Neutral Citation Number: [2005] EWCA Civ 931

Case No: A3/2004/2506

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
OF THE HIGH COURT (MASTER PRICE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2005

Before :

LORD JUSTICE WALLER
LORD JUSTICE LAWS
and
LORD JUSTICE JACOB

- -

Between :

LONDON GENERAL HOLDINGS LTD & ORS	**Appellant**
- and -	
USP PLC & ANR	**Respondent**

- -

Mr Andrew Monson (instructed by **Berwin Leighton Paisner**) for the **Appellant**
Mr Peter Leaver QC and Mr Thomas Mitcheson (instructed by **DLA Piper Rudnick Gray Cary UK LLP**) for the **Respondent**

Hearing dates : 6 July 2005

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Approved Judgment

Lord Justice Laws:

INTRODUCTORY

1. This appeal is brought with permission granted by Jacob LJ on 15 December 2004 against a decision of Master Price given in the Chancery Division on 20 June 2004. The proceedings before the learned Master consisted in an inquiry into damages in a copyright action. In an earlier judgment dealing with liability only, given on 8 November 2002, HHJ Weeks QC sitting as a High Court Judge in the Chancery Division had held that the appellants (defendants in the action), to whom I may collectively refer as AON, had infringed the copyright owned by the first claimant ("USP") in a document known as the Collections Account Agreement ("CAA"). AON were also held liable to the second claimants for breach of confidence and contract, but these claims have no direct relevance to the issues in this appeal. On 13 February 2003 HHJ Weeks ordered an inquiry as to damages. Master Price, having conducted the inquiry, made an award in USP's favour of £126,720 plus interest.

THE FACTS

2. We have been supplied with a "Statement of Agreed Primary Facts" on which I have drawn and to which I will refer in describing the relevant events. The AON Group to which the appellants belong offer an extensive range of financial services. These include the supply and administration of what are called extended warranty schemes. The respondents (claimants in the action) entered the same market in 1998. Extended warranties are generally offered by retailers of household electrical goods for sale to their customers. Before 1997 the warranty schemes for the larger retailers were based on insurance and attracted insurance premium tax. In the 1997 budget the Chancellor of the Exchequer raised this tax to 17.5%. Insurance-based schemes became less attractive.

3. In September 1997 two solicitors from the Isle of Man, Mr Cooper and Mr Chan, devised a scheme which was not insurance-based. It involved an offshore service company which contracted directly with the customer for the provision of any repairs under the warranty. The customer's money would be placed in a trust fund to meet the costs of the repair, and the surplus distributed eventually to the participants in the scheme. In November 1997 the second claimants, Unicorn, were incorporated and registered in the Isle of Man in order to market and implement this scheme. Its first prospective customer was Scottish Power. Scottish Power had an existing insurance-based scheme administered by LGH, the first defendant. But this scheme was due for renewal, and Scottish Power were interested in the new scheme which was presented to them by Unicorn in February 1998.

4. In the same month, February 1998, Messrs Cooper and Chan drafted the essential documents that were required for the new scheme. These included the CAA. The CAA was integral to the establishment of the trust which was an essential

characteristic of the scheme. It was envisaged, moreover, that the CAA would provide a template for future schemes. LGH were involved as administrators. As I have said they were already the administrators of Scottish Power's earlier insurance-based scheme. However Mr Borrill of the respondents indicated that Unicorn would not release the scheme documents to LGH unless the latter entered into a confidentiality agreement, which they did; accordingly on 19 February 1998 LGH were supplied with drafts of the scheme documents including the template CAA.

5. The copyright in the original draft template CAA was first vested in Unicorn and was assigned to USP in 1999. Over a five week period after it was supplied to LGH in February 1998, its operative clauses were considerably transformed in the course of working up Scottish Power's scheme. Mr Ellery of Scottish Power's solicitors took the lead in redrafting the document so as to suit his clients' particular requirements. It is accepted that in its original form the template CAA was not satisfactory. It would have needed some alteration and development to be brought into practical effect for the purpose of implementing any trust-based scheme, and not only that developed for Scottish Power. HHJ Weeks was to say (judgment, page 13, line 18ff):

> "…Undoubtedly Unicorn had, and USP now has, the copyright in the draft CAA which was supplied to LGH on 19 February 1998 and handed out at the meeting on 24 February. Equally clearly, USP and Scottish Power, and possibly LGH, have the copyright in the final version of the CAA. It is common ground that when a work goes through successive stages in writing, copyright continues to subsist in the earlier versions. It is also common ground that one joint owner cannot exploit his copyright without the consent of the others,…"

