Sloan Plumb Wood

SOLICITORS

Legal Update

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Case Law Updates

Introduction

Welcome to the Summer edition of the Sloan Plumb Wood LLP legal update.

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Copyright Infringement in hypertext links and headlines

Newspaper Licensing Agency v Meltwater Holding BV, Meltwater News UK and PRCA

Many businesses use e-mail alerts for their clients and customers to update them as to news stories or general matters which may be of interest to them. A recent case in the Court of Appeal (The Newspaper Licensing Agency v Meltwater Holding BV, Meltwater News UK and PRCA [2011] EWCA Civ 890) in respect of copyright infringement in newspaper headlines and articles by a news aggregation service may be of interest to such businesses.

The Newspaper Licensing Agency ("the NLA") is the organisation responsible for managing copyright in its members' newspaper articles. It collects the fees on behalf of the member copyright owners and licences their copyright. The Defendants ("Meltwater") in this case are collectively a media monitoring service which distributed to its business customers copies of its online publication "Meltwater News".

Meltwater used software to monitor news and other websites and then e-mailed the Meltwater News to its customers (for a fee). The e-mails contained a hypertext link to the article as it featured on the copyright owners' websites. The e-mail would contain the headline of the article itself (as the hypertext link for the user to click on); the opening text of the article; and an extract of the text showing the search terms of the user in context.

The NLA took Meltwater to Court for copyright infringement. Meltwater appealed the decision of the High Court but the Court of upheld the High Court's decision as follows:

- Importantly it held that headlines can attract copyright in their own right.
- Some of the text sent out in the e-mail could amount to an infringement of copyright even if it was a small section of the overall article, and
- The end users of the e-mail had no defence to copyright infringement

Prior to this case it was always thought that simple linking (i.e. providing a hypertext link to the homepage of another site) was an acceptable practice. The Meltwater case has not change this for now in principle but it has potentially opened up door to copyright infringement. We may in the future see claimants arguing that the link itself has copyright protection, in the same way that headlines have now been held to attract copyright protection. The copying of the link may then amount to copyright infringement. The reason it was copyright infringement in this case was because the hypertext link to the article was the headline rather than the website address itself.

In the case of "Deep links", i.e. links to beyond homepage of the end website, this has always been considered more problematic for the owners of the end websites as any advertising, policies, terms and conditions that appear on the homepage may get bypassed by this practice. For now, the position is the same as simple linking and we will need to see how the Courts develop this in the coming years.

It wasn't decided in the case but it is possible that the end user of the e-mail could be found liable for copyright infringement by opening up the link which technically makes a copy on the end user's computer. However, this is not certain and we will have to see how the Courts deal with this question in the future.

This case was decided on the particular facts but businesses disseminating news stories to their own clients need to be careful in the future as to what rights they have to use the material they are passing on and also in what way they summarise or link to the information.

Trigger for Payment in Construction Contract

R and C Electrical Engineers Ltd v Shaylor Construction Ltd [2012] EWHC 1254 (TCC) (15 May 2012)

In R and C Electrical Engineers Ltd v Shaylor Construction Ltd [2012] EWHC 1254, the claimant R and C Electrical Engineers Ltd ("R & C"), the sub-sub contractor in respect of a construction project, sought to enforce an adjudicator's decision against Shaylor Construction. The dispute centred in part on whether the monies were due to Shaylor under its Contract with Ashley House.

The adjudicator had found that the final payment due to R&C was £196,963 (plus VAT) and said as to the timing of that payment:

"Any sum to which R&C are entitled to be paid by Shaylor shall not be paid forthwith (but only following issue of the Final Certificate under the Main Contract and then in accordance with clause 21.8 (b))." (Adjudicator's emphasis)

Clause 21.8 (b) provided as follows:

"21.8 (b) The Final Payment shall be due not later than 30 days after the date of issue of the Final Certificate to Shaylor Construction Ltd under the Main Contract conditions and within 7 days of the date on which the payment becomes due the Contractor shall send the Final Payment Notice notifying the Subcontractor of what the amount relates (sic) and the basis on which the account has been calculated. The final date for payment of the Final Payment shall be 52 days after the date it becomes due.

Not later than 7 days before the final date for payment of the Final Payment the Contractor may give a notice to the Subcontractor which shall specify any amount proposed to be withheld or deducted from the amount notified under clause 21.9 (a) the ground or grounds for such withholding or deduction and the amount of the withholding or deduction attributable to each ground."

