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Neutral Citation Number: [2017] EWHC 3342 (IPEC)

Ref. IP-2017-000048

IN THE ROLLS BUILDING

Fetter Lane
London

Date: 6 November 2017

Before

MR RECORDER DOUGLAS CAMPBELL QC

SCOMADI LIMITED and another

Claimants/Respondents

- v -

R A ENGINEERING COMPANY and others

Defendants/Applicants

MR JONATHAN HILL appeared on behalf of the Claimants/Respondents

MR HUGO CUDDIGAN QC appeared on behalf of the Defendants/Applicants

JUDGMENT

6th November 2017, 11.10 – 11.30
(AS APPROVED)

MR RECORDER CAMPBELL QC:

1. I handed down judgment in this case on 27th October this year. On that day, I made various orders consequential on that judgment. One of these was refusing the defendants' application for a publicity order, based on the evidence before me then.

2. I have before me an application by the defendants to vary the order I made on 27th October as follows.

1. The Trial Order is hereby varied so as to include an order that by 4pm on Friday 10 November 2017, the Claimants shall at their own expense:

- (a) publish in a font size no smaller than Arial 11pt the notice set out in Schedule 1 to this Order on each of the web pages accessible at the URLs listed in Schedule 2 to this Order together with a hyperlink to the judgment of Mr Recorder Douglas Campbell QC dated 27 October 2017 (www.bailii.org/ew/cases/EWHC/IPEC/2017/2658.html), the said notice and hyperlink to remain displayed on the said web pages until 10 May 2018 or until further order of the court;
- (b) send to each of the persons or undertakings to whom the Press Release was sent ("the Recipients") and to the Defendants' solicitors a signed and dated letter featuring the same Scamadiv letterhead as the Press Release and containing the text of the notice specified in Schedule 3 to this Order without any additional text of other material;

2. By 4pm on Friday 10 November 2017 the Claimants shall serve on the Defendants' solicitors an affidavit containing the following information:

- (a) the identity and contact details of the Recipients of the Press Release (and the recipients of any substantially similar publication by the Claimants);
- (b) the precise locations of all places where the Press Release, or any substantially similar publication has been published since 27 October 2017, such to include but not be limited to electronic publication; and
- (c) confirmation that the Claimants and each of them have complied with the terms of paragraph 1 of this order.

3. Paragraph 1 is essentially a variation of the trial order so as to include various publicity orders. By paragraph 2c, the defendants seek confirmation by way of an affidavit that the claimants have complied with paragraph one of this order. Paragraphs 3 and 4 relate to costs.

4. The claimants, against whom this application is sought, accept that I have jurisdiction to vary my earlier order, citing the Supreme Court's judgment in **In re L (Children) (Preliminary Finding: Power to Reverse)** [2013] UKSC 8 at [16]-[19]. This was not

disputed by, and indeed it was also relied upon by, the defendants. **In Re L** establishes that this is a broad discretionary power to be exercised with a view to the overriding objective to deal with cases justly: see paragraph [26] thereof.

5. Furthermore, in **Samsung v. Apple** [2012] EWCA CIV 1430, the Court of Appeal did exactly this, ie vary an existing order. In particular the Court of Appeal did make a further order in relation to publicity. However as was pointed out, in **Samsung** it was clarification of a pre-existing order where in this case, there is no such pre-existing order.

6. I pick up the story with the first press release set out by the claimants on 30th October 2017. This stated, so far as material, as follows:

Legal Update

The High Court has now given judgment on the first part of the dispute between this company, Moto GB and Hanway. Our company was successful in relation to the validity of its key registered designs and the infringement of one of those designs by the Royal Alloy GT. In particular our 2004 Registered Community Designs were declared valid and made a different impression particularly when compared to the old Lambretta scooter designs.

The Court has held that Hanway is entitled to make some models by virtue of a contractual licence. This will be subject to the payment of royalties to us. We do not accept the Court's decision on the contractual licence and we are seeking to appeal the same. Unfortunately, therefore, the dispute between the companies continues.

...