6. Sometime after the Scottish Power transaction there were discussions between AON and the respondents as to the possibility of co-operation in the marketing of extended warranty schemes. These, however, came to nothing. AON and the respondents essentially marketed different kinds of schemes. The respondents' schemes involved the creation of what is called an "SPV" or "Special Purpose Vehicle" which uses a trust mechanism. AON employed an "MPV" or "Multiple Purpose Vehicle", which does not have a trust mechanism. There was however some evidence that AON considered the possibility of trusts; although I should notice (for it is important to the way that AON's case is put) that there was evidence from Mr Witt of AON (he was the company secretary of LGH) that after April 1999 AON effectively turned their backs on trust-based schemes. At all events, however, in April 1999 Mr Brimacombe of AON saved an electronic copy of the CAA on AON's central computer. This was a version of the CAA as it had been worked up for Scottish Power. This, and a clone or clones of it, were the infringing copies complained of in these proceedings.

7. The month of April 1999 ushers in the first series of events in relation to which the learned Master made a compensatory award in favour of the respondents. A company called Apollo 2000 Ltd ("Apollo") was a client of LGH. In April and early May 1999 LGH were considering a trust-based extended warranty scheme for Apollo. An in-house lawyer with LGH, Mr Ian D'Castro, used the infringing copy of the CAA to

prepare draft documentation for Apollo. He also in April 1999 sent the infringing copy for the purpose of obtaining advice to a firm of solicitors in the Isle of Man called Cains. There was a question at the inquiry before the Master as to the extent to which, or the stage at which, the scheme devised for Apollo involved use of a trust. The respondents were saying that at least it did initially. The Master held in essence that the question did not really matter; there had in any event been infringements of copyright by the appellants in connection with the Apollo scheme. I should notice that the Master did not find that any infringing copies were sent to Apollo itself.

8. In relation to Apollo, the Master held (judgment page 5) that "the right way to proceed to assess these damages is by way of a notional royalty". He proceeded to consider the respondents' case as regards other infringements which should properly be compensated by way of such a royalty. These concerned warranty schemes for Tesco, and also for a company called Otto. For reasons he gave the Master made no finding against the appellants in relation to Otto and it is unnecessary to say any more about that part of the case. The complaint relating to Tesco concerned events taking place in 2002. The appellants had offered a trust arrangement for an extended warranty scheme. They instructed solicitors, Messrs Collyer Bristow, to advise and draft documents.

9. Mr Monson for AON submitted that the Master did not find any infringement in relation to Tesco, or any other "unspecified" infringement, so that his award of notional royalty was only in respect of Apollo. On reading the whole passage of the judgment from paragraph 6 to paragraph 15 inclusive, one might suppose that that is incorrect. The Master does not specifically describe the use of infringing copies in relation to Tesco; but he expressly excludes only Otto and at paragraph 15 says this:

> " 15. My conclusion therefore is that the claimant should receive £15,000 by way of compensation for the labour and skill involved in producing the template CAA as an appropriate notional royalty in respect of all of the uses to which the defendants have put it, apart from the question of Powerhouse…."

However, it is clear from his judgment on costs that he did not find an infringement in relation to Tesco.

10. The figure of £15,000, which the Master arrived at in carefully reasoned steps, is not in fact itself the subject of challenge by AON. AON's complaint is that the Master was wrong to award, as he did, the additional and much greater sum of £111,720 by way of damages for infringement in relation to what may be called the Powerhouse transaction. The respondents, by their re-amended respondent's notice, contend amongst other things that if the award of £111,720 is to be set aside then certain other sums should have been awarded; in particular, if the appellants' infringements in relation to Powerhouse ought to be met with an order for payment of a reasonable royalty, in common with those relating to Apollo, then the figure of £15,000 should

be substantially increased since it was arrived at without regard to Powerhouse, which the Master dealt with separately.

