



Neutral Citation Number: [2019] EWHC 1706 (Ch)

Case No: FS-2019-000005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch.D)
FINANCIAL SERVICES AND REGULATORY SUB-LIST

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 18/07/2019

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

VIAGOGO AG	<u>Claimant</u>
- and -	
COMPETITION AND MARKETS AUTHORITY	<u>Defendant</u>

Mr Paul Stanley QC and Mr Malcolm Birdling (instructed by **CMS Cameron Mckenna Nabarro Olswang LLP**) for the **Claimant**

Mr Rob Williams and Mr Jack Williams (instructed by **CMA Legal Department**) for the **Defendant**

Hearing dates: 18 June 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of a Part 8 Claim by which the Claimant (“viagogo”) seeks declarations concerning the true meaning and effect of two substantive provisions within a consent Enforcement Order made pursuant to s. 217 of the Enterprise Act 2002 on 29 November 2018 by Nugee J (“Order”).

Background

2. Viagogo is a corporation registered in accordance with the laws of Switzerland that operates a global online sales platform by which it solicits offers to purchase admission tickets issued by the organisers of live sport, music and entertainment events, usually on behalf of third party sellers (either individuals or traders) that have pre-purchased them at face value from the event organisers. The sale price of such sales is usually at a premium to the face value of the tickets concerned. This market is known as the secondary ticket market. There are other participants in the secondary ticket market, of which the most prominent is StubHub. Secondary ticket market customers can move effortlessly from website to website. This leads Mr Stanley QC to submit on behalf of viagogo that it is important to its business success that it can compete on a “*level playing field*” with its competitors.
3. In December 2016, the defendant (“CMA”) commenced an investigation into the secondary ticket market. In relation to viagogo, part of the focus was on what the CMA characterises as missing information in particular concerning the face value of the ticket being offered for re-sale and on the fairness of various restrictive and exclusionary terms including short deadlines for making claims under viagogo’s guarantee in respect of tickets purchased using its website. In early 2018, the CMA sought various undertakings from the four main market participants in the secondary ticket market (including viagogo). In March 2018, the CMA began a formal consultation under s.214 of the Enterprise Act 2002 but by April 2018 the CMA had obtained undertakings that were satisfactory to it from all the market participants under investigation other than viagogo.
4. Following further correspondence and a letter before action on 8 June 2018, on 30 August 2018, the CMA issued proceedings against viagogo seeking an Enforcement Order on the grounds that it had failed to comply with its obligations under the Electronic Commerce (EC Directive) Regulations 2002, the Consumer Protection from Unfair Trading Regulations 2008, the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 and the Consumer Rights Act 2015. As I have alluded to already, part of the focus of these complaints related to the alleged failure by viagogo to supply information about the face value of tickets being offered for sale on its website and the unfairness of deadlines imposed in respect of claims under viagogo’s guarantee. The CMA contends and I find that information concerning the face value of tickets being offered for sale is of importance to consumers for two reasons – first, it enables a consumer to evaluate the quality of the ticket being offered and secondly, it enables the consumer to ascertain whether he or she is being invited to pay a premium to the face value of the ticket and if so how much that premium is. Information as to the time limits that apply to claims by consumers under Viagogo’s

guarantee enables a consumer to decide whether viagogo's guarantee offers adequate protection and, therefore, whether to purchase using its platform.

5. Following a significant amount of interlocutory activity after the issue and service of proceedings, on 27 November 2018 the parties compromised those proceedings by the Order. As I have said, viagogo offers its services exclusively via its website. The Order required that certain information be provided to customers using the website. In purported compliance with the Order, viagogo provided information concerning the face value of the tickets being offered for sale and concerning the time limits that applied to claims under its guarantee using what the parties call in these proceedings a "hover over" text facility by which a website user wishing to access information places the mouse operated cursor over an icon within the website which results in a box opening, which displays the required information. However, the information is visible only if and as long as the cursor is positioned over the relevant icon and the information cannot be printed.

The Order

6. In so far as is material, the Order provides:

“Upon [CMA] bringing proceedings in respect of the matters set out in ... the Claim Form (“the Conduct”)

...

1. [viagogo] shall comply with Sections 217(6) and 217(10A) of the Enterprise Act 2002 in relation to the Conduct by complying with the terms of Section A, Section B1, Section B3 and Section C of this Order.
2. [viagogo] will comply with Paragraph 1 by 17 January 2019 and thereafter.

