

# worldsportslawreport

**FEATURED ARTICLE**  
**06/10**



cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

# Seymour Pierce v Grandtop International: analysis

Investors often employ financial advisers when looking to acquire sporting clubs. Advisers commonly bargain for a 'success fee' should the takeover be successful. Sohrab Daneshku, an Associate with Lewis Silkin LLP, examines a recent case where the 'success fee' was disputed, *Seymour Pierce Limited v Grandtop International Holdings Limited*.

At the end of March 2010, judgment was handed down in the case of *Seymour Pierce Limited v Grandtop International Holdings Limited*<sup>1</sup>. Seymour Pierce, whose Chairman is Keith Harris, are financial advisers well known in the English football world. Mr Harris was Chairman of the Football League between 2000 and 2002 and has been involved in a large number of football club takeovers. Seymour Pierce had advised Grandtop, a company controlled by Mr Carson Yeung, in relation to Grandtop's 2007 bid to acquire Birmingham City Football Club. At that time, Grandtop only acquired a minority shareholding. Grandtop did not acquire a controlling interest in Birmingham until September 2009 and used different advisers for that part of the deal. Seymour Pierce nevertheless argued, relying on the terms of its retainer, that it was entitled to a success fee in relation to its work. The claim was a summary judgment application, so Seymour Pierce needed to show that Grandtop had no real prospect of successfully defending the claim.

## The background

In 2007, Grandtop wanted to buy a FA Premier League club and Keith Harris of Seymour Pierce began negotiations with Birmingham's then majority owners, David and Ralph Gold, David Sullivan and

Karren Brady. By early June 2007, Heads of Terms had been agreed, which involved a public offer in accordance with the Takeover Code for the entire share capital of the club. However, it later became clear that Grandtop planned to acquire the club in two stages: first, a private purchase of 29.9% of the club's shares, followed within six months by a public offer for the remainder, in accordance with the Takeover Code (once Grandtop's shareholding reached 30%, it would be obliged to make a public offer for the remainder of the shares).

## The Engagement Letter

Seymour Pierce's Engagement Letter was signed on 25 June 2007. By the Letter, Seymour Pierce agreed to act for Grandtop 'in connection with a proposed recommended offer for the entire issued share capital of Birmingham City plc ... or cash investment in Birmingham, by [Grandtop], (the 'Offer' or the 'Transaction')'. The Engagement Letter also provided: 'The engagement shall commence from the date of this letter and continue until the Transaction becomes unconditional in all respects, lapses or is withdrawn'. A non-refundable fee of £300,000 was payable by Grandtop to Seymour Pierce on signature of the Engagement Letter. However, Seymour Pierce's main fee entitlement was contained in the following provision: 'Conditional upon the Offer being declared unconditional as to acceptances and in consideration of our providing the Services, [Grandtop] shall pay to Seymour Pierce an additional Success Fee of £2,200,000'.

Under 'Termination', the Letter provided: 'In the event the engagement pursuant to this letter of engagement is terminated by the Company and an Offer for the

Target is declared or becomes wholly unconditional as the result of any offer made by or in association with [Grandtop] within a period of 12 months after the effective date of termination [Grandtop] shall pay to Seymour Pierce the Success Fee in full'. We will call this clause the '12 Month Clause'.

It was upon the 12 Month Clause that Seymour Pierce relied in support of its application. A key question before the court was whether the contract had in fact been terminated. The Engagement Letter provided that either party could terminate the appointment by giving the other not less than three months notice, not to take effect before the first anniversary of the agreement (i.e. 25 June 2008). Grandtop said it had not terminated the agreement, but that the agreement had terminated automatically. Seymour Pierce claimed that Grandtop had terminated the agreement, with effect from 21 August 2009, in the circumstances described in the next section.

## Birmingham City purchase

On 17 July 2007, Grandtop completed the purchase of 29.9% of the club's shares for a price of approximately £15 million. For the remainder of 2007, Seymour Pierce's involvement continued and there were further negotiations with the club's owners with a view to Grandtop launching a public offer for the remainder of the shares. However, no bid price could be agreed and on 20 December 2007, the club announced that it had ended offer discussions because the club did not believe that Grandtop would purchase the entire share capital.

