

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Claim No. HC 08 C02329

B E T W E E N :

EASYGROUP IP LICENSING LIMITED

Claimant

- and -

EASYJET AIRLINE COMPANY LIMITED

Defendant

PARTICULARS OF CLAIM

Introduction

1. The Claimant and easyGroup (UK) Limited are companies incorporated in England and Wales.
2. The Defendant is a company incorporated in England and Wales and a member of a group of companies of which the parent company is easyJet plc.
3. The Claimant and easyGroup (UK) Limited are members of the same group of companies in which Sir Stelios Haji-Ioannou (“Stelios”) is the ultimate shareholder.
4. By a written agreement (“the Brand Licence”) made between the Claimant, the Defendant, easyGroup (UK) Limited, easyJet plc and Stelios dated 5 November

2000, the Claimant granted the Defendant a licence to use and to sub-license the use of certain intellectual property (“the EIPR”) relating, in particular, to the use of the sign “easyJet”.

The Brand Licence is reproduced in Annex 1 hereto.

5. In this statement of case, save where the context indicates otherwise:
 - (1) Capitalised terms bear the meaning ascribed to them in the Brand Licence;
 - (2) References to clauses and schedules are references to the clauses and schedules of the Brand Licence;
 - (3) References to the Licensor and Licensee are references to the Claimant and the Defendant respectively; and
 - (4) The term “the Branding” is used to refer to the branding which the Defendant is licensed to use and to sub-license under the Brand Licence.
6. The Brand Licence was entered into in the context of the initial public offering (“IPO”) of easyJet plc and the terms of the Brand Licence were disclosed in some detail in the IPO prospectus dated 15 November 2000 (“the IPO Prospectus”).

The material parts of the IPO Prospectus are reproduced in Annex 2 hereto.

7. The business of easyJet plc as at the date of the Brand Licence was that of a low cost airline, that is to say, an airline which, amongst other things:
 - (1) Offers no “frills” such as free onboard service, airport lounges or loyalty programmes; and

- (2) Treats all revenues other than those derived from seat sales as ancillary.
8. A dispute has emerged between the parties regarding the true interpretation of certain of the terms of the Brand Licence relating to the use of the Branding in connection with activities other than the Core Activity of transportation of passengers in fixed wing aircraft.

The terms of the Brand Licence

9. The Claimant will rely on the Brand Licence for its full terms, meaning and effect. The terms of the Brand Licence set out hereafter are the principal terms the meaning and effect of which are in dispute or are material to such dispute.

The 75:25 Rule

10. Under clause 1.1 the following meanings are ascribed to the following terms:

- (1) Business Name means easyJet as, or as part of, the Licensee's trade business or corporate name;
- (2) Core Activity means, in the case of the Licensee, that part of the Licensed Activities of the Licensee that constitute its principal business as defined in Schedule 4 as passenger transport in fixed wing aircraft; and
- (3) "the 75:25 Rule"

"means that during any consecutive 12 month period no less than 75% of:

- (a) the total consolidated turnover of the Licensee Group; added to

- (b) the total income (net of trade discounts and value added tax and other sales taxes but otherwise without any deductions) of all of the Licensee's sub-licensees who are not members of the Licensee Group deriving from goods or services exploiting any of the X Rights and Z Rights

derives from the Core Activity rather than from activities ancillary and conducive thereto. For the purposes of this definition, turnover shall be computed in accordance with the Companies Act 1985 and with United Kingdom Generally Accepted Accounting Practice”.

11. Under Schedule 4:

- (1) The Core Activity of the Licensee shall be passenger transport in fixed wing aircraft;
- (2) “Subject to the 75:25 rule the Licensee may engage in any activity ancillary and conducive to its Core Activity provided that when initiated by the Licensee such activity is conducted by a number of competitors in the Licensee's peer group. ...”.

12. Under clause 6.1.15 the Licensee undertook to ensure that the limitations imposed by the 75:25 Rule are complied with.

13. Under clause 6.1.17 the Licensee undertook that upon completion of the accounts of the Licensee Group the Licensee's auditors shall provide a report to the Licensor certifying that during the accounting period in question the limitation imposed by the 75:25 Rule has been complied with.

