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Case Notes & Comments

The seductive interface between adult entertainment and *Norwich Pharmacal* relief

Golden Eye (International) Ltd v Telefonica UK Ltd [2012] EWHC 723 (Ch) and 2012] EWCA Civ 1740.

Introduction

This article analyses the High Court ruling in *Golden Eye (International) Ltd v Telefonica UK Ltd*[1] handed down in March 2012 and the subsequent appeal ruling[2] handed down by the Court of Appeal on December 21, 2012.

The claim was brought by Golden Eye (International) Ltd and 13 other claimants against Telefonica UK Ltd, trading as 02. The object of the claim was to obtain disclosure of the names and addresses of customers of 02 who were alleged to have committed infringements of copyright through peer-to-peer file-sharing of pornographic movies, using the Bit Torrent protocol.[3]

The case's importance is linked to the fact that it raised fundamental questions as to the operation of the *Norwich Pharmacal* regime and how to balance the rights of copyright owners and consumers.

The Golden Eye agreements

The copyright material comprised pornographic films. The two principal claimants, Golden Eye and Ben Dover Productions,[4] entered into an agreement in December 2009 whereby the latter granted the former a royalty free worldwide exclusive licence of all copyrights and rights in the nature of copyright in the works listed in Schedule 1 to the agreement for a period of five years. One of the provisions in the agreement empowered Golden Eye to decide what, if any, action to take in respect of any suspected infringements of copyright, and gave it sole control over and conduct of all proceedings on terms that it would bear all the costs and be entitled to retain all sums recovered.

The second group of claimants consisted of the third to fourteenth claimants ('the other claimants'). They were owners of the copyrights in pornographic films. Each of these claimants also entered into an agreement with Golden Eye which granted Golden Eye the exclusive right to act for it in relation to any alleged breaches of copyright arising out of peer-to-peer copying of material on the internet. The agreement gave Golden Eye sole control over and conduct of all claims and proceedings. The agreement also stipulated that Golden Eye would pay to its licensor 25 per cent of 'any revenue' (this last-mentioned percentage was actually higher in respect of three of the licensors).

Norwich Pharmacal authorities referred to by Arnold J

Besides the seminal case, *Norwich Pharmacal Co v Customs and Excise Commissioners*,[5] Mr Justice Arnold also referred to two other *Norwich Pharmacal* rulings of particular pertinence, handed down by the Court of Appeal.

The first, *Totalise plc v Motley Fool Ltd*,[6] involved a *Norwich Pharmacal* application for the disclosure of the name and contact information of a person who had posted defamatory statements on a website. Arnold J referred to the court analysis carried out by Aldous LJ in *Totalise* where he stated that it was plain from Schedule 2, paragraph 6 of the Data Protection Act 1998 that no order should be made for disclosure of a data subject's identity, whether under the *Norwich Pharmacal* doctrine or otherwise, unless the court has first considered whether the disclosure is warranted having regard to the rights and freedoms or the legitimate interests of the data subject.[7]

Aldous LJ drew particular attention to the coming into force in 2000 of the Human Rights Act 1998. Since its adoption, the court must be careful not to make an order which unjustifiably invades the right of an individual to respect for his private life. In this regard, Lord Justice Aldous referred to section 6 of the Human Rights Act 1998 and articles 6 (1) and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Lord Justice Aldous argued that the court faced difficulty in terms of avoiding a possible unjustifiable invasion of a person's private life. Aldous LJ likened the situation to a court refereeing a contest between two parties neither of whom is the person most concerned, ie the data subject. One of the parties will be the data subject's prospective antagonist and the other party will know the data subject's identity and will have undertaken to keep it confidential so far as the law permits and would like to get out of the cross-fire as rapidly and as cheaply as possible.[8]

The second ruling is *Rugby Football Union v Viagogo Ltd*.[9] In that case, the RFU alleged that Viagogo had permitted a large number of tickets for international rugby matches held at the RFU stadium at Twickenham to be advertised on the Viagogo website for sale at prices far above the face value of the tickets. The RFU contended that both the sellers and the purchasers of those tickets committed actionable wrongs against the RFU, it having made strenuous efforts to prevent the sale of such tickets at inflated prices on the 'black market.' The RFU further contended that Viagogo became innocently involved in such wrongdoing and that the court should make a *Norwich Pharmacal* order requiring Viagogo to identify the persons advertising and selling such tickets and identifying the tickets so sold by block, row, seat number and price.