...

Section A – Requirements

...

16. [viagogo] will Clearly and Prominently display a notice to Consumers on the website that [Viagogo's] Guarantee does not affect their statutory consumer rights.
17. [viagogo] will ensure that all exceptions and qualifications which apply to [Viagogo's] Guarantee are Clearly and Prominently displayed on the website at the time of the purchase of the ticket.
18. [viagogo] will not reject a claim by a Consumer under [viagogo's] Guarantee if the reason for the rejection of the

claim was not Clearly and Prominently displayed on the website at the time of the purchase of the ticket.

...

19B Where [viagogo] is the seller, [Viagogo] will Clearly and Prominently state on the ticket listing pages that [Viagogo's] Guarantee does not exclude or limit a Consumer's statutory rights.

Complaint and Claim Handling

20. [viagogo] will establish a Complaint and Claim Handling Process. To comply with this requirement, [viagogo] will:

...

(c) ensure that the deadlines for Consumers to submit a claim under the Defendant's Guarantee are Clearly and Prominently disclosed to Consumers at the time of purchase and in a Durable Medium with the confirmation of the purchase of a ticket;

...

Section B1 – Disclosure of Information on the Website

...

2. Where applicable, the following information of which [viagogo] is Aware will be Clearly and Prominently displayed on each ticket listing on an Event Page (either in writing or indicated through a suitable label or icon)

...

(e) the Face Value of the ticket

...

Section C – Definitions

...

5. **Clearly** means information must be displayed in plain English and, so far as [Viagogo] can determine from the information of which it is Aware, be:

(a) complete;

(b) correct; and

(c) not misleading.

...

9. **Consumer** means a natural person acting for purposes not related to his or her business or professional activities and, for the avoidance of doubt, not an Event Organiser

...

13. **Event** means a specific performance, sporting fixture or equivalent scheduled for a specific venue on a specific date and time.

...

15. **Event Page** means any page on the Website which displays multiple ticket listings for an Event.

...

17. **Face Value** means the amount stated on the ticket as its price.

...

27. **Prominently** means the information must be displayed so that it:

- (a) is clearly visible in each location as required by this Order;
- (b) is presented in an appropriate font, size, colour and position to enable the Consumer to easily identify, reads and understand the information; and
- (c) except as permitted by this Order, does not require the user to take any action to access the information.

...

40. **Website** means www.viagogo.co.uk and any other internet based site, platform or facility ... operated by [Viagogo] as a secondary Ticketing Facility and which is directed to UK consumers.

...”

The Issues

7. The CMA maintains that viagogo has failed to comply with its obligations under the Order in two respects. First, it maintains that, contrary to what is required by section A, clause 20(c), viagogo has failed to ensure that the deadlines by which Consumers have

to submit any claim under viagogo's Guarantee are "... *Clearly and Prominently* ..." displayed. viagogo supplies this information by a pop-up box when a cursor is placed over an information icon at the bottom of the final review page. Although viagogo maintains that properly complies with the requirements of the Order, the CMA maintains that it does not because the definition of "... *Prominently* ..." in Clause 27 of the Order requires that such information must be displayed in a way that does not require the user to take any action to access the information. It maintains that by requiring a Consumer to access the information by placing his or her computer cursor over the information icon, viagogo is making the required information available only to those Consumers who take that action.

8. The other respect in which the CMA allege that Viagogo is in breach of the order is in relation to the requirement that it displays the Face Value of the ticket "... *Clearly and Prominently* ...". viagogo includes on the relevant pages of its website an icon resembling a ticket, within which appears the letters "FV". If the Consumer places his or her cursor over the icon, then the Face Value of the ticket in questions becomes visible. At the top of the Event Page there is a key informing Consumers that this icon indicates where the Face Value of the Ticket is to be found. The CMA maintains that this does not comply with the requirements of the Order since viagogo is making the required information available only to those Consumers who access it using the icon. It maintains that this does not satisfy the definition of "... *Prominently* ..." within the Order.
9. In support of its position, viagogo make two general points. First, hover over text facilities have been recognised in other equally sensitive areas concerning information disclosure as an effective and appropriate means of providing information – see paragraph 5.4.1 of Mr Tench's first statement – and secondly if the CMA's construction is correct, then it will place viagogo in a position that is disadvantageous when compared to its competitors – see paragraph 6 of Mr Tench's first statement. This last point is based on the information that it is said that Viagogo's only surviving competitor (Stubhub) provides. It is said that (i) Stubhub is not required to display the face value of tickets on an event page and it does not do so and (ii) although Stubhub is required to provide such information at subsequent stages of the "... *overall purchasing journey...*", it does so using techniques that are similar to those in respect of which Viagogo is being criticised – see paragraphs 6.3 and 6.4 of Mr Tench's first statement.