Shaylor and Ashley House were involved in a separate dispute as to delay under the "Main Contract". No Completion Certificate had been issued on 7 March 2011 when the works the subject of the Main Contract were completed. This dispute was eventually settled and part of the negotiations leading to the settlement resulted in the issue of the Completion Certificate on 23 February 2012 and affirmation of the provisions of the Main Contract to include the terms as to the Final Certificate.

R&C argued that if no Completion Certificate was issued on the correct day by Ashley House and there was no challenge to that failure by Shaylor way of adjudication, the contractual machinery relating to certification must be taken to have broken down and it could not be revived some 12 months later. Mr Justice Edwards-Stuart rejected that argument saying:

"...a refusal by Ashley House to issue the clause 19.3 certificate (if there was such a refusal) does not in my view mean that the contractual machinery had broken down. In my judgment, there is a difference between circumstances which prevent the contractual machinery being operated, and circumstances in which one party refuses to operate it although in a position to do so."

Mr Justice Edwards-Stuart said that in any event the failure to issue the Completion Certificate was cured by Ashley House issuing the Completion Certificate on 23 February 2012.

R&C also argued that Shaylor's solicitors had misled the adjudicator by failing to clarify the position as to the Completion Certificate and that as a result the adjudicator's decision as to the timing of the payment to R&C should be varied. R&C criticised Shaylor's solicitors, suggesting that they either knew or ought to have known that the Final Certificate would never be issued. Mr Justice Edwards-Stuart considered that the information provided by Shaylor's solicitors to the adjudicator had been accurate and that Shaylor's solicitors could not be criticised. It appears that the suggestion is the subject of possible defamation proceedings by Shaylor's solicitors.

Mr Justice Edwards-Stuart also considered that R&C's arguments failed on an assessment of the terms of the sub-contract. R&C was required to send Shaylor all the documents necessary for calculating the Final Sub-Contract Sum within 3 months of completion, by 7 June 2011. No more than 9 months later Shaylor was required to prepare and send to R&C a statement of the calculation of the Final Sub-Contract Sum. This process should therefore have been completed by no later than 7 March 2012; two months after the Adjudicator issued his Decision. The Final Payment to R&C would then have become due no later than 30 days after the issue of the Final Certificate (with actual payment, subject to set-off, taking place 52 days later). Mr Justice Edwards-Stuart explained that:

"If the question of the non-issue of the Certificate under clause 19.3 of the Main Contract had been raised before the Adjudicator, and if an analysis along these lines had been presented to or carried out by the Adjudicator in consequence, he would inevitably have concluded that the sum to which he found R&C was entitled on its final account, £196,963, was not payable immediately but only following the issue of the Final Certificate pursuant to the terms of clause 21.8 (b) of the Sub-Contract or, alternatively, by the latest date on which the Final Certificate ought to have been issued."

Therefore R&C's claim failed and no monies were found to be due until a Final Certificate is issued under the Shaylor/Ashley House Contract.

"Best Endeavours" obligation considered by Court of Appeal

Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417 (02 April 2012)

We considered this case at first instance in our SPW legal update for Autumn 2011. Copies of past SWP legal updates are available from our website.

This case involved the construction of a "best endeavours" clause in a contract between Jet2.com Ltd ("Jet2") and Blackpool Airport Limited ("BAL"). BAL had set opening hours but was initially willing to vary those opening hours to accommodate Jet2. BAL later decided that it was uneconomic to continue to vary its opening hours to accommodate Jet2 and sought to return to its original opening hours. Jet2 argued that, as the contract provided that BAL would use its "best endeavours" to *"promote Jet2.com's low cost services from [the airport]"*, and would *"use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low cost pricing"*, this included varying its opening hours in order to do so even if it was uneconomic for BAL to do so. Jet2's low cost model was dependent on flexibility to leave early and arrive late.

At first instance the court held that the opening hours of the airport were something within Blackpool Airport's control, in those circumstances whilst Jet2.com did not necessarily have an absolute right to insist on any hours it chose (and indeed the judge did not feel able to rule on hours when Blackpool Airport should ensure that the airport was open), the fact that opening the airport specifically for a relatively small number of Jet2.com flights would mean incurring a loss did not take it outside the scope of a "best" or "all reasonable" endeavours obligation.

BAL appealed to the Court of Appeal. The Court of Appeal, in a split decision, held dismissing the appeal that the agreement was intended to create legally binding obligations. The principle of promotion of a low cost airline is not so vague or elusive an object that the best endeavours obligation assumed by BAL should be regarded as unenforceable in law. A "best endeavours" or "reasonable endeavours" clause is not itself too uncertain provided the object of the endeavours can be ascertained with certainty. Such a clause may also mean that a party must operate contrary to what might seem to be its commercial interests.

