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Case No: IL-2022-000039

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INTELLECTUAL PROPERTY LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday, 6 November 2024

BEFORE:

MR JUSTICE ADAM JOHNSON

BETWEEN:

ARKEYO LLC
(A company organised under the laws of the State of Delaware)

Claimant/Applicant

- and -

METRO BANK PLC

Defendant/Respondent

MR WILLIAM TUSTIN appeared on behalf of the Claimant
MR B NICHOLSON KC and MS K NEZAMI appeared on behalf of the Defendant/Respondent

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE ADAM JOHNSON: These are proceedings between Arkeyo LLC, a company organised under the laws of Delaware, USA, and Metro Bank PLC. The issue I have to address is as to Arkeyo's representation at this case management conference.

2. Since Arkeyo is a company, it cannot appear in person; it must be represented by someone. At an earlier stage, it had representation from English solicitors and counsel, but they are no longer acting. They ceased acting on 2 April 2024, shortly before disclosure was given on 26 April 2024. The nature of the disclosure given is one of the matters Metro Bank has put in issue.

3. The issue of representation has been raised between the parties. The Defendant, Metro Bank, is concerned about ongoing management of the litigation and indeed of the trial if appropriate arrangements are not made. Faced with this, Arkeyo has now made an application under CPR, rule 39.6. That rule permits a company to be represented at trial by an employee if the employee has been authorised and if the Court gives permission. By its present application, Arkeyo seeks such permission.

4. To start with, and having regard to the terms of CPR, rule 39.6, I note that the present hearing is not the trial. On the face of it, rule 39.6 is limited to representation at trial. However, I do not think that the principle established by the rule can be so restrictive, and I will proceed on the basis that permission is required for representation by an employee at other hearings, including a CMC. That seems to be the view the Chancery Guide takes of it at paragraph 2.44, and I note that Soole J tentatively took the same approach in Irama Pte Limited v Formark Scaffolding (Holdings) Limited [2024] EWHC 2309 (KB).

5. Moving on to the relevant facts, the dispute has its origin in a business arrangement for the provision by Arkeyo to Metro Bank of coin counting machines known as "*Magic Money Machines*". A number of issues arise. One is as to the terms of the parties' business arrangement, and specifically whether it was governed by Arkeyo's written terms of business referred to as the "*2010 Contract*". There is then a claim for copyright infringement which rests on the proposition that the software provided by Arkeyo, including what has been referred to as the "*Source Code*", has been

impermissibly reproduced or translated. There is also a claim for misuse of confidential information and trade secrets, which again hinges on allegedly impermissible use of the Source Code or parts of it, either alone or in combination. The case is reasonably well advanced procedurally, at least in the sense that the parties are working towards an 18-day trial currently listed in a five-day window from 3 February 2025.

6. That is the case in a nutshell. As to the immediate background, just a few days ago, on 31 October 2024, the members of Arkeyo, that is to say Mr William Tustin and his wife, Patricia Tustin, passed a resolution resolving to authorise Mr Tustin to extend an offer of part-time employment to a Mr Francis X Taney Jr. Mr Taney is an American attorney based in New Jersey. He has been providing advice to Arkeyo, including in connection with the related proceedings in the United States. Those proceedings are pending on the Northern District of Illinois against a business partner of Metro called Saggezza, Inc.

7. I am told, and have no reason to doubt, that Mr Taney is very familiar with the general background to the issues in the present action. Arkeyo's skeleton argument goes on to say that Mr Taney is, "*capable of causing Arkeyo to comport with its obligations pursuant to the Civil Procedure Rules at this CMC*."

8. The evidence includes a letter from Arkeyo to Mr Taney dated 31 October 2024. This sets out terms of the offer authorised by the board. It is signed by Mr Tustin and countersigned by Mr Taney, so it clear the offer has been accepted. The first part of the letter is as follows:

> "*Dear Frank,*
>
> *Arkeyo LLC is pleased to offer you a part-time employment position with Arkeyo as Arkeyo's Chief Operating Officer and General Counsel. In this role, you will report directly to me. Your responsibilities in this role include the following ...*".

9. A list of five matters is then set out, which includes conducting the litigation against Saggezza Inc. which I have mentioned, referred to as the "*Saggezza Action*". Item 4 in the list is as follows:

> "*Conduct litigation against Metro Bank PLC pending in the High Court of Justice in London (Metro Action)*."