Scomadi Ltd

7. This press release was sent out around midday on 30th October 2017 to a variety of UK dealers and service centres, I understand about 43 people in total. The defendant has three complaints about this to which I will come.

8. By way of background, I should say that the defendants served an unsealed application about this press release by letter on the evening of 31st October at 8.35pm. The defendants set out a claim for a malicious falsehood claiming that the press release was incorrect in three ways, which I will address when I come to the substance of it. They also alleged in that letter that the press release was a clear abuse of the court's process. Finally they specifically reserved their right to apply for committal. The claimants' response came on 1st November.

Events were moving fairly quickly at this stage, but essentially, the claimants' response was to acknowledge no more than ambiguity re the words 'infringement.'

9. I now return to the press release which is said to be misleading in three respects.

10. First of all, complaint is made about the second sentence, "*Our company was successful in relation to the validity of its key registered designs and the infringement of one of those designs by the Royal Alloy GT*". It is accepted by the claimants that this is ambiguous because on its face, it suggests that I found that the Royal Alloy GT infringed. In my judgment, the claimants may be forgiven for this because the draft judgment which I handed down in advance of the hand down hearing said the same thing in the very last paragraph. The defendants failed to correct that at the time. Of course, to any lawyer reading my judgment, it was perfectly clear what I meant – see in particular paragraph 75 - but this does reflect that layman and lawyers will often use the word infringement in slightly different ways. I therefore accept there was an ambiguity there.

11. Moving on, this press release states: "*In particular, our 2004 Registered Community Designs were declared valid and made a different impression, particularly when compared to the old Lambretta scooter designs. The court has held that Hanway is entitled to make some models by virtue of a contractual licence. This will be the subject of payment of royalties to us*".

12. So far as the second and third complaints by the defendants are concerned, the defendants say that reference to "*some models*" was misleading because that implies that a different rule or conclusion would apply to other models. It was also said that by referring to "*this will be the subject of a payment of royalties to us*", the press release was inaccurate here as well. The claimants' response is that it is in fact correct to say that Hanway is entitled to make "*some models*" by virtue of a contractual licence because only some models were before me; and to say that "*this will be subject to the payment of royalties to us*" is plainly a reference to the previous sentence and the models referred to therein.

13. When assessing these criticisms, I agree with the claimants. In my judgment, there is nothing very wrong with this press release, apart from what I have held to be an ambiguity on "infringement"; and this ambiguity is something which the defendants themselves could have corrected at an earlier stage, but did not. As for the other criticisms, the mere fact that a lawyer

can tease out extra meanings from a document does not mean a layman would read it in that way.

14. I also accept the evidence of Mr Ian Morris, who is in fact the claimant's solicitor, namely a partner and member of Keit Steinart Levy LLP. He explains in detail how the ambiguous statement came to be made. He exhibits a number of drafts of the press release and says that there was absolutely no intention to deceive. I accept that evidence. There was no real attempt by the defendants to challenge it or even to mention it.

15. Now, that is not the end of the matter because there was evidence from Mr Stephen Oliver, who is the general manager of Moto GB, the third defendant, to the effect that this press release has caused confusion. He gives three particular instances. These are set out in paragraphs [5] to [8] of his fifth witness statement, dated 31st October 2017.

16. The first of them relates to a call, or rather a series of telephone calls, between Mr Oliver and Mr Phil Yardley of QB Motorcycles, one of MotoGB's dealerships. Mr Oliver says that the dealerships, including Mr Yardley, had received the email from Scomadi which enclosed the press release to which I have referred. In paragraph [6], Mr Oliver said as follows,

"I later spoke to Phil Yardley by telephone. In that call, he told me that he was very much confused as to what the outcome of the trial was, because Scomadi's version of events differ to the conversation I had previously had with them following the handing down of the judgment, when I indicated we could sell all our models without any question of infringement."

17. Pausing there, it is obvious that Mr Oliver has had some sort of conversation with Mr Yardley following the handing down of the judgment. I do not have any records of this conversation, if any, because Mr Oliver does not exhibit any. However in this witness statement Mr Oliver appears to say that he told Mr Yardley that *'we could sell all our models without any question of infringement'*. That would have been an incorrect statement to make. There was no finding that *'all our models'* could be sold.

