



Neutral Citation Number: [2024] EWHC 1303 (Ch D)

Case No: IL-2021-000086

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

The Rolls Building  
7 Rolls Building  
London, EC4A 1NL

Date: 13 May 2024

**Before:**

**MR NICHOLAS THOMPSELL**  
**Sitting as a Deputy Judge of the High Court**

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**Between:**

**(1) ENREACH UK LIMITED**

**First Claimant**

**(2) ENREACH HOLDING BV**

**Second Claimant/**  
**Part 20**  
**Defendant**

**- and -**

**INREACH GROUP LIMITED**

**Defendant**

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**MR JOHN ELDRIDGE** (instructed by **Collyer Bristow LLP**) for the **Claimants**  
**MISS GEORGINA MESSENGER** (instructed by **Murgitroyd & Company Ltd**)  
for the **Defendant**

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**APPROVED JUDGMENT**

## **JUDGE THOMPSELL:**

### **1. INTRODUCTION**

1. My judgment today relates to a consequential hearing today, 13 May 2024, following the handing down of my judgment on 11 November 2022 (the "**Relevant Judgment**").
2. The Relevant Judgment concerned a dispute between two corporate groups holding trademarks and related intellectual property. It is reported as *Enreach UK Limited and Another v Inreach Group Limited* [2022] EWHC 2867 (Ch). The dispute has engaged questions concerning the potential effect of human rights legislation and trademark law.
3. A full description of the matters in issue is provided within the Relevant Judgment and I will not repeat it here. I will use terms defined in the Relevant Judgment as well as some other terms defined within this judgment which I will define as I go along.
4. The only matter which I have been asked to adjudicate on in this hearing has been the Claimants' application for permission to appeal the Relevant Judgment. In this hearing the Claimants have been ably represented by Mr John Eldridge of counsel and the Defendant has been no less ably represented by Miss Georgina Messenger of counsel. I am grateful to both counsel for their thoughtful submissions.

### **2. THE TEST FOR PERMISSION TO APPEAL**

5. The test for permission to appeal is set out at CPR rule 52.6(1) as follows:

“(1) Except where rule 52.7 ... applies, permission to appeal may be given only where -

  - (a) the court considers that the appeal would have a real prospect of success; or
  - (b) there is some other compelling reason for the appeal to be heard.”
6. As the Defendant has reminded me, permission to appeal is a matter for the court's discretion and it is for the Claimants to establish that permission should be granted rather than for the Defendant to establish why it should not be given.

### **(3) THE STATED GROUNDS FOR APPEAL**

7. The Claimants' grounds for appeal are based primarily on a contention that an appeal would have at least a real prospect of success. The Claimants' overall justification and its contention has been put as follows:

"The learned Judge erred in law and/or principle in holding that there is no real prospect of the Claimants succeeding in persuading a court that the Trade Marks (Relative Grounds) Order 2007 (the "**2007 Order**") must be applied by the Court in the present case pursuant to section 6 of the Human Rights Act 1998 (the "**HRA**"). Had the

learned Judge not erred in law and/or principle as aforesaid, the learned Judge would have found that there is at least a real prospect of persuading a court that the 2007 Order must be disapplied by the court in the present case pursuant to section 6 of the HRA on the grounds that its application would occasion a breach of the Claimants' rights pursuant to Article 1 of the First Protocol of the European Convention on Human Rights 1953 ("A1P1")."

8. In support of this general contention, the Claimants contend that the Principal Judgment was based upon and rendered unsafe by a number of alleged errors of law and/or principle. Four alleged errors are enumerated in the application for permission to appeal and have been expanded upon in the Claimants' skeleton argument and in oral argument before me today. I will consider each of these separately.

#### **4. THE FIRST DETAILED GROUND OF APPEAL**

9. The Claimants' first detailed ground of appeal is as follows:

"The learned Judge erred in law and/or principle in holding that the Claimants' reliance upon section 6 of the HRA in the manner pleaded in the Amended Particulars of Claim is precluded by the operation of section 7 of the HRA. Had the learned Judge not so erred in law and/or principle, he would have found that the Claimants have at least a real prospect of persuading a court that they are entitled to rely upon section 6 of the HRA in the manner pleaded in the Amended Particulars of Claim."