10. The letter then deals with remuneration and other practical matters. It states the following:

> "*Arkeyo will compensate you with a net monthly salary of $8,750. You will also receive a performance-based bonus of 20 per cent (20%) of the net recovery in the Saggezza Action and the Metro Action. As noted above, this offer is for part-time employment and does not preclude you from performing other work for other clients, provided that doing such work does not pose any conflicts that would preclude you from doing so pursuant to any applicable Rules of Professional Conduct*."

11. Based on this letter, Arkeyo submits that Mr Taney is now an employee; that he has been duly authorised to represent it; and thus it seeks the court's permission. It suggests that in the circumstances, and given in particular Mr Taney's background knowledge, granting permission is both warranted and appropriate. Metro Bank resists the application and says that permission should be refused. Its main point is that the recent employment of Mr Taney is really a sham designed to permit someone who is not an English lawyer to conduct litigation in England on terms which include payment of a US-style contingency fee. They say such an arrangement is likely to be illegal and contrary to public policy.

12. Turning to the principles in play, the discretion conferred on the court by rule 39.6 is very broad. Rule 39.6(b) says simply that the company may appear by an employee, if "*the court gives permission*". No particular criteria are specified. Plainly though, the discretion must be exercised in a manner which promotes the overriding objective in rule 1.1, namely, to deal with cases justly and at proportionate cost. Plainly also, the discretion must not be exercised in a manner which promotes illegality or outcomes which are likely to be contrary to public policy.

13. Bearing such matters in mind, I have come to the view that I must refuse the application for Mr Taney to represent Arkeyo. I do so with some reservations, because Mr Tustin has said to me that Arkeyo has limited funding available at present, although that may improve at some point before the end of the year. At any rate, taking what Mr Tustin has said at face value, if Arkeyo is not presently able to afford representation

from advisers in this country but nonetheless does have a value claim to bring, that seems to be just the sort of situation that CPR, rule 39.6 is there to address – i.e. it is there to provide flexibility and to avoid situations arising where a company with a potentially valid claim is left unrepresented before the court.

14. Be that as it may, however, I have very serious concerns about whether, even if an order for representation were otherwise justified, Mr Taney is the right person for the job. In saying that, I mean absolutely no disrespect to him. I am sure he is a very fine attorney and wishes only to do the best he can to protect the interests of his longstanding client. But the issue is one of principle and policy.

15. On this aspect, Metro Bank has put its case very high. It says that the employment offer made to Mr Taney is no more than a sham designed to create the pretence that he is an employee so as to bring someone who is really an independent contractor within the scope of CPR, rule 39.6.

16. I do not go that far, but nonetheless I have serious concerns. Even taken at face value, what the 31 October letter involves is Mr Taney accepting a commission to conduct litigation in London, including I assume by acting as advocate at this hearing and possibly at the trial, and thus exercising rights of audience. Conducting litigation and exercising rights of audience are reserved legal activities under the Legal Services Act 2007 (see ss.12(1)(a) and (b)). Reserved legal activities may only be carried out by persons authorised by an approved regulator, such as the Solicitors Regulation Authority. Certain exemptions exist, but I do not consider that any apply here.

17. The upshot is that I have a real concern that acceding to Arkeyo's application would infringe the restrictions imposed by the Legal Services Act and so be contrary to the policy which limits the conduct of litigation, including advocacy, to persons who are accountable to the appropriate regulators in this jurisdiction. In expressing that concern, I do so as much on behalf of Mr Taney as on behalf of anyone else, because s.14 of the Legal Services Act makes it a criminal offence for any person to carry out a reserved legal activity without proper authorisation. I do not want Mr Taney, who comes before the Court I have no doubt in good faith, to run any such risk, and I think

it would be wrong in principle and as a matter of policy for the Court to encourage him to do so by granting the authorisation Arkeyo seeks on its behalf.

18. In discussions this morning Mr Tustin, who made the present application, said he did not see any difference between an order allowing him to represent the company and an order permitting Mr Taney to do so. I think there is this difference, however, namely that a material purpose for Mr Taney's appointment under his employment letter is to engage him specifically to conduct litigation in this jurisdiction and specifically on the basis that he is an attorney. To put it another way, what he is being employed to do as a US attorney is to conduct regulated activity in this jurisdiction.