The Applicable Principles

10. A consent order is to be construed in accordance with the same principles that apply to the construction of contracts – see Weston v. Dayman [2006] EWCA Civ 1165 [2008] 1 BCLC 250 *per* Arden LJ (as she then was) at [3] and [5], following earlier House of Lords authority to similar effect. Those principles are well known and are not in dispute. In summary, they are as follows:
 - (a) The court construes the relevant words in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the order or contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document

was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

- (b) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;
 - (c) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;
 - (d) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;
 - (e) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;
 - (f) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;
 - (g) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11; and
 - (h) a court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.
11. To this I add that where a consent order made in a statutory or regulatory context is being considered, it necessarily means that the relevant context includes the statutory

or regulatory purposes to which effect is being given by the order being construed. This is no more than a specific application of the general principle summarised at paragraph 10(a)(iii) above. This last mentioned factor leads viagogo to submit that where there is a literal ambiguity, that should not be resolved in favour of a construction that goes beyond anything that is required by the applicable statute or regulations. Finally, the nature of the document being construed means that as part of the context it is necessary to remember that court orders are of public significance – see Botleigh Grange Hotel Limited v. HMRC [2018] EWCA Civ 1032 *per* Asplin LJ at [19]. This is likely to lead to more weight being placed on the language used, particularly where there is no evidence of drafting errors or ambiguities – see Botleigh Grange Hotel Limited v. HMRC (ibid.) at [22-23].

Discussion

General Considerations

12. The Order when read as a whole has plainly been skilfully drafted. That fact, together with the fact that the document being construed is a court order emphasises the importance of the language used as a starting point.
13. The parties plainly had in contemplation at the time when the Order was drafted the possibility of providing information by means of hover-over text because the parties have expressly referred to the provision of information by such means where that was intended. So Section C, clause 20 provides a definition of “*Misleading*” that includes information based on assumptions not disclosed in the text. However, the parties have agreed that this definition does not prevent viagogo from providing “... *further explanation via hover-text on the same page as long as the hover-text does not contradict or change the meaning of the message it relates to ...*”. Two points emerge from this formulation. First, as I have said, the parties had in contemplation at the time they were agreeing the terms of the Order that information might be provided by hover-over text and, where this was considered appropriate, it was expressly provided for. Secondly, this formulation suggests that the parties considered hover-over text to be appropriate only to the provision of further detail to augment but which did not change or contradict information provided in a more direct manner or otherwise provide new information not otherwise provided.
14. A similar point can be made in relation to Section B1, clause 4, where it is expressly provided that a trader’s postal address must be displayed on the final checkout page when the consumer clicks to confirm a purchase but that it could be provided by “... *clicking on a link or pop-up display ...*”. The points that emerge from this formulation are first that where the parties intended that information could be provided otherwise than by text on a particular web page they expressly provided for it and secondly where it was intended to depart from the definition of “*Prominently*” the parties did so expressly. The link or pop up display had to be “*Prominently displayed*”. The reference to clicking on a link required the consumer to take action but Section C clause 27(c) was disapplied pursuant to its proviso by Section B1, clause 4 permitting the provision of information by clicking on a link.