11. I turn to the facts relating to the Powerhouse transaction. Mr Stuart Turner was the Warranty and Insurance Manager of Powerhouse. In September and October 1999 he was reviewing Powerhouse's extended warranty scheme. He attended meetings with Mr Mian of LGH in September 1999, and Mr Borrill of the respondents in December 1999. So it was that at this period Powerhouse through their principal protagonist Mr Turner were negotiating both with AON and the respondents. At AON's request Powerhouse on 7 February 2000 entered into a wide-ranging confidentiality agreement by which they (and therefore Mr Turner) were prohibited from using any information supplied by AON other than for the purpose of taking forward the scheme being elaborated for Powerhouse by AON. After this, and following a request which had been made by Mr Mian of AON on 2 February 2000, Powerhouse sent AON information about the size of their warranty business. There was then another meeting between Mr Turner and the respondents, who by Mr Borrill on 10 February 2000 sent a proposal to Powerhouse. It included a provision for a one-off implementation fee of £40,000. The proposed scheme's costing structure also included operating profit figures which were, however, swiftly reduced after further discussion.

12. At about this time Mr Turner informed AON and the respondents that they were in competition with each other, as the Master put it "in order to be able to play one off against the other in the context of the negotiations" (judgment paragraph 19). Mr Turner believed that the scheme being offered by the respondents had advantages because of its "robustness", but that AON's scheme was keener on price. He raised with AON the question whether a trust mechanism might be provided within their scheme, so as to impart the quality of "robustness". Mr Mian of AON agreed to seek advice. AON accordingly approached Messrs Cains, the Isle of Man solicitors. They provided advice which was sent to Mr Turner. It is common ground that this advice was based on the infringing copy of the CAA supplied to Cains the previous year in connection with the Apollo scheme.

13. Powerhouse were not satisfied with Cains' advice. The solicitors provided further advice, communicated to Mr Turner on 23 February 2000. The next day Mr Turner prepared a memorandum for members of the Powerhouse board. In it he stated:

> "The major cause for concern surrounding the validity of a trust arrangement for our ring-fenced service fees held within the offshore service company has not yet been satisfactorily resolved…
>
> We need to take into account that no precedent… has been set in law and therefore no proof exists that the trust solution presented to Powerhouse by AON would have any legal weight. It would seem only wise to secure further independent advice…"

Accordingly it was resolved that Mr Turner should obtain further advice from Powerhouse's solicitors, Messrs Biddle & Co, and I shall refer shortly to some of Biddle's correspondence.

14. On about 24 February 2000 Mr Turner asked Mr Mian for a copy of AON's CAA. It was not immediately supplied and Mr Turner continued to press for it. At length Mr Mian provided it on 7 March 2000, and I shall come to that. I should make it clear that the Master did not find, and it is not suggested, that AON had in February 2000 made any further infringing copy of the CAA and sent it to Powerhouse, or to Cains to facilitate their giving advice. Mr Pinson of Cains gave evidence that he had not received a copy of the CAA in February 2000: he already had a copy as a result of the disclosure made in April 1999.

15. On or before 1 March 2000 Mr Turner spoke to Mr Reardon of Biddle & Co. Mr Turner was clearly not satisfied that AON's scheme would necessarily work. He wanted Biddle's views on Cains' advice. Mr Reardon apparently told him that AON's scheme was feasible, but this advice (as the Master found) must inevitably have been tentative.

16. On 1 March 2000 there took place a telephone conversation between Mr Turner and Mr Borrill whose outcome is the genesis of AON's claim, and the Master's award, of £111,720 damages. Its terms are therefore of great importance in the case. However the Master's findings as to the content of the conversation are not, with respect, sufficiently exact, and I will reproduce this passage from the Agreed Statement of Facts:

> "…In the conversation Mr Turner told Mr Borrill inter alia that 'LGH has cracked it' and that 'LGH's collections account agreement would do the trick'; and that as a result of the Cains advice and the promise of the CAA the defendants' scheme was now sufficiently robust. The factors which Mr Borrill said caused him to reduce his price included the content of the Cains' advice, the fact that LGH had sent this advice to Powerhouse, Mr Turner's apparently genuine belief that the defendants' scheme was sufficiently robust and/or as robust as the claimants' scheme, the fact that Powerhouse had gone so far as to take advice from Biddles, the fact that Powerhouse were requiring Mr Mian to provide a physical copy of the CAA and the fact that Mr Mian had promised to provide Mr Turner with a copy of the defendants' CAA."

17. As a result of what Mr Turner said to him, Mr Borrill agreed to reduce USP's price further (it had already been reduced once after the 10 February proposal). The upshot of the agreed reduction was that USP would make £111,720 less profit over the lifetime of the scheme.