Duties relating to the exploitation of the EIPR and the pursuit of the Licensed Activities

14. Under clause 2.1 the Licensor granted the Licensee a licence in respect of the activities set out in sub-clauses 2.1.1 to 2.1.5 in accordance with the terms and conditions of the Brand Licence and subject to the Licensee devoting its efforts exclusively to pursuing the Licensed Activities.
15. Under clause 3.4 the Licensee undertook and agreed with the Licensor that it would at all times during the continuance of the Brand Licence use its best endeavours to preserve and promote the goodwill associated with the EIPR.
16. Under clause 3.6 the Licensee acknowledges that its duty to devote itself exclusively to exploiting the rights granted to it under the Brand Licence in relation to the Licensed Activities precludes the Licensee whether directly or indirectly (and the latter shall include by way of any subsidiary) from pursuing activities that are not the Licensed Activities.
17. Under the Brand Licence the Licensee undertook that it would at all times comply with certain standards, including, without prejudice to the generality of the foregoing:
 - (1) Under clause 6.1.6:

“except in the manner permitted by the Brand Licence and subject to clause 9.4 ... the Licensee shall not use the EIPR or the Business Name together with or in combination with any other marks, names, words, logos, symbols or devices except with the prior written approval of the Licensor”.

(2) Under clause 6.1.8:

“the Licensee shall not use the EIPR or carry on its Licensed Activities in any manner which (as compared with the standards of the industrial, professional, ethical, national or cultural context in which the use is complained of takes place) would be (or on a reasonable analysis would be highly likely in due course to be) materially detrimental to or inconsistent with the good name, goodwill, reputation and image of the Licensor and/or the EIPR”

Rights and duties as regards sub-licensing

18. Under clause 9.2 the Licensee is “permitted, subject to the limitations imposed by the 75:25 rule, to sub-license the rights within the limits of the Core Activity and to any member of its Group of Companies in relation to any other Licensed Activity”.

19. Under clause 9.4 the Licensee is prohibited from sub-licensing its rights save “for the purpose of co-branding with third parties” subject to the limitations of the 75:25 Rule and the conditions upon sub-licensing set out in clause 8.3.

20. Under clause 6.1.14 the Licensee shall vigilantly supervise the performance by each sub-licensee of its obligations pursuant to its sub-licence and give notice to the Licensor forthwith as soon as the Licensee becomes aware of any breach by any sub-licensee.

Provision of information

21. Under clause 6.1.13 the Licensee must upon written request supply the Licensor with details of all material complaints made by customers relating to the Licensed

Activities together with reports on the manner in which such complaints are being or have been dealt with.

22. Under clause 6.3 the Licensee undertook to provide the Licensor promptly on request with any reasonable information relating to the conduct of the Licensed Activities which is relevant, in the Licensor's reasonable opinion, to the rights of the Licensor in relation to the EIPR.

Other material clauses

23. Clause 13.1 provides:

“The rights of any party hereto (whether arising under the Brand Licence or under the general law) shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing ...”.

24. Clause 18.4 provides that the Brand License shall be governed by and construed in accordance with English law.

Matters in Dispute

25. Certain differences have emerged between the Claimant and the Defendant regarding the true meaning and effect of the Brand Licence and the manner in which the Defendant is operating or purporting to operate under it.

The 75:25 Rule

26. Differences have emerged between the parties concerning the operation of the 75:25 Rule.

- (1) A difference has emerged as to whether the income “which derives from the Core Activity *rather than* from activities ancillary and conducive thereto”, *includes* income which derives from activities ancillary and conducive thereto. The Claimant contends, and the Defendant disputes, that the two sources of income are separate.
- (2) A difference has emerged as to whether the income which the Licensee Group derives from the Core Activity, that is, “passenger transport in fixed wing aircraft”, is confined to that which the Licensee Group receives in consideration for transporting passengers in fixed wing aircraft. The Claimant contends, and the Defendant disputes, that it is.
- (3) A difference has emerged as to whether the income which the Licensee and its sub-licensees derive from ancillary and conducive activities includes the monies which consumers pay for those goods and services or only so much of those monies as the Licensee or its sub-licensees may retain for themselves. The Claimant contends, and the Defendant disputes, that it includes all such monies.