Lord Justice Longmore said:

"The "out of normal hours" use of the airport caused no problems for four years; reasonable endeavours had been used to promote Jet2's low cost services. BAL's sudden change of stance needed a justifiable explanation. The judge [at first instance] did not think there was one and neither do I."

Lord Justice Lewison dissenting had concerns with regard to the possible open ended nature of the "best endeavours" provision giving the example:

"But the obligation is so open textured that it could potentially have repercussions elsewhere. The [contract] excluded check-in charges from the agreed tariff and entitled Jet2.com to use its own check in staff. But it did not require Jet2.com to use its own check-in staff. If Jet2.com decided not to use its own staff for that purpose was it entitled to require BAL to provide the staff? After all, a low cost airline cannot operate without checking in its passengers. So why is the provision of check in staff not part of a general obligation to "promote" Jet2.com's business at the airport?"

Lord Justice Longmore did suggest some relief might be available to BAL saying:

"The judge [at first instance] was, moreover, right to refuse a declaration that BAL were obliged for the whole 15 years duration of the contract to continue to keep the airport open otherwise than during normal hours. There might indeed be circumstances in which BAL, after proper notice, might be entitled to refuse to continue handling aircraft movements outside normal hours but that is not a question raised on this appeal..."

This case highlights the difficulties that can arise where there is some ambiguity in the terms of a commercial contract.

Alongside our regular newsletter, we also post regular updates on our blog which can be found at www.spw-law.co.uk/blog. We write about lots of different issues which may affect your business and we welcome comments on them.

Also...coming soon...SPW takes to Twitter!

Severability of an Adjudicator's Decision

Working Environments Ltd v Greencoat Construction Ltd [2012] EWHC 1039 (TCC) (24 April 2012)

This recent case raised issues about adjudication enforcement, crystallisation of disputes and the severability of parts of an adjudicator's decision. The Defendant, Greencoat Construction Ltd ("Greencoat") was a main contractor employed to carry out substantial fitting out works at existing office accommodation on Shaftesbury Avenue, London. The Claimant, Working Environments Ltd ("WE") was the mechanical and engineering sub-contractor on the project.

A dispute arose between the parties as to WE's entitlement to an interim payment. WE applied for an interim payment on 24 November 2011 in the sum of £488,153.45, WE issued a "Payment Certificate and Notice of Withholding Payment" in response to this application on 2 December 2011 stating that only £16,686.36 was due for payment with the remainder withheld for various reasons, 9 of which were quantified, and one of which, "Liquidated Damages" was "to be confirmed". Under the sub-contract payment was due by 14 January 2012.

WE served a Notice of Adjudication on 14 December 2011 claiming that it was entitled to payment totalling £470,508.16 made up of various elements to include alleged undervalued variation works totalling £370,392.91; an abatement of the contract sum work completed by £32,702.32; and an alleged set off by Greencoat in the sum of £67,412.93. WE asked the adjudicator as part of his decision to *"Decide that the Respondent is to pay the sums decided by the Adjudicator within 3 days of his decision."*

Greencoat argued that the adjudicator had no jurisdiction to consider the dispute as, it was claimed, no or no material dispute had crystallised because the date for payment had not yet accrued, and because relief for payment was sought which the adjudicator could not award because the obligation to pay had not arisen. Greencoat argued that no dispute could have crystallised because WE had not communicated a dissatisfaction with the payment Certificate issued by Greencoat and because Greencoat had been deprived of a reasonable opportunity to review and respond to a claim.

WE agreed that the request for relief for payment was incorrect as the obligation to pay had not arisen and withdrew the request that the adjudicator order immediate payment but maintained that the adjudication should continue save for that item. The adjudicator agreed to continue editing out this request.

By a withholding notice in the form of a letter dated 5 January 2012 from Greencoat to WE, Greencoat set out details of and calculations in respect of the various deductions that it had proposed to make and additionally set out details of 3 additional deductions that it proposed to make to include liquidated damages in the sum of £120,000 (two weeks and two days delay); defective works in the sum of £9,629 and "Lack of co-ordination and BREEAM" in the sum of £11,520. This was the first time that these 3 items had either been identified as issues in dispute or, in the case of the liquidated damages, quantified by Greencoat. Greencoat argued that the adjudicator did not have jurisdiction to consider these additional 3 items and maintained its earlier jurisdictional challenge. The adjudicator considered that as the 3 items would be deducted from WE's application and as that application was the subject of the adjudication, he had jurisdiction to consider the 3 additional items.

The adjudicator found that the interim payment due to WE was £250,860 plus VAT and WE then issued proceedings in the TCC claiming the sum of £250,860 plus VAT. Greencoat resisted enforcement of the adjudicator's decision, maintaining its initial jurisdictional challenge and also arguing that the adjudicator had no jurisdiction to consider the additional 3 items in the 5 January 2012 letter.