18. The Master made these observations about what Mr Turner said to Mr Borrill on 1 March:

> "It has to be appreciated that Mr Turner was a skilled negotiator and as such he would have played his cards quite carefully to his best advantage. He agreed that he may well have used poetic licence, and it would be surprising if he had not done so. He would hardly have revealed his personal doubts about the robustness of the defendants' scheme, since that would have undermined his own position. It has also been suggested that he misrepresented the defendants' price but I do not see how that is made out on the evidence. It is certainly the case that Mr Turner revealed the costings which he had produced on the basis of the competing quotes he had from the defendants and the claimants. However, I do not think that there is any evidence that he misrepresented the position or suggested the defendants had made a concession which they had not done."

19. As I have said, Powerhouse were pressing AON for a copy of the CAA which, of course, they knew had been the basis (or part of the basis) of Cains' advice. Mr Mian at length supplied it to Biddle & Co, with a copy to Mr Turner, on 7 March 2000. As I understand it, this copy was identical to the one in Cains' possession. Both were generated from, or at any rate were the same as, the electronic copy which Mr Brimacombe had put on AON's computer in April 1999. HHJ Weeks considered the similarities between the original template CAA and the infringing copy. He said this (page 14, lines 14ff):

> "I do not think it necessary or appropriate therefore to go into a line by line comparison of the two documents. It is clear to me that the substance of the draft is reproduced in the final version and that, by using the final version in an attempt to advance their case with Powerhouse, LGH wrongly appropriated the labour and skill of Cooper Chan and so infringed the copyright of Unicorn which had been assigned to USP."

20. Although (and I am coming to this) the Master made no award against AON in respect of any loss connected with Powerhouse other than for what might be called the 1 March price drop, there is some correspondence which post-dates 1 March which is of some importance given what I regard as the true issue in this appeal, as I will in due course explain it. On 7 March 2000, having that day received the infringing copy of the CAA from Mr Mian, Mr Reardon of Biddle & Co wrote to another firm of solicitors, Dickinson Cruickshank & Co, who were also recruited on behalf of Powerhouse. Among other documents he enclosed the CAA. He said:

> "Aon have made the point that this [CAA] would need to be tailored to the specific situation with Powerhouse. Aon have also emphasised the confidentiality and commercial sensitivity

> of the [CAA] which has been disclosed only for use by Powerhouse legal advisers in advising Powerhouse.
>
> I would be grateful if you could consider the enclosures and advise whether, as a matter of principle, it would be possible adequately to protect the position of Powerhouse customers in the event of the insolvency of the off-shore service company. At this stage, Powerhouse are looking for clear advice that they can safely go forward with the type of scheme being promoted by Aon (which may be a more cost effective alternative to the [SPV] scheme promoted by USP)."

There is a note from Dickinson Cruickshank in reply, which includes this:

> "We have not seen the entirety of the arrangement and, certainly, no proposed documents (apart from the example draft [CAA])…
>
> We, like Cains, have seen no actual proposed documentation."

Mr Reardon wrote to Mr Turner on 16 March, advising that:

> "[a] trust of the nature proposed by Aon, if properly drafted and constituted, would be effective under English law to protect the trust funds…
>
> In conclusion it is our view that, in relation to English law, with careful document drafting under the Aon arrangements, monies in the Trust Fund can be protected from claims by creditors of the offshore service company…"

21. Later on 24 March 2000 the respondents agreed a further price reduction on the basis that the implementation fee would come down from £40,000 to £25,000 and would be liable to be rebated if the respondents' scheme generated fees in excess of a stated level. On this basis the respondents were awarded the Powerhouse contract. In fact the fees indeed exceeded the stated level, but Powerhouse went into liquidation.

THE MASTER'S DECISION

22. The question the Master had to decide, as he put it in paragraph 27 of his judgment, was whether USP (as owner of the copyright in the CAA) had a good claim against AON for damages for infringement arriving out of the respondents' conceding reductions in their price on 1 March and on 24 March 2000. After citing authority and in particular *Kuwait Airways Corporation against Iraqi Airways* [2002] 2 AC 883 to which I will come, the Master said this (paragraphs 30-33):

