

# HIGH COURT

## COMMERCIAL

**BETWEEN:**

**Record No. 2019/5278P**

**THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED**

**Plaintiff**

- and -

**EIRCOM LIMITED TRADING AS EIR**

**SKY IRELAND LIMITED**

**SKY SUBSCRIBERS SERVICES LIMITED**

**VIRGIN MEDIA IRELAND LIMITED**

**VODAFONE IRELAND LIMITED**

**Defendants**

**EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 22<sup>nd</sup> day of June, 2021**

1. This is my judgment on an application by the Football Association Premier League Limited (“FAPL”) for an Order extending the terms of the Order previously made by the High Court (Haughton J.) on 15<sup>th</sup> July 2019 (as extended by me on 15<sup>th</sup> June 2020) prescribing measures to be put in place for the blocking of illegal streaming of FA Premier League football matches during the 2021/2022 Premier League season.

2. The named defendants are the major internet service providers (ISPs) in Ireland and for the purpose of the issues raised in these proceedings ‘mere conduits’ as provided for under Directive 2000/31/EC. They have all taken a responsible and reasonable position in response to this application as they did with the previous applications in these proceedings. The position of each of the Defendants on the previous application may be summarised as follows:

- (i) Eircom Limited is neutral in respect of the application and has no comments or changes to the proposed draft Order.
- (ii) The Sky defendants (i.e. the second and third defendants) support the application and are not opposing it and equally have no comments on the draft Order.
- (iii) Virgin Media Ireland Limited is neutral on the application and neutral on the terms of the draft Order.
- (iv) Vodafone Ireland Limited is neutral in respect of the application and the proposed Order.

3. The Order made by Haughton J. on 15<sup>th</sup> July 2019 was in the nature of a “live blocking injunction” and was on fairly complex terms. The judgment delivered by Haughton J., *The Football Association Premier League Ltd v Eircom Ltd & Ors* [2019] IEHC 615 (“*FAPL1*”), sets out the applicable law. Haughton J. directed that the proceedings be stayed and reviewed by the 30<sup>th</sup> June 2020. On 15<sup>th</sup> June 2020, I considered the further evidence provided by FAPL and after hearing the submissions of Mr. Newman S.C. and Mr. Gibbons B.L., I continued the Order to 30<sup>th</sup> June 2021. I gave an ex-tempore judgment in the matter, *The Football Association Premier League Ltd v Eircom Ltd & Ors* [2020] IEHC 332 (“*FAPL2*”).

4. In my judgment, I referred to the judgment of Haughton J. who, in turn, had referred to and applied the principles for “blocking Injunctions” set out by Hogan J. in the Court of Appeal in *Sony Music Entertainment (Ireland) v UPC Communications Ireland Ltd* [2016] IECA 231 (“*Sony*”). I considered the additional evidence in June 2020 and was satisfied that the test applied in *Sony* and *FAPLI* had been satisfied based on the evidence before me. The Order made on that day provided for a further stay of the proceedings until June 2021 and a further review in 12 months.

5. This is an application to further extend the Order for the 2021/2022 Premier League season and for a further stay of the proceedings until 30<sup>th</sup> June 2022. There are significant changes sought to the existing Order. These were outlined by Mr. Newman S.C. and set out in the submissions and the affidavit evidence before the court. The FAPL relies on four affidavits as well as the earlier affidavits filed in support of the June 2019 and June 2020 applications. I should also note that there was a further Order of the High Court made by me on 25<sup>th</sup> November 2020 to update Schedule 1 of the existing Order. The affidavits before the Court today consist of:

- (a) The third affidavit of Mr. Kevin Mark Plumb (Director of Legal Services at FAPL),
- (b) The second affidavit of Mr. George Demetriades (Lead Data Analyst at Friend MTS Limited),
- (c) The second affidavit of Mr. Jiajun Chen (an employee of Sky UK Limited which is the indirect holding company of the Second Defendant and the direct holding company of the Third Defendant) and
- (d) The third affidavit of Ms. Maureen Daly (of Beauchamps who are the solicitors acting for FAPL).

