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Consequences of Inconsistent Source Code Escrow Agreements

The development of increasingly sophisticated software has prompted the emergence of a distinct subset of escrow agreements known as source code escrow agreements. These agreements are tailored towards the safekeeping of source code — the human-readable series of commands at the foundation of every software program.

Parties entering into software development agreements nowadays invariably also consider entering into separate arrangements with reputable source code escrow agents. There are certain benefits to be gained. For instance, in the event that contractual relations break down, and the party who has commissioned the development of bespoke software (**Customer**) has to engage an alternative software developer (**Supplier**) to carry on works, the Customer will have a contractual means of accessing the source code to enable the new Supplier to perform the necessary work.

Problems can, however, arise if there is any uncertainty surrounding the conditions which will trigger the release of the source code from escrow, as illustrated by the case of *Filmflex Movies Ltd v Piksel Ltd*.
[\[1\]](#)

Background

The Plaintiff was in the business of providing video-on-demand movie streaming services to mobile network operators. The Plaintiff entered into a Master Service Agreement (**MSA**) with the Defendant, a video broadband software designer and developer, for the design, construction and maintenance of an online content delivery and streaming platform (**the Platform**). Following the conclusion of the MSA, the Plaintiff and Defendant also signed a standard form agreement with an escrow agent (**Escrow Agreement**).

Considerable work was done by the Defendant to develop the Platform, and the Defendant was in turn paid for its services. Matters came to a head when the Plaintiff requested a copy of the source code for the Platform from the Defendant directly. Although the Defendant provided a file, the Plaintiff alleged this to be functionally useless. The Plaintiff then appointed a third party developer to also work on developing the Platform in tandem with the Defendant.

Clauses 9.10 and 6 of the MSA and Escrow Agreement respectively

both exhaustively provided for the trigger events upon which the source code for the Platform would be released from escrow. While the appointment of a third party developer by the Plaintiff was a trigger event specified in the MSA, it was not one found in the Escrow Agreement.

As the Defendant refused to provide the source code or to procure the escrow agent to release the source code to the Plaintiff, the Plaintiff commenced proceedings against the Defendant for breach of the MSA, seeking damages and delivery up of the source code from escrow. In defence, the Defendant argued, *inter alia*, that there was an inconsistency between Clause 9.10 of the MSA and Clause 6 of the Escrow Agreement and that the terms of the Escrow Agreement superseded those of the earlier MSA. The Defendant maintained the Plaintiff could only have recourse to Clause 6 of the Escrow Agreement. However, as no trigger event specified therein had occurred, there were no grounds upon which the escrow agent could be requested to release the source code.

Decision

The learned judge dismissed the Defendant's argument above. Firstly, it was found that there was no inconsistency between the MSA and the Escrow Agreements. Secondly, the learned judge considered that in any event, where an inconsistency did indeed exist between two agreements, one of which was in standard terms, the bespoke terms of the other would prevail, irrespective of whether the standard form contract had been signed after the bespoke agreement.

The Defendant was accordingly ordered to instruct the escrow agent to release the source code to the Plaintiff.

Impact

The importance of ensuring consistency in the trigger events found in source code escrow agreements remains a matter which parties often fail to have sufficient regard for and hence overlook. While such clauses may not be at the forefront of parties' priorities at the time of entering into a new software development agreement, an oversight in this regard can result in unnecessary litigation and, ultimately, considerable losses, as demonstrated above.

Parties should, therefore, take sufficient care to ensure that the trigger events in any source code escrow agreement are consistent with those incorporated in the services agreement and/or other agreements entered into by the parties.

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[2015] All ER (D) 281 (Feb)