"30 The starting point is therefore the question of causation. In my judgment on the findings I have made the availability of a trust mechanism was important to Powerhouse in the context of the negotiations. In order to demonstrate the availability of a trust mechanism in the context of their proposals the defendants made use of the infringing copy they had sent to Cains in April 1999 and subsequently infringed the defendants' copyright again when they sent a copy of the CAA to the claimants on the 7 March 2000. It is necessary to distinguish these two stages of the negotiation in consideration of this issue. On the 1 March 2000 when the first price reduction was agreed the only infringements in issue were the infringements by Mr Brimacombe when he made an electronic copy and the subsequent infringement involved in sending the document to Cains. These two infringements enabled the defendants to obtain the two pieces of advice from Cains in the context of the negotiations with Powerhouse, although those pieces of advice did not persuade Mr Turner on their own. However the availability of the CAA which had been copied enabled Mr Mian to promise a copy to Mr Turner. The advice from Cains together with that promise strengthened his negotiating position and enabled him to persuade Mr Borrill that the claimant was vulnerable to competition from the defendants. But for the infringement I have mentioned I do not consider that Mr Turner would have been in a position to do this. The defendants argue that it was not the infringements that caused this chain of events but the fact of legitimate competition involving the concept of a trust mechanism over which the claimants have no monopoly, a fact quite apart from the infringement of copyright in the CAA. In a sense this is true but it only operates if one conceptualises what happened at too high a level of abstraction. The reality is that it was the infringements that I have mentioned which put the defendants in a position to rely on the trust concept in the bargaining with Mr Turner and which he could then use against Mr Borrill. The fact that the defendants could at relatively little expense have avoided this by devising their own scheme is nothing to the point…

31 The defendants rely upon *Work Model Enterprises Limited –v- Eco System Limited* [1996] FSR 356 in this context. That case involved an admitted infringement of copyright by a competitor who copied the claimant's brochure. It was held that the infringement did not cause the lost sales which were the result of legitimate competition. This neatly illustrates the principle of causation but it is not in my view applicable on the facts. In this case it was the infringements which enabled the claimants to lay claim to be able to put into place a trust mechanism, and it was that which led to the prejudice to the claimants' negotiating position.

> 32 The defendants further argued that Mr Turner's conduct of the negotiations involved misrepresentations and breaches of Powerhouse's confidentiality agreement with the defendants, so that there was a break in the chain of causation. In this respect Mann J has held that there was a breach of the confidentiality agreement in imparting the Cains advice to the claimants, and this must be accepted as correct. Mr Turner also prepared an analysis of costings based on information supplied to him and I accept that in imparting these analyses to the claimants he was again in breach of the confidentiality agreement. I do not however accept that there was ever any misrepresentation by the way he represented his impression of the robustness of the defendants' scheme although he may have used poetic licence to the extent that he did not reveal his reservations. However, all this is part of the course [sc 'par for the course'] in the context of commercial negotiations. Even were it to be categorised as wrongful, it does not in my view break the chain of causation: see for example *Stansbie v Troman* [1948] 2 KB 48. In that case it was the defendant who created the opportunity for the burglar to enter the house which he should have guarded against. In my judgment in this case it was the defendants' infringements of the claimants' copyright which facilitated Mr Turner's actions in the context of the negotiations, which involved breaches of the confidentiality agreement. All this was moreover, in my view, a perfectly foreseeable consequence of the initial and subsequent infringements of the copyright in making an electronic copy and sending this to Cains for advice. It was foreseeable that once the defendants began to make use of the CAA and to infringe the claimants' copyright this would cause loss to the claimant. It matters not whether the precise concatenation of events is foreseeable: see *Jolley v Sutton LBC* [2000] 1 WLR 1082. The general risk which was foreseeable was that infringement of copyright would lead to losses to the claimants by undermining their special competitive position. In effect, the claimants' actions were steps taken acting reasonably in mitigation of their losses in reducing their price in response to the tortious actions of the defendant.
>
> 33 My conclusion therefore is that the defendants are liable in respect of the initial price reduction which occurred on the 1 March 2000…."

23. The Master went on to hold that the later price reduction, including the agreement for rebate of the implementation fee, did not sound in damages: "By that stage the force of the trust mechanism as a negotiating tool had been expended" (paragraph 33). In the result, then, the Master awarded an agreed sum of £111,720 by way of damages to reflect the price reduction of 1 March 2000.

THE APPEAL

24. AON's first complaint is that the Master's award of a notional royalty of £15,000 *and* damages for loss of profit represents a species of double recovery. It is said that the loss of profit allegedly suffered in relation to Powerhouse flowed only from the infringements committed in the context of Apollo: those infringements were compensated by the notional royalty, and thus the loss of profit damages compensates usp again for the same infringement.