6. Mr. Newman S.C. has directed me to the relevant portions of the above affidavits which support the extension of the Order and the changes sought to be made to the Order. It is unnecessary for me to set out in any detail in this short ruling the basis on which the Order should be extended. The changes are necessary to ensure that the Order is dynamic and reflects technological changes which have occurred during the currency of the existing Order. It is critical to ensure that the Order is effective and if the Order can be circumvented by technological changes or adaptations by those who are operating illegal streaming services, then it will cease to be effective. I am satisfied on the evidence that the amendments sought to the Order are necessary to ensure its effectiveness. The dynamism sought is required in order to avoid the operators of illegal streams circumventing the Order. I have no difficulty with the changes sought to the Order.

7. In the earlier judgments of Haughton J. and of myself in this case and in my judgment in *Union des Associations Européennes de Football v Eircom Ltd & Ors* [2020] IEHC 488 (“*UEFA*”), the relevant legal principles were set out and these can be found at paragraphs 11 *et seq* of the judgment in *UEFA*. I adopt and apply those legal principles for the purposes of this judgment. There is no need to set them out again here.

8. At para 36 of the *UEFA* judgment, I quoted the relevant requirements as set out by Hogan J. in the Court of Appeal in *Sony* for a court to grant a blocking injunction i.e.:

- (i) The order sought must be necessary;
- (ii) The costs involved must not be excessive or disproportionate and the orders made should not be unduly complicated;
- (iii) The cost sharing proposals (if any) must be fair and reasonable;
- (iv) The orders must respect the fundamental rights of the parties affected, including internet users, and

(v) The duration of the proposed injunctions and the provisions for review must be reasonable.

**9.** Two of the requirements mentioned above do not arise in this case i.e. those relevant to cost sharing proposals and costs. The first important requirement is that the orders sought must be necessary. I am quite satisfied that on the basis of the evidence of Mr. Plumb, Mr. Demetriades and Mr. Chen, the extension of the Order, in the terms sought, is necessary to prevent the ongoing illegal streaming of Premier League matches and the amendments or changes sought are necessary to ensure the continued effectiveness of the Order against changes or steps taken by those operating these illegal services to evade the terms of the existing Order. The first requirement of the test is clearly satisfied on the evidence before the court.

**10.** The second requirement is that the Order must respect the fundamental rights of the parties affected including internet users and the rights of the Defendants as internet service providers. In relation to the internet service providers, the Order does adequately protect and respect their position. Paragraph 15 of the Order has been described as an ‘emergency brake’ that may be used by the defendants if required, in certain circumstances, where they reasonably believe suspension is necessary. I also note the provisions in the Order, paragraph 16, that allow the defendants and others to apply to the High Court to vary or discharge the Order if further required. In relation to internet users, their rights are also fully respected. I have considered the evidence before the Court to address the issue of “over-blocking”. This has been considered in all the cases to date and requires the court to ensure that, so far as is possible, there is no over-blocking i.e. preventing or restricting legitimate use. I am satisfied, based on the evidence of Mr. Plumb, Mr. Demetriades and Mr. Chen, that the risk of “over-blocking” is minimised while maintaining the effectiveness of the Order. There is no real or substantial risk of “over-blocking” in continuing and amending the existing Order.

**11.** The final requirement relates to the duration of the Order and the provisions for review. I must be satisfied that they are reasonable. What is sought here is an extension of the Order for the 2021/2022 Premier League season. A one year period was sought and granted by the court in 2019 and 2020 and the same period is now sought for the present Order. The Order of 15 June 2020 also took into account the suspension of the Premier League matches caused by the Covid-19 pandemic. I consider the period of extension sought to be a reasonable period. I must also be satisfied that the period of review is reasonable. It is proposed that the proceedings be stayed for another year and reviewed at that stage, with liberty to apply at any time prior to this date to extend the Order further. That also appears reasonable to me.

**12.** I am satisfied, having considered the evidence of the FAPL and the reasonable and responsible position adopted by the defendants, that the continuation of the Order in the terms sought, with the critical amendments proposed by the FAPL, is necessary, reasonable, not disproportionate and fully respects the fundamental rights of the parties involved including the defendants and internet users. I am also satisfied that the duration of the Order and the provisions for review are reasonable. I will, therefore, make the Order in the terms of the draft Order proposed to the Court with liberty to apply.