In the London Arbitration Centre Case No. EU125077

The seat of Arbitration is in England & Wales

Under the ADR Procedure for the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

In accordance with the London Arbitration Centre Rules of Procedure

Date of Award/Decision; 2nd December 2019

XXXXXXXXXXXXXX

The consumer

and

Epic Games International S.à r.l.

The trader

Decision

The claim

The consumer claims that he has been wrongly banned from the online video game known as '*Fortnite*' which is a product regarded in law as 'digital content' under the Consumer Rights Act 2015 (being distinct from the supply of goods or services). The trader is the supplier of the digital content.

Procedural background to the claim

The claim was originally presented by the consumer through the EU Online Dispute Resolution (ODR) platform on 16th July 2019. The claim was accepted for resolution by the London Arbitration Centre Limited (LAC) by both parties on agreement to the terms set out in my communication dated 18th July 2019. Principally, this was that the dispute be resolved

in accordance with LAC rules, that the cost of the ADR be borne by the trader and that the decision of the ADR officer (being the decision herein) be binding upon both parties.

The consumer agreed to the terms on 20th July 2019 and the trader agreed to the terms on 26th July 2019. On 30th July 2019, I directed that the process of dispute resolution be carried out off the EU ODR platform primarily because of the uncertainty over 'BREXIT' and the possibility that all UK ADR entities might be shut out from the platform in the event of a no deal 'BREXIT'.

The consumer had filed two documents with his claim submitted through the EU ODR platform;-

1. Notice of Dispute;

2. Further Information (Addendum to Notice of Dispute).

I have set out below the consumer's claim in full as set out on the EU ODR platform headed '***Complainant's version of events'***;

On May 30th 2018, I was falsely banned from the online video game, Fortnite, accused of cheating. Over the year, I have spoken back and forth with a staff member from Epic Games in regards to this, with no hope of the situation being resolved due to their appaling customer support. I have already filed a 20+ page document as an Informal Resolution directly to Epic Games, to which they responded with a one-line answer essentially saying they would maintain the ban. I have spent an estimated £87.90 on in-game currency. (Plus an additional amount in which I purchased their single-player campaign, "Save The World" on a third-party site.) - I am being withheld from accessing these purchases, locked out of them and accused of cheating. This ban was made over a year ago, and I have persisted for the sake of proving my innocence that no cheating of any kind ever took place. I put together a list of theories as to what might have gone so terribly wrong, to no avail. Epic Games will simply not provide me with the exact reason for my ban so that I may defend myself further. I understand that this may seem, to some, a silly topic to complain about, but the reality is that I am being locked out of these purchases and repeatedly accused of doing something that I have not.

I have attached the "Notice of Dispute" that I sent to Epic Games which includes all the details I have gathered over the year.

(Note: The date provided for the purchase of the goods/service has been set to the first purchase made, as it includes multiple purchases made over a period of time.)

What you are asking for

I'm kindly asking for this unjust and unwarranted ban to be lifted and to be reimbursed for the year in which I was unable to access any of my monetary purchases and grief caused. This entire event that should not have occurred also caused delays to the development of a project a team and I are working on, due to game development content being located on the same software that I was banned from. (Unreal Engine 4).

The claim also shows £87.90 as the sum paid by the consumer under the heading '**price of goods or service**'.

The trader had not already filed a response to the claim before my above direction dated 30th July 2019. Subsequently, the claim was re-presented through the process provided by the LAC. This process provides for the completion of an online claim form. The consumer re submitted the complaint in the terms set out above but provided additional comment in relation to questions the consumer is required to complete through the LAC claims process;-

HOW HAS THIS AFFECTED THE CONSUMER

This wrongful ban not only locked me out of my purchases for months, it also put a strenuous delay on my own project, an independent video game being developed with the Unreal Engine (which shares the same launcher as the aforementioned video game, Fortnite) - the ban extended to all accessible content and software within the Epic Games Launcher, not just Fortnite. As a result, our project was delayed. I've also felt that the treatment given to me via Epic Games was not acceptable, being branded within an email from a staff member that I am "110% a cheater" - as is showcased in the Notice of Dispute documentation. While not public, I feel that this is internalised slander and Epic Games presumes me to not be a genuine customer/supporter.

HOW SHOULD THE TRADER PUT THINGS RIGHT

I feel that Epic Games, in order to put things right, should either: a) lift the wrongful ban, compensate me for the duration of the ban and apologise privately for the difficulties I had getting in touch with them and some of the treatment received, or b) provide me with the supposed evidence of any falsely alleged suspicious activities so that I may better defend myself, as I am at an impasse due to the lack of details provided by Epic Games.