18. Continuing with Mr Oliver's witness statement, Mr Oliver says,

"[Mr Yardley] told me that after having read the Press Release, he would not be placing any orders for the Royal Alloy models until things had developed further and

he was clear what the position was. He told me he was worried he would not be able to sell Royal Alloy stock if consumers were also confused about the legal position.”

19. Now, the reference to things developing further can, in my judgment, only be a reference to the second paragraph of the Press Release, which states, “*We do not accept the court’s decision on the contractual licence and we are seeking to appeal the same.*” This is why the dispute between the companies continues. As the defendants themselves pointed out, nothing else was going to develop apart from the possibility of an appeal. It therefore seems from this hearsay account from Mr Oliver of what Mr Yardley has said to him, in circumstances where I do not know what else (if anything) Mr Oliver said to Mr Yardley, that Mr Yardley seems to be adopting a cautious approach in light of the possibility of an appeal.

20. The next instance of alleged confusion is an email attaching a FaceBook discussion group posting from Heidi at Ital Scooter Limited. That was exhibited at SEO29. The posting from Heidi reads as follows. First, she sets out the substance of the Scomadi press release and then she adds her own comments:

“What do we make of it? Scomadi owns its trademarks, but Hanway can sell its Royalloy models if it pays royalties, who is going to produce the Scooters that Scomadi are selling under their trademark? All a bit confusing, really, seems Hanway have all the aces, seems that if Hanway have a load of scooters and spares ready to go that both Hanway and Scomadi are entitled to sell in the UK, it's obvious who's gonna get first choice. Heidi.”

21. As one analyses what Heidi says, in perhaps more detail than Heidi herself ever intended, it can be seen that her first point is that Scomadi owned its trademarks. That is correct. The second point is that Hanway can sell Royalloy models if it pays royalties. That is also correct. The specific question she asked is: who is going to produce the scooters? That is a relevant question, but it is not something that arises out of any of the three ways in which the defendants said people would be confused by the press release.

22. So far as the third and final example is concerned, Mr Oliver exhibits a WhatsApp message from a dealer on the circulation list of the Scomadi email. This could be any one of 43 different people. The dealer in question has asked Mr Oliver not to identify him. Mr Oliver then sets out the WhatsApp message as follows,

“Scomadi press release ... should I be concerned? They state that the dispute continues and that have so far been successful????”

23. It is difficult to analyse the significance of this absent any context, where there must be some context since it seems unlikely that a WhatsApp message like this would come completely out of the blue. Mr Oliver accepts that he has not identified the dealer and all this unnamed dealer is actually doing is asking whether he should be concerned. He refers to the statement that the dispute continues, which is correct. This seems to be, again, a reference to the second paragraph in the press release. He then refers to the statement that Scomadi had so far been successful. Well, it is true that the press release does actually say in the second sentence, *“Our company was successful in relation to its key registered designs,”* which is true, and then one comes to the ambiguity re *“infringement”*.

24. So, again, it seems to me that having regard to the third party reaction to the press release, the only concern might relate to the ambiguity as regards the treatment of *“infringement”*.

25. That brings me to the second press release which was sent out on 2nd November 2017. I annex a copy of it to this judgment. The claimants’ evidence explains, and it is not disputed, that this was settled by counsel. I have read this and I can find no reason at all to complain about it. It is true that the defendants found three things they could complain about, but in my judgment, none of these would even occur to the lay reader.

26. I also note that there does not appear to have been any further instances of alleged confusion subsequently to the second press release. All three of the alleged instances came in response to the first press release, and all came very quickly. This second press release was actually sent out on 2nd November 2017.

27. As I go through this second press release, it says in the heading, *‘Hanway MotoGB have complained to us that our press release dated Monday, 30th October 2017 regarding, was in some respects misleading’*. That is correct. It goes on to say *“We are pleased to issue this further notice to make this position completely clear.”* I am satisfied it does make the position clear. The legal update in this second press release is, in my judgment, an accurate summary (albeit a short one), of quite a long judgment. It then says towards the end, in the penultimate

paragraph, “*There are aspects of the court decision we do not believe to be correct and so we will be seeking to obtain permission to appeal at the Court of Appeal.*” That is also correct. It even gives a copy of the full judgment of the court together with a link.