At no point, though, did Grandtop serve a notice of termination on Seymour Pierce. In fact, contact between the parties on

matters relating to Birmingham continued through to August 2009.

On 20 May 2009 Grandtop wrote to Seymour Pierce stating that the retainer had terminated on 20 December 2007. Seymour Pierce responded on 16 June 2009, disputing that the retainer had ended as claimed, but accepting Grandtop's 20 May 2009 letter as constituting a notice of termination, to take effect three months later, on 21 August 2009.

Also in August 2009, Grandtop announced that it had made an offer to purchase the remaining shares in Birmingham, which was agreed by 79% of the shareholders. The offer became unconditional and Grandtop acquired control of the club at the end of September 2009. Grandtop did not use Seymour Pierce as financial advisers in connection with that offer. Instead, Grandtop instructed BDO Stoy Hayward, for a considerably lower fee than Seymour Pierce's Success Fee.

### The arguments of the parties

The dispute was whether, because of the operation of the 12 Month Clause, Grandtop had to pay Seymour Pierce the Success Fee of £2.2 million. Seymour Pierce's case was that the retainer had ended in August 2009, Grandtop's offer for the remaining shares became unconditional the following month and the 12 Month Clause operated so as to trigger payment of the Success Fee.

Grandtop put forward three defences:

- the first proposed offer/transaction in 2007 was withdrawn - or lapsed - in December 2007, thus bringing the engagement to an end;
- the 2009 offer/transaction was different from the 2007 offer/transaction and did not fall within the definition of 'Offer' or 'Transaction' contained in the

### The Success Fee was payable, because the offer became unconditional within 12 months of the termination of Seymour Pierce's retainer

Engagement Letter;

- Seymour Pierce was not the - or an - effective cause of the success of the second offer/transaction in 2009.

In relation to the first bullet point above, the terms 'lapse' and 'withdrawal' have specific meanings under the Takeover Code, which Seymour Pierce said was important in the context of the contractual obligations of the parties. There had been no lapse or withdrawal in December 2007. Grandtop's contention was that the words 'lapsed' and 'withdrawn' should be interpreted more informally. This, though, would mean that the court would have to consider all the communications between the parties to decide whether the retainer had come to an end. Seymour Pierce's contention had the advantage of clarity. It was also important that in the Engagement Letter, the 'Transaction' was equated with 'Offer', which necessarily required a public offer, thus engaging the Takeover Code obligations. The court preferred Seymour Pierce's case.

Grandtop's second defence was that the 2009 offer was different from the 2007 offer. The argument was of no assistance to Grandtop, as the 12 Month Clause contemplated 'any offer' for the club being declared or becoming wholly unconditional within 12 months of termination.

The third defence was that Seymour Pierce was not the - or an - effective cause of the success of the 2009 transaction. The defence required a term to be implied into the contract, which the court declined to do. Under English law, a court will imply a term into a contract if the court considers that the parties must have intended that term to form part of the contract. A term will be implied if it is necessary to give a contract what is

called 'business efficacy'. Here, the court said there was no such need.

The 12 Month Clause required Seymour Pierce to be paid even though it had not been the adviser helping to bring about the later acquisition. This did not matter for the purposes of the contract. The effect of the clause was that the Success Fee was payable, because the offer became unconditional within 12 months of the termination of Seymour Pierce's retainer. Grandtop may well have felt this to be unfair, given that it would have to pay the fees of two advisers, but clauses such as the 12 Month Clause are commonplace in corporate agreements of this type.

It followed that the court decided that Seymour Pierce was entitled to the Success Fee.

### Comment

The case illustrates the reluctance of courts to imply terms into contracts unless necessary. Freedom of contract is a cornerstone of English commercial law. Absent any unusual features, the fact that a contract may end up operating harshly against one party will not be sufficient to enable that party to avoid its contractual obligations.

**Sohrab Daneshku** Associate  
Lewis Silkin LLP, London  
[sohrab.daneshku@lewisilkin.com](mailto:sohrab.daneshku@lewisilkin.com)

1. [2010] EWHC 676 (QB).



# cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

Registered number 2676976 Registered address 141 Wardour Street, London W1F 0UT VAT registration 577806103

## e-commerce law & policy

Many leading companies, including Amazon, BT, eBay, FSA, Orange, Vodafone, Standard Life, and Microsoft have subscribed to ECLP to aid them in solving the business and legal issues they face online.

ECLP, was nominated in 2000 and again in 2004 for the British & Irish Association of Law Librarian's Legal Publication of the Year.

**A twelve month subscription is £390 (overseas £410) for twelve issues and includes single user access to our online database.**

## e-commerce law reports

You can now find in one place all the key cases, with analysis and comment, that affect online, mobile and interactive business. ECLR tracks cases and regulatory adjudications from around the world.

Leading organisations, including Clifford Chance, Herbert Smith, Baker & McKenzie, Hammonds, Coudert Brothers, Orange and Royal Mail are subscribers.

**A twelve month subscription is £380 (overseas £400) for six issues and includes single user access to our online database.**

## data protection law & policy

You can now find in one place the most practical analysis, and advice, on how to address the many problems - and some opportunities - thrown up by data protection and freedom of information legislation.

DPLP's monthly reports update an online archive, which is an invaluable research tool for all those who are involved in data protection. Data acquisition, SMS marketing, subject access, Freedom of Information, data retention, use of CCTV, data sharing and data transfer abroad are all subjects that have featured recently.

Leading organisations, including the Office of the Information Commissioner, Allen & Overy, Hammonds, Lovells, BT, Orange, West Berkshire Council, McCann Fitzgerald, Devon County Council and Experian are subscribers.

**A twelve month subscription is £355 (public sector £255, overseas £375) for twelve issues and includes single user access to our online database.**

## world online gambling law report

You can now find in one place analysis of the key legal, financial and regulatory issues facing all those involved in online gambling and practical advice on how to address them. The monthly reports update an online archive, which is an invaluable research tool for all those involved in online gambling.

Poker, payment systems, white labelling, jurisdiction, betting exchanges, regulation, testing, interactive TV and mobile gaming are all subjects that have featured in WOGLR recently.

Leading organisations, including Ladbrokes, William Hill, Coral, Sportingbet, BskyB, DCMS, PMU, Orange and Clifford Chance are subscribers.

**A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.**

## world sports law report

WSLR tracks the latest developments from insolvency rules in football, to EU Competition policy on the sale of media rights, to doping and probity. The monthly reports update an online archive, which is an invaluable research tool for all involved in sport.

Database rights, sponsorship, guerilla marketing, the Court of Arbitration in Sport, sports agents, image rights, jurisdiction, domain names, ticketing and privacy are subjects that have featured in WSLR recently.

Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.

**A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.**

- Please enrol me as a subscriber to **e-commerce law & policy** at £390 (overseas £410)
- Please enrol me as a subscriber to **e-commerce law reports** at £380 (overseas £400)
- Please enrol me as a subscriber to **data protection law & policy** at £355 (public sector £255, overseas £375)
- Please enrol me as a subscriber to **world online gambling law report** at £485 (overseas £505)
- Please enrol me as a subscriber to **world sports law report** at £485 (overseas £505)

**All subscriptions last for one year. You will be contacted at the end of that period to renew your subscription.**

Name

Job Title

Department  Company

Address

Address

City  State

Country  Postcode

Telephone  Fax

Email

**1** Please **invoice me**  Purchase order number

Signature  Date

**2** I enclose a **cheque** for the amount of

made payable to 'Cecile Park Publishing Limited'

**3** Please debit my **credit card**  VISA  MASTERCARD

Card No.  Expiry Date

Signature  Date

VAT No. (if ordering from an EC country)

Periodically we may allow companies, whose products or services might be of interest, to send you information. Please tick here if you would like to hear from other companies about products or services that may add value to your subscription.

priority order form

FAX +44 (0)20 7729 6093

CALL +44 (0)20 7012 1380

EMAIL dan.towse@e-comlaw.com

ONLINE [www.e-comlaw.com](http://www.e-comlaw.com)

POST Cecile Park Publishing 17 The Timber Yard, Drysdale Street, London N1 6ND