



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 252

BETWEEN:

**(1) SESAME WORKSHOP
(2) BERMUDA BROADCASTING COMPANY LTD**

Plaintiff

- and -

BERMUDA CABLEVISION LIMITED

Defendant

Date of Hearing: 2 February 2011

Date of Judgment: 17 February 2011

Mr. Nathaniel Turner for the plaintiffs; and
Mr. Ben Adamson for the defendant.

JUDGMENT

INTRODUCTION

1. This matter comes before me on the application of Bermuda Cablevision Limited ('Cablevision') to strike out the claims made by the second plaintiff ('the BBC') on the basis that it has no standing to bring such claims. An alternative head of relief against the first plaintiff was abandoned at the outset of the hearing.

2. I am proceeding on the basis that this application is made under Ord. 18, r. 19 and should be construed as one to strike out the writ and the statement of claim on the basis

that it is frivolous, vexatious or an abuse of process. I do not understand the defendant to say that the pleadings disclose no reasonable cause of action, and in any event they put in an affidavit in support of the summons which they could not do if they were proceeding on the latter basis.

3. I can only accede to an application to strike-out pleadings if the matter is ‘plain and obvious’: see e.g. Electra Private Equity Partners (Ltd Partnership) & Ors v KPMG Peat Marwick (A Firm) & Ors [1999] EWCA Civ 1247 at p. 17. I do not think that this case calls for me to set out more law than that.

4. The action itself is one for breach of Copyright. The first plaintiff (‘Sesame’) holds the copyright in certain children’s educational programming. The BBC is a broadcast radio and television station in Bermuda. Sesame licenses the BBC to broadcast some of its material in Bermuda. Cablevision is a cable television operator in Bermuda, and it retransmits programming from, *inter alia*, the United States. This includes a PBS station which is carried on cable channel 5. This PBS station also carries Sesame programming, presumably under its own licence in the US, but that does not seem to extend to cover Cablevision in Bermuda. The plaintiffs object to Cablevision carrying this PBS programming, which they say is in breach of Sesame’s copyright and the exclusive licence granted by Sesame to the BBC. There is a long history to this, which the plaintiffs plead, but in my view that is not relevant to this application which turns upon a narrow point of law.

5. The point of law is the true construction of the BBC’s licence and the proper application to it of sections 118 and 129 of the Copyright and Designs Act 2004 (‘the Act’). Cablevision argues that the licence only confers an exclusive right to ‘broadcast’ Sesame programming. ‘Broadcast’ is a term of art defined in the Act to mean over-the-air radio transmissions, and does not include cable. Therefore, Cablevision argues, BBC has no exclusive right which covers cable transmissions and cannot rely upon the provisions of sections 118 and 129. The plaintiffs disagree.

6. As to the meaning of 'broadcast', I accept that it is a term of art in the statute and applies only to over-the-air radio transmissions and does not cover cable transmissions. They are very different animals. Thus section 14 defines 'a broadcast' and 'broadcasting' as follows:

“14. (1) In this Part a "broadcast" means a transmission by wireless telegraphy of visual images, sounds or other information which
(a) is capable of being lawfully received by members of the public; or
(b) is transmitted for presentation to members of the public;
and references to broadcasting shall be construed accordingly.”

While a cable service is defined expressly so as to exclude 'wireless telegraphy':

"cable programme service" means a service which consists wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception

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(a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users); or
(b) for presentation to members of the public;
and which is not, or so far as it is not, excepted by or under the following provisions of this section.

To the extent that the plaintiffs use the expression 'broadcast' to include cable transmissions they are, therefore, wrong.

7. The operative terms of the licence between Sesame and the BBC grant the BBC “the right to make certain television exhibitions (as described in the table below under Sections F, G, H, I, J & K) of the Programs (as described under Sections C, D & E), within the Territory (as described in section M).” The Territory is of course Bermuda. The remainder of the provisions can best be explained by a facsimile reproduction of the table in the licence itself, but the ostensible effect of them is to grant an exclusive licence for the subject programming for “Terrestrial/Free TV” but not for any form of cable, satellite or Pay per View.