28. This second press release was not acceptable to the defendants. In my judgment, this second notice should have been the end of it. However, the correspondence subsequently descended into a number of mainly bad-tempered exchanges.

29. The main point which I wish to draw attention for present purposes is the defendants’ repeated reference to allegations of contempt of court and an abuse of process. This was made in a number of the letters, I believe on 1st and also 2nd November. The letter of 2nd November was written in response to one received at 5.54pm the previous evening. In these letters the defendants fail to give any proper explanation as to their case on contempt and abuse of process, suggesting that their case will somehow emerge in counsel’s skeleton argument. That was a statement made in the defendant’s solicitor’s letter of 2nd November 2017, page two, under the heading of ‘Malicious falsehood, abuse of process, contempt,’ which are all rolled up together. In my judgment, this is not satisfactory. If parties are going to make serious allegations, they have to be prepared to justify them, not just leave it for some other day. Contempt, for instance, carries a maximum sentence of two years’ imprisonment, but all of these allegations, including abuse of process and even malicious falsehood are, in my judgment, serious ones.

30. Then when one got the defendants’ skeleton argument, it still failed to say what the defendants’ case actually was. For instance in paras 26 to 28, in a few short paragraphs of their skeleton argument, the defendants set out some parts of the Contempt of Court Act 1981, but they failed to establish why they said contempt was established. I draw particular attention to s.2(2) of the Act, which says that “*The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced*”. Therefore, there has to be a substantial risk; it has to relate to “*the course of justice in the proceedings in question*” and there must be a substantial risk that such proceedings will be seriously impeded or prejudiced. Moreover, these two high hurdles have to be established to the criminal burden of proof and not the civil one. The defendants do not suggest to the contrary.

31. There is a sub-dispute about whether the proceedings in question are still active, but I am satisfied that they are. However, I fail to see how either of these press releases creates any substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. This is a trial held by a judge, not by a jury, and in those circumstances it is difficult to see any risk at all that the course of justice will be in any way impeded or prejudiced. In any event it seems to me that what happened in this case fell a long way short of proving any of these requirements. At most one press release contained one ambiguity; the undisputed evidence of the claimant's solicitor that the ambiguity was unintended; and it was corrected within 24, perhaps 48, hours of the complaint.

32. So far as abuse of process is concerned, the defendants have made it clear that they rely on the same arguments. In my judgment, that allegation falls for the same reasons.

33. So far as the malicious falsehood allegation is concerned, the defendants have not suggested that I can decide this today without a trial. They nevertheless submit that there is a sufficiently strong case of malicious falsehood to justify the relief sought. When I turn to the elements of the tort, it requires "*false words which are maliciously published and which are calculated to cause and do cause the claimant pecuniary loss*": see eg **Clark and Lindsell on Torts**, 21st edition at 23-10). It seems to me that this is a weak claim and the defendants have difficulties proving all three of the elements of the tort (by which I mean false words; maliciously published; and calculated to cause and do cause the claimant pecuniary loss).

- a. So far as the words are concerned, I have held that there is at worst an ambiguity.
- b. So far as malice is concerned, it seems to me that the defendants have no case at all. I have had a full explanation, which has not been disputed, as to how the words came to be said. It seems to me that the case on malice does not get off the starting blocks.
- c. So far as damage is concerned, one might have thought it was a slightly easier task for the Defendants. However, even assuming there is a loss of sales, it is not clear whether that would be due to the press release, or the mere possibility of an appeal (as appears to have been something which occurred to Mr Yardley). Alternatively any loss of sales may simply be the uninformed speculation by third parties, having nothing to do with the claimants' press release. There may also be other reasons for lost sales.

34. Next, when I turn to the relief sought, para 1a seeks an order that the notice set out in schedule one be printed, essentially, on the defendants' websites, namely www.scomadi.co.uk and www.scomadi.com. It was not explained to me why an order requiring the notice to be published on the website would help, since on the evidence the website played relatively little part in publicising the first press release. In fact, most of the argument was placed on the latter provision, ie an order requiring the claimants to send letters to the recipients of that press release.

