Claim No: 1CF00072

IN THE CARDIFF COUNTY COURT

2 Park Street
Cardiff
Wales CF10 1ET

Friday, 13 May 2011

BEFORE:

HIS HONOUR JUDGE JARMAN QC

BETWEEN:

THE OFFICE OF FAIR TRADING

Applicant/Claimant

- and -

ARORA TECH LIMITED & MR PAVAN ARORA

Respondent/Defendant

MR M PURCHASE (instructed by The Office of Fair Trading) appeared on behalf of the Claimant

The Defendant did not appear.

Approved Judgment

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1. JUDGE JARMAN: This is a claim brought by the Office of Fair Trading against two defendants, Arora Tech Limited and Mr Pavan Arora. The claim is issued under part 8 of the Civil Procedure Rules and seeks against each defendant (1) an enforcement order against them under section 217 of the Enterprise Act 2002; (2) an injunction against each defendant under Regulation 27 of the Consumer Protection Distance Selling Regulations 2000 (SI 2000/2334); (3) an information notice enforcement order against each defendant under section 227 of the Enterprise Act 2002.

2. The background of the matter is set out in the evidence before me. Since the issue of the claim, neither defendant has engaged with the court process. Mr Arora is a director, along with his wife, of Arora Tech Limited. I understand from Mr Purchase, counsel for the Office of Fair Trading, that Mr Arora did contact his instructing solicitor yesterday with a view to seeing what was likely to happen today but it did not appear that he wished to dispute any of the evidence which has been filed in this case. Neither he nor the company has appeared or is represented today.

3. The background of the matter very briefly is that Mr Arora, as a personal trader, set up a website in the autumn of 2009 called shopfortech. During the course of the operation of that website, and I understand that currently it appears no longer to be functioning, the Office of Fair Trading received 82 complaints in relation to computer software goods offered for sale via that website. The complaints related to a failure to supply those goods, a failure to refund for goods cancelled and a failure to respond to attempts to contact the supplier.

4. The situation developed in the early part of 2010 when a further website was set up, through the business of the first defendant, known as esavetoday.com. Again, similar complaints were made. It is the case for the Office of Fair Trading that the business moved from shopfortech to esavetoday and continued to engage in the conduct which gave rise to the initial complaints. The websites promised either next day delivery of the goods, or an express same day delivery, or an express delivery within one to three days. All of those services were advertised for an extra cost. Another alternative offered was free delivery via Royal Mail with first class post provision.

5. 93 complaints were received from all parts of the United Kingdom dealing with similar problems. 83 of those complaints related to a failure on the part of the supplier to send the ordered product. Most of those related to a failure to do so after 30 days. Some 45 of those were complaining that they had still not received the goods by early 2010, having ordered them in the autumn of 2009. The inference I am invited to draw from that is that the suppliers, whether it be that the first or second defendant, did not have the goods to send when they were ordered. Next there were some 23 specific complaints about a failure to provide a refund. 14 of those complainants had sent a cancellation notice to the supplier. Some have received refunds from their credit or debit card companies but many, according to the evidence filed, are still out of pocket. On 21 January 2010, that evidence shows, Mr Arora promised to the Office of Fair Trading that the refunds would be made. By October 2010, according to the witness statements filed many of which are from the consumers themselves, that failure was continuing.

6. Furthermore, there was a process known as consultation whereby the Office of Fair Trading contacted Mr Arora to ascertain whether there had been compliance with an

undertaking which he signed, and was also signed by his wife, on 9 June 2010. That undertaking runs for some four pages. The undertaking was by Mr Arora, as a trader pursuant to section 219 of the Enterprise Act 2002, that he would not continue or repeat the conduct described in sections 219(1) and (2); that he would not continue the conduct described in sections 219(3) and would ensure that all outstanding instances of remedial conduct would take place within 14 days of signing that indication; that he would not engage in either prohibited or continue the remedial conduct in the course of his business or another business; and that he would not consent or connive in the carrying out of the prohibited conduct or the continuance of the remedial conduct by a body corporate with which he had a special relationship. Section 219(1) set out the prohibited conduct including domestic infringements which harm the collective interests of consumers in the United Kingdom, most notably by breaches of contract and infringements of the Sale of Goods Act 1979. Paragraph 2 set out what was called Community infringements, that is infringements under regulations passed by the United Kingdom parliament to give effect to legislation emanating from the European Union, most notably the Consumer Protection from Unfair Trading Regulations 2000 and the Distance Selling Regulations 2000 and the Electronic Commerce (EC Directive) Regulations 2002. Paragraph 3 set out the remedial conduct, again, as continuing conduct which harms the collective interests of consumers in the United Kingdom and made specific reference to the Distance Selling Regulations 2000 and breaches of contract.