Following a preliminary review of the claim on 5th August 2019 the trader was requested to advise the LAC whether the trader requested a stay of the arbitration to enable the trader to furnish evidence that it had taken all reasonable steps necessary to discharge a duty of care which might be implied in law. It is my view that this is a new and fast changing area of law. I was primarily concerned to see what checks, if any, the trader had in place to ensure that their users did not harm themselves or others. The arbitration was thereafter stayed to enable the trader to deal with the preliminary point raised by myself. When I say 'stayed' I mean stayed as between the parties whilst the trader went away to address issues I had raised in the preliminary point. I add here, the preliminary point is not part of the consumer's claim. I did not want to start the ADR process without the background information being supplied to me about the process leading up to the referral to ADR. The trader's response dated 9th September 2019 is referred to below.

Next following the submissions by the trader as to the preliminary point referred to above, a substantive order was made on 12th September 2019 for the resolution of the claim. Essentially, the trader was ordered to respond to the claim with the consumer having the final say in the form of a reply. Before making the order, I went into detail as to what the trader should include in their response to the claim under the heading '*about the order*'.

This included matters of law which although not raised by the consumer seemed to me relevant to my decision. Without repeating the order word for word, I wanted to know from the trader whether the rights of the consumer had been infringed under the various pieces of legislation enacted to protect the rights of consumers. I was raising all the possible legal arguments on behalf of the consumer in place of the bare claim by the consumer that he had been banned from the online game. I had taken an investigative approach to the claim. The imbalance between the parties in expertise and resources in favour of the trader was balanced by the assistance provided to the consumer identifying matters of law that were relevant in this case.

I had also resisted arguments by the trader set out in the preliminary point that the consumer particularise his claim. This is because the primary focus of the LAC is to provide a dispute resolution service for ordinary consumers where the consumers are not expected to use the service of lawyers or have detailed knowledge of law. So overall both in terms of the process and the procedure this has been weighted in favour of the consumer.

Moving on to directions I gave to the consumer. I believe that I should highlight one particular aspect of information I gave to the consumer under the heading '*about the order*' which I have referred to above;-

"..the reply by the consumer can be in any form but should be clearly marked/headed 'Reply' and should deal exclusively with the contents of the Response to the Claim. The consumer may submit any document in support of the Reply but the consumer must remember that new matters of complaint can't be introduced. The consumer is simply replying to the Response."

This direction related to how the consumer was expected to reply to the response by the trader to the case against the trader.

Following the order dated 12th September 2019, the trader filed their response to the claim at 4.40pm on 1st November 2019. This was after extensions of time allowed to the trader by direction of the LAC and then by agreement of the consumer.

On the same date, timed at 21.11 the consumer wrote by email;-

Dear all,

I confirm receipt of the Response of the Trader. I have decided to waive the remainder of the time I have to add any further information and I have attached my response, the Response of the Consumer, and I would also appreciate a confirmation of receipt.

Kind regards,

XXXXX

Attached to the email is a document headed 'RESPONSE OF THE CONSUMER' and in the top right hand corner of each page the document is dated 1/11/19. To put this into time context, the consumer had until 29th November 2019 to consider the response by the trader

and reply to the same. Instead the consumer had replied by email on the same date, less than 5 hours later.

By email dated 8th November 2019, the consumer then sought to add to his case. I informed the consumer that his request was to be treated as an application to amend his case. I asked him to tell me the about the substance of the proposed change and an explanation why he had not been able to include this 'change' in his earlier document. The consumer responded on 9th November 2019. There was no explanation why the proposed change had not been included in the earlier document.

The trader made no comment on the application to amend. By email dated 13th November 2019, I informed the parties that the outcome of the consumer's application to amend would be dealt with in my final decision herein.

The application by the consumer to amend his case

I am not going to allow the amendment. The consumer seeks to adduce evidence showing an outright ban imposed by the trader on another gamer and also seeks to draw comparisons (through alleged 'support' received from others). The example provided by the consumer shows an outright ban against another gamer. The proposed amendment does not assist the consumer with his case. Furthermore, the subject of the proposed amendment does not go to the response by the trader. When I gave directions about the order made on 12th September 2019 the consumer was specifically informed that his reply "..*should deal exclusively with the contents of the Response to the Claim.*

No explanation has been given why the consumer had not included the proposed amendment in earlier submissions. I also believe the consumer has been slightly impetuous filing the reply in short time taken. A period of reflection by the consumer would have been better than an instantaneous response.

