



Claim No: IP-2016-000016 19 Feb 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT

IP-2016-000016

Before Deputy High Court Judge Stone (sitting as an Enterprise Judge)

B E T W E E N:

(1) MS JUTHIKA BHAYANI
(2) BHAYANI LAW LIMITED

Claimants

- and -

TAYLOR BRACEWELL LLP

Defendant

ORDER

UPON considering the Claimants' Application dated 12 February 2018, including the evidence of Ms Bhayani set out in that document signed under a statement of truth on 9 February 2018

AND UPON reading the witness statement of Peter Harold Caswell

AND UPON reading the skeleton arguments of Marc Beaumont, Counsel for the Claimants and Jonathan Moss, Counsel for the Defendant

AND UPON reading the skeleton argument in reply of Marc Beaumont, and the email submissions made by Mr Beaumont

AND UPON the Court finding that the Claimants' conduct in relation to the Application was unreasonable

IT IS ORDERED THAT

1. The Claimants' Application is dismissed.

2. The Claimants shall pay the Defendant's costs of the Application pursuant to CPR 63.26(2). These costs shall be assessed at the end of the trial or agreed between the parties.
3. Service of this Order is dispensed with.

Reasons:

1. This is an application to amend the Claimants' Reply and Defence to Counterclaim. Although the amendments are clustered into groups, they impact on 28 paragraphs of the Reply and Defence to Counterclaim, including adding several new defences.
2. The application was accompanied by a draft order that made no provision as to payment of the Defendant's costs of and occasioned by the proposed amendments.
3. The Claim Form in this matter was filed on 8 January 2016. Following the Defence and Counterclaim, the Claimants filed a Reply and Defence to Counterclaim on 24 March 2016, nearly 2 years ago. There was an application for summary judgment heard by HHJ Hacon in December 2016 with a written judgment given very speedily thereafter. Summary judgment was given on most of the Claimants' case. They lost. All that remains of their case is an application to revoke a trade mark.
4. There was a form of order hearing on 2 February 2017, which included a request from the Claimants to keep the matter in the IPEC, even though the vast bulk of what remains of the matter is the Defendant's counterclaim, which is not in relation to intellectual property – it is a partnership dispute between solicitors. A CMC was held on 3 July 2017 and what remains of the matter was, 6 months ago, set down for trial on 28 February 2018 (in 10 days' time) for 2 days.
5. There was a previous application to amend the Claimants' Reply and Defence to Counterclaim signed on 19 December 2017, but not served until 12 January 2018, which was determined by me on 22 January 2018. I rejected that application on the basis that it was hopelessly late.

6. Having received this application from the court registry on 15 February 2018, I indicated that day that I intended to determine it without a hearing, and invited the filing of any additional documents by 4 pm on Friday 16 February 2018. To a 30 paragraph skeleton argument by Mr Beaumont was added, on 16 February 2018, a 59 paragraph skeleton argument from Mr Moss, and, late that evening, a further 58 paragraph skeleton argument in reply from Mr Beaumont. I also received email correspondence from both sides.
7. In the IPEC, the default position is that applications are to be dealt with without a hearing, unless the court considers it necessary to hold a hearing (CPR63.25(3)). This is a matter for the court's discretion, and the party seeking a hearing will need to satisfy the court that a hearing is "necessary", including by setting out in writing why a hearing would be more cost effective. There is a helpful passage in *The Intellectual Property Enterprise Court* (Fox, 2nd Edition, 2016):

"The applications made in a case and how they are handled are of particular importance in the IPEC. The caps on recoverable costs mean that parties are unlikely to obtain full costs recovery, and possibly not anything even approaching that on more complex applications. Multiple, difficult or unanticipated applications in a case may therefore create problems for the smaller and medium-sized enterprises that the IPEC was set up to serve.

Consequently, the IPEC approaches applications with a strong emphasis on proportionality and minimising costs, and its application procedures different in important ways from elsewhere in the High Court."
8. The Claimants' counsel set out the following reasons for holding a hearing (an in person hearing was requested – unfortunately, it does not appear that a telephone hearing was ever considered):
 - a. The proposed amendments are important to Ms Bhayani;
 - b. Fairness and justice require a hearing;