7. The similar undertaking was given by Arora Tech Limited on the same day, again signed by both Mr and Mrs Arora. On 10 June 2010 the Office of Fair Trading wrote to Mr Arora under section 224 of the Enterprise Act 2002 requiring the following information: (1) a list of all purchases made on the websites operated either by him personally or by a company of which he was a director, including shopfortech.com, esavetoday.com and pricebustersuk.com; (2) evidence of the delivery of the items purchased with the date of dispatch and confirmation that the items were in stock at the time of dispatch or, where delivery had not occurred, evidence of a refund of the purchase price; and (3) a list of any purchases which have not been delivered or refunded giving the reasons for each.

8. There was then an exchange of emails between Mr Arora and a Mr Peyton who is an officer of the Office of Fair Trading in July and August 2010. On 12 July 2010 the Office of Fair Trading again wrote to Mr Arora, this time at his home address, referring to the undertakings and again seeking evidence of compliance. There was a further exchange of emails but that brought forth no evidence that satisfied the Office of Fair Trading of compliance. Accordingly on 12 November 2010, the Office of Fair Trading wrote to Mr Arora at his business address in Atlas Road, Canton, Cardiff saying that, because he had failed to respond to that correspondence, the Office of Fair Trading was preparing to issue County Court proceedings under part 8 of the Act and that is what took place.

9. The law on the matter is somewhat complex and I set it out below:
Enterprise Act 2002:

> "Section 211 Domestic infringements
> (1)In this Part a domestic infringement is an act or omission which—
> (a) is done or made by a person in the course of a business,

(b) falls within subsection (2), and
(c) harms the collective interests of consumers in the United Kingdom.
(2) An act or omission falls within this subsection if it is of a description specified by the Secretary of State by order and consists of any of the following—
(a) a contravention of an enactment which imposes a duty, prohibition or restriction enforceable by criminal proceedings;
(b) an act done or omission made in breach of contract;
(c) an act done or omission made in breach of a non-contractual duty owed to a person by virtue of an enactment or rule of law and enforceable by civil proceedings;

212 Community infringements
(1)In this Part a Community infringement is an act or omission which harms the collective interests of consumers and which—
(a) contravenes a listed Directive as given effect by the laws, regulations or administrative provisions of an EEA State,
(b)contravenes such laws, regulations or administrative provisions which provide additional permitted protections.
(c)contravenes a listed Regulation, or
(d)contravenes any laws, regulations or administrative provisions of an EEA State which give effect to a listed Regulation.

217 Enforcement orders
(1) This section applies if an application for an enforcement order is made under section 215 and the court finds that the person named in the application has engaged in conduct which constitutes the infringement.
(2) This section also applies if such an application is made in relation to a Community infringement and the court finds that the person named in the application is likely to engage in conduct which constitutes the infringement.
(3) If this section applies the court may make an enforcement order against the person.
(4) In considering whether to make an enforcement order the court must have regard to whether the person named in the application—
(a) has given an undertaking under section 219 in respect of conduct such as is mentioned in subsection (3) of that section;
(b) has failed to comply with the undertaking.
(5) An enforcement order must—(a)indicate the nature of the conduct to which the finding under subsection (1) or (2) relates, and(b)direct the person to comply with subsection (6).
(6) A person complies with this subsection if he—
(a) does not continue or repeat the conduct;
(b) does not engage in such conduct in the course of his business or another business;
(c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3)).

227 Notices: enforcement

(1) If a person fails to comply with a notice given under section 224 or 225 the enforcer who gave the notice may make an application under this section.
(3) An order under this section may require the person to whom the notice was given to do anything the court thinks it is reasonable for him to do for any of the purposes mentioned in section 224 or 225 (as the case may be) to ensure that the notice is complied with."

Consumer Protection (Distance Selling Regulations) 2000:

"Interpretation
3(1) In these Regulations ...
"distance contract" means any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service provision scheme run by the supplier who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded;
"means of distance communication" means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties; and an indicative list of such means is contained in Schedule 1;

Contracts to which these Regulations apply
4. These Regulations apply, subject to regulation 6, to distance contracts other than excepted contracts.

