

# LexisNexis Practical Research - Dispute Resolution

Grun GmbH is an established entity in Germany selling vaping liquids and associated paraphernalia in what is a growing global industry. Keen to break into the UK market but without the current resource to do so itself, Grun GmbH engages Blue UK Ltd as its exclusive distributor in the UK for a minimum period of two years, Grun GmbH will not either directly or via another entity seek to market or sell its equipment in the UK for a minimum of two years or for the duration of the agreement if less than two years.

## Memo

To: New DR Trainee

From: Supervising Associate

Client: Blue UK Ltd

Status: URGENT

Nine months into the operation of the contract Blue UK Ltd is making a substantial profit but finding it difficult to extract information from Grun GmbH as to product development. Furthermore the sales information and forecast systems introduced by Grun GmbH have not been working properly, causing issues for Blue UK Ltd in complying with its obligations under the sales agreement.

The relationship deteriorates to the extent that Grun GmbH threatens to terminate the agreement on the basis of Blue UK Ltd's non-compliance in failing to provide accurate sales data and forecasts and lack of development in new sales.

Blue UK Ltd accuses Grun GmbH of failing to provide sales support services and that their ulterior motive was to implement a deliberate strategy to undermine Blue UK Ltd so that Grun GmbH could terminate the agreement and start selling direct itself into the UK.

Blue UK Ltd claims that Grun GmbH is in breach of the agreement and that Grun GmbH's actions amount to a repudiatory breach of the agreement which Blue UK Ltd accepts. Blue UK Ltd claims damages for loss of the remainder of the contract's term.

Grun GmbH argues that it is not in breach of the agreement and that Blue UK Ltd has wrongfully terminated it.

Proceedings are issued. The claim is to be allocated to the multi-track.

You are to prepare for a meeting tomorrow morning regarding disclosure requirements only.

Blue UK Ltd believes it is likely to be the case that Grun GmbH has two categories of documentation:

- Category 1: documentation regarding Grun GmbH's own sales efforts in the UK in the period both immediately before the termination and thereafter. Blue UK Ltd believes that Grun GmbH has entered into agreements with third party wholesalers in the UK immediately after the termination which must have been negotiated prior to termination.
- Category 2: Blue UK Ltd also believes that Grun GmbH has had discussions with and obtained relevant UK Government clearance in relation to its activities and agreements with the wholesalers – the UK Government having recently stepped up its intervention in policing the sale of foreign produced vaping equipment in the UK. Such discussions suggest Grun GmbH was looking to start selling direct in the UK itself well ahead of the two year term of the agreement expiring.

Blue UK Ltd wants Grun GmbH to disclose any documents falling in category 1 and category 2 above on the basis that:

- Category 1 documents: are relevant both to support the 'ulterior motive' allegation and to assist with quantum in respect of Blue UK Ltd's loss of profit claim.
- Category 2 documents: relevant to the ulterior motive argument.

Grun GmbH does not want to disclose either category of documents. It's reasoning being:

- Blue UK Ltd should be able to evidence its own loss of profit claim from its own sales forecasts, thus there is no need to have sight of any such agreements and documents that might exist and this is just a fishing exercise by Blue UK Ltd to seek to undermine Grun GmbH and waste their time and reputation in the industry.
- Any such agreements are commercially confidential as between Grun GmbH and those wholesalers and Grun GmbH cannot therefore disclose them.

- Any discussions which Grun GmbH may have had with the Government should be protected on the grounds of public interest issues.
- Furthermore, Grun GmbH believes that Blue UK Ltd will use information obtained from either category of documents to determine pricing strategy for a new venture with another principal from the US with whom it understands Blue UK Ltd is planning to start selling for and will exploit the nature of the Government assurances (category 2 documents).

As Blue UK Ltd's lawyer, you are asked to advise on:

- 1) the likelihood of Grun GmbH succeeding withholding disclosure and/or inspection of the category 1 and category 2 documents;
- 2) the extent to which any confidentiality issues could be agreed with Grun GmbH;
- 3) how an application for specific disclosure and/or inspection may be pursued if Grun GmbH continue to oppose disclosing documents which Blue UK Ltd assert should be disclosed.

**Please prepare answers to the following questions:**

- 1) What is the scope of standard disclosure?
- 2) Since this case is allocated to the multi-track and is not a PI case, what is the process for disclosure in this instance?
- 3) When, if ever, can commercial confidence protect documents from disclosure and/or inspection? Is there protection from inspection based on public interest issues? Your supervisor remembers a fairly recent case about this topic again involving a German company and a mobile phone patent. Nokia were involved and Floyd the judge. Can you find it?
- 4) How could Blue UK Ltd seek the court's assistance in this respect, on the basis of CPR 31.17?

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