IS IT DETRIMENTAL FOR ENTREPRE DRIVE A HARD BARGAIN?

By David Willbe

The road to a successful venture can be exciting, fast paced and occasionally cut-throat. Most entrepreneurs will agree that among the key characteristics possessed by successful entrepreneurs is an eye for a good deal, and a willingness to grab it. Inevitably, this will mean driving a hard bargain, and at times getting the best deal for your own company will mean taking advantage of another person's willingness to accept a bad deal for them.

This approach is so widely lionised within most entrepreneurial communities that it may be difficult to comprehend that pushing too far in one's best interests could actually work to an entrepreneur's detriment. The law respects the driving of a hard bargain, but where people take it to an extreme, there are certain cases where the law will refuse to enforce their agreement. Whilst it is always advisable to take reasonable and legitimate steps to pursue your business's interests, it is also important to be aware of where to draw the line.

Taking advantage of individuals

Wayne Rooney first entered the public domain at the age of 15, and virtually immediately was hotly tipped as the next big football star. Quite apart from his on-pitch exploits, this put him into the category of potentially lucrative marketing tool - as such he was in great demand from advertising agencies from the very outset of his football career.

Rooney engaged the services of a footballing agent, Proactive Sports Management Limited, to represent him in negotiations with Everton, which was his club at the time, and advise him on his commercial opportunities. A little while later, for tax reasons, he assigned all of his "image rights" to Stoneygate 48 Limited, a company in which he was the sole shareholder. Paul Stretford, a football agent and director of Proactive with whom Mr. Rooney developed a personal friendship, became a director of Stoneygate to advise Rooney on those image rights.

As part of Proactive's arrangement with Mr. Rooney, Proactive entered into an agreement with both Stoneygate and Mr. Rooney whereby Proactive would act on behalf of Stoneygate to negotiate sponsorship deals and exploit his image rights. By the end of 2003 there were two contracts in place between Mr. Rooney and Proactive, one in respect of image rights and one for all other representation, both of which were for a period of eight years and entitled Proactive to a 2.5% commission on Mr. Rooney's footballing wages, and a 20% commission on any off-pitch endorsement deals entered into on behalf of Mr. Rooney. His wife, once endorsement and similar deals began to manifest for her, also took on Proactive's representation and made the 20% commission payments.

In 2008, Mr. Stretford was (for unrelated reasons) banned from acting as a player's agent for an initial period of nine months. Consequently, the relationship between Proactive and Mr. Stretford broke down irretrievably in May 2008 and Mr. Stretford resigned from his post as a director of Proactive. As the relationship had broken down so badly, Mr. Stretford (as a director of Stoneygate) stopped all payments to Proactive from the Rooney's, and terminated the image rights agreements with Proactive. Proactive claimed that they were still owed commission, and took the matter to court.

Stoneygate argued (among other things) that the contract between Rooney, Stoneygate and Proactive was not enforceable as it should be classed as a "restraint of trade", a doctrine which (in certain limited circumstances) will invalidate a contract that unduly interferes with an individual's ability to follow their trade and use their skills. The argument was that the contract should be considered a restraint of trade as it provided for a term of eight years (which, in most cases, is the majority or all of the top-level career of a footballer) at a uniform commission regardless of how much cash this generated for Proactive, and contained no early termination rights or ability for Rooney to seek a better deal elsewhere.

The Judge found that the contract did indeed impose excessive restrictions on Mr. Rooney's right to exploit his talents in the ways he might wish, and ruled that it was unenforceable because it was in restraint of trade. The Judge pointed in particular to the wide restriction that Mr. Rooney could not negotiate or enter into contracts with any other agency who might be considered to be Proactive's competitor, and was instead bound to bring every commercial opportunity that was presented to him to Proactive. The Judge also focused on the fact that this exclusive, long-term arrangement with Proactive was entered into at a time when Mr. Rooney was only 17, and that despite his lack of sophistication in legal matters, he did not take legal advice on the document.