Recovery of sums paid by or on behalf of the consumer on cancellation, and return of security
14(1) On the cancellation of a contract under regulation 10, the supplier shall reimburse any sum paid by or on behalf of the consumer under or in relation to the contract to the person by whom it was made free of any charge, less any charge made in accordance with paragraph (5)
(3) The supplier shall make the reimbursement referred to in paragraph (1) as soon as possible and in any case within a period not exceeding 30 days beginning with the day on which the notice of cancellation was given.

Performance
19(1) Unless the parties agree otherwise, the supplier shall perform the contract within a maximum of 30 days beginning with the day after the day the consumer sent his order to the supplier.
(2) Subject to paragraphs (7) and (8), where the supplier is unable to perform the contract because the goods or services ordered are not available, within the period for performance referred to in paragraph (1) or such other period as the parties agree ("the period for performance"), he shall—
(a)inform the consumer; and

(b)reimburse any sum paid by or on behalf of the consumer under or in relation to the contract to the person by whom it was made.
(4) The supplier shall make the reimbursement referred to in paragraph (2)(b) as soon as possible and in any event within a period of 30 days beginning with the day after the day on which the period for performance expired."

Enterprise Act 2002 (part 8 Community Infringements specified UK laws order 2003)

The Schedule specifying the laws as follows:Regulations 19 to 24 of the Privacy in Electronic Communications (EC Directive) Regulations 2002 in their application to consumers (use of telecommunication services for direct marketing purposes); Regulations 6, 7, 8, 9 and 11 of the Electronic Commerce (EC Directive) Regulations 2002 (requirements as to information and orders) and finally the Consumer Protection from Unfair Trading Regulations 2008.
The relevant sections of the Sales of Goods Act 1979 are as follows:

"27 It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.
28 Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.
29(3)Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

The Electronic Commerce (EC Directive) Regulations 2002:

"Interpretation 'information society services' (which is summarised in recital 17 of the Directive as covering "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service") has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations(3), as amended by Directive 98/48/EC of 20 July 1998(4));

6.—(1) A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information—
(a) the name of the service provider;

(b) the geographic address at which the service provider is established;
(c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;"

10. These provisions have been given attention by the Court of Appeal in the Office of Fair Trading v Miller [2009] EWCA Civ 34. In the judgment of Arden LJ at paragraph 44, the learned judge said this:

> "That takes me to the meaning of "Community infringement". This was considered in an authority not cited to the judge, namely OFT v MB Designs (Scotland) Ltd [2005] SLT 69, a decision of Lord Drummond-Young, sitting in the Outer House of the Court of Session, on an application under the Enterprise Act 2002. In a thoughtful judgment, Lord Drummond-Young considered that the provisions of the Enterprise Act 2002, which now represent the United Kingdom's implementation of the injunctions directive, should be interpreted in conformity with that directive. He concluded that the notion of 'collective interests of consumers' (see [14] above and the definition of 'Community infringement') indicated that there must be harm to a section of the public ... He held that harm to the interests of consumers could be inferred from the accumulation of individual instances ... I respectfully agree with these conclusions. However, I would not for my part agree with Lord Drummond-Young's conclusion in the passage relied on by Mr Turner that '[m]ore than one instance of a defective supply is required before there can be a breach' of an order pursuant to the provisions of the Enterprise Act 2002 now providing for stop orders ... It must depend on the facts. A Community infringement is committed when harm is caused to the collective interests of consumers. It is possible that a single supply might be enough, as where a supplier puts on to the market a large consignment of a beverage stated to be a healthy drink for a baby that is wholly unsuitable for this purpose. For this reason, I do not consider that the expression 'Community infringement' requires a course of conduct."
> (Quote checked)

11. With those provisions in mind, Mr Purchase, who has presented this case in a very clear and skilful manner, submits that there is a clear infringement both in terms of domestic conduct and in terms of Community infringement. I unhesitatingly accept that submission. He further submits that from the conduct, which I find has taken place in accordance with the uncontested evidence filed on behalf of the Office of Fair Trading, amounts to harm to the collective interests of consumers. Again, I accept that submission. I am satisfied therefore that I have the power to impose the orders sought.