Terminology

I believe it is important that I bring some clarity as to the terminology in use in this case. Certain words have been used out of context, in particular, the words '*cheating*', '*cheats*', '*cheat detection'* and '*cheat software'*.

My starting point is the definition of a 'cheat'. For convenience, I have taken an online dictionary for reference;-

https://dictionary.cambridge.org/dictionary/english/cheat?q=cheating

cheat- to behave in a dishonest way in order to get what you want

It can be seen that being called a cheat is generally understood as being a dishonest person. I want to make it absolutely clear that I am not dealing with any allegation that the consumer is a '*cheat*' or that he has been '*cheating*' within the ordinary meaning of the words set out above.

It is unfortunate that the online gaming industry uses archaic terms. I can see this has been the source of some anguish to the consumer when these words have been used out of

context. The consumer believes he has been *accused of cheating* and that he believes he has been '*branded within an email from a staff member that I am "110% a cheater" ...I feel that this is internalised slander …….. '*.

I use the word '*cheats'* and '*cheat detection*' as defined in the trader's End Users Licence Agreement (EULA) referred to as Fortnite EULA May 2018 set out at annex C to the response by the trader.

The definitions are provided as follows;-

"Cheats" means programs or other processes which may give players an unfair competitive advantage in the Software.

"Cheat Detection" means functionality intended to identify Cheats.

From these definitions, I have derived corresponding meaning as to, '*cheat software'* which should be interpreted as software that provides an unfair competitive advantage. I have thought best to avoid use of the term '*cheating*' but if it had to be used at all in a gaming context it should be interpreted as using 'cheats'.

<u>The test</u>

I have to decide whether the trader is entitled in law in terminate the EULA with the consumer. If the trader is not entitled to do so, I have to go on further and decide what remedy or relief the consumer is entitled following the wrongful termination of the EULA.

The test involves reviewing the terms of the contract against the circumstances of the case. In simple terms, 'right' and 'wrongs' of any situation can only be judged against what the parties have agreed. By way of example, it may be wrong to play football in the street but it is not wrong in law to play football in the street. Conversely, playing music is perfectly acceptable but playing music in a public library might be deemed unacceptable by the rules of the library.

This is where drawing comparisons and providing detailed explanations as the consumer does fall down unless these refer back to the contract agreed between the parties (n this case the EULA) or some other piece of (consumer) legislation binding on the parties.

<u>The contract</u>

In response to the claim, the trader relies on the (licence) conditions set out in the EULA. I have set out below the relevant provisions of Clause 2 of the EULA relied on by the trader;-

The Software may contain Cheat Detection software or features or you may be prompted to install Cheat Detection software during your installation of the Software. If you do not agree to install the Cheat Detection software or at any time remove or disable the Cheat Detection software or features, the License granted to you automatically terminates and you may not make use of the Software. The Software or the Cheat Detection software may collect and transmit details about your account, gameplay, and potentially unauthorized programs or processes in connection with Cheat Detection, subject to Epic's Privacy Policy. In the event

that Cheats are identified, you agree that Epic may exercise any or all of its rights under this Agreement.

I have to decide whether on the balance of probability 'cheats' have been identified by the trader on the consumer's device. If so, the trader may exercise the right against which the consumer now complains. The term 'balance of probability' is a legal term which is used in civil cases and is used to describe the burden of proof meaning 'more likely than not'. This is because nothing can be proved with absolute certainty.

As a matter of law, I cannot import words into a contractual agreement. This is different to a situation where contractual terms are not clear. In that case, the contractual terms are open to interpretation by the court or tribunal. This is not the case here.

It seems to me that the relevant provisions of clause 2 referred to above have effect whether or not users actually know about or even use 'cheats' whilst playing 'Fornite'. Suffice, 'cheats' are identified on the device on to which the software is installed '*which <u>may</u> give players an unfair competitive advantage in the software'* not that they actually do so. This is a '*one size fits all*' provision. By this I mean regardless of the users actual knowledge or use.

It is because I cannot import my own words into contractual agreement that it matters not in this case whether the consumer actually uses the 'cheats'. Once identified, the trader may exercise all or any of its rights under EULA.

<u>Cheat detection software</u>

It is for the reasons set out above, I believe there is no requirement to examine the reliability of the trader's cheat detection software. The online game Fortnite comes with all its spectacle and beauty, cheat detection software included. Ugly or not. I am not going to decide whether the trader's cheat detection software detected the use of 'cheats' by the consumer. Neither would sharing of confidential commercial information about the cheat detection software make any difference. The trader's cheat detection software is what it is.