35. In this context if I look at the substance of the notice which the defendants wanted the claimants to distribute, the claimants pointed out (and the defendants did not dispute), that it is actually misleading in a number of respects as well. The defendants' proposed notice says as follows:

Notice

"PLEASE NOTE: Trade in the Royal Alloy GT and GP scooter models manufactured by Changzhou Hanwei Vehicle Science & Technology Limited Company and distributed by Moto GB Limited and others is lawful.

None of the Royal Alloy GT and GP scooters infringe Scomadi's intellectual property rights.

Hanway, RA Engineering Limited, and Moto GB Limited, are each entitled to sell the Royal Alloy GT and GP scooters direct to the public and to retailers.

The High Court of England and Wales has held that the statement released by Scomadi on 30 October 2017 was misleading.

The High Court of England and Wales on 3 November 2017 ordered Scomadi to issue this publication to dispel the confusion created by Scomadi's misleading statement.

A copy of the full judgment of the court is available at the following URL:

<http://www.bailii.org/ew/cases/EWHC/IPEC/2017/2658.html>"

36. Thus the first paragraph states, *"Please note, trade in the Royal Alloy GT and GP scooter models manufactured by Changzhou Hanway Vehicle Science and Technology Limited Company and distributed by MotoGP Limited and others is lawful."* That is not true, and I made no such finding. The findings I made in the judgment were limited to the things which were the subject of that action. I made no finding that all Royal Alloy GT and GP scooters whatsoever could be lawfully traded.

37. The second paragraph says *"None of the Royal Alloy GT and GP scooters infringe Scomadi's intellectual property rights"*. That is not correct either. The court has made no ruling as to whether they infringe, for instance, any trademarks or any other intellectual property rights. Indeed, both sides have stressed on numerous occasions that the trial continues, or rather different aspects of this same trial.

38. I therefore conclude that the notice which the defendants want me to order the claimants to publish is at least, if not more, misleading than anything that the claimants themselves produced.

39. Finally, I should make it clear that I do accept the claimants' criticism of the defendants' conduct generally. It does seem to me this application has been pursued in an overbearing and oppressive manner and that the defendants have chosen to make serious allegations which they have been unable to justify. I have considered whether the defendants made these allegations purely and simply as a means of intimidation. This is a difficult question and I prefer to reach no conclusion on the evidence before me. However, if the defendants do the same thing again, the judge considering any such application arising out of that may have to revisit this topic.

40. I also note that although this court is designed for small and medium sized enterprises, the defendants have spent a whisker under £20,000 on this application alone. In normal County Courts, that amount of money could cover a whole trial, or at least a substantial proportion thereof. That supports my conclusion that the defendants have adopted a disproportionate approach.

41. In the result, then, I therefore dismiss the defendants' application insofar as paragraphs one and two are concerned.

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We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge

Annex – Claimants’ second press release

Hanway and Moto GB have complained to us that our press release dated Monday 30 October 2017 regarding was in some respects misleading. We are pleased to issue this further notice to make the position completely clear.

Legal Update

The Intellectual Property Enterprise Court (part of the High Court of Justice) has given Judgment and held that:

- Hanway is entitled to make, sell and distribute its Royal Alloy GT and GP models.
- Neither Hanway nor Moto GB’s dealings in these models infringe our registered designs or unregistered design rights.

Our company was successful in defending the validity of its key registered Community designs, dating from 2004, which was challenged by Hanway. One of those registered designs was held to be used in the Royal Alloy GT. Hanway has accepted that it will be liable to pay us royalties on sales of scooters it makes to that design under a contractual licence between ourselves and Hanway which the Court held to have arisen and to continue in place.

There are aspects of the Court’s decision we do not believe to be correct, and so we will be seeking to obtain permission to appeal these before the Court of Appeal.

A copy of the full judgment of the Court is available at the following URL:

<http://www.bailii.org/ew/cases/EWHC/IPEC/2017/2658.html>