WITH COMPLIMENTS

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PROPERTY AGREEMENTS – AN ALTERATION COULD SINK YOUR SALE!

"Agreement makes law" (Old legal maxim)

Although in our law most verbal contracts are binding, property sale agreements are an exception. They must be in writing and signed by the parties to be valid, the reason being that it greatly reduces the risk of confusion or dispute as to what the buyer and seller have actually agreed.

In practice of course, the buyer's initial offer is usually in the form of a written document which only becomes an agreement if and when signed in acceptance by the seller. And often that initial offer sparks negotiation, usually over price or other important terms, with the result that sale agreements are frequently amended both before and after signature.

A recent High Court case shows once again how vital it is to ensure that any such amendments have actually been agreed to by both seller and buyer.

An offer "accepted" – or was it?

1. A buyer offered R6.3m for a property
2. The seller signed the Offer to Purchase in "acceptance", but conditionally, with changes to clauses relating to inspection of the property by a Building Inspector
3. The buyer, seeing these alterations only after paying a 10% deposit, rejected them and demanded her deposit back
4. When the seller refunded only part of the deposit (arguing that her acceptance of the offer had resulted in a valid and enforceable sale agreement) the buyer went to court.

The law on conditional acceptance

Ordering the seller to refund the balance of the deposit to the buyer, the Court held that –

- The seller had to prove that the buyer had agreed to the written contract "in its final form"
- Conditional acceptance of an offer amounts to either –
    - A rejection of the offer, or
    - A counter–offer
- When there are outstanding issues requiring further negotiation, either there is no contract at all, or a contract is formed with an understanding that the outstanding issues would be negotiated at a later stage

On the facts of this case, the seller's alterations were material and amounted to a counter-offer which was never accepted by the buyer. There was therefore no sale.

Avoiding the trap

Make sure that any changes to sale documents correctly reflect your agreement, and that both parties sign or initial them in confirmation. And as always with property transactions, don't take any chances - **sign nothing without your lawyer's advice!**

COPYRIGHT IN CYBERSPACE: NEW GUIDELINES FOR ONLINE PUBLISHERS

"Is a stolen copyright a copy-wrong?" (Anonymous)

The high profile "Moneyweb v Fin 24" High Court judgment is significant for all online publishers. In a nutshell, Fin 24 was ordered to pay damages to Moneyweb for copyright infringement in respect of one article, but the Court found against Moneyweb in regard to six other articles and ordered it to pay 70% of Fin 24's legal costs.

Both sides in the litigation have claimed victory but the

important message for us all is this - original creative works are protected by copyright even when posted online.

Strong protections – a summary

Let's start with our Copyright Act, which since 1978 has been protecting the creators of original works – literary, musical, artistic, photographic, and more recently computer programming, website creation and the like – from plagiarists. The idea of course is to encourage creativity, but without upsetting the balance between a creator's rights and the public interest.

Copyright protection kicks in automatically as soon as you create an original work. No paperwork or registration is required, and you are covered internationally in all Berne Convention countries (map here https://en.wikipedia.org/wiki/Berne_Convention#/media/File:Berne_Convention_signatories.svg). To be protected you don't have to mark your works with the copyright "©" sign, but it's good practice to do so, together with your name and the year of creation.

And if your copyright is infringed you can both claim damages from the copycat and put a stop to the infringement.

In cyberspace: What's fair game? And is it enough to acknowledge source?

What has not been clear until now is the extent to which these protections apply to re-publishing online. The common misperception that anything on the Internet is fair game for wholesale re-publication without permission is of course totally incorrect, and now we have from our courts some solid guidelines which **both the creators of online creative works, and those re-publishing them, need to pay heed to.**

In outline (this is inevitably just a summary of some very complex legal issues, so seek advice on your specific case) -