10. The Claimants have not developed this point in argument except to say that if their second or fourth detailed ground of appeal is made out, it follows inexorably that the first and third grounds will also be made out.

#### **(5) THE SECOND DETAILED GROUND OF APPEAL**

11. The Claimants' second detailed ground of appeal is as follows:-

"The learned Judge erred in law and/or principle in holding that the Claimants' case as pleaded in the Amended Particulars of Claim cannot succeed in consequence of paragraph 2 of Article 1 of the first protocol under the European Convention on Human Rights 1993 A1P1. Had the learned Judge not erred in law and/or principle as aforesaid, the court would have found that the Claimants have at least a real prospect of persuading the court that the interferences of the Claimants' possessions pleaded in the Amended Particulars of Claim would amount to unjustified interferences of the Claimants' peaceful enjoyment of their possessions within the meaning of A1P1, and that such interferences would not serve any legitimate public or general interest, or alternatively would fail to strike a proportionate or fair balance between the demands of the general interest of the community and the protection of fundamental rights."

12. The Claimants here are referring to the first and second paragraphs of the A1P1 rights (which I will refer to respectively as "**paragraph 1, A1P1**", and "**paragraph 2, A1P1**", and it is useful to set these out in full.
13. Paragraph 1 of the A1P1 provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”.
14. Paragraph 2, A1P1, however, circumscribes the ambit of this in providing that:

“The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”.
15. The Claimants have expanded on this argument in their skeleton argument and in oral submissions before me today. They support this contention on the following grounds:
  - I. The court’s conclusion that the Claimants are not the victims.***
16. The Claimants’ contend that the court was wrong in relying on a view that the Claimants were not victims for the purpose of section 7 HRA. They base this view on various putative errors in the court’s reasoning as set out in paragraphs 91 to 122 of the Relevant Judgment.

*(a) The temporal argument”*
17. The first is said to emerge from paragraphs 97 to 102 of the Relevant Judgment where the court dismissed the idea that the Claimants could have been regarded as victims in relation to the 2007 Order. This was on the basis that they had no trademark at the time the 2007 Order was made. Accordingly, when they chose to register a trademark which may - it remains to be established - infringe the Defendant's trademarks, they were choosing to obtain the benefits and risks of UK trademark law as it stood at the time about registration. It followed that there was no point at which they had risk to their property rights and their trademarks increased by the 2007 Order.
18. The Claimants argue that in reaching this conclusion the court misstated the Claimants’ case and thereby misdirected itself as to the proper analysis.
19. They contend that it was wrong for the court to focus on the *making of the 2007 Order* as amounting to an unjustifiable interference with the Claimants’ A1P1 rights and therefore to look at those rights at the time that the 2007 Order was made. Instead, the court should have considered whether the court’s *application to the Claimants of the 2007 Order* would amount to an unjustified interference with their A1P1 rights. The court therefore should have tested this by reference to the position as it stood at the time the court was being invited to apply the 2007 Order to the Claimants. At this point, the court applying the 2007 Order and would thereby expose the Claimants to a

risk, or alternatively an increased risk, that the Claimants may lose their relevant possessions.

