

High Court Contract Dispute Focuses on Ocean-Going Yacht Racing

Specialist goods and equipment sometimes do not perform as well as hoped, but a buyer's disappointment does not always equate to a breach of contract. The High Court made that point in a case concerning carbon fibre hydrofoils which were designed to make an ocean-going racing yacht skim atop the waves.

With a view to improving her performance in a round-the-world race, the owner of the yacht engaged a specialist manufacturer to create a set of two hydrofoils. The port hydrofoil was undergoing sea tests when it suffered a catastrophic failure which rendered it unusable. The owner subsequently refused either to take delivery of the starboard hydrofoil or to pay the balance of the purchase price.

After the manufacturer launched proceedings, the owner argued that it had breached the terms of the purchase contract in that the



hydrofoils were not fit for purpose and were in effect worthless. Having paid most of their £280,600 purchase price, the owner counterclaimed to recover its outlay and damages to reflect losses arising from the manufacturer's alleged failure to provide goods of appropriate quality.

Ruling on the dispute, however, the Court described as untenable the owner's argument that there was some inadequacy in the

hydrofoils' design. Expert evidence established that they were strong enough to resist 28 tonnes of force even at their weakest points. The Court was also unpersuaded that the failure of the port hydrofoil arose from a manufacturing defect. Notwithstanding extensive investigations, no such defect had been identified.

The manufacturer was awarded the balance of the purchase price, together with a bonus of £30,000 that was due to it as a result of the yacht having come second in the race. The Court, however, ruled that the manufacturer had no contractual entitlement to recover the cost of storing the undelivered starboard hydrofoil.

Expert legal advice is essential in all litigation. Preparing the best possible evidential support is vital, as is compliance with the rules of litigation practice.

Live Boxing Events Organiser Granted 'Dynamic' Internet Blocking Order

Organisers of sporting and other events who derive much of their income from pay-per-view or subscription live streaming are fighting a constant war against internet piracy. As a High Court case showed, with the assistance of judges and the legal profession, they are definitely winning.

An organiser of live boxing events sought an order against various internet service providers requiring them to block, or attempt to block, IP addresses which were being used to infringe its copyright in live-streamed events. The providers were happy to submit to such an order but, given its impact on the rights of others, the application received close judicial scrutiny.

In granting the order sought, the Court noted that it would enable use of what were described as 'dynamic web blocking arrangements' which had been developed at considerable cost. Public access to targeted IP addresses would be blocked in real time whilst live boxing events were in progress.

Dynamic blocking was quicker and more effective than previous anti-piracy methods and minimised the risk that legitimate access to websites would be inhibited. Parts of the Court's order were kept confidential, including the IP addresses concerned and details of how dynamic blocking works. Such confidentiality was necessary to guard against the risk that copyright infringers might otherwise be assisted in undermining blocking measures.

Aircraft Lease Arbitration Clause Comes Under High Court Microscope

Arbitration clauses are commonplace in commercial contracts and generally provide a relatively swift and cost-effective route to resolving disputes without resort to full-blown litigation. Their correct interpretation can, however, present a challenge and that was certainly so in a High Court case concerning an aircraft lease.

A company leased a Boeing aircraft to an overseas airline. The former took action with a view to recovering from the latter over \$5 million in unpaid rent and interest. The airline impliedly admitted the debt in correspondence. It asserted, however, that the proceedings should be stayed under Section 9 of the Arbitration Act 1996.

The airline pointed to an arbitration clause in the lease agreement which stated in terms that any dispute arising out of or in connection with the lease, including any question regarding its existence, validity or termination, should be resolved by a three-member arbitration panel under the rules of the London Court of International Arbitration. Any award made by such a panel was to be treated as final, binding and incontestable.

The company denied that the matter had to be referred to arbitration. It asserted that another term of the lease provided an exception to the arbitration clause and entitled it to take appropriate court action in the event of default by



the airline. The airline's continuing failure to pay rent was said to amount to such an event.

Following a hearing, the Court preferred the airline's construction of the agreement. Notwithstanding its implied acknowledgment that sums were due and owing under the agreement, its refusal to pay those sums meant that a dispute had arisen within the meaning of the arbitration clause. Granting the stay sought, the Court found that it was obliged to bow out in favour of the arbitration panel.