25. In my judgment this argument is misconceived. The notional royalty of £15,000 was awarded, as the Master put it in paragraph 15 of his judgment (which I have read), "in respect of all the uses to which the defendants have put [the CAA] apart from the question of Powerhouse". It must, plainly, be elementary that an infringing copy may be put to several uses each of which, other things being equal, may give rise to a damages claim. The royalty was awarded, however, only for the use relating to Apollo. The use relating to Powerhouse was something else besides. The real question here is whether damages in respect of the Powerhouse price reduction were properly recoverable at all; and it is to this question that I now turn.

26. The issue requires the court to consider the very basis upon which damages for breach of copyright are awarded. It will make for clarity if I first explain how Mr Monson for AON puts his case. He submits, correctly, that the normal measure of damage is the amount by which the copyright is depreciated, by the infringement, as a *chose in action*: see for example per Goff LJ as he then was in *Paterson Zochonis v Merfarken* [1986] 3 AER 522, 538b, citing Lord Wright MR in *Sutherland Publishing* [1936] Ch 323, 336. Here, however, the claim is not for depreciation of the copyright arising from an infringer's unauthorised use. The claim is for damage said to be consequential upon the unauthorised publication of the CAA to Cains, originally in April 1999. Mr Monson submits, again correctly, that (as is generally the case with claims in tort for consequential loss) it must be shown that the loss contended for has been caused by the wrongdoing in question, is not too remote, and is foreseeable. The Master rightly observed that *Gerber v Lectra* [1995] RPC 383 (Jacob J) and [1997] RPC 443 (Court of Appeal) shows that the usual rules of causation and remoteness apply in this area.

27. Against that background Mr Monson submits, first, that the respondents' claimed loss was not a foreseeable consequence of any infringing act by AON. Since no infringing copies were made at the time of the Powerhouse negotiations before 7 March (which was, of course, after the alleged damage – the 1 March price drop – occurred), the respondents' case must be that their loss is attributable to the earlier infringement of April 1999 when the infringing copy was sent to Cains in the context of the Apollo scheme, and its foreseeability or otherwise must be assessed as at that date. But in that case, says Mr Monson, the 1 March price drop cannot be said to have been foreseeable: there was, if I may put it in my own words, a chasm of time and circumstance between the infringing act in April 1999 and the claimed loss in March 2000. On this aspect Mr Monson also submits that the respondents cannot save the day by recourse to a read-over into the law of copyright of the notion of foreseeability

of risk of harm from the law of negligence: yet this, it is said, is what the Master did (paragraph 32) by reference to the personal injury case of *Jolley v Sutton LBC* [2000] 1 WLR 1082.

28. Mr Monson next submits that the "chain of causation" is broken by three events or circumstances: (1) the fact that between April 1999 and January 2000 they had made a positive decision not to offer trust-based schemes to clients so that (Mr Monson's skeleton argument, paragraph 6.8) "the continued existence of an infringing copy of the CAA in the hands of Cains and on the appellant's computer in February 2000 was merely fortuitous": (2) the real cause of the price drop on 1 March 2000 was what Mr Turner said to Mr Borrill about AON's proposed trust scheme, but those representations were made in breach of the confidentiality agreement entered into by Powerhouse on 7 February 2000, so that what Mr Turner said was not merely an intervening cause, but one constituted by wrongdoing towards AON; and (3) Mr Turner's representations to Mr Borrill also miss-stated his true state of mind about the "robustness" of AON's trust-based scheme.

29. I have to say that in my judgment none of these arguments touches the real point in the case. I return to the question: what is the basis upon which damages for breach of copyright are awarded? The question cannot be answered without consideration of the *nature* of the wrongdoing which breach of copyright represents. The nature of the wrong is clear enough. In a case where the copyright work is a written document, it consists in the unauthorised use of the *actual text* of the document. It does not consist in pirating the idea or ideas to be found in the text. The point is put clearly and simply in *Halsbury's Laws* (vol. 9(2), paragraph 56):

> "Ideas as such are not the subject matter of copyright, but only the form in which ideas are expressed."

This is exemplified by the decision of Jacob J (as my Lord then was) in *Work Model Enterprises Ltd v Eco System Ltd* [1996] FSR 356, and many other cases. With respect I need not give the details. The proposition is perfectly elementary.