Section B1, clause 2(e) – Face Value Information

15. Had Section B1, clause 2(e) simply said that the Face Value of a ticket had to be (Clearly and) Prominently displayed on each ticket listing on an Event Page I do not consider that there would have been any real textual difficulty. I would have considered that provision of information by hover text would not have been Prominently displayed because getting access to the information requires the user to take some action contrary to the definition of “*Prominently*” in Section C, clause 27(c).
16. I do not accept the argument advanced by Viagogo that this construction is inconsistent with Section A, clause 2 of the Order. That provision requires Viagogo not merely to disclose the information there referred to in accordance with clause 1 of the Order but in addition that it be “... *Prominently disclosed to Consumers in a Durable Medium within a reasonable time after the purchase of a ticket*”. Viagogo submit that the reference to “... *a Durable Medium* ...” is to an email. I accept that is likely in the circumstances, given the definition of “*Durable Medium*” in Section C, paragraph 11 of the Order. Viagogo submit that of necessity such an email would have to be opened (and thus action taken) by the recipient. I accept that is so. However, I do not accept that this is inconsistent with Section C clause 27(c) having the effect I have described. As I have noted already, the definition of “*Prominently*” in Section C, clause 27(c) is expressly qualified by the words “... *except as permitted by this Order*...”. The words “... *in a Durable Medium* ...” qualify the requirement for prominent disclosure since the sending of the email and the opening of it by the recipient has been expressly “... *permitted by this Order* ...”.
17. Equally I do not accept that the need to see all information displayed on a web page requires scrolling down the page is a relevant consideration either. There is an obvious distinction between scrolling down a web page in order to read text that is permanently displayed on the web page and an action that is necessary in order to access information that won’t be visible unless that action is taken.
18. However, Section B1, clause 2(e) does not simply state that the Face Value of a ticket has to be (Clearly and) Prominently displayed on each ticket listing on an Event Page. It states that the Face Value of a ticket is to be “... *Prominently displayed ... either in writing or indicated through a suitable label or icon*”. An icon when used in an IT context means a word, phrase or image through which a function or information is accessed by placing the cursor over the item concerned and either hovering over or clicking on it. A well-known example is the letter “S” set in an irregular blue ring as a means by which Skype is accessed on a PC.
19. Plainly accessing functionality by icon requires the user of the website within which the icon appears to take the action first of clicking or hovering on it and then taking whatever further action is required thereafter. Thus, in my judgment the express inclusion within Section B1, clause 2(e) of the words “... *either in writing or indicated through a suitable label or icon* ...” means that the Face Value of the ticket can be provided either “... *in writing* ...” on the face of the webpage or “... *through a suitable... icon*”. The fact that to access the information through an otherwise suitable icon requires action by the user of the website is not to the point because the parties expressly permitted the information to be provided through an icon and information cannot be provided through an icon without activity on the part of the user of the website. That being so, the provision of information through an icon comes within the express qualification to Section C, clause 27(c).

20. The CMA submits that this approach is wrong for two reasons. First, it submits that the icon itself does not communicate the Face Value of the ticket and that could only be the case if the icon contained on its face the actual Face Value of the ticket in question. I do not agree. The language the parties have chosen to use is “... *through a suitable... icon*” not “by” such an icon. That reflects the common understanding of an icon, which is that by clicking or hovering over it, the user will access new or further information or functionality. There is no distinction of substance between providing the information in writing and providing it as or by a pictorial image. There would be no point served by including the two alternatives if that was what the parties intended. The true distinction is between providing the information on the face of the webpage (“... *in writing ...*”) and providing access to it via an icon (“... *through a suitable... icon ...*”).
21. The final point made by the CMA in relation to the Face Value icon is that it is on its face misleading and thus not “*suitable*”. This issue is addressed at paragraph 51 of Mr Riley’s first witness statement filed on behalf of the CMA, where he states:

“On its face, a listing currently contains an “FV” icon, which the key describes as indicating “Face value” and a price. However, that price is not the face value, it is the selling price of the ticket on the website. Consumers are only told that there is a separate face value if they hover their cursor over the relevant icon. The presentation of the icon showing only the letters “FV” may therefore also create the misleading impression that the ticket is being offered for re-sale at the original face value price, which impression will not be corrected unless and until the consumer hovers over the relevant text. ”

The CMA submits that although clause 2(e) permits the information to be “...*indicated through a ...icon...*” the icon must be “...*suitable ...*”. What is suitable is an icon that provides the information “*Clearly and Prominently*” as defined. In my judgment, the information provided satisfies the requirements of Section C, clause 5 and clause 27 (a) and (b). It does not have to satisfy (c) for the reasons I have explained in paragraph 19 above. I don’t accept that the overall get up is misleading as alleged. The icon is plainly an icon. The key at the top of the page shows that it is concerned with the face value of what is being offered for sale. The asking price is well separated from the icon. Persons shopping for tickets in the secondary market will be aware that the prices being demanded will be in excess of the face value of the tickets being offered or are likely to be.

