

EIP

Director's Liability Caught in a Tangle in Toy Making Feud in UK High Court

In Tangle Inc (“**Tangle**”) and One for Fun Ltd (“**One for Fun**”), Mr David Stone (sitting as Deputy High Court Judge) had to consider the liability of three directors from One for Fun as joint tortfeasors to the First Defendant (One for Fun).

The case revolves around the two toy companies: Tangle and One for Fun. Tangle owns the intellectual property rights in a toy product called the Tangle. The Tangle is based on a wooden sculpture created by Mr Richard Zawitz in or around 1975, which in turn was based on drawings by Mr Zawitz. Smaller versions of the Tangle sculpture have been created since 1981. Copyright is asserted in the drawings, sculpture and the variations.

Tangle claims infringement of that copyright by One for Fun (the First Defendant). Tangle also made a claim on the basis of joint tortfeasance against three directors of One for Fun - the Second, Third and Fourth Defendants. The Defendants sought to have the case against the directors struck out.

At the case management conference, the Judge decided on the evidence put before him that the strike out application be permitted in relation to the Third and Fourth Defendants but not the Second Defendant. Upon the Claimant's counsel's request, the Judge has now provided in this judgment detailed reasons for his decision.

The Strike Out Application

Counsel for both parties submitted that the Judge had to consider each of the three defendants separately and that the strike out application was “weaker” as against the Second Defendant (who was a controlling shareholder as well as director of One for Fun) when compared to the Third and Fourth Defendants. Counsel for the Claimant did go on

to suggest that, rather than striking out the case in relation to any of the Second, Third and Fourth Defendants, the Claimant would consent to the case being stayed to the damages enquiry, so as only to be heard if the primary case on infringement as against the First Defendant were established.

Counsel for the Claimant referred to *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10 as the leading case in this area; whilst counsel for the Defendants pointed to the more recent review of the law in the Court of Appeal decision of *Lifestyle Equities CV v Ahmed* [2021] EWCA Civ 675. The Judge reiterated the key principles set out in these cases when providing his reasoning.

Outcome for the Third and Fourth Defendants

The Judge considered the totality of the pleadings and evidence put before him in order to assess whether the Claimant's case as pleaded on the point of joint tortfeasance had any real prospects of success.

On the materials before him, the Judge did not find that the Claimant had put forward enough to claim that the Third and Fourth Defendants had done anything more than what was required as their role as directors. And thus, concluded that the claim against the Third and Fourth Defendants had no real prospects of success and therefore must be struck out.

Outcome for the Second Defendant

The Judge was unable to say that the joint tortfeasance case against the Second Defendant had no real prospects of success. The Second Defendant was alleged in the pleadings to have "authorised, procured, facilitated and otherwise assisted" the allegedly infringing acts and to "control and operate" the First Defendant. The Judge believed there was (just) enough on the pleadings to suggest that the Second Defendant co-operated in the alleged infringing acts and (just) enough to suggest he intended that his co-operation would help bring about the alleged infringing acts. And so, the strike out application failed against the Second Defendant, but, by consent, and as suggested by the Claimant, that claim was stayed to any quantum hearing.

Take Away Points

It is clear from the jurisprudence on this point in intellectual property cases that each case will be assessed on an individual basis. The High Court have held that although being a director does not exempt that person from ever possibly running the risk of having a claim brought against them as a joint tortfeasor. It will look at the actions and duties carried out as a whole, provided that the allegations are pleaded and supported

with appropriate evidence.

p3

Interestingly, the Supreme Court is due to hear Lifestyle Equities CV v Ahmed on the issue of joint tortfeasance soon and so it is worth keeping an eye out on how the Supreme Court decide on this case and whether the principles in Fish & Fish Ltd v Sea Shepherd UK will be affirmed or whether new points of law will arise.

The judgment is available [here](#) – Case: IL-2022-000042