30. That being so, the true point in this appeal is not to be found in Mr Monson's elaborate arguments about foreseeability and breaks in the chain of causation. It is that on the facts relating to Powerhouse the respondents have suffered no damage arising from the unauthorised deployment of the actual text of the CAA, as opposed to the idea or ideas which it contains. Certainly the 1 March price drop does not constitute any such damage (even assuming – a large assumption – that if the CAA had played no part in the advice given to Powerhouse the respondents would have won the contract at the pre-1 March price). The utility of the CAA for Mr Turner's purposes rested in the trust-based concept which it exemplified. Nothing in the exchange between Mr Turner and Mr Borrill on 1 March turned on the actual text of the CAA, despite the comment 'LGH's collections account agreement would do the trick'. Mr Turner and Mr Borrill were not discussing the *words*. What mattered was the *idea*. So much is forcibly demonstrated, in my judgment, by the solicitors' correspondence which I have cited, though it took place after 1 March. I have in mind

in particular the references to "the type of scheme being promoted by Aon", "We, like Cains, have seen no actual proposed documentation", and "a trust of the nature proposed by Aon, if properly drafted and constituted".

31. In fact the point goes further. It will be recalled that the relevant copyright was originally in the template CAA, drafted by Messrs Cooper Chan. It was first vested in Unicorn and assigned to USP in 1999. There can, as it seems to me (and the point was put to counsel in the course of argument), be no question of the copyright-protected text *of the template* being causative of any loss. As I have already stated, in its original form the template CAA was not satisfactory. It would have needed some alteration and development to be brought into practical effect for the purpose of implementing any trust-based scheme. So much, I understand, was common ground. It is a short step to the conclusion that in truth the parties are at one in accepting that use of the relevant protected text cannot be said to have been the genesis of the damage claimed.

32. The Master, with respect, does not seem to have been alive to the critical point in the case. I conceive that his essential findings are to be found in paragraph 30 which I have read:

> "The advice from Cains together with that promise [sc. to supply the CAA] strengthened [Mr Turner's] negotiating position and enabled him to persuade Mr Borrill that the claimant was vulnerable to competition from the defendants… The reality is that it was the infringements that I have mentioned [sc of April 1999] which put the defendants in a position to rely on the trust concept in the bargaining with Mr Turner and which he could then use against Mr Borrill."

This altogether loses sight of the difference between the text and the idea which it represents.

33. I should add that nothing I have said contradicts HHJ Weeks' statement, which I have read, that "by using the final version in an attempt to advance their case with Powerhouse, LGH wrongly appropriated the labour and skill of Cooper Chan and so infringed the copyright of Unicorn which had been assigned to USP". The judge's reference is to the transmission of the infringing copy on 7 March. On the Master's findings, as I have made clear, that infringement caused no damage: though I shall have to consider it in the context of the respondent's notice.

34. In the circumstances, the appeal must in my judgment be allowed on the simple ground that the claimed loss is not attributable to any breach of copyright: not because it was unforeseeable or otherwise too remote for the reasons urged by Mr Monson, but because in principle, and for the reasons I have given, it lies beyond the scope of protection which the law of copyright affords.

35. In a sense, this true basis for the appeal's succeeding was just around the corner from Mr Monson's skeleton. He cited passages from two opinions of Lord Hoffmann which should have pointed the way to the real point in the case. First, *Kuwait Airways Corporation against Iraqi Airways* [2002] 2 AC 883 at paragraph 128:

> "There is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and purpose of liability. One cannot separate questions of liability from questions of causation. One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability… [T]he question of causation is decided by applying the rules which lay down the causal requirements for that form of liability to the facts of the case."

Then in *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 WLR 87, 92 – 94:

> "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation… Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful."

36. This reasoning demonstrates the intimacy between the nature of the wrong alleged and the damage which by law may be attributed to it. It serves also to dispel the notion (if anyone entertains it) that the law's different approaches to causation, according to the kind of case before the court, is in any sense random; the question is always a constant one, namely what is the loss for which the defendant should justly be held responsible. The nature of the cause of action which the claimant pleads and proves will often determine the question's answer, and will always condition it. In this case, with respect, the Master's mistake was to forget the nature of the cause of action in copyright.

THE CROSS-APPEAL

37. The cross-appeal articulated in the re-amended respondent's notice proceeds upon the premise that the appeal is successful: that is, that the award of £111,720 damages for the 1 March 2000 price drop is set aside, as I have held it should be. In that case, the respondents say that they should be awarded damages of £40,000 for loss of the full implementation fee which had been put at that figure. They submit also that the royalty awarded by the Master, £15,000, should be increased to take account of the

admitted infringement of 7 March 2000 when Mr Mian supplied the CAA to Biddle & Co with a copy to Mr Turner.