- c. Adverse comment against a party should “only be entertained in open court given the principle of open justice”;
 - d. Efficiency does not replace fairness; and
 - e. “The value of oral advocacy in our system is never to be underestimated”.
9. My attention was also drawn to comments by Sir Robert Megarry in *John v Rees* [1969] 2 All ER 274.
10. To the extent these are reasons, they are reasons that would apply in every, or almost every, case, and clearly the rules, and the whole IPEC system, require otherwise. The rules are clear – the default position is that applications are to be dealt with on the papers. No reasons have been put forward that suggest to me that a hearing is necessary in this case. Indeed, there are various factors that militate against a hearing – including that the trial is in 10 days’ time, and no hearing could be accommodated by the parties’ counsel in this coming week. It is clearly urgent for all parties for this application to be determined quickly. I have therefore determined it on the papers on the basis of my finding that no hearing is necessary.
11. I now turn to the application itself. As the brief chronology set out above amply demonstrates, this application is hopelessly late. Both counsel referred me to *Redd Solicitors LLP v Red Legal Limited* [2012] EWPC 50. In that case, HHJ Birss QC (as he then was) referred to the “exceptional circumstances” required to allow a late amendment. I respectfully agree with what was said in that case, and, as in that case, I find that the amendments proposed in this case engage Rule 63.23(2). It is not an answer to say that the Claimants’ defences under the proposed amendments are strong, and that abrogates the need to demonstrate “exceptional circumstances”. As HHJ Birss QC clearly set out, the first question is whether there are “exceptional circumstances”.
12. The “exceptional circumstances” referred to by the Claimants are:
- a. That new counsel has recently been instructed and wishes to argue the Claimants’ case differently; and

b. The witness statement of Mr Caswell dated 7 February 2018 has recently been provided.

13. I do not accept that change of counsel is an “exceptional circumstance”. It happens all the time. If a change of counsel were to be “exceptional” for these purposes, a party would only need to change counsel in order to obtain pleading amendments at a late stage. Nor is it exceptional that current counsel takes a different view of a case than previous counsel.

14. I also do not accept that there are any “exceptional” revelations in Mr Caswell’s witness statement. That witness statement annexes a number of documents, all of which were signed by or copied to Ms Bhayani. She therefore either had copies, or had access to copies, or was aware of their existence and/or content well before 8 February 2018.

15. I therefore find that there are no exceptional circumstances in this case that would allow me to consider the proposed amendments.

16. If I am wrong in that and the Claimants do actually clear the first hurdle of exceptional circumstances, then I need to consider whether allowing the amendments would be proportionate and meet the cost benefit test: IPEC Guide, section 2.6(f). In my judgment, they do not. In my judgment, the proposed amendments will undoubtedly require additional evidence and argument at trial, and a trial that will already be tight at 2 days (the Claimants now say that the two day estimate was “wrong”) would inevitably run over, and likely run over substantially. I do not accept the submission that these are only legal submissions on known facts that will not jeopardise the trial – especially as they are made for the first time shortly ahead of the trial. For example, under the IPEC rules, trial bundles are to be filed 4 days ahead of the trial – that is now in 4 days’ time. I also note the irrecoverable costs of having to deal with such amendments, even if that were possible in the short time now available.

17. I comment briefly on the proposed amendments:

a. Absence of consideration: I do not accept that this is clearly the complete defence that the Claimants allege. As a practical matter, partnerships, including law firms, change all the time – partners are

added and removed, terms change, and they do not invariably change for the better (or indeed, what is better for one partner may not be better for others). In addition to the novelty of the point at this very late stage, as a question of logic, the Claimants' position does not strike me as arguable. I also accept the Defendant's submission that this is not simply a legal argument, but would require a detailed factual enquiry, including as to any additional benefits Ms Bhayani obtained.

- b. Deletion of old clause 2.6: Again, I do not accept that this is purely a legal argument. If a defence is to be run that Ms Bhayani did not know what she was signing, then significant cross-examination would be required.
- c. Estoppel: Again, this entirely new defence (in fact three new defences in the alternative), made for the first time now by an experienced employment solicitor, raises new facts that will need to be determined. This cannot be done without significantly overrunning the trial.
- d. Loss: As pointed out by the Defendant's counsel, liability and quantum have been split. These are matters for any damages enquiry – they are not matters for now. If the aim is to encourage settlement, these figures can be put in without prejudice or open correspondence. It is inappropriate to include them in amended pleadings for the liability trial.
- e. Restraint of Trade: Again, this is a completely new argument, which requires a detailed factual investigation.

18. It is therefore clear to me that allowing these amendments at this late stage would mean the vacation of the trial date, and would require the transfer of this matter out of the IPEC as the hearing is very likely to exceed 3 days. That is not proportionate. Nor does it meet the cost benefit test. The proposed amendments should not be allowed.

19. In my judgment, this application was always doomed to fail. It was therefore unreasonably brought. The request for a hearing was also unreasonable.

20. The Claimants brought their claim in the IPEC fully cognizant of the regime. Whilst I have applied no higher test to Ms Bhayani, she is, on her own evidence, an experienced litigator, so she, additionally, knew or ought to have known what she was signing up to. When the bulk of her claim was struck out, she asked to keep the case in the IPEC, and that was done, over the objections of the Defendant. Having sought the relative safety of the IPEC costs regime, the Claimants cannot now be heard to complain of the streamlining that that entails.