22. I ought to make two final points before leaving this part of the case. First, it was submitted by viagogo that on CMA’s construction, the Order went further than was required by s.90 of the Consumer Rights Act 2015, the principal statutory basis for requiring information to be provided concerning the face value of tickets. Whilst I accept that this would have been a material consideration had the language used been ambiguous, the language used is not ambiguous for the reasons set out above. I should also make clear that I regard the fact that the CMA arrived at a different arrangement with viagogo’s competitor is immaterial as well. What matters is what was agreed by the parties to the Order not what one of them agreed with a third party. Viagogo chose not to compromise with the CMA at the stage when the various other market participants chose to do so. The Order reflects the terms that the parties to it were

prepared to agree at the time it was agreed between them. There is no proper basis for departing from what was agreed simply because at an earlier stage viagogo's trade rival was able to secure better terms by negotiation with their common regulator.

Section A, clause 20(c) – Deadline Information

23. In my judgment different considerations apply to this requirement. First, if and to the extent that viagogo place any reliance on the obligation to supply the information after purchase in "...a Durable Medium ..." I think that is mistaken. If and to the extent that a consumer would be affected by the deadlines in arriving at a decision whether to purchase, receiving the information after a sale has been completed does not assist. The sole question is whether viagogo has Clearly and Prominently disclosed the deadlines by using hover-over text. Unlike the position with Face Value information, there is no provision that enables the deadline information to be provided through an icon. Thus the answer to that question depends on whether as a matter of construction accessing the information as hover-text requires the user to "... take any action to access the information". In my judgment it does. I have explained already why this is so – see paragraphs 13 -17 above.
24. The absence of an express provision that enables the information to be provided through an icon is a significant consideration that supports this conclusion because (contrary to the position that applies to the provision of Face Value information) there is no express provision within or relating to Section A, clause 20(c) that excepts strict compliance with Section C paragraph 27(c). Had viagogo considered such a provision necessary or desirable in relation to the provision of deadline information it could have sought it, as it had sought it in relation to the provision of Face Value information. Either it chose not to do so or if it did it could not be agreed. It is not for the court in those circumstances to re-write the Order after the event.
25. Although viagogo relies on it as a relevant contextual consideration, the ease with which information can be accessed by hovering a cursor over an information icon is not material. The language used is not ambiguous or unclear. The language used excludes such activity as a means of accessing the deadline information. That is unsurprising given the issues that led the CMA to commence enforcement proceedings against viagogo and that the CMA considers the provision of information concerning deadlines for claims under viagogo's guarantee to be of great importance to consumers. Whilst some and perhaps a majority of online shoppers will understand the significance of an Information icon, that is not necessarily so in respect of all such purchasers. Whilst this might appear an unduly cautious approach, it is appropriate here because the context in which the issue arises concerns an enforcement order made to enforce statutes and regulations enacted for the purpose of protecting all consumers.
26. In reality however the point is a relatively straightforward one – where the parties have intended that information be provided through an icon they have expressly so provided. Where they have not, Section C paragraph 27(c) takes full effect in accordance with its terms. Since accessing hover-over text requires action by the website user, it is not permitted except as otherwise expressly permitted by another provision within the Order. There is such a provision in respect of the provision of Face Value information but there is not in relation to Guarantee claim deadline information. There is no

evidence that suggests this was an error much less one that could justify an attempt to rectify Section A, clause 20(c) by construction.

Conclusions

27. Subject to any further submissions from counsel for the parties concerning the appropriate form of relief to give effect to my conclusions, I am prepared to grant a declaration that viagogo complies with its obligations under Section B1, clause 2(e) of the Order by providing where applicable the Face Value of which viagogo is aware on each ticket listing on an Event Page by text that appears when a cursor is placed over the ticket icon labelled “FV”, when combined with the provision of a key on each page as shown for illustrative purposes in exhibit JSR.1, page 110 to the witness statement of Mr Jonathan Stephen Riley dated 8 April 2019 filed in these proceedings.
28. I refuse a similar declaration in relation to the provision of deadline information for the reasons set out above.
29. I refuse a declaration in the terms of paragraph 1 of the draft order provided by viagogo because whether the provision of information by hover over Text constitutes compliance depends on the terms of each obligation under which information is to be supplied.