Collyer Bristow

Collyer Bristow Annual IP Debate 2017

29 June 2017

On 29 June 2017, Collyer Bristow hosted its third annual Intellectual Property debate. This year's motion was ***'This house believes that IP law in post-Brexit Britain will benefit from leaving the binding jurisdiction of the European Court of Justice (ECJ)'.***

The debate was chaired by Sir Richard Arnold. Proposing the motion were Martin Howe QC of 8 New Square and Dr Gunnar Beck, Reader in law at SOAS. The opponents were Professor Lionel Bently of the University of Cambridge and Professor Tanya Aplin of King's College London.

Martin Howe contended that, for IP, the ECJ was unfit for purpose. It had never been designed, he said, to deal with IP disputes, but rather trade and economic issues. However, as EU IP law became increasingly harmonised, the Court had effectively become an appeal court for large areas of substantive IP law. However, this is not reflected in the Court's make-up and constitution. Howe referred to a 2016 academic study by Marcella Favele indicating that the majority of ECJ judges' expertise was in EU/public law. Not one cited IP experience in his/her CV. There was, Howe argued, very little rationale for UK rights owners submitting to the jurisdiction of an EU court devoid of judges with relevant specialisms, particularly given the cost of a reference to the ECJ in terms of money, delay, and damage to litigants compared to its domestic counterparts. The UK ought to have more confidence in its own judiciary.

In opposition, Professor Bently said such criticism of the ECJ was *'unfair, ignorant and wrong'*; any court dealing with the range of issues and workload of the ECJ would have had difficulties. In Bently's view, it had, overall, done *'a pretty good job'* of making sense out of what was often bad or partial legislation. In answer to Martin Howe's claim that ECJ judgments were often Delphic and even unhelpful, Bently recalled the late-90s when the ECJ had ultimately conclusively settled the meaning of *'likelihood of confusion'* for the purposes of the Trade Mark Directive. Bently also argued that much of the criticism of the ECJ comes from taking individual decisions and picking them apart in isolation when, in fact, we should not be reading ECJ judgments as we would English judgments. He quoted Mummery LJ in La Mer Technology, that the ECJ's judgments should not be read or applied too literally but were *'part of a continuing conversation'* with national courts.

Dr Beck's response charged the ECJ with having a *'pervasive teleological pro-Union bias'*, of interpreting EU law broadly and promoting harmonisation at the expense of all else. Dr Beck also reminded the audience that the ECJ is currently a multi-national court in which the UK participates fully, nominating judges and an advocate general. However, post-Brexit it will become a foreign court making decisions according to foreign legislation and affording the UK even less respect than it does now. Remaining subject to the ECJ from outside would therefore be the worst possible result.

Professor Aplin replied with cautionary tales from the UK's own higher courts to persuade the audience that, in fact, the UK should not feel so confident that they were preferable to the ECJ. Aplin argued that, of the nine IP cases decided by the Supreme Court since its creation in 2009, none were beyond criticism. She considered **Trunki, Vestergaard Frandsen v Bestnet** and **Lucasfilm v Ainsworth**, concluding that here were a range of Supreme Court decisions displaying a lack of clarity and a normatively questionable approach. Could we really be so sure that IP rights owners would be better off without the ECJ? Aplin also responded to the complaint that a lack of specialist judges made the ECJ unsuitable for hearing IP disputes, observing that, once Lord Neuberger retires from the Supreme Court, there is no guarantee that an IP specialist will be appointed. She also pointed out that the US Supreme Court only has one IP specialist and the Australian Supreme Court has none at all. We are used, she said, to entrusting our appellate courts to decide our most complex IP cases without requiring them to be specialists.

The vote resulted in a two third's majority against the motion, perhaps indicating that many in the UK's IP profession still value the benefits of harmonisation with Europe above the sovereignty of our courts.

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