Claims of bad faith and breach of exclusivity: not cricket?

- Licensee of sports broadcast rights fails to pay sums due under the rights agreement
- Licensee argues breach of exclusivity by rights owner
- Can a licensor commence discussions with a new licensee without breaching exclusivity?

What's it about?

New Zealand Cricket (**NZC**), the national governing body of cricket in New Zealand and owner of the broadcast rights to matches taking place in New Zealand, and Neo Sports (**NS**) were parties to media rights agreement (the **Agreement**). The Agreement gave certain exclusive broadcast rights to NS, was governed by English law and provided for the exclusive jurisdiction of the English courts.

NS failed to pay sums due under the Agreement. NZC served notice to remedy its default and then served proceedings on NS's solicitors. No defence was filed and proceedings were stayed. NZC served notice to lift the stay and applied for summary judgment for part of its claim, being the outstanding sum of US$8,729,650 and interest, with further damages to be assessed. NS did not serve any evidence in response to the summary judgment application and did not appear at the hearing.

Even though NS had not responded to the summary judgment application, the Judge considered arguments which had been made by NS in earlier correspondence.

In correspondence NS argued that NZC had breached the Agreement as NZC's agent had conversations with another organisation regarding a sale of NS's rights under the Agreement. In particular, NS argued that the agent's discussions were (1) a breach of exclusivity, (2) a breach of exclusive right to exploit advertising under the Agreement and (3) a breach of the implied covenant of good faith and fair dealing. NZC did not dispute that it had discussions with third parties to discuss whether they would be willing to purchase the rights under the Agreement in the event that NS failed to pay the sums due and the Agreement was terminated. NZC's agent provided a witness statement and notes as evidence of NS acknowledging acceptance (in without prejudice discussions) that NZC's agent was free to open discussions with other organisations.

The Court granted the application for summary judgement, agreeing with NZC that NS's claim had no basis.

Why does it matter?

The Court had no difficulty in concluding that NZC had not breached the exclusivity provisions of the Agreement, and that neither had it acted in bad faith:

"A party which is in breach of contract and which faces termination of the contract within a matter of days if it continues to fail to comply with its obligations cannot complain, let alone complain of bad faith, if the other party to the Agreement begins to make enquiries during that time as to how it will seek to mitigate its loss in the event that the breach is not remedied."

Now what?

Although this case very much turns on its facts, it is an illustration of the Court's unwillingness to find that a party has acted in bad faith, particularly where the other party is itself in breach of contact. Also, proving breach of exclusivity is likely to take much more than showing that a licensor had opened discussion with potential new licensees.

New Zealand Cricket (Incorporation) v Neo Sports Broadcast PVT Ltd and another [2016] EWHC 3615 (Comm), 2 December 2016

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