For advice on any contractual matter, please contact us.

Commercial Contracts Undermined by Lockdown – Where Do Losses Fall?

Lockdowns put into force in response to the COVID-19 pandemic have rendered many commercial contracts unprofitable if not entirely inoperable. In a guideline case, the High Court considered where unforeseen losses arising under a local authority contract for the management of leisure facilities should fall.

A company was awarded the minimum 10-year contract after a tendering exercise. It took the form of a concession agreement whereby, in general terms, the company paid management fees to the council and, in return, retained profits generated by the facilities. The contract operated successfully for some years but, after the first lockdown was introduced, the company began to suffer heavy losses.

After negotiations, revised financial arrangements were agreed. Save in the event of the company receiving central government support, the council agreed to waive its management fees during lockdown. It also agreed to make certain payments to the company so that it was able to meet its salary costs. The council, however, sought judicial guidance after the parties were unable to reach agreement in principle as to how risks under the contract should be allocated.

Ruling on the matter, the Court noted that the sophisticated contract was drawn up in standard form with the assistance

of skilled professionals. It provided that financial arrangements under the contract could be modified in the event of circumstances being transformed by unforeseen changes in the law. It was common ground that the restrictions imposed on the use of leisure facilities during lockdown constituted such a change.

The company's plea that the council was obliged to ensure that it was 'no worse off' as a result of the change in the law fell on fallow ground. On a true construction of the contract, the Court found that management fees payable by the company could be cut to zero, but not beyond. They could not be reduced into negative territory so that sums became payable by, rather than to, the council. The contract made provision for payments in one direction only, not both, and the management fees could therefore not fall below zero in any one contract year.

The Court, however, went on to rule that the council was entitled under the contract to make one-off capital or lump-sum payments to the company in order to assist it in implementing lockdown restrictions, offsetting its losses and meeting its salary costs. The Court's interpretation of the contract would form the basis of future negotiations between the company and the council and the resolution of any disputes arising between them.

Sensible Businesspeople Never Contract Without Legal Advice

It is a frequent occurrence that two businesspeople who attend the same meeting emerge with diametrically opposed views as to what, if anything, has been agreed. A High Court case concerning the sale of a luxury overseas property development showed exactly why legal representation and formal documentation matter.

The development of villas and town houses was hampered by delays, cost overruns and other difficulties. The businessman behind the venture was under great financial pressure, not least from a man who had financed the project and, through his company, was seeking possession of the development.

The businessman alleged that, during a meeting with the lender – at the lender's home – they had reached an immediate and binding oral contract concerning the sale of the development's units and the division of the proceeds. The lender was also said to have agreed to defer the possession proceedings in order to allow time for the units to be marketed and sold. The businessman claimed

damages from the lender on the basis that he had suffered losses of about \$6.8 million due to the lender's breach of the agreement.

The lender, however, gave a very different account of the meeting. He said that its purpose was to discuss an offer made by the businessman and that it only lasted about an hour. He asserted that he had made it clear at the outset that he reserved his rights, that the meeting was without prejudice and that he would enter no agreement without legal advice.

Rejecting the businessman's claim, the Court commented adversely on his reliability as a witness and his tendency to make self-serving statements to bolster his case. Although the two men may have reached an understanding by the end of the meeting, it was clear from the surrounding correspondence that neither of them understood that it had the effect of creating a binding contract.

We can advise you on any aspect of contract law.

Writer's Ex-Partner Wins Recognition as Co-Author of Hollywood Screenplay

Professional writers often receive assistance and inspiration from friends, family and others, but to what extent, if any, should their contributions be recognised in law? The High Court addressed that issue in the context of a broken relationship between two creative people which yielded a Hollywood screenplay.

The screenplay, which told the story of an American socialite and opera singer, was written, in the physical sense of the word, by an established author and was made into a successful film. He accepted that his partner at the time, a professional opera singer, had supported and assisted him in the project. Following the end of their relationship, however, he denied that she was entitled either to recognition as the screenplay's co-author or to a share of its generated profits.