The first issue to be addressed was what if anything was the crystallised dispute at the time of the Notice of Adjudication. Mr Justice Akenhead concluded that there was a crystallised dispute as to whether £488,153.45 was due or £16,686.36 or something in between and the adjudicator had jurisdiction to consider that dispute.

The next issue was to what extent the Notice of Adjudication sought in effect an order or direction from the adjudicator for payment as against Greencoat. Mr Justice Akenhead concluded that what was being claimed was effectively a declaration that the sum proposed by Greencoat is not to be withheld against what is to be payable to WE. The adjudicator did not in any directive way order Greencoat to pay any sums to WE immediately but the sums would fall due to be paid pursuant to the sub-contract.

Mr Justice Akenhead then went on to consider the 3 additional items. As to liquidated damages, he concluded that Greencoat had presaged in its earlier payment and withholding notice that it asserted a right to deduct liquidated damages from the sums due to WE, albeit the amount of liquidated damages was not confirmed at that time. This reference brought the issue of liquidated damages within the dispute and therefore the adjudicator's jurisdiction.

As to the remaining 2 items, Mr Justice Akenhead concluded that these items were not within the scope of the crystallised dispute. The adjudicator had therefore exceeded his jurisdiction in considering these items. The question therefore arose as to whether the remainder of the decision could be enforced. Mr Justice Akenhead considered that it was consistent with good authority that the majority of the adjudicator's decision be enforced, stripping out the two items in respect of which the adjudicator had no jurisdiction. This is an interesting decision and whilst made with the intention that the majority of the adjudicator's decision should stand, it may open the door to more challenges to aspects of an adjudicator's decision and requests that certain items be "stripped out" of the adjudicator's award.

Compliance with the Pre-Action Protocol for Construction

Higginson Securities (Developments) Ltd & Anor v Hodson [2012] EWHC 1052 (TCC) (26 April 2012)

This case concerned the lengths to which parties are required to engage with The Pre-Action Protocol for Construction and Engineering Disputes ("the Protocol") before embarking on proceedings.

The Protocol envisages that a claimant party will set out its claim in a letter of claim, that the defendant party will respond to that letter and that the parties will normally have a without prejudice meeting (or meetings) to discuss whether the claim can be settled and if not how the claim might be dealt with in the most cost effective and efficient manner. This is often a very useful tool in allowing parties both to better understand their respective positions and to have an opportunity to discuss and resolve disputes before expensive and time consuming litigation is commenced.

This is however to be balanced against the argument that compliance with the Protocol can have the result of inflating costs and delaying the commencement of proceedings in claims where there is little prospect of the parties achieving anything of value by compliance with the Protocol. The courts are conscious that claims should be dealt with in a way that is proportionate to the amount of money involved.

In this case the value of the claimants', Higginson Securities (Developments) Ltd & Anor, claim was said to be in the region of £70,000 against the defendant architect, Mr Hodson, and arose partly in respect of alleged professional negligence and partly for repayment of allegedly overpaid fees pursuant to the construction of a new Spiritualist church and a block of nine flats on the Isle of Wight. The court considered that it was likely that the costs incurred by the parties would likely exceed the value of the claim.

The parties exchanged letters in accordance with the Protocol over a protracted period of time during 2011 culminating in the defendant's letter in December 2011 fully rejecting the claimant's claim. There was no suggestion that a meeting take place by either party.

The claimant issued proceedings on 13 February 2012 and the defendant applied for a stay of proceedings to enable without prejudice meeting(s) to take place. The claimant would not agree a stay but did say that it would be willing to agree an extension of time for the defendant to file its defence in order to allow a meeting to take place. The defendant rejected that offer.

Mr Justice Akenhead said that compliance with the Protocol should not be used as a weapon or a tactic and that both parties should seek to co-operate during its implementation. The wording of the Protocol does not state that a meeting is absolutely mandatory; it does however say that "normally" a meeting should take place and this should therefore be the default position. However, in relation to low value claims, such as this one, it is important that the parties proceed reasonably expeditiously, do not drag the process out and keep the costs of the exercise to a reasonable minimum.

In this case Mr Justice Akenhead said that he had formed the view that, whilst the claimants repeatedly adopted a pragmatic approach, the defendant and his advisers did not do so. The defendant's application was therefore dismissed.

Mr Justice Akenhead reminded practitioners in this field, particularly in low value claims, to consider pragmatic and cost saving responses in the circumstances in which they find themselves at the given time.

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