



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No. 16

BETWEEN:

PATRICIA NESBITT

(trading as “PATRICIA NESBITT PRODUCTIONS”)

Plaintiff

-v-

ROSHEENA BEEK

(trading as “MOJA CO PRODUCTIONS” and

“4 WOMEN PRODUCTION HOUSE”)

1st Defendant

-and-

MICHELLE LAYLOR

(trading as “MICHE (ARTS DEVELOPMENT & PHOTOGRAPHY) and

“4 WOMEN PRODUCTION HOUSE”)

2nd Defendant

-and-

LEISURE TIME LTD.

3rd Defendant

-and-

DUANE DENNIS

(trading as “PHASE 1 VIDEO STORE”)

4th Defendant

RULING

(In Chambers)

Date of Hearing: April 27, 2011

Date of Ruling: May 4, 2011

Mr. Allan Doughty, Trott & Duncan, for the Plaintiff

The 1st Defendant appeared in person.

The Applications

1. The Plaintiff issued on January 20, 2011 a Generally Indorsed Writ seeking, *inter alia*, a permanent injunction restraining the Defendants from infringing her copyright in the dramatic work entitled “*Pastor, will you marry me please?*” (“the Work”). On the same date I granted an ex parte interim injunction in support of the Plaintiff’s claims (“the Interim Injunction”).
2. By Summons dated February 16, 2011, the 1st Defendant applied to set aside the Interim Injunction. On the first return date of this Summons, directions were given for the filing of evidence in relation to the application to set aside and the summary judgment application which Mr. Doughty indicated on February 24, 2011 he proposed to file on the Plaintiff’s behalf. The latter application was issued on March 22, 2011 (although it was filed a week earlier).
3. These two applications were eventually heard together. The 1st Defendant indicated that she did not contest the existence of the Plaintiff’s copyright in the Work. Rather she contended that at all material times prior to the commencement of the present proceedings, she was contractually entitled (under an oral contract evidenced in part by writing) to distribute the Work and on that basis had not contravened the Plaintiff’s

rights. She accepted that the distributorship agreement which she relied upon had now come to an end.

4. On this basis it seemed obvious that (a) there was no defence to the Plaintiff's claim for a permanent injunction restraining the 1st Defendant from committing any future interference with her proprietary rights in the Work; and (b) there was, accordingly, no basis for the application to set aside.
5. What required more time to assess was whether, despite my strong provisional view that the balance of the Plaintiff's claim depended on disputed facts about the terms of an oral agreement which could only be determined at trial, the Plaintiff was entitled to summary judgment in respect of the entirety of her claim. Mr. Doughty very forcefully argued that if the documentary evidence was read carefully in light of the applicable law, it was ultimately clear that there were no triable issues in respect of the entirety of the Plaintiff's claim.

The Plaintiff's claim

6. In her Statement of Claim, the Plaintiff alleges (controversially) that the 1st Defendant was authorised to prepare DVDs of the Work for limited distribution and sale to fund the production of another work called 'The Wedding'. It was stipulated that the Plaintiff did not yet have the right to use the music featured in the Work on a mass distribution basis. In or about December 2010, it is alleged that the 1st Defendant without permission prepared DVDs for the purpose of mass distribution and on or about December 16 without authority entered into agreements with the 3rd and 4th Defendants for the distribution of DVDs of the Work. These averments are made on the foundation of the non-controversial plea that she owns the copyright in the Work.
7. The Plaintiff seeks by way of primary relief: (a) a permanent injunction restraining the 1st Defendant from infringing the Plaintiff's copyright in the Work; (b) an inquiry as to damages and an account of profits; (c) an order for payment of all sums found to be due; (d) an order for delivery up of all infringing copies of the DVD.

The 1st Defendant's Defence

8. The 1st Defendant relied upon her First Affidavit sworn in support of her application to set aside the Interim Injunction to demonstrate that she had an arguable defence. She orally made it clear that she now entirely accepts that she no longer has any right to distribute the Work without the Plaintiff's permission. In essence, her case is that she was entitled to sell the DVDs and that her local retail actions did not go beyond the scope of

what was agreed. Since it is accepted by the Plaintiff that the 1st Defendant was authorised to make DVDs of the Work for limited distribution and that the terms of this agreement were not recorded in a formal written agreement, the merits of the defence (that her distribution authority was broader than the Plaintiff contends) are almost impossible to fully and fairly assess on the basis of affidavit evidence alone.

9. Nevertheless, the Plaintiff deposed in her Third Affidavit as follows:

“7. I refer to paragraphs 25 and 26 of the Affidavit of the First Defendant which was sworn on the 14th of February 2011 wherein the First Defendant admits to selling the DVD footage of the production to the Third and Fourth Defendants. Despite the claim of the First Defendant that she had my permission to do so, which is denied in both of my previous affidavits, I again stress that the First Defendant has admitted in those paragraphs that she has ‘pocketed’ the profits of those sales in breach of my copyright.”

10. If the assertion that the 1st Defendant has admitted breaching the Plaintiff’s copyright is well-founded, there would be no triable issue. However the admission assertions reflect more “spin” than objective analysis of the 1st Defendant’s evidence. In the crucial paragraphs, she says:

“...I was the distributing arm...for the DVD...which was consented to by the Plaintiff...I at no time infringed on the copyrights of the Plaintiff because I was given consent by the Plaintiff to sell the DVD...”

11. I find that the 1st Defendant has not admitted selling copies of the DVD in breach of the Plaintiff’s rights. In addition, as she explained in her oral argument, the 1st Defendant contends that she was entitled to recoup monies owed to her in respect of ‘The Wedding’ out of the proceeds of selling the Work. This assertion cannot be rejected out of hand at this stage because the Plaintiff agrees that the limited sales she authorised were intended to meet just such expenses, albeit that by the Plaintiff’s account the 1st Defendant was not entitled to resort to self-help.