At first instance, Tugendhat J identified five issues for decision:

1. Had arguable wrongs been committed against the RFU?
2. Was Viagogo mixed up in those arguable wrongs?
3. Was the RFU intending to try to seek redress for those wrongs?
4. Was disclosure of the information which the RFU required necessary for it to pursue that redress?
5. Should the court exercise its discretion in favour of granting relief?

Tugendhat J answered all five questions in the affirmative.

The Court of Appeal (Longmore LJ, Patten LJ and Rafferty LJ) proceeded on the basis that it had to be shown that the disclosure was both necessary and proportionate, and affirmed Tugendhat J's decision.

In relation to the questions of necessity and proportionality, Longmore LJ said that the trial judge had concluded that the RFU had no available means of finding out the information it was seeking other than through Viagogo and that the making of the order was therefore necessary.[10]

Longmore LJ saw no plausible suggestion as to how the RFU could obtain information about the identity of those selling tickets for more than their face value. Consequently, he believed that a *Norwich Pharmacal* order was indeed necessary and he agreed with the trial judge's decision under that particular head.

As regards the matter of proportionality, that was dealt with at paragraphs 28 and 29 of the Court of Appeal's ruling.

With regard to the issue of proportionality, Longmore LJ stated that:

> *'Once it is established that there is arguable wrongdoing by unidentified individuals and that there is no realistic way of discovering the arguable wrong doers other than by a Norwich Pharmacal order, then it will generally be proportionate to make such an order revealing the identity of those arguable wrongdoers.'*[11]

Lord Justice Longmore went on to state that there can be no reasonable expectation of privacy in respect of data which reveal such arguable wrongs, and Viagogo's own conditions of business pointed out to their customers that there may be circumstances in which their personal data will be passed on to others. In Longmore LJ's view, the fact that Viagogo's conditions of business contemplated that personal data of their customers may be revealed was not wholly irrelevant to proportionality.[12]

The court ruled that the requirement that Viagogo disclose a limited amount of personal data be deemed proportionate because there was no other way in which arguable wrongdoing could be exposed. The court went on to say that in that case, as in many other *Norwich Pharmacal* cases, necessity and proportionality may go hand in hand.[13] The terms of the order must be proportionate but as the only personal data ordered to be revealed were the names and addresses of the arguable wrongdoers, then that seemed both proportionate and just to Longmore LJ.[14]

The evidence of infringement

One particularly interesting part of the High Court's ruling in *Golden Eye* was that pertaining to the technical evidence and issues of traceability. At paragraph 103 of the judgment, Arnold J set out the basic position with which all the parties agreed. It can be summarised as follows:

1. Most ISPs (internet service providers) allocate IP (internet protocol) addresses to consumers dynamically, so that a particular IP address is allocated for a few hours, days or possibly weeks.
2. Since 2009, ISPs which have been served with the relevant statutory notice are required by UK law to retain records of which customer was using which IP address at any particular time for a period of one year.
3. It is technically possible, using appropriate monitoring or tracking software, to identify IP addresses which are participating in P2P file sharing of particular files at particular times.
4. For the results to be reliable, it is important to ensure that the monitoring software is functioning correctly. In particular, it is vital that the computer on which it is running has a correctly synchronised clock.
5. Importantly, even if the monitoring software is functioning correctly, ISPs sometimes misidentify the subscriber to whom the IP address which has been detected was allocated at the relevant time. This can occur for example because of mistakes over time zones.
6. Even if the monitoring software is functioning correctly and the ISP correctly identifies the subscriber to whom the IP address which has been detected was allocated at the relevant time, it does not necessarily follow that the subscriber was the person who was participating in the P2P filesharing which was detected.

There are a number of alternative possibilities, many linked to erroneous identification. What can be said with certainty is that there is always an unknown percentage of errors.

Mr Justice Arnold then went on to describe the following five alternative possibilities:[15]

1. The IP address identifies a computer and someone else in the same household (whether a resident or a visitor) was using the computer at the relevant time (which might be with or without the knowledge of the subscriber).
2. The IP address identifies a router and someone else in the same household (whether a resident or a visitor) was using a computer communicating via the same router (which might be with or without the knowledge of the subscriber).