20. In fact, far from there being a misunderstanding of the Claimants' case, it is clear at various points in the Relevant Judgment, including at paragraphs [77], [84], and in the detailed discussion at paragraphs [130] to [135], that the court understood Mr Edenborough's argument on behalf of the Claimants that one should look at the Claimants' possessions at the point in time when the court was being asked to disapply the 2007 Order. But nevertheless, the court took the view that the temporal issue was important. This was for the reasons explained in the Relevant Judgment but I will amplify these reasons for the sake of clarity.
21. In my view the Claimants in relation to this argument have missed the point that was being made in the Relevant Judgment. This was that when judging what a person's AIP1 rights are, it is necessary to take a precise view of what that person's possessions comprise.
22. Trademarks are creatures of statute. They provide the trademark owner a right to prevent another person from trading under a particular name or mark subject to conditions prescribed by the law. It is in effect a right to constrain the rights of others and that right must always be circumscribed by the legislation by which it is created. Someone who registers a trademark does so on the basis of the law including, secondary legislation at the time of registration. That person's possession is the bundle of legal rights subject to conditions created by law as a result of the registration. The law defines whether or not those rights include a right to challenge an earlier trademark on relative grounds.
23. It cannot therefore be said that an interference with that person's trademark possession for the court to apply the very scheme of regulation that brings that possession into an existence and to which that possession is subject. When registering their own trademarks, the Claimants were getting the benefit of the *locus standi* limitations on challenge on relative grounds created by the 2007 Order. They cannot ask the court to disapply this provision in relation to another trademark that has happened to suit their particular case. The court applying the 2007 Order is not interfering with the Claimants' trademarks, it is upholding part of the legislation by which those trademarks exist.
24. An example may illustrate this more clearly. Supposing there were to be changes by way of secondary legislation to the categories of goods to which trademarks apply. Suppose there was no transitional arrangement or grandfathering arrangement and as a result the effect was to reduce the protection provided by a trademark which had previously covered all categories of musical instruments, by preventing the ability to use that trademark in relation to electronic musical instruments to (which were hence to be covered by a different trademark category).
25. It would be easy to see how that trademark owner might have success with an argument based on AIP1 that the court should disapply that legislation when determining that person's rights. In the case of that trademark caveat, the effect of the secondary legislation would have been to reduce the scope and value of that person's possession.

26. However, the position of a person who registered a musical instrument trademark only after the change had been implemented would be entirely different. That person would never have acquired a right that was adversely affected by the legislation. That person would have expected to have registered, and would have got, a trademark to cover musical instruments excluding electronic musical instruments. It would be quite improper for the court to disapply the legislation and provide for wider rights, than those for which that person had bargained in taking out that trademark.
27. In undertaking its necessary consideration of what in fact the Claimants' possessions were, the Relevant Judgment was correct in considering the relationship between the date of introduction of the 2007 Order and the date of the registration of the Claimants' trademarks, and in so doing determining that the Claimants' argument had no real prospect of success. The court was being asked to protect different rights to the rights that they acquired when they registered their trademark. This point is underlined by the EHRC Guidance referred to at paragraph [106] of the Relevant Judgment.
28. Furthermore, if a court were to disapply the 2007 Order, this would expose the Defendant to a risk, or increased risk, that they would lose their relevant possessions in the form of those trademarks. The bundle of rights included in those trademarks included protection from challenges on relative grounds from any person other than a trademark owner whose only trademark was infringed. In such circumstances the Defendant would have a strong claim that the court in disapplying the 2007 Order was in fact interfering with *its* right to property as it was denying it the protection that it has under the legislation by which its trademark possession subsisted.
29. This point is also emphasised when one considers the application in paragraph 2 A1P1. It would impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest if, as the Claimants suggest, the A1P1 rights could be employed to disapply what may be regarded as a fundamental basis of the current scheme for registering enforcing trademarks - that only persons who can challenge a trademark on relative grounds are those interested in an earlier trademark that it infringes.
30. In view of all these considerations, I see no real prospect of an appeal succeeding on this argument.

*(b) The court's finding that the Claimants' loss was hypothetical or speculative*

31. The Claimants contend that the court was in error in considering what would need to happen for the Claimants to have been adversely affected if the court had failed to disapply the 2007 Order, as discussed in paragraphs 117 to 121 of the relevant judgment. They argue that the court erred in expressing a conclusion as to the likely overall outcome of a hypothetical trial in which the relevant degrees of similarity between the same various marks was in issue.
32. However, this ignores the point that this discussion was in the context of the court needing to reach a conclusion as to whether or not the 2007 Order (or at least applying it to the Claimants) had *direct* that from the Claimants, or whether its likely impact should be considered remote or tenuous to engage in A1P1 rights. As part of the general consideration of these matters the point, in my view, remains good.