Restraint of trade is an area of law that most entrepreneurs will only encounter when negotiating non-competes with their senior employees, but certain of the considerations that the Judge looked at in the Rooney case are of wider application. In coming to his conclusion on the point, the Judge did consider the fact that there was clearly an

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inequality between the parties in terms both of knowledge of the sports agency industry and of their relative bargaining positions. These are both reasons for which the courts have shown themselves willing to intervene in contracts in other areas, where restraint of trade does not apply, to relieve the "weaker" party of obligations which seem unfair in that context.

In entering into dealings with someone who is in a manifestly weaker bargaining position, or whose knowledge of the area is likely to be weaker (and, in both cases, particularly if they are not taking separate legal advice), an entrepreneur should take care not to take undue advantage of that person.

Striking too hard a bargain

A slightly odder case concerns the possible consequences of giving oneself too much flexibility and leeway in a contract – in this case a website's standard terms and conditions. The case concerned a financial spreadbetting website (Spreadex) to which a Mr. Cochrane had signed up as a member.

As was widely reported in the press in 2012, one bank holiday weekend Mr. Cochrane was at his girlfriend's house in the morning and used her computer to manage his spread bets. When his girlfriend's young son asked what he was doing, Mr. Cochrane explained that he was playing a "guessing game". Later that day Mr. Cochrane apparently went to a friend's house, where there was no internet access, and stayed there for a few days. Meanwhile his girlfriend's son discovered that he was able to play the "guessing game" (as Mr. Cochrane had failed to log himself out), and did so extremely badly.

When Spreadex called Mr. Cochrane to tell him that it would no longer accept any bets from him until he cleared his by-now expansive debt, Mr. Cochrane explained what had happened and refused to pay. Spreadex took him to court for the debt, relying on a term of their standard user agreement (to which Mr. Cochrane had agreed, as part of the sign-up process) that stated that he would be responsible for any and all trading that took place on his account.

As Mr. Cochrane was a consumer, dealing with a business on its standard terms, the usual analysis is whether or not a term is reasonable – and "reasonable", in this context, is a combination of fairness and obviousness. The less fair a term is to the consumer, the more obvious it must be made to them if the court is to allow it to stand. In this case, the "standard user agreement" was a suite of four documents and the sign-up process only provided links to them, rather than the text – and the particular clause was found in one of the four documents which itself was 49 pages long. The Judge in the case remarked that he could not believe that any member of the site would have read the clause, or appreciated the point it was making – and that he considered the clause to be unfair in itself and, therefore, unreasonable. He did not, however, make his decision on that basis.

In fact the Judge went even further in assessing the bargain that Spreadex had struck as being excessive. It is a fundamental principle of English contract law that, unless an agreement is entered into as a deed (which this was not) it must contain obligations on both parties or it will not be enforceable. The Judge considered the possible obligations of Spreadex under the contract and found that, in each case, they reserved the right not to fulfill them – they were not obliged to accept a bet from Mr. Cochrane, or to let him onto the website, or even to keep his account open if they chose not to do so. The Judge came to the view that, in fact, there was nothing in the agreement that Spreadex were obliged to do – and, therefore, there was no contract at all.

An entrepreneur may at times be in a position to enter into a deal that is extremely favourable to his business, and the temptation will be to do so, but this case demonstrates that it is important to ensure that your business is at least subject to some obligations. In addition, if the business deals with consumers and has them sign its standard terms, it will be important to ensure that anything in those terms which is harsh or unfair on the consumer is not buried away in pages of small print.

Conclusion

These are cases which deal with rare situations, but the principles that they consider are to a large extent applicable to everyday business as well. The law is, in general, reluctant to involve itself in what two parties have agreed among themselves – but it will do so where that agreement is skewed by an inequality of bargaining power, or where it seems that one party has not grasped the fundamental points of what is being agreed. Knowing where to draw the line between pursuing a good bargain and taking undue advantage of a person or situation, then, could be crucial.

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