12. Whether I should exercise it or not is, of course, another question. Mr Purchase submits that I should for six main reasons. Firstly, that the infringements constitute a wide range of conduct and not just one particular type. It compromises, for example, the failure to supply within the promised time; the failure to respond to complaints or attempts by consumers to contact the suppliers; and the failure to provide for refunds

when those were requested. Secondly, he submits there are a considerable number of people involved. Again, I accept that submission. He invites me to infer from the known number of complaints that there are likely to be more than those who complained. That may well be the case but I am not inclined to draw any specific inference from the numbers who complained. It seems to me that the numbers who did complain are sufficient to amount to a substantial number of consumers. Thirdly, despite the original contact with Mr Arora and the company and the undertakings offered in June 2010 and despite the correspondence thereafter from the Office of Fair Trading to each of those persons, the infringements have continued. Fourthly, this was not just one instance of infringement. He points, particularly, to the fact that shopfortech continued to take orders after the autumn of 2009 into 2010. Fifthly, he said it is easy for the defendants to set up a business again. It appears, as indicated, that the websites are at present not functioning but, submits Mr Purchase, this occurred on one occasion between the autumn of 2009 and early 2010 and could occur again. I accept that that has some force but is not a very weighty factor. What is more weighty, in my judgment, is that the defendants have failed to comply with the undertakings they gave to the Office of Fair Trading in June 2010. The evidence shows that they have not complied with those undertakings. Furthermore, they have failed to co-operate in the consultation process thereafter and have failed to supply the information requested to satisfy the Office of Fair Trading of compliance.

13. The one issue, which Mr Purchase raises, is whether for the purposes of making a mandatory order conduct in this statutory regime can include a failure to act. He submits that the natural meaning of that word is sufficient to include such a failure. He relies upon an authority in a very different context, that is the question of whether a failure to pay a rent on the part of a tenant is an instance of conduct within the meaning section 277(a) of the Housing Act. In the Court of Appeal decision of Regal Grand Limited v Anita Dickerson and Lynette Wade CCRTF 95/0747E(?), Alder(?) LJ said this at page 6:

> "Mr McCormick who appeared for the respondents submitted that the word 'conduct' in subsection 7(a) only referred to serious acts of malfeasance and not to failure to carry out an obligation or some inaction. Thus, he submitted, a failure to pay rent was not a conduct of the former residential occupier. That submission is untenable. The word 'conduct' should be given its ordinary meaning. Although there may be no exact synonym, its use in this subsection is equivalent to behaviour. A standing-by can amount to conduct just as much as a positive step. To take a pertinent fact in this case a failure to pay rent is part of the conduct of a tenant. It may or may not enable the tenant to be evicted."
> (Quote unchecked)

14. As I have indicated the statutory regime is very different in this case but I am satisfied that conduct within the meaning of the regime which I am considering is sufficiently wide to include a failure to act.

15. Accordingly, I am satisfied that the Office of Fair Trading is entitled to the orders it seeks, with one or two minor exceptions, under both limbs of its applications. I was concerned to ensure that, as far as reasonably practical, that the defendants should

know what they should do to comply with the order. This is particularly so because Mr Purchase has asked that the penal notice should be attached to that order and, for reasons which I will deal with shortly, I accept that it should. In paragraph 5 therefore, I have indicated, and Mr Purchase accepted, that when it is ordered that the defendants if they are unable to dispatch goods should inform the person in question, that should be specified to be information by written or telephonic communication. In paragraph 7 when it is ordered that the defendants should provide on their websites contact details including electronic mail address or addresses, Mr Purchase fairly and properly accepted that the requirements of the provisions relate to just the latter. Accordingly it seems to me that that is the specific word that should be used in subsection 7 so as to delete the words "contact details including". And finally in paragraph 8 of the order which requires the defendants to provide to the Office of Fair Trading the information set out in their request of 10 June 2010 in my judgment the order should specifically refer to such requirements, even if it is simply by way of repetition. Again, Mr Purchase accepts that point.

16. Finally, he says a penal notice should be attached because there is clear evidence that the defendants have failed to comply with the undertakings they gave in June 2010 and it makes it clear what the likely consequence of any breach of an order is and I am satisfied that this is a case where such a notice should be included.

17. Mr Purchase now applies for the costs of the Office of Fair Trading in taking these proceedings. They are set out in a statement dated 11 May 2011 in the total sum of £9,509.24. In my judgment the Office of Fair Trading has succeeded in obtaining an order against both defendants who have failed to engage in these proceedings. It was necessary therefore for the Office of Fair Trading to come to court and obtain these orders. They are in principle entitled to their costs. There is no other countervailing factor in the conduct of either party which suggests otherwise. In terms of the amount, I am entirely satisfied that the amount claimed is reasonable. These are complex proceedings involving complex provisions of domestic and Community law and a number of different sets of regulations there under. The claim is also somewhat factually complicated dealing as it did with a number of different complaints and the taking of witness statements from various complainants and dealing with matter which was an emerging picture from 2009 through to the end of 2010 when proceedings were commenced. Accordingly, I summarily assess the costs the defence must pay in the sum of £9,509.24.