33. It was acknowledged that paragraph [120] of the Relevant Judgment that this remote prospect was nevertheless a possible result had this matter gone to trial. But this did not prevent, and should not have prevented, the court reaching a conclusion that the prospect described fell into the category of being hypothetical and/or speculative and thus too remote for the application of the A1P1 rights. By definition, all matters that are hypothetical or speculative might nevertheless turn out to be capable of being established, but until they are they will remain hypothetical or speculative.
34. Furthermore, as Miss Messenger pointed out, the discussion at paragraphs [117] to [121] of the Relevant Judgment was only one of two limbs supporting the court's finding that the Claimants were not directly affected by the 2007 Order and as such are not victims. That proposition had already been determined by the court's findings at paragraphs [97] to [116]. Indeed, it would be surprising if the court had concluded there is a party who could only be affected by the application of the 2007 Order because it had breached the trademark of another party who had been regarded as a victim.
35. Accordingly, I can see no real prospect of a successful appeal based on this argument.

## ***II. The court's finding that the interference can be justified***

36. The Claimants contend that the court was in error at paragraph [162] of the Relevant Judgment where it was said that:

“Mr Edenborough invites the court to entertain the speculation that the UK could have adopted another system for challenging trademarks that may have had greater public benefit than the one that was adopted. However, in the light of the principle explained in the previous paragraph, even if there was, I find it vanishingly unlikely that evidence could be put before the court that would persuade it that the 2007 Order provided a disproportionate response to the legitimate aims set out in the Consultation Paper.”

37. The reference to the "previous paragraph" is a reference to a principle in the ECHR Guide at paragraph 156 where it was stated that it is not for the court to say whether the legislation represents the best solution for dealing with a problem.
38. Having regard to this, and indeed to the entire discussion at paragraphs [136] to [156], I remain of the view that it is fanciful to consider that the Claimants would, were this to have gone to trial, been able to produce evidence that would demonstrate that the application of the 2007 Order was not protected by paragraph 2 A1P1. If the court were to set aside the 2007 Order in relation to the Defendant and thereby create a precedent which any other trademark owner who wished to challenge an earlier trademark on grounds of similarity to an earlier trademark, this would clearly impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.
39. Accordingly, I can see no prospects of success being based on this argument.

**III. *The court's recourse to policy considerations***

40. The Claimants contend that the court was in error when at paragraphs [163] to [167] of the Relevant Judgment it considered potential policy ramifications of the Claimants' arguments.
41. The Claimants' primary position is that the court should have placed no reliance on such policy considerations but they have produced no rule or case law to support this.
42. In the current case, the Claimants themselves introduced policy considerations in challenging the Secretary of State's policy reasons for making the 2007 Order. It seems then a little inconsistent for them to criticise the court for considering such matters. Mr Eldridge tried to make a distinction between policy matters that the Claimants had raised and those considered by the court, but I see no substantive difference. Policy issues were necessarily debated and as these went to the proportionality in the 2007 Order, it was entirely legitimate for the court to make the findings which it did.
43. In the alternative the Claimants contend that the court ought to have concluded that the said policy considerations did not support the court's conclusion.
44. I take the Claimants' point that some of my consideration might be taken as a criticism of the trademarks regime prior to 2007, but here it is relevant that, after a public consultation, the Secretary of State determined that the system did require reform and presented good reasons for this.
45. Beyond this point, the Claimants' argument seemed to be largely supported by assertion rather than on any factual basis. Nothing has been raised to establish that the determinations made by the court were incorrect.
46. In any event, whatever the merits of the policy argument formally, the Claimants' arguments do not provide any sound basis for an appeal. Whilst these issues were discussed in the Relevant Judgment, they did not form any necessary part of my overall conclusion that the Claimants' case, as put in their Amended Particulars of Claim, disclosed no reasonable grounds for bringing the claim and therefore had no real prospect of success.
47. Accordingly, I can see no real prospect of success for an appeal based on this argument either.

