one that I consider can properly go forward,

even considering the low standard that I am applying in relation to what is only an application for permission to appeal.

25. I also consider the contract between the claimant and Monaco Telecom suggests that the proper forum is actually not England and Wales but Monaco. That is almost always the effect of an exclusive jurisdiction clause and, in this case, it seems to me that this is a clause that is quite widely drafted. Article 35.1 of the contract refers to the case of a dispute regarding the execution or interpretation of the service agreement, and it requires in the first place mandatory dispute resolution, and if that cannot be achieved it refers the dispute to the competent courts of the principality of Monaco. I am not satisfied that this claim is not caught by that clause, and it seems to me that it is a clear indicator that the gravity of this matter inclines towards Monaco and not England and Wales. So, in relation to the second grouping of claims, the Master was correct in refusing permission to serve out of the jurisdiction as against Monaco Telecom and there is no reasonably arguable case that this decision will be varied in terms of outcome on appeal.
26. I move on to the related third grouping of claims, against Google. It seems to me that these claims must stand or fall with the Monaco Telecom claim. The basis of the claim is that Google was told about the cloned website and continued to index it without the consent of Mr Wheat. I am satisfied that this is a claim that is joined at the hip with the claim as against Monaco Telecom in that obviously the question of consent lies central to all of the claims. Because I do not consider that the claim against Monaco Telecom should proceed in this jurisdiction, that must be my conclusion so far as this third grouping of claims is concerned.



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**This transcript has been approved by the Judge.**