IPEC costs cap disapplied

Link up Mitaka Limited t/as thebigword v Language Empire Limited **[2018] EWHC 2633 (IPEC)**
Link up Mitaka Limited t/as thebigword v Language Empire Limited (No. 2) **[2018] EWHC 2728 (IPEC)**

This was a damages inquiry in the IPEC following a default judgment for trade mark infringement and passing off. The parties are competitors in the provision of translation and interpretation services. The Defendants had set up websites which used the Claimant's trade mark in their url and which otherwise gave the impression that they were the Claimant's websites (the "**Websites**"). The Websites had web enquiry forms for receiving customer enquiries. Her Honour Judge Melissa Clarke has handed down two judgments, both of which will be of interest to IPEC users.

The Damages Judgment – [2018] EWHC 2633 (IPEC)

This judgment is of interest because it shows the Court's willingness to draw inferences and award damages where it has found that a Defendant has, in the conduct of its case, acted to obscure the nature and scale of its infringing conduct.

The Claimant elected for an inquiry as to damages. The Defendants denied throughout the damages inquiry that it had made any sales. There was therefore no evidence of sales before the Court, and the only disclosure of web traffic diversion by the Defendants was in a document showing some 38 enquiries in 2016 (the "**Web Enquiry Document**"). The Defendants' case was that they had made no sales to the customers listed in the Web Enquiry Document.

However, the Court found that the Defendants' case as a whole was "a tangled mass of contradictions, inconsistencies, unlikelihoods, implausibilities and untruths". Its key finding was that the Web Enquiry Document had been constructed; that the web enquiries in that document had in fact been cherrypicked so as to obscure the number of enquiries made and show that no sales had been made. The Claimant submitted that, in the circumstances, the best the Court could do was to use the Web Enquiry Document as a basis for assessing the value of the sales made. The Court adopted this approach, using the Claimant's estimates of the value of those enquiries as potential sales. Further, it found that because the Web Enquiry Document was evidently an incomplete record, it was appropriate to apply an uplift of 33% to that amount. The result was a substantial award of £142,044 to the Claimant.

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The Costs Judgment – [2018] EWHC 2728 (IPEC)

This judgment is of interest because it is rare example of the IPEC disapplying the costs capping scheme in its entirety and awarding indemnity costs.

At the handing down of the Damages Judgment, the Claimant submitted that the Defendants' conduct in the damages inquiry (discussed above) had been so exceptionally unreasonable that it amounted to an abuse of process, such that (i) the IPEC costs cap (£25,000 in an inquiry as to damages) should not apply; and (ii) an award of indemnity costs should be made. The Court made that finding, disapplied the costs cap and awarded costs and interest in the sum of £99,706, summarily assessed on the indemnity basis . The Court reserved its reasons on the costs cap issue and set them out in the Costs Judgment.

The Costs Judgment should be of particular interest to IPEC users for the Court's discussion of its power to disapply the costs capping scheme under CPR rule 45.30(2) where there has been an abuse of process and the distinction to be drawn between that power and the IPEC's general discretion to lift its costs caps under CPR rule 44.2 (discussed in a number of previous cases such as *Westwood v Knight*, *Henderson v All Around the World Recordings Ltd* and *F H Brundle v Richard Perry*).

This case also serves as a warning to litigants (which the Court made explicit in the final paragraph of the judgment) that, where the Court finds that they have abused its process, they will lose the protection of the costs capping scheme.

Nick Zweck, instructed by Virtuoso Legal, appeared for the Claimant

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