**6. THE THIRD DETAILED GROUND FOR APPEAL**

48. The Claimants' third detailed ground of appeal is as follows:

“As a result of the foregoing errors of law and/or principle, the learned Judge erred in law and/or principle in finding that: (i) the Claimants' case as set out in their Amended Particulars of Claim has no real prospect of success and that there was no other reason why the matter should go to trial; and (ii) the Amended Particulars of Claim disclose no reasonable grounds for bringing a claim. Had the learned Judge not erred in law and/or principle as aforesaid, the learned Judge would



have found that: (i) the Claimants' case as pleaded in their Amended Particulars of Claim has at least a real prospect of success; and (ii) the Amended Particulars of Claim do disclose reasonable grounds for bringing a claim, and would have ordered that the Defendant's application dated 24 January 2022 be dismissed with costs."

49. As with the first ground, the Claimants have not separately argued this point but rather stated that this contention would be made out if the second or fourth of the Claimants' grounds are made out.
50. I have already dismissed the various arguments supporting the Claimants' second ground of appeal. The Claimants' case that it has a real prospect of success, therefore depends on its fourth and final detailed ground of appeal.

## **7. THE FOURTH DETAILED GROUND OF APPEAL"**

51. The Claimants' fourth detailed ground of appeal is as follows:

"Further, or alternatively, the learned Judge erred in law and/or principle in determining that the issues raised by the defendant's application dated 24 January 2022 were such as could appropriately be dealt with via a summary procedure. Had the learned Judge not so erred in law and/or principle as aforesaid, the learned Judge would have found that the issues raised by the Defendant's application dated 24 January 2022 included controversial questions of law in a developing area, which could only appropriately be dealt with on the basis of actual facts as found at trial, and would have ordered that the Defendant's application dated 24 January 2022 be dismissed with costs."

52. In relation to this the Claimants contest my findings at paragraphs [183] to [184], that there was no reason for this case to go to trial as the court already has before it all the facts that it needs to weigh up in arguments made on behalf of the Claimants and the Defendant and that I should therefore "grasp the nettle" and determine the matter on a summary basis.
53. I see nothing new in submissions now made on this point that I have not already fully considered in the course of my careful judgment. The Claimants' case turned on the proposition that paragraph 1 of A1P1 applied to the facts that they had averred and paragraph 2 of A1P1 did not prevent this from applying. It was possible to dismiss their case on the basis that these propositions were incorrect, even if one assumed that they could show all the facts that they alleged in their Amended Particulars of Claim.
54. This being so, the case was entirely appropriate for summary judgment. The Claimants' assertion that the court could not decide this matter without first seeing evidence as to the similarity of the three sets of trademarks in question and without receiving evidence of how the aims of the 2007 Order could have been differently met are simply incorrect.

## **8. CONCLUSION**

55. I must admire the tenacity and inventiveness of the Claimants in how they pursued their case today but it should be plain from the discussion above that nothing I have heard leads me to believe that there are grounds of appeal that have any real prospect of success.
56. Their case from the beginning has been a counterintuitive one - using the A1P1 rights to attack someone else's possessions in order to defend their own possessions. Despite all the sophistication with which this case has been brought, I remain satisfied that there was no prospect of that case succeeding so that summary judgment was indeed appropriate.
57. At a very late stage towards the end of oral submissions, the Claimants submitted that I should also consider granting permission to appeal on the basis that there is another compelling reason for the appeal to be heard. This was said to be the fact that the case raised novel arguments and that the relationship between the A1P1 rights and trademarks have not been previously explored by the courts and it would be useful to have guidance on it from the Court of Appeal.
58. I do not accept that these matters amount to a compelling reason for an appeal to be heard. As Mr Eldridge accepted, this issue is bound up with the question of the strength of the case put forward by the Claimants, and having dismissed the case as having no real prospect of success, I do not consider there is an issue on foot that requires to be resolved in the public interest.
59. This case is essentially a private dispute between two sets of trademark owners and there is no broader public interest that I discern that merits the attention of the Court of Appeal, whatever the novelty of the points that the Claimants have raised. Accordingly, I will refuse the Claimants' application for leave to appeal.
60. I will hear from the parties on costs and on the appropriate form of order following this judgment.