3 The IP address identifies a wireless router with an insecure (either open or weakly encrypted) connection and someone outside the household was accessing the internet via that router (in all probability, without the knowledge of the subscriber).

4 The IP address identifies a computer or router, the computer or a computer connected to the router has been infected by a Trojan and someone outside the household was using the computer to access the internet (almost certainly, without the knowledge of the subscriber).

5 The IP address identifies a computer which is open to public use, for example in an internet cafe or library.

In assessing the evidence, Arnold J stated that the claimants' evidence was sufficiently cogent to establish a good arguable case that:

- P2P filesharing of the claimants' copyright works took place via the IP addresses and at dates and times identified by Mr Torabi, and
- many, but not all, of the subscribers to whom those IP addresses were allocated by 02 at those dates and times were persons engaged in such file sharing.[16]

Proportionality of the order sought

In addition to the reasons accepted by the Court of Appeal in *RFU v Viagogo,* there were two further reasons why it was necessary to consider the proportionality of the order sought by the claimants. Firstly, Article 3 (2) of the Enforcement Directive[17] imposes a general obligation to consider the proportionality of remedies for the infringement of IPRs, including orders for the disclosure of the identities of infringers.[18]

Secondly, the CJEU has held that, when adopting measures to protect copyright owners against online infringement, national courts must strike a fair balance between the protection of IPRs guaranteed by Article 17 (2) of the Charter of the Fundamental Rights of the European Union ('the Charter') and the protection of the fundamental rights of individuals who are affected by such measures, and in particular the rights safeguarded by articles 7 and 8 of the Charter.[19]

Correct approach to considering proportionality

In Mr Justice Arnold's view, the correct approach to considering proportionality could be summed up in the following four propositions.[20] First, the claimants' copyrights were property rights protected by article 1 of the First Protocol to the ECHR and IPRs within article 17 (2) of the Charter. Secondly, the right to privacy under article 8 (1) ECHR/article 7 of the Charter and the right to the protection of personal data under article 8 of the Charter were engaged by the present claim. Thirdly, the claimants' copyrights are 'rights of others' within article 8 (2) ECHR/article 52 (1) of the Charter. Fourthly, the approach laid down by Lord Steyn in *Re S*,[21] where both article 8 and article 10 ECHR rights were involved, was also applicable where a balance fell to be struck between article 1 of the First Protocol/article 17 (2) of the Charter on the one hand and article 8 ECHR/articles 7 and 8 of the Charter on the other hand. That approach is as follows:

1 Neither article as such had precedence over the other.

2 Where the values under the two articles were in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case was necessary.

3 The justifications for interfering with or restricting each right must be taken into account.

4 Finally, the proportionality test – or 'ultimate balancing test' – must be applied to each.[22]

Mr Justice Arnold went on to summarise the claimants' position as follows.[23] The claimants were owners of copyrights which have been infringed on a substantial scale by individuals who have been engaged in P2P filesharing. The only way in which they could ascertain the identity of those individuals and seek compensation for past infringements was by:

1 obtaining disclosure of the names and addresses of the intended defendants;

2 writing letters of claim to the intended defendants seeking voluntary settlements; and

3 where it was cost-effective to do so, bringing proceedings for infringement.

The judge then went on to summarise the position of the intended defendants with the assistance of the Consumer Focus submissions.[24]

He stated that it was likely that most of the intended defendants were ordinary consumers, many of whom were probably on low incomes without ready access to legal advice, particularly specialised legal advice of the kind required for the present claim. He acknowledged that the grant of the order sought would invade their privacy and impinge upon their data protection rights. Furthermore, it would expose them to receiving letters of claim and might expose them to proceedings for infringement in circumstances where they might not be guilty of infringement.

In addition, the subject matter of the claim might cause them embarrassment, a proper defence to the claim would require specialised legal advice (that they might not be able to afford) and, they might not consider it cost-effective to defend the claim even if they were innocent.