Income derived from the Core Activity

27. In support of its contention that the income which the Licensee Group derives from the Core Activity is confined to that which it receives for transporting passengers in fixed wing aircraft, the Claimant will refer to, amongst other things, the treatment of other revenues as deriving from ancillary and conducive activities in the IPO Prospectus and ordinary industry practice as exemplified in the accounts of the Licensee Group.

Relevant sections of the Licensee Group 2007 Annual Report and Accounts and the Licensee Group Third Quarter 2008 Interim Management Statement are reproduced in Annex 3 hereto.

28. In support of its contention that the income which the Licensee and its sub-licensees derive from ancillary and conducive activities goods and services exploiting the Branding includes the monies which consumers pay for such goods and services the Claimant will refer to, amongst other things:

- (1) The actual and potential impact of the exploitation of the EIPR in relation to ancillary and conducive goods and services on the reputation and goodwill of and associated with the EIPR;
- (2) The actual and potential impact of the exploitation of the Branding in relation to ancillary and conducive goods and services on the reputation and goodwill of and associated with the Licensor and other actual or potential licensees of EIPR and, in particular, the right to use the sign “easy” which is licensed to the Licensee under the Brand Licence on a non-exclusive basis.

The income derived from ancillary and conducive activities

29. Differences have emerged between the parties as to which of the monies received by the Licensee or its sub-licensees from the sale of ancillary and conducive goods and services exploiting the Branding are to be recognised as income of the Licensee or its sub-licensees for the purposes of the 75:25 Rule.

30. The Claimant contends that all monies paid for goods or services in connection with the marketing or provision of which the Licensee or its sub-licensees have exploited the licensed intellectual property is to be recognised as income for the purposes of applying the 75:25 Rule.

31. In the alternative the Claimant contends that any and all monies received by or on behalf of the Licensee or its sub-licensees in connection with the marketing or

provision of goods or services exploiting the licensed intellectual property is to be recognised as income for the purposes of applying the 75:25 Rule.

32. In the further alternative, the Claimant contends that any and all monies received by or on behalf of the Licensee or its sub-licensees in connection with the marketing or provision of goods or services exploiting the licensed intellectual property is to be recognised as income for the purposes of applying the 75:25 rule, save where the Licensee's sub-licensees are exploiting the EIPR to effect the sale of the goods or services of third parties on a commission basis, in which case the commission alone shall be recognised for the purposes of calculating the amount referred to in sub-paragraph (b) of the 75:25 rule in and only in those cases where:

- (1) Purchasers or consumers of the goods or services have no recourse in law against the Licensee or its sub-licensees for the condition or quality of the goods or services; and
- (2) The manner in which the goods or services are marketed is such as to ensure that the purchasers and consumers of such goods or services are in fact made fully aware that neither the Licensee nor its sub-licensees is responsible for the condition or quality of those goods or services.

33. In addition, any and all of the monies received by the Licensor or its sub-licensees in connection with the activities set out in Annex 4 hereto are to be recognised as income derived from ancillary and conducive activities for the purposes of applying the 75:25 Rule.

The recognition of income derived from impermissible activities (i.e. not from a Core Activity nor from an activity ancillary and conducive thereto)

34. Clarification is required as to whether for the purposes of the 75:25 rule the Licensee's sub-licensees include any and all third parties which the Licensee

authorises or purports to authorise (or authorises or purports to authorise others to authorise or purport to authorise) to use or exploit any of the Branding.

35. The Claimant contends that any and all such third parties are to be treated as sub-licensees for the purposes of the 75:25 Rule whether the Licensee's authorisation or purported authorisation of them was expressed as a licence, permission or otherwise.
36. Further and in the alternative, the Claimant contends that those who the Defendant permits to use the Branding in connection with co-branding activities are to be treated as sub-licensees for the purpose of applying the 75:25 Rule.
37. Clarification is required by the parties as to whether it is necessary for the purposes of the 75:25 Rule to distinguish between that income which the Licensee or its sub-licensees derive from (1) permitted ancillary and conducive activities exploiting the intellectual property licensed under the Brand Licence and (2) activities which are exploiting the intellectual property licensed under the Brand Licence whilst being neither Core Activity nor permitted ancillary and conducive activities.
38. It is the Claimant's contention that any and all income deriving from activities other than the Core Activity which exploit the Branding are to be taken into account in calculating the income deriving from ancillary and conducive activities exploiting the Branding for the purposes of applying the 75:25 Rule.
39. The Claimant contends that any and all income other than that derived from the Core Activity is to be treated as deriving from activities ancillary and conducive thereto for the purposes of applying the 75:25 Rule.

