[GB] The High Court determines jurisdiction in online trademark infringement case

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On 21 November 2018, the High Court of Justice in England held in EasyGroup Ltd v Easy Fly Express Ltd & Chowdhury that a court had erred in granting permission to serve the Claim Form and Particulars of Claim on the defendants outside the jurisdiction. This was because the claimant had no real prospect of establishing that the defendant had targeted the UK and EU markets.

The claimant in this case was the well-known proprietor of several "easy-" prefixed registered UK and EU trademarks, including the words "EasyJet" and "easyFlights", registered in relation to the transportation of goods by air. The defendants were Easy Fly, a Bangladeshi airline company and Mr Chowdhury, its chairman, who offer and provide airline cargo services under the sign "EasyFly". At the date of issue of the claim, Mr Chowdhury was also the registrant of the domain name www.easyfly-express.com from which Easy Fly marketed its services.

EasyGroup contended that the similarity between their registered trademarks and the defendants' sign was "striking" and that the defendants "imitated" EasyGroup's get-up (including their branded aeroplanes and distinctive house style). As such, the defendants' use of the "EasyFly" sign allegedly infringed the trademarks of the claimant company and amounted to passing off. In September 2017, Deputy Master Lloyd granted permission to serve a trade mark infringement claim on the defendants outside the jurisdiction in Bangladesh. The defendants' case was, however, that the court had no jurisdiction to do so.

Considering that the defendants' company is established in Bangladesh, the High Court in England had to apply three key criteria before granting permission to serve out of the jurisdiction, as established in AK Investment CJSC v. Kyrgyz Mobil Tel Ltd (2011), namely the claimant was required to satisfy the court that: first, there was a "real" (as opposed to a fanciful) prospect of success on the claim; secondly, there was "a good arguable case" that the claim against the foreign defendant could pass through at least one of the so-called jurisdictional "gateways" for service of proceedings outside the jurisdiction (as set out in the Civil Practice Directions); and thirdly, that in all the circumstances, England was "clearly or distinctly the appropriate forum" for the dispute.

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As regards the first criterion, the High Court concluded that EasyGroup did not have in the instant case a real prospect of establishing that the defendant's airline had targeted the European Union and the United Kingdom specifically. Easy Fly had never offered flights to anywhere in Europe and had no plans to do so. The bulk of its business was transporting food within Bangladesh and its customers were predominantly Bangladeshi companies. Also, it had never had a customer from anywhere in Europe. Arnold J. was "unimpressed" with EasyGroup's claim that the defendants' website and Facebook page were in English. The judge observed that English was widely spoken in business in Bangladesh and was the dominant language used on websites worldwide. Moreover, it was obvious from the defendants' website that Easy Fly did not have "anything remotely resembling a global reach" and was at the time "only targeting China and the Middle East." The resemblance between Easy Fly's sign and the EasyGroup's trademarks and get-up was a relevant factor, but it was not sufficient to lead the average UK or EU consumer to believe that the defendants' website or Facebook page were targeted at them. Finally, the recent Google search relied upon by EasyGroup, which generated the defendants' website as the second result when searching for "cargo flight Bangladesh," did nothing to suggest that the service was aimed at Europe.

As regards the remaining AK Investment CJSC criteria, the High Court held that EasyGroup had an "unanswerable case" in relation to one or more of the gateways relied upon, that is, EasyGroup sought an injunction to restrain the doing of acts within the United Kingdom; they relied upon UK registered trademarks, which were property situated within the United Kingdom; and lastly, the English High Court was an EU Trade Mark Court and thus had jurisdiction to hear claims related to EU trade marks. In terms of the third criterion above, it was plain in Arnold J.'s view that, had EasyGroup had a real prospect of success, England would have been the appropriate forum for the trial of the claim.

For all these reasons, Arnold J. acceded to the defendant's application for an order that the High Court had no jurisdiction to hear EasyGroup's claim.

EasyGroup Ltd v Easy Fly Express Ltd & Anor [2018] EWHC 3155 (Ch) (21 November 2018)

https://www.bailii.org/ew/cases/EWHC/Ch/2018/3155.pdf

AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors (Isle of Man) (Rev 2) [2011] UKPC 7 (10 March 2011)

https://www.bailii.org/uk/cases/UKPC/2011/7.html

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