Consideration of the claim by Golden Eye and Ben Dover Productions

Mr Justice Arnold deemed that Golden Eye and Ben Dover Productions, the principal claimants, had a good arguable case and that many of the relevant intended defendants had infringed their copyrights.[25] Arnold J was satisfied that the claimants intended to seek redress for those wrongs and that disclosure was necessary to enable them to do so. In those circumstances, he concluded that the claimants' interests in enforcing their copyrights outweighed the intended defendants' interest in protecting their privacy and data protection rights.[26] Therefore, it was proportionate to order disclosure, provided the order and the proposed letter of claim were framed so as to properly safeguard the legitimate interests of the intended defendants, and, in particular, the interests of intended defendants who have not in fact committed the infringements in question.[27]

However, as regards the other claimants, Mr Justice Arnold took a far stricter line.

He believed it was inappropriate, when balancing the competing interests, to make an order which endorsed an agreement under which the other claimants surrendered total control of the litigation to Golden Eye and Golden Eye received about 75 per cent of the revenues in return.[28] Mr Justice Arnold considered that that would be tantamount to the court sanctioning the sale of the intended defendants' privacy and data protection rights to the highest bidder.[29]

Court of Appeal ruling

The key section of the Court of Appeal's judgment,[30] handed down on December 21, 2012, is contained in paragraphs 25-30.

There, Lord Justice Patten considered the other claimants'[31] appeal against the refusal of the order on two related grounds. Firstly, the other claimants argued that it was both illogical and inconsistent for the High Court to deny them *Norwich Pharmacal* relief merely because they had chosen to pursue their claims with the assistance of Golden Eye under arrangements which Mr Justice Arnold had previously found to be both lawful and not part of a speculative invoicing scheme.[32]

Secondly, they took issue with Mr Justice Arnold's statement[33] that to grant the order would amount to the court sanctioning the sale of the intended defendants' privacy and data protection rights to the highest bidder. They contended that such statement was both wrong in itself and also contradicted the judge's own views expressed in paragraph 113 of the judgment that this was a legitimate commercial arrangement for the other claimants to enter into in order to vindicate their IPRs.

Patten LJ found both the other claimants' criticisms well founded. He also opined that Mr Justice Arnold's refusal to grant the *Norwich Pharmacal* relief to the other claimants was based on his disapproval of the recovery sharing arrangements with Golden Eye which was confirmed by his statement that to make the order sought would be tantamount to the court sanctioning the sale of the intended defendants' rights to the highest bidder.[34]

Lord Justice Patten stated that he found those reasons difficult to follow. He went on to say that the court was not sanctioning the sale of anything. As Mr Justice Arnold had already held that the litigation arrangements (between the other claimants and Golden Eye) were neither unlawful nor a money-making exercise designed to take advantage of the vulnerability of the subscribers, Patten LJ could see no justification for refusing relief based on a disapproval of those arrangements. Indeed, he found it difficult to articulate what that disapproval could have been based upon.[35]

Lord Justice Patten further stated that with Mr Justice Arnold's safeguards[36] in place, it seemed to him that the intended defendants were as well protected against the risks identified in court as the court could achieve consistently with the enforcement of the claimants' own property rights. In essence, that was the point at which the balance seemed to tip in favour of making the *Norwich Pharmacal* order just as it did in relation to Golden Eye and Ben Dover Productions previously.[37]

Nor did Lord Justice Patten believe that the interposition of Golden Eye would affect the balance to be struck. Mr Tritton (acting on behalf of the Open Rights Group) had contended that one objectionable feature of the arrangements with Golden Eye was that it would become privy on disclosure to the otherwise protected data of the intended defendants even though it was not asserting any property rights of its own.[38]

However, this objection had not troubled Mr Justice Arnold. Nor did Patten LJ believe Mr Tritton's contention to be of substance. In essence, Golden Eye would not be able to use any of the disclosed information received through its solicitors except for the purpose of enforcing the IPRs of the other claimants.[39] Since the enforcement of the other claimants' IPRs justified the disclosure sought, the interposition of Golden Eye on those terms did not affect the balance to be struck.[40]

For those reasons, Lord Justice Patten allowed the appeal, with the Master of the Rolls and Lord Justice Sullivan concurring.

Conclusions

In the High Court, Mr Justice Arnold referred to *Totalise* and *Rugby Football Union.*

In *Totalise,* Aldous LJ made it clear that disclosure of a data subject's identity can only be warranted after the rights and freedoms or the legitimate interests of the data subject (under the Data Protection Act 1998) have first been taken into account. Lord Justice Aldous also drew attention to the Human Rights Act 1998 and the obligation it places on the UK courts to respect the private lives of individuals. Any invasion of an individual's private life must be justified.