The auditor's certificate

40. The Defendant has not procured the Licensee's auditors to provide a report to the Licensor upon completion of the annual accounts of the Licensee Group certifying that during the accounting period in question the limitations imposed by the 75:25 Rule has been complied with.
41. The Claimant contends that the Defendant is obliged so to do, under clause 6.1.17, within a reasonable time of the annual accounts being announced to the stock market. The Claimant contends that such reasonable period is 14 days.
42. On the basis of the information as the Defendant has provided to it concerning the issue of compliance with the 75:25 Rule, the Claimant is unable to determine whether the limitations imposed by the 75:25 Rule has been complied with or whether or how imminently the Defendant may be threatening to breach those limitations, and the Claimant reserves its position pending disclosure and the provision of the information which the Claimant request of the Defendant pursuant to clause 6.3 hereinafter.

The activities which constitute ancillary and conducive activities

43. Differences have emerged between the parties as to which activities constitute Ancillary and Conducive Activities.
44. It is the Claimant's contention that for an income generating activity to constitute an activity ancillary and conducive to the Core Activity of the Licensee it must satisfy the following necessary (but not sufficient) conditions, that is:
 - (1) The activity must be directed exclusively either to passengers transported on fixed wing aircraft (of the Licensee or its sub-licensees) or persons who

have purchased (or been purchased) a ticket to be transported on such fixed wing aircraft; and

- (2) The goods or services which are provided in the course of the activity are to be consumed in the course of such transportation (“the Flight”), (food and beverages), related to the Flight (travel insurance), designed to facilitate the taking of the Flight (airport parking), designed to create the occasion for the Flight (holiday villas) or are otherwise goods or services which are sold in-flight as a matter of airline custom and practice (alcohol and tobacco).

The goods and services referred to parenthetically are so referred to for illustrative purposes only.

The Peer Group Proviso

45. Clarification is required by the parties as to the number of competitors in the Peer Group, which is required under Schedule 4 (c) to be conducting an ancillary and conducive activity when initiated by the Licensee.
46. The Claimant contends that the number of competitors in the Peer Group which is required under Schedule 4 (c) to be conducting an ancillary and conducive activity when initiated by the Licensee is a number of 3 or more such competitors.
47. Clarification is required as to what is meant in Schedule (c) by a low cost airline.
48. The Claimant contends that what is meant in Schedule (c) by a low cost airline is any airline operating a low cost business model with the following typical principles:
 - (1) A scheduled service offering a single class of travel;

- (2) High utilisation on a low cost base;
- (3) Dense, short haul, point to point service;
- (4) No “frills” offered, such as free onboard service, airport lounges, loyalty programmes;
- (5) Direct booking over the internet or via call centres;
- (6) Ticketless travel;
- (7) No cancellations or refunds;
- (8) Ancillary revenues supplement earnings from seat sales; and
- (9) Average fares substantially lower than those offered by regional or national carriers.

49. Pending disclosure and the provision of the information which the Claimant request of the Defendant pursuant to clause 6.3 hereinafter, the Claimant reserves its position as regards which of those of the ancillary and conducive activities being conducted by the Defendant were being conducted by the required number of members of the Defendant’s Peer Group at the time when the Defendant initiated such activity.

Non Licensed Activities

50. Clarification is required as to which of the activities that the Defendant is carrying on under the Branding are activities ancillary and conducive to the Core Activity of transporting passengers in fixed wing aircraft.

51. The Claimant contends that the activities which the Defendant is carrying on under the Branding, which involve the provision of goods and services to members of the public otherwise than in connection with or in the course of the sale or provision of Flights, are not activities ancillary and conducive to the Core Activity of transporting passengers in fixed wing aircraft.