If the consumer believes the trader's cheat detection software did not detect him using 'cheats' that might be useful information he could impart to the trader or this information might have a commercial value elsewhere but that in itself is not sufficient to discharge his own legal duty to the trader. Simply because there may be room for technological improvement in the cheat detection software is not sufficient. The test is whether the trader's cheat detection software has identified 'cheats' on the consumer's device which might have given him *'an unfair competitive advantage in the software'.* It is up to the trader where they set the parameters of the cheat detection software.

All I say is that the consumer has presented a really good case why the parameters of the trader's cheat detection software may be too wide but that does not have any impact on the application of clause 2 of the EULA referred to above for the reasons stated. I can only consider the terms of the EULA. I cannot import my own wording.

<u>Findings of fact</u>

I find as a fact that the consumer agreed to the terms of the EULA when he set up an Epic Games Account. The process by which the consumer agreed to the terms of the EULA is set out by the trader under paragraph 2 of their response to the claim in paragraphs 2.1 to 2.5. The consumer in his reply to the response does not take issue with paragraph 2 of the response by the trader as to his entry into EULA.

I find as a fact that the trader's cheat detection software identified 'cheats' on the consumer's device in breach of clause 2 of the EULA. On page 7 of the consumer's document headed '*Notice of Dispute for Epic Games'* the consumer states;-

"Cheat Engine.

My computer has Cheat Engine installed on it. A software used for modifying values in various other software, most notably single-player games. This has been mentioned in various emails between Tony Won and I, it's not something I'm worried to share, due to the nature in which I use said software…."

I also note the consumer's reply at 3.2 he states *"…I was banned for either having a software installed that I use at my own leisure, and understandably, at my own risk, or for having a website open that refers to using Cheat Engine in Mad Max. I must stress and repeat that this has never been used in the Trader's software, Fortnite, nor any other multiplayer game."*

I find that the '*Cheat Engine'* referred to above by the consumer and/or the consumer *'having a website open that refers to using Cheat Engine in Mad Max'* is a 'cheat' within the definition of cheats set out in the EULA. I find as fact that as a consequence of cheats being identified, the trader is entitled to exercise its right to terminate the consumer's licence to use the digital content. The trader is entitled to terminate the EULA whether or not it has reserved the right to do so following the consumer's breach of contract.

In this case, the trader has specifically reserved the right to do so under clause 10 of the EULA. The consumer raises the issue of 'fairness' (albeit after earlier prompting by myself) at paragraph 3.5 of his reply to the response by the trader in relation to purchases that have been lost;-

"*If I had legal expertise, I would absolutely love to refer to a relevant argument for the statement in 3.5 that there is no obligations to any refunds……. I am being deliberately withheld and locked out of my purchases within the Trader's software, Fortnite. Money has been spent to obtain items within the software, and now I am being kept from these purchases. If I bought a phone from a shop, I couldn't see the manufacture taking the phone away and refusing the give me my money back. I made a purchase using money and it is my belief that these purchases must be respected or refunded..".*

I note the submissions made by the trader by reference to the "guidance notes to the CRA published by the Competition and Markets Authority". These are shown

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf

The trader states these guidance notes make clear that in this situation, a trader may well be entitled to retain all or some monies prepaid by a consumer. The trader says that the position might have been different if the Termination Right sought to impose an obligation on the Consumer to pay any additional sum by way of compensation, but that is not the case. The trader submits that the termination right is neither disproportionate nor penal. I agree with the submissions made by the trader here although I also refer to paragraph 5.5.6 of the guidance notes by the Competition and Markets Authority". ;-

Disclaiming liability where the consumer is at fault.

Terms which disclaim liability for loss or damage (for example, to the consumer's property) which is caused by the consumer's own fault may be acceptable. But this does not mean that a disclaimer which operates only where the consumer is in breach of contract is necessarily fair.

Under clause 10 of the EULA the trader restricts their liability as follows;- *Except to the extent required by law, all payments and fees are non-refundable under all circumstances, regardless of whether or not this Agreement has been terminated.* This clause operates whether or not the consumer is in breach of contract.

If the consumer had not been at fault, I would have had no hesitation ordering the trader to repay the loss incurred by the consumer. In this case, my finding is that the consumer is at fault (albeit either knowingly or unknowingly) and therefore it is not unlawful for the trader to retain sums paid by the consumer. I believe this would be the position under general law, outside of the consumer rights Act 2015, in any event. There has been no loss sustained by the consumer.