12. Finally, the 1st Defendant informed the Court that her only commercial objective in defending the present proceedings is to recover \$2500 owed to her by the Plaintiff for services rendered. If this is right, there will be a colossal wastage of costs should this Court be required to reach legal findings in relation to an informally consummated commercial agreement reached by friends who have fallen out and chosen to expose themselves to large legal costs rather than to reach a financially sensible compromise.

Findings: Summary Judgment

13. Summary judgment may be granted in respect of a claim for an injunction and/or for a declaration in relation to proprietary rights: Supreme Court Practice 1999, paragraph 14/1/2.
14. The Plaintiff is entitled to a declaration as to her rights in the Work and to the permanent injunction she seeks as against the 1st Defendant, who has disclosed no triable issue by way of defence to this aspect of the Plaintiff's claim. It follows that the application to set aside the Interim Injunction must be refused.
15. That leaves outstanding the Plaintiff's claims for damages for breach of copyright, an accounting and delivery up of DVD copies of the Work. Based on the concession that any distribution agreement has come to an end, I further find that the Plaintiff is entitled to an Order for (a) an accounting, and (b) delivery up of all copies of the DVD version of the work in the 1st Defendant's possession. The relief does not in any way depend on whether or not the 1st Defendant is entitled to keep whatever monies she has received from sales to date and/or whether or not any agreement has been broken.
16. Whatever agreement there was, the 1st Defendant must have been required to give an accounting of her sales. And if the agreement is admittedly now at an end, the 1st Defendant cannot insist on retaining unsold copies of the relevant DVDs. Ordinarily she might be able to exercise some form of lien over such items as security for monies owing to her, but if the 1st Defendant is due only \$2500, the net position is very likely to be that she is a debtor of the Plaintiff in respect of the costs of the present application, ignoring everything else.
17. As far as the damages claim is concerned, there are triable issues and those matters will-if they are not resolved amicably-have to be tried. However, it seems obvious that a trial would likely involve costs in excess of \$10,000 while the 1st Defendant has indicated that she is merely interested in recouping \$2500. This suggests that it is improbable that the Plaintiff is likely to be able to establish at trial any damages claim which would come close to being proportionate to the costs that would be incurred in adjudicating her claim.
18. The Overriding Objective obliges the court to take active steps to ensure that this action is disposed of justly. Order 1A of the Rules of the Supreme Court provides as follows:

"1A/1 The Overriding Objective

1 (1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.

- (2) *Dealing with a case justly includes, so far as is practicable —*
 - (a) *ensuring that the parties are on an equal footing;*
 - (b) *saving expense;*
 - (c) *dealing with the case in ways which are proportionate —*
 - (i) *to the amount of money involved;*
 - (ii) *to the importance of the case;*
 - (iii) *to the complexity of the issues; and*
 - (iv) *to the financial position of each party;*
 - (d) *ensuring that it is dealt with expeditiously and fairly; and*
 - (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

1A/2 Application by the Court of the Overriding Objective

2 The court must seek to give effect to the overriding objective when it —

- (a) *exercises any power given to it by the Rules; or*
- (b) *interprets any rule.*

1A/3 Duty of the Parties

3 *The parties are required to help the court to further the overriding objective.*

1A/4 Court's Duty to Manage Cases

4 (1) *The court must further the overriding objective by actively managing cases.*

(2) *Active case management includes —*

- (a) *encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- (b) *identifying the issues at an early stage;*
- (c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- (d) *deciding the order in which issues are to be resolved;*
- (e) *encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
- (f) *helping the parties to settle the whole or part of the case;*
- (g) *fixing timetables or otherwise controlling the progress of the case;*

- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- (i) dealing with as many aspects of the case as it can on the same occasion;*
- (j) dealing with the case without the parties needing to attend at court;*
- (k) making use of technology; and*
- (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.” [emphasis added]*

19. I have borne the above principles in mind in reaching my primary findings set out above on the applications presently before the Court and in making the directions for the further conduct of this matter set out below.

20. Having regard to the fact that (a) the likely costs of trying the remaining issues appear to be disproportionate to the amounts of money likely to be in issue, and (b) the 1st Defendant is appearing in person, I direct that:

- (1) the Plaintiff shall take no further steps (save to procure compliance with the Order drawn up to give effect to this Judgment) to prosecute the present action for 28 days;
- (2) the parties shall in the interim use their best endeavours to settle their outstanding disputes (including the costs of the present application, which are reserved) either directly or through mediation;
- (3) in the event the Plaintiff proposes to proceed after the expiry of the period referred to in (1), her attorneys should first file with the Court a ‘Scott Schedule’ setting out the issue and amount in dispute, the respective positions of the parties and the estimated costs attributable to pursuing the issue to trial.

Conclusion

21. The Plaintiff is entitled by way of summary judgment to a permanent injunction restraining the 1st Defendant from interfering with the Plaintiff’s copyright in the Work and to an Order for an accounting of any and all monies received from sales to date and for delivery up of all unsold copies of the DVD portraying the Work.

22. The 1st Defendant has established that there are triable issues with respect to the allegation that she distributed copies of the Work in breach of the terms of her distributorship agreement with the Plaintiff, giving rise to a damages claim. Based on the

material presently before the Court, any such trial seems likely to entail a disproportionate amount of legal costs to pursue.

23. The action is therefore stayed on the terms set out in paragraph 20 (above) so that the parties can attempt to resolve the outstanding disputes between them.

Dated this 4th day of May, 2011 _____
KAWALEY J