

Suing the Spice Girls: Busin



Business and breaking contracts



From time to time during the life of a company, things will go wrong. The timing of those events will not always be in the control of the entrepreneur, and occasionally they will occur around the time that the company is pursuing a major event – an acquisition, an investment or a major commercial agreement. When this happens, it can be tempting to sweep these events under the rug and hope that the counterparty to the major event simply won't notice until after the ink is dry on the contract.

Unfortunately, that is often a route that would leave the company and even the entrepreneur himself open to legal action – losing the contract, and even paying damages to the counterparty. It is broadly understood in business that actively lying to a counterparty is likely to create legal issues; what is perhaps not so widely understood is that failing to bring a counterparty's attention to something, if that thing is significant in context, can be just as risky.

On 4 March 1998, SGL (a company founded and owned by five entrepreneurs) signed a heads of terms with AWS. The terms were for a major commercial agreement – SGL was already a successful business, but the AWS agreement was significant to the business. Moving from signed heads of terms to a full agreement took a couple of months so, as is often the case, both SGL and AWS behaved in the intervening time as though the contract was already in force. AWS paid SGL the first two instalments of SGL's fee under the agreement, and SGL and its founders duly performed their obligations under the as-yet unwritten agreement. The agreement was eventually signed on 6 May 1998.

On 27 May, Geri Halliwell left the Spice Girls – and resigned as a director of SGL. As became apparent when she published her autobiography, “If Only”, Geri had actually informed the other four founders that she intended to leave the band as early as March – in fact she had mentioned an intention to leave even prior to SGL entering into the heads of terms, although it had not been taken seriously. Certainly it was clear to all concerned on 25 April, when Geri called a meeting with the entire band and their manager and reiterated her plan to leave.

AWS was an Italian scooter manufacturer, which had signed up SGL to promote a new line of “Sonic Spice” air-cooled scooters on the Spice World tour. From signature of the heads of terms through to 27 May, the Spice Girls had taken part in various promotional activities at AWS's request. When news of Geri's departure broke, AWS informed SGL that it would not be paying any further fees.

Breach of a Contract Term

The first argument that AWS made was that Geri leaving the band was an outright breach of the contract by SGL. AWS's view was that they had signed up to sponsor a tour given by the Spice Girls, and that meant the band of all five singers as it was generally known. Without Geri, the tour that took place was not a Spice Girls tour – and accordingly SGL was in breach of the agreement. This argument was rejected by the court, because where the contract referred to the Spice Girls, that term was defined as meaning “the group of individuals performing under the professional name “Spice Girls” (currently comprising...[band members' names])” – accordingly it was not a breach of the contract for one of the members to leave. On the wording of the contract, AWS had agreed to sponsor a tour by a band called the Spice Girls – with no term of the agreement dealing with who would be comprised in that band, or making it clear that AWS was making the contract only on the basis that the tour would go ahead with the then-current lineup.

Similar types of argument could be constructed in respect of many material facts that have been withheld from counterparty. Where, for example, a software application's beta test results have revealed major issues (beyond the normal run of what might be expected from a beta) a



Geri Halliwell (far right) departed from the band shortly after this picture was taken of the girls promoting the Spice World Tour.

counterparty that had signed up to a joint venture promoting that software might argue that, as the application was not fit for purpose, the company had failed to deliver on its part of the obligations under the contract.

In these cases, as in the SGL case, whether or not this amounts to a breach will turn on the precise wording of the contract. In general the courts will only find a breach in these situations where the contract is absolutely clear as to the specification of what is required. The courts are prepared to enforce a bargain on the parties who make it, but they have to be clear that the aggrieved party was in fact contracting on the basis of that exact specification and no other. AWS could not prove that, on the language of the Contract.

Breach of Warranty

Having been defeated on the argument that Geri's departure constituted a breach of a term of the agreement, AWS then attempted to argue that it was a breach of a warranty. Warranties are statements in a contract that a party makes about themselves, or their products or their affairs. The operative language around the giving of warranties will tend to be that the warranties are, as at one or more specified dates, true, accurate and not misleading – where that is not

the case, the party to whom the warranties are given will be entitled to sue for damages.