Lack of transparency would help a term fail the test of unfairness. I do not find any lack of transparency in relation to the term relied upon by the trader, if it was necessary to do so.

<u>Intellectual & Property rights</u>

The trader's response is set out at paragraph 5 of their response - paragraphs 5.1 to 5.8. The trader's rights to the intellectual property are not challenged by the consumer and I am satisfied that the trader does have ownership rights to the core game 'Fortnite' and the virtual items that can be acquired therein.

In relation to the Unreal Engine 4 (UE4) and the Unreal Engine Marketplace, I understand that these are subject to separate licence agreements. I understand the consumer's use of this property has been reinstated and that the consumer's concern set out in paragraph 5.7/5.8 is *what can the trader do to ensure this doesn't happen again?*

The only guidance that can be offered is that the consumer would have to complain again through the trader's own complaints process which may or may not lead to independent adjudication. All I can say is that if the consumer's use of the property has been reinstated there is no issue to be resolved which I might have difficulty dealing anyway with without sight of the licence agreements.

<u>Data Protection</u>

I asked the trader to include in its response whether the consumer's data was being processed lawfully. I am satisfied, after considering the submissions by the trader, that the functioning of the trader's anti-cheat software and systems would be excluded from disclosure under Article 15(4) General Data Protection Regulation (EU) 2016/679 (GDPR) and paragraph 26 of Schedule 2 to the Data Protection Act 2018 as set out in paragraphs 6.4 and 6.5 of the response by the trader. The consumer's claim for disclosure of commercially sensitive information as to the operation of the trader's cheat detection software cannot therefore be sustained.

I am not, however, satisfied beyond this that the consumer's data is being processed lawfully. The consumer has been identified as using 'cheats'. For reasons explained above under terminology, this is wholly different to being identified as a 'cheater' or as having been found 'cheating' as set out in paragraph 6.7 and paragraph 7.9 of the response by the trader. I shall require that the trader to rectify the consumer's personal data held by the trader to this effect.

The duty of care on the trader

I am grateful for the trader response to the Order dated 13 August 2019 because the issues raised in my preliminary review were not part of the dispute between the parties. The document helpfully sets out the up to date position on the duty of care owed by trader to users (outside of contract law).

I believe the document also helpfully sets out the trader's complaints policy in the light of the difficulties experienced by the consumer in communicating with the trader. Those perceived difficulties have to be balanced with the fact that the trader has provided to the consumer an opportunity, at no cost, to have his claim reviewed independently. Nothing further arises from the response to the preliminary point other than an advisory comment that checks be introduced to identify vulnerable users in the processes the trader already has in place.

Conclusions

Regardless of the decision on the claim, the 'ban' imposed on the consumer cannot be lifted without the consent of the trader. Once a trader decides he is not going to do business with somebody there is no mechanism which can be employed to make the trader carry on business with that person. Even if I had made findings against the trader on the EULA, the outcome would not have been much different in real terms.

I can see that the main thrust of the consumer's claim is that the ban be lifted. This is a decision which can only be taken by the trader. I have identified errors in the handling of the consumer's personal data which errors would no doubt have been taken into account in the decision by the trader to ban him from the game Fortnite. By correcting the errors in the consumer's personal data, this may assist the consumer in seeking a review of the trader's decision to ban him permanently. This decision on the claim, however, confirms that the termination of the EULA by the trader is lawful.

A breach of the consumer's personal data may be actionable in damages but I am not going to order the trader to pay damages to the consumer because there is no claim or evidence of any loss suffered by the consumer, other than upset. As far as I am aware the consumer's personal data has not been shared with any third party. Likewise, I have not heard submissions from the trader on any claim for compensation.

The order I make below in relation to the order that the trader rectify the consumer's personal data can be enforced by the consumer by further reference to the Information Commissioner but only if the trader does not comply with the order I make below.

For the avoidance of doubt, the are no damages payable to the consumer in contract because of the findings I have made herein.

Order

1. The claim by the consumer is dismissed; and
2. The trader within 28 days hereof rectify any personal data held by trader on the consumer to show that the trader's cheat detection software identified 'cheats' on the consumer's device from any personal data held by the trader which identifies the consumer as being a '*cheater*' or has been found by the trader as having been engaged in '*cheating*'.

Signed
Mr Ayub Sadiq
ADR Official appointed by the London Arbitration Centre Limited