8. The table in the licence looks like this:

A. LICENSEE	Bermuda Broadcasting Co., Ltd.			
B. LICENSEE ADDRESS	4 Fort Hill Road Prospect, Devonshire BV 02 Bermuda Attention: Ms. Dorene Ming			
C. NAME OF SERIES OR SPECIAL ("PROGRAM")	Sesame Street - Season 40			
D. NUMBER OF PROGRAMS	Twenty-six (26) episodes			
E. APPROXIMATE LENGTH OF EACH PROGRAM	Sixty (60) minutes			
F. NUMBER OF RUNS OF EACH PROGRAM	Twelve (12) runs (one "run" is one exhibition of an episode)			
G. EXHIBITION FACILITIES (e.g. broadcaster)	Bermuda Broadcasting Co., Ltd.			
H. EXHIBITION RIGHTS	FORM OF EXHIBITION	GRANTED	IF GRANTED EXCLUSIVE NONEXCLUSIVE	NOT GRANTED
	Terrestrial/Free TV	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input type="checkbox"/>	
	Basic Cable			<input checked="" type="checkbox"/>
	Pay Cable			<input checked="" type="checkbox"/>
	Free to Air			<input checked="" type="checkbox"/>
	Satellite			<input checked="" type="checkbox"/>
	Pay Satellite			<input checked="" type="checkbox"/>
	Video on Demand			<input checked="" type="checkbox"/>
	Pay Per View			<input checked="" type="checkbox"/>
I. INTENDED EXHIBITION SCHEDULE AND TIME SLOT IF KNOWN	Licensee will provide this information to tv.sales@sesameworkshop.org as soon as it is available.			

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9. The Governing law of the licence is that of New York State: see cl. 13.05, and I have no evidence on what that law is. Cablevision ask me to proceed on the basis that it is the same as Bermuda law in this respect, but I think that a rather large assumption. What is quite clear, however, is that the licence itself draws a sharp and clear distinction between Cable and other forms of transmission, and that no type of cable rights are conferred by it upon the BBC.

10. Section 118 of the Act provides:

“Exclusive licences

118. (1) In this Part an "exclusive licence" means a licence in writing signed by or on behalf of the copyright owner authorising the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner.

11. The rights of an exclusive licensee are governed by section 129, which provides:

“Rights and remedies of exclusive licensee

129. (1) An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

(2) His rights and remedies are concurrent with those of the copyright owner; and references in the relevant provisions of this Part to the copyright owner shall be construed accordingly.

(3) In an action brought by an exclusive licensee by virtue of this section a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.”

12. The essence of that is that an exclusive licensee has the same rights against third parties as the copyright owner in respect of the right which is the subject matter of his licence. The question then is: what is the right in respect of which exclusivity has been conferred in this case? Is it the general right to make television exhibitions of the programming in Bermuda or is it simply the right to broadcast the programming by means of wireless telegraphy? Put another way, would the licence allow the BBC to prevent Sesame granting to third parties rights in respect of any of the means of transmission set out in the unticked boxes in the table in the licence? I assume, from the fact that it is a party to these proceedings as plaintiff, that Sesame concedes that it does.

13. While there is a lot of force in Cablevision’s argument, I think that I should not determine this matter on a strike out basis. I cannot safely say that it is plain and obvious. The true meaning of the licence may indeed depend upon New York law. Copyright is a specialist area, particularly in respect of such things as television programming. It is likely to be subject of trade practices and understandings which may provide an important element of context to the bare bones of the licence itself. Nor will striking out the BBC bring an end to the overall action, as Sesame can pursue it irrespective of the terms of the licence if they are so minded.

14. I therefore dismiss the application to strike out the second plaintiff's action. I will hear the parties on costs.

Dated this 17th day of February 2011

Richard Ground
Chief Justice