38. Before dealing with those arguments I should confront another assertion made in the respondent's notice (it was in fact the subject of the re-amendment), to the effect that the Master's award of £111,720 damages should be upheld on a further ground, namely that Cains must have made an additional infringing copy in February 2000 in order to prepare their advice for Powerhouse. Mr Leaver QC for the respondents did not press this at the hearing. It is obviously possible that such a further copy was made, but it is not in my judgment proved that it was. More important, however, the point cannot, it seems to me, make any difference to the outcome. If the Master's award of damages is bad because it conflates damage flowing from use of the copyright text with damage flowing from use of the ideas in the text, it is no less bad if another copy of the CAA was created along the road to Mr Turner's deployment of the ideas contained in it.

39. The same consideration gives the lie to the claim for damages of £40,000 representing the value of the implementation fee. I have stated the relevant facts. For convenience I repeat this much only, that on 24 March 2000 the respondents agreed a further price reduction on the basis that the implementation fee would come down from £40,000 to £25,000 and would be liable to be rebated if the respondents' scheme generated fees in excess of a stated level. Mr Leaver submitted (skeleton argument paragraph 63) that if the Master's conclusion as to the 1 March price drop is disturbed, then "the value of the CAA as a negotiating tool had not been exhausted by [24 March]". But this is simply a *non sequitur*. In any event, if the 1 March price drop cannot attract damages because it cannot be attributed to any use of the copyright text as such, the same is true of the 24 March price drop – including, therefore, Mr Borrill's concessions on the implementation fee. Mr Leaver submitted that because Powerhouse had the CAA text on 7 March, it must be harder for AON to contend that losses thereafter suffered by the respondents were not attributable to the use of the actual text. But the correspondence with Biddle & Co, which I have set out, plainly shows that the words of the CAA were not the driving force of anything.

40. Accordingly there is nothing in the cross-appeal relating to the implementation fee. In my judgment, however, the royalty is another matter. The basis of the Master's award of £15,000 related to the infringement committed in connection with Apollo, and not Powerhouse. Mr Monson submitted that the award must also have reflected the 7 March infringement relating to Powerhouse, and so there is no call for an increase in the royalty notwithstanding the appeal's success (if my Lords agree) on the damages claim. I have already explained why I disagree, by reference to the language of the Master's judgment (paragraph 15). The royalty needs to be uplifted to take account of the 7 March infringement. The only remaining question is, by how much.

41. Mr Leaver (skeleton argument paragraph 60) contends for an additional £50,000. The figure comes from Mr Borrill's evidence. Its purported justification is that in the Powerhouse context USP and AON were head-to-head competitors and any licence to

use the CAA (let alone any sale of the copyright in it) would have been at a substantial price.

42. Mr Monson submits that if (contrary to his first case) the figure of £15,000 is to be increased at all, it should be by a much more modest amount. He draws attention to the fact that there was evidence from Mr Chan that he would have charged about £20,000 for producing the CAA. He says that that sum would have included sale of the copyright, not just a licence. But he reminds us that the template CAA itself required substantial amendment. Mr Witt gave evidence that Messrs Collyer Bristow estimated the cost of producing trust documents in the context of the Tesco scheme at £5,000.

43. This is, of necessity, a rough and ready exercise. We are required to put a value on a transaction which never took place – it is a notional royalty; and therefore, of course, the evidence is subjunctive: what this or that party *would* have done in circumstances which were not actually in contemplation. Whether one estimates a figure for a general licence to use the CAA, or a figure which might have been negotiated for a licence to release the CAA to AON and Powerhouse for the purpose of negotiations in February 2000 in which the copyright owners were of course themselves competitors, I am clear that the existing figure of £15,000 is inadequate. I would uplift it by £20,000 to a total award by way of notional royalty of £35,000, and to that extent would allow the cross-appeal.

Jacob LJ:

44. I agree. I would just add this summary of my opinion as to why the main appeal succeeds. Copyright in a literary work is infringed if the work is copied exactly or substantial (see s.16(1)(a) and (3) of the Copyright Designs and Patents Act 1988). It is the text of the work which is protected from copying. The head of damage claimed here in no way turns on the fact that the exact text was copied. It is not attributable at all to the precise nature of the text used by the defendants. So it did not flow from the fact that the exact text was taken – it was not caused by the infringement.

Lord Justice Waller:

45. I agree.