AWS's case here was made more difficult by the fact that there was no such warranty written in the contract. Their argument was that the law should imply that there was a warranty given as to who the members of the group would be, just as the law implies warranties as to specifications of products into certain other types of contract. Again, the judge's view was that the loose language that the contract used to define the "Spice Girls" ran contrary to this argument – in effect the judge ruled that what AWS had contracted for was the "Spice Girls", rather than any particular configuration of them.

An entrepreneur's failure to disclose some material fact will, most often, constitute a breach of warranty. Warranties in agreements, particularly in acquisition or investment agreements, are designed to cover all of the significant aspects of a company's organisation and business that could matter to the recipient of the warranties. It is rare that a fact of any material importance could arise, and be known at the time by the people giving the warranties, without the warranties having been breached. In the SGL case the idea that one of the band members would leave was simply beyond what the parties had contemplated, but

it is not often that such an irregular event occurs. Most of the time, particularly in the context of an investment round or acquisition, the warranties that are given will cover the event that has arisen.

This can be particularly significant for entrepreneurs themselves, as the usual situation is that the shareholders of a company give the warranties to the counterparty personally. Accordingly if the warranties are found to have been breached it is the entrepreneur personally, and not the company, who is liable for the damages caused by that breach – and their personal assets, or their proceeds from the sale of the company, that are on the line.

Misrepresentation

Having failed in their first two arguments, AWS argued that SGL had been aware at the time of signing the contract that Geri was leaving. By behaving as though she was fully committed to the contract, SGL had enticed AWS into signing a contract that they would not otherwise have signed. If the court found that SGL had indeed induced AWS to enter into the contract by making false representations to them, that would constitute a misrepresentation – which would give AWS the right to rescind the contract.

The argument turned on the fact that, on 4 May 1998, all five Spice Girls turned up to and participated fully in a photoshoot to create promotional material for the “Spice Sonic” scooters. This was two days prior to the final agreement being signed between AWS and SGL, but after the time at which everyone within SGL was clear that Geri would be leaving the band – rendering all of the promotional material they were creating useless. The argument that the judge accepted was that by

taking active part in the shoot, knowing that the promotional material (under the contract) was intended to be used until March 1999, the Spice Girls were representing to AWS that the lineup of the band would remain unchanged until at least that time. As they knew this to be untrue, and as using the material generated by the shoot was a significant factor in AWS agreeing to sign the contract, misrepresentation was proven and AWS won the case.

This type of situation may arise for entrepreneurs as well. Of course, in the process of doing a deal, entrepreneurs will have to take certain steps to help that deal along – allowing counterparties access to staff and records, for example. Those should not constitute misrepresentations. The issues arise where the parties discuss, or take steps towards, the plans following the deal. Being ambitious about those plans is unlikely to be a problem, but an entrepreneur who knows that they cannot be delivered but agrees to go along with them (or, worse, takes active steps towards them) is likely exposing themselves to a misrepresentation claim. An entrepreneur who knows that his product can’t be sold in a particular territory, or that a key staff member is leaving, should not silently go along with a counterparty’s plans that depend on those sales or that person.

The SGL case contains facts that most entrepreneurs will not have to deal with – sponsorship deals and photoshoots are unlikely to be of direct application to the majority of businesses. The arguments that were made, however, demonstrate the three arguments that a counterparty will consider if they discover that an entrepreneur has withheld material information from them – that the fact not disclosed constituted a breach of a term of the contract, or a breach of a warranty, or that the fact of non-disclosure itself was a misrepresentation.



Top Right: Simon Fuller managed the Spice Girls throughout the peak of their success.

That is not to say that all facts, if not disclosed to the counterparty, will fall into one of those three categories – certainly the less significant a matter is to the overall business, the less likely it would be to come under any of those headings. But where a fact is material, unless he and his advisers have examined non-disclosure from all of these angles, honesty will be the entrepreneur’s best policy.

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