Ruling on the matter, the Court noted that there was no dispute that the man held the pen with which the screenplay was written. However, when asking whether it was the product of a collaboration between him and his former partner, it was not enough simply to ask, 'Who did the writing?' Authors may collaborate in many ways, for example where one person creates the plot and another writes the words.

The former couple had worked closely together on shaping pivotal scenes in the screenplay and, in some cases, she contributed just as much as he did. She had the initial idea for the script and her knowledge of music and the operatic world meant that her creative role went far beyond that of a sounding board. They recognised and knew that they were on a path towards creating a screenplay and her input, often provided at his request, went well beyond mere editing of his work.



Attempting to separate their individual contributions to the script was like trying to unmix purple paint into red and blue. Nevertheless, the Court found that her role in its creation was authorial and, employing a broad-brush approach, assessed her contribution to the work at 20 per cent. She was therefore entitled to public recognition as the screenplay's joint author.

Although she had initially consented to her ex-partner's dealings with the script, she later withdrew that consent and he thereafter became liable for infringement of her copyright and moral rights in the work. The Court heard further argument as to the financial and other consequences of its ruling.

It is important to ensure your Intellectual Property rights are protected. Contact us for advice.

Online Gambling Domain Name is Crux of Contract Dispute



Internet domain names often change hands for large sums of money and disputes in respect of their ownership are an increasing source of litigation. A High Court ruling in one such case concerned a domain name which had strategic potential in the online gaming industry.

The domain name, which was identical to the name of a popular card game played in casinos worldwide, was acquired for \$465,000 and later came into the hands of an online gambling business based in the Cayman Islands. It entered into a written agreement with a Uruguayan company whose owner and sole director was a businessman who had expertise in the online gambling market, particularly in the UK. The agreement was governed by English law.

Under the agreement, the domain name was transferred to the Uruguayan company, together with the website, goodwill and customer data associated with it. It agreed to pay \$250,000 to the Cayman Islands company together with a percentage of revenue generated by the ongoing business.

Although the \$250,000 was paid, the Cayman Islands company claimed that the Uruguayan company had failed to pay commissions due to it. It gave written notice terminating the agreement and launched proceedings, seeking a declaration that it had lawfully resumed ownership of the domain name. The Uruguayan company had since been dissolved and the businessman, to whom the domain name had been transferred, was the sole effective defendant to the claim.

Ruling on the matter, the Court found that the Uruguayan company was in persistent, material and irremediable breach of the agreement in failing to keep financial records of the business which were sufficient to enable the commissions to be calculated. It had failed in its contractual obligation to provide the Cayman Islands company with details of transactions and income generated by the website.

On valid termination of the agreement, the Cayman Islands company had acquired an equitable interest in the domain name. No transaction since then had deprived it of that interest. On that basis, the Court found that the Cayman Islands company was entitled to call for the assignment to it of full ownership of the domain name and the goodwill attached to it. The precise terms of the relief to which the Cayman Islands company was entitled in the light of the Court's ruling would be considered at a further hearing, if not agreed.

Our expert lawyers can advise you on any commercial litigation matter.

Get in touch with us if you would like advice on any of the issues raised in this bulletin or on any other commercial law matter.



51 PROMENADE, CHELTENHAM GL50 1PJ

TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888 DX 7404 CHELTENHAM
LEWIS BUILDING, 35 BULL STREET, BIRMINGHAM B4 6EQ

TELEPHONE: +44 (0)121 371 0301 FAX +44 (0)121 371 0302 E-MAIL: SIMON.BURN@SIMONBURN.COM

SIMON BURN SOLICITORS IS A TRADING STYLE OF SIMON BURN SOLICITORS LIMITED REGISTERED IN ENGLAND AND WALES UNDER COMPANY NO. 06524676 AND AUTHORISED AND REGULATED BY THE SOLICITORS REGULATION AUTHORITY (NO. 516917)

DETAILS OF THE SOLICITORS CODE OF CONDUCT CAN BE FOUND AT WWW.SRA.ORG.UK

PARTNER: SIMON L. BURN LLB (DIRECTOR)

We use the word "Partner" to refer to a share owner or director of the company, or an employee or consultant who is a lawyer with equivalent standing and qualification.

The information contained in this newsletter is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances, please contact us.