- To qualify for protection the work must be "**original**" (resulting from "sufficient application of the author's mind" rather than "slavish" copying), and it is for the creator to prove originality
- It isn't necessary to prove word-for-word plagiarism – copyright is infringed where a "**substantial part**" of the work has been reproduced. The court will make a value judgment here, based on the work as a whole and "focusing more on the quality of what has been taken than on the quantity"
- There are **exceptions** - no copyright protection at all is given to things like legislation, political speeches and "news of the day that are mere items of press information" (this last being the aspect relevant to the Moneyweb case)
- "**Fair dealing**" is a defence available to re-publishers of literary or musical works only for the purposes of research, private study, personal/private use, criticism/review, and (the aspect relevant to the Moneyweb case) the reporting of "current events". A re-publisher claiming fair dealing must prove it, and again the court will make a value judgment on fairness after considering all the facts of each case. Where fair dealing has been proved, both the source and author must be mentioned by the re-publisher. The Court held that a hyperlink back to the original article, together with mention of the author's name, is sufficient compliance.
- Note however that **acknowledging source** – for example via a hyperlink back to the original source - doesn't in itself establish fair dealing. Fair dealing has to be proved separately as above – if it isn't, the copyright holder's permission to re-publish is essential.

BABY BOOMERS: AT WHAT AGE MUST YOU RETIRE?

Employers need to be particularly on their guard for cases in which a workplace dismissal is automatically unfair. Our courts take a particularly dim view of discrimination cases falling into this category.

Age discrimination is one such instance, and an employer faced with such a claim can defend it only by proving (the onus is on the employer) that the employee has reached "the normal or agreed retirement age for persons employed in that capacity".

With "Baby Boomers" (people born between 1946 and 1964) now retiring in record numbers, expect to see a spike in disputes and litigation over retirement issues. A recent Labour Court decision illustrates just how costly any mistake in this regard is likely to be for the employer.

Forced to retire at 63, awarded nearly R1.3m

1. An employee of an informally-run, family oriented business believed his agreed retirement age to be 65, although this was not specified in his contract of employment, and the business had no staff manual

2. The business was sold twice, each time to larger corporations with more formal policies in place

3. The employee refused to sign a new employment contract specifying an agreed retirement age of 60, saying it would be difficult to find new work at that age

4. When he was forced to retire on turning 63, he approached the Labour Court for assistance, asking for 2 years' remuneration as compensation in terms of the LRA (Labour Relations Act) and another 2 years' remuneration as damages for violation of the EEA (Employment Equity Act)

5. The employer defended this claim on the basis that retirement age for employees was governed by its standard retirement policy which set retirement age at 63 (previously 60)

6. On the facts however it was unable to prove this defence, and the Court found the dismissal to be unfair and awarded the employee compensation of R1,283,760 (16 months' remuneration).

7. Note that the Court accepted that the employer had acted in good faith, genuinely believing that it was entitled to apply the standard retirement policy in the absence of a written agreement to another retirement age. **Had the employer acted in bad faith, the Court would doubtless have made a much higher award** – and whilst claims for automatically unfair dismissal in terms of the LRA are capped at 24 months' remuneration, EEA awards have no such limit.

Employers: your essential action plan

- No matter how small or informally-run your business may be, have all new employees sign written employment contracts specifying a compulsory retirement age

- If your existing employment contracts don't stipulate a retirement age, remedy that now. Note that this must be a matter for negotiation; you cannot unilaterally impose new terms like these on employees.

Employees: fight any form of discrimination

You have strong legal protection from all forms of unfair discrimination, direct or indirect, "on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

CREDIT PROVIDERS - NCA REGISTRATION THRESHOLD REDUCED TO NIL

If you are a credit provider and required to register as such in terms of the NCA (National Credit Act), not doing so can have drastic consequences for you. For a start, your agreements will likely be declared void and unenforceable.

Apart from some specific exclusions from the NCA's provisions (take advice if you aren't sure whether you fall into any of them), you must register if the total principal debt owed to you under all outstanding credit agreements exceeds a set threshold. This used to be R500,000 but has now been reduced to nil – meaning that all affected credit providers have to register regardless of the amount of credit advanced.

The NCA and Regulations are complex with a lot of technical requirements and pitfalls for the unwary, so get help from your lawyer if you are unsure of anything!

YOUR JUNE WEBSITE: "AM I CONTAGIOUS?" DON'T BE 'PATIENT ZERO' THIS WINTER

It's cold and flu season again, and unless you want to be the deeply unpopular "Patient Zero" who infects everyone else in your social circle or at work, make sure you know when to stay home with the article and infographic "'Am I Contagious?' When to Stay Home Sick" on HealthLine's website http://www.healthline.com/health/cold-flu/contagious#1.

Dipping into the dictionary

"Cryptarchy", n. - Secret government