19. Wherever the dividing line is to be drawn between what is permissible and what is not, it seems to me that must be on the wrong side of it. I realise that this leads to the rather paradoxical result that the only option left today will be representation by Mr Tustin himself, who is not a lawyer and, as we have discussed, may be less well able to assist the Court with the case management issues it presently has to deal with. All the same, it seems to me that the practical result we are left with and its apparent undesirability in comparative terms does not provide a basis for ignoring or overriding the important policy issues and limitations I have referred to.

20. I should say that I take the view, based on this logic, that Mr Tustin himself is in a different position and should be entitled to represent Arkeyo at least for the purposes of this CMC. I grant him permission for that purpose, including retrospective permission to the extent needed for him to have made the application I am now disposing of

21. A number of issues now arise as to what should happen next. I do not propose to give any firm directions about that for now. I think the course of action from here should be the subject of further discussion and debate between the parties and the Court.

22. What I will do, however, is emphasise certain points made to Mr Tustin in argument this morning, namely that if Arkeyo does have good claims, as he plainly thinks -- and his conviction was evident in his submissions -- then it would plainly be in Arkeyo's interests to secure English legal representation if at all possible and as quickly as possible. I say that because, again as I explained in argument, already there are some

warning signals that the trial presently planned for February next year may be disrupted.

23. As to this, Metro Bank has argued that the case involves a degree of procedural legal and factual complexity. I agree, at least up to a point. The overall complexity may be a little exaggerated in the sense that the case is not out of the norm for cases in the High Court Chancery Division, some of which involve representation by litigants in person. Certainly, however, I think there is potential for increasing confusion and difficulty if the presently outstanding procedural issues are not gripped quickly. It seems to me obvious it will be much better if they are gripped by appropriately qualified advisers who are familiar with the English rules on matters such as disclosure and pleadings.

24. I will give two examples. One is the business of disclosure. It is true that this point cuts both ways, because Arkeyo are critical about Metro Bank's disclosure, but for the moment I am concerned about Arkeyo's disclosure. The point made by Metro Bank is that there has been an unreviewed document dump of about 17,000 documents which do not appear to have been identified by means of keyword searches or screened for relevance by English solicitors.

25. Metro Bank in its skeleton for the present hearing has taken the pragmatic view that the immediate issue of concern is about selecting from the disclosure a subset of documents to be included in the trial bundle. Mr Tustin has therefore said there is no real problem. But it seems to me that there might be, because whatever practical arrangements are made for the production of trial bundles, if there remain doubts about the nature of the disclosure given, which are systemic and fundamental, such doubts are likely to be interrogated further at trial and risk the trial being interrupted or even derailed. That should be a matter of concern for Arkeyo and its directors and shareholders as well as for Metro Bank and the Court.

26. There is also the question of the pleadings and the way Arkeyo's cases on copyright infringement and breach of confidence are put. Following directions given by Master Brightwell on 27 May 2024, Arkeyo served a document headed "*Arkeyo LLC's Statement of Case on Copyright Infringement and Breach of Confidence*". The

S*tatement of Case*" is in the form of a letter rather than pleading and does not contain a Statement of Truth. It seems to me a reasonable inference that it was likely prepared by a US lawyer, or at any rate by someone with a background in US legal practice. I make no criticism of that as such, but Metro Bank points to some shortcomings with this document, and certainly it seems to be the sort of document one might expect to see in a jurisdiction where the purpose of pleading is typically to give only general notice of the type of claim being advanced, with the detail of the case then to be refined by the process of discovery, both documentary and via oral depositions, which is typical in the United States.

27. In response to Metro Bank's criticisms, Arkeyo relies on a report from an expert it has now served, Dr Ricardo Valerdi, whose evidence is that he has been able to detect a number of indicators suggesting strongly that Arkeyo's software was improperly translated by Saggezza, the software provider engaged by Metro Bank. That may be correct, but all the same, the pleaded case somehow needs to be conformed, if possible, with the developing evidence or we will all end up in a muddle at trial. Subject to hearing further submissions, again it seems to me that English advisers are likely to be best placed to deal with that sort of practical question.

28. I will say no more about such matters for now. I will conclude by repeating that, for the reasons given earlier in this ruling, Arkeyo's application in relation to Mr Taney is refused, but I will give permission to Mr Tustin on the limited basis I have described.

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This transcript has been approved by the judge