In *Rugby Football Union*, the Court of Appeal proceeded on the basis that it had to be shown that the disclosure was both necessary and proportionate.

Consideration of the proportionality of the remedy sought was also required under the enforcement Directive (and this covered disclosure of the identities of infringers). In addition, the CJEU has ruled that national courts must strike a fair balance between the protection of IPRs and the fundamental rights of individuals under the Charter when adopting measures to protect copyright owners. The fundamental rights of individuals refered principally to the right to respect for private and family life (art 7 of the Charter) and the right to the protection of personal data concerning him or her (art 8 of the Charter).

Mr Justice Arnold summed up the correct approach to proportionality by way of the four propositions described earlier.

As regards the actual appeal, in some ways what was determinative was Patten LJ's difficulties in following the reasoning of Arnold J. Mr Justice Arnold had refused *Norwich Pharmacal* relief to the other claimants because of his disapproval of the recovery sharing arrangements between the other claimants and Golden Eye. But, this stance seemed to contradict Mr Justice Arnold's earlier holding that the litigation arrangements (between the other claimants and Golden Eye) were not unlawful. For that reason, Patten LJ could see no justification for refusing relief to the other claimants.

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Notes

1 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch).
2 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740.
3 For a comprehensive account of the workings of the Bittorrent P2P protocol see *Dramatico Entertainment Limited v British Sky Broadcasting Limited* [2012] EWHC 268 (Ch) [19] – [20].
4 Ben Dover Productions is a partnership between Lindsay Honey and Linzi Drew Honey. Lindsay Honey is also a director of Golden Eye. Under the pseudonym Ben Dover, he directed, produced and starred in a series of pornographic films. Ben Dover Productions is the owner of the copyright in those films. Golden Eye is owned 50/50 by Mr Becker and Mr Honey.
5 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.
6 *Totalise plc v Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233.
7 Ibid [24].
8 Ibid [26].
9 *Rugby Football Union v Viagogo Ltd* [2011] EWCA Civ 1585.
10 Ibid [25] et seq.
11 Ibid [28].
12 Ibid.
13 Ibid [29].
14 Ibid.
15 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 [103].
16 Ibid [105].
17 Directive 2004/48/EC on the enforcement of intellectual property rights (Corrigendum to Dir 2004/48/EC [2004] OJ L195/16).
18 Case C-324/09 *L'Oreal SA and Others v eBay International AG and Others* [2011] ECR I-0000, paras 139-144.]
19 Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271, paras 61-68; case C-70/10 *Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-0000, paras 42-46, 50-53.
20 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 [117].
21 *Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593 [17].
22 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 [117].
23 Ibid [118].
24 Ibid [119].
25 Ibid [145].
26 Ibid.
27 Ibid.
28 Ibid [146].
29 Ibid.
30 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740.
31 That is, third claimant to thirteenth claimant inclusive.
32 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740 [25].
33 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 [146].
34 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740 [28].
35 Ibid.
36 Mr Justice Arnold made various amendments to the proposed order to include: removing various recitals from the order to avoid giving the impression that the court had already made a finding of infringement against its recipients. In addition, Arnold J removed an implicit threat of publicity following the commencement of proceedings. He also objected to certain aspects of the letter of claim (contained in the draft order). For example, as drafted, the letter of claim gave any reader the impression that the court had already made a finding of infringement and failed therefore to make clear the possibility that the addressee might not be responsible for the downloading of the relevant files. Mr Justice Arnold also objected to the arbitrary figure of £700 claimed in the letter. As the scale of the infringements appeared to be largely unknown and could not be quantified without further disclosure, Arnold J stated that there was no established basis for a claim for substantial or additional damages. Instead, what was acceptable in his view was an indication by the claimants that they would be prepared to accept a lump sum in settlement but not specifying a figure in the initial letter. He stated that the settlement sum should be individually negotiated with each intended defendant. See *Golden Eye (International) Ltd v Telefonica* [2012] EWCA Civ 1740 [21] – [23]
37 *Golden Eye (International) Ltd vs Telefonica* [2012] EWCA Civ 1740 [29].
38 Ibid.
39 Ibid.
40 Ibid.