

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV3136/2005

BETWEEN HAMMER MUSICK GMBH 1st CLAIMANT

A N D KEMAR MCGREGOR
Trading as NO DOUBT PRODUCTIONS
And/or KINGSTON SONGS 2nd CLAIMANT

A N D JET STAR PHONOGRAPHICS LTD. DEFENDANT

Mrs. Gloria Langrin and Hugh Hyman for Claimant

Mrs. Francine Noel and Christopher Kelman instructed by Myers, Fletcher and Gordon for Defendant.

Heard: October 12, 2006 & June 6, 2008

APPLICATION TO SET ASIDE ORDER FOR SERVICE OF CLAIM

FORM OUTSIDE THE JURISDICTION

DAYE, J

On the 28th November 2005 the Claimants Hammer Musik GMBH and Kemar McGregor obtained an Order to serve their claim on the Defendant Jet Star Phonographics Ltd. outside the jurisdiction in England. They had filed this claim in the Supreme Court of Jamaica on the 21st October 2005. On the 3rd January 2006 the claim was duly served on Jet Stat Phonographics Ltd. in England. On the 4th January 2006 Jet

Star Phonographics filed an Acknowledgment of Service in the Registry of the Supreme Court of Jamaica. They disputed this claim.

Hammer Musik GMBH is a company based in Stuttgart, Germany. Kemar McGregor appears to be an agent in Jamaica for the 1st Claimant Company. The Defendant Jet Star Phonographics Ltd. is a company based in England and operates in Europe, the USA and Japan. Both companies are engaged in the business of publishing, recording, selling, distributing, acquiring and owning copyrights and licences of musical works among other works.

On 6th November 2002 Jamaica song writers and composers - Keith Blair and Miguel Collings aka Sizzla – assigned their copyrights in eleven (11) and thirteen (13) songs respectively to Hammer Musik GMBH. They signed individually written Agreements transferring their copyrights. Kemar McGregor signed these Agreements for and on behalf of Hammer Musik GMBH

It appears Jet Star Phonographics Ltd. has released in Jamaica sometime in early 2006 two albums titled “Future” and “Red Alert” which contain several of the songs/composition that Hammer Musik GMBH secured copyrights from Keith Blair and Miguel Collins. This is what has lead to this claim and the consequential issue of service out of the jurisdiction.

Service of Claim out of jurisdiction

The general rule is that the Court has a discretion to permit a Claim Form to be served out of the jurisdiction in circumstances which include these hereunder:

JURISDICTION

Apart from the express provisions of the civil procedure rules a judge/court has an inherent jurisdiction to set aside its own order made for want of jurisdiction (**Delroy Rhoden v Construction Developers Ass. Ltd et al** SCCA 2/2002 delivered March 18, 2005) A litigant affected by an order of a court which is a nullity or is an irregularity which is not waived is entitled to have that order set aside “ex debito juslitiae” which means the litigant is entitled as a matter of right to have it set aside. (per, Downer J.A in **Rhoden’s** case (supra) P.20 paragraph 2) The Learned Judge of Appeal demonstrated on the authority of **Isaacs v Robertson** that the litigant entitled to set aside such order without any to recourse to the rules that deal expressly with proceedings to set aside order for irregularity” (**Rhoden** (supra) p.25 paragraph 2). A point on jurisdiction can be made at any time. This is the opinion of Downer, J.A.

Pleadings

The Claim Form and Particulars of Claim of Hammer Musik GMBH dated 21st October 2005 aver a breach of infringement of the copyright of the Claimant and seeks the remedy of an injunction. There is no averment in relation to the jurisdiction of Jamaica.

Mr. Christopher Krlman submit the claim does not raise a claim in contract. He says it raises a claim for copyright and injunction. These are not claims he argues that satisfy the rules i.e 7.3 (2)(b) and (c) to obtain permission to serve a claim outside the jurisdiction. Mr. Hugh Hyman responded that the claim for infringement of copyright is a tort. An action for a tort he argues is a claim which the rules allow to ground an application for service outside the jurisdiction. Mr. Hyman submission is valid and the court accept it (see R.7.4 CPR 2002 cited above)

Mr. Hyman also submitted the rules permit an application for service outside the jurisdiction where a claimant applies for an injunction. Mr. Hyman submission is valid and the court accepts it (See R. 7.3(2) (b) cited above) An injunction is not a claim or a cause of action but an equitable remedy. Nevertheless the rules expressly provide where a claim involves a feature such as an injunction it is a ground to apply for service of claim outside the jurisdiction.

Evidence on Affidavit.

Attorney-at-Law Mrs. Gloria Langrin swore by an Affidavit on the 5th November 2005 in support of the Application to serve claim outside the jurisdiction on the defendant in England. The relevant portion of Mrs. Gloria Langrin's Affidavit is as follows:

- “7. That the Defendant distributed or caused the distribution of the pirated musical works in Jamaica and elsewhere.
8. That the Claimants claim an injunction to restrain the continued distribution and sale of the said musical works in Jamaica.....
10. That approximately thirty five per centum of the pirated music is distributed in Jamaica.....”

Mr. Hugh Francis a senior official of the defendant company responded to this Affidavit on 16th March 2006.

He challenge each aspect of this evidence in paragraphs 6, 7 and 8 of his Affidavit. This challenge does not negate the evidence of jurisdiction. It only raises an issue of the primary facts which can only be determined at the trial of the action, Mr. Luel Johnson for Claimants depone to the following effect:

“That on the 30th May 2006 I purchased two compact discs from an outlet

known as Top Ranking situated at Shop 4, Westgate Plaza,
Montego Bay in the parish of St. James, Jamaica”.

He describes one of the compact disc as an Album entitled Red Alert.

There are songs on the Album composed by the artist/song writer ‘Sizzla’. He claimed this album and the other on the second CD states they were manufactured and distributed by Jet Star Phonographics Ltd., England. Hammer Musik claim copyrights for these songs while Phonographics claim licences in the songs.

SUBMISSIONS

Attorney-at-Law Mr. Christopher Kelman gave an Affidavit exhibiting the Agreement assigning the alleged copyright in musical works the subject matter of the claim.

Mr. Kelman submits the Agreement assigning copyright to the Claimant expressly provides the law of Germany should govern it. Also he says the defendant also has agreements from the Jamaican artists transferring copyrights to them. These Agreements he says provides that the law of England should govern them. No written Agreement of ownership of copyright of the defendants were exhibited. However, Mr. Kelman submit on the documents available, the jurisdiction of Jamaica was excluded. So, there was no basis to permit service of the claim outside the jurisdiction. Mr. Hyman in his opening submission says there was a difference between choice of jurisdiction and choice of law and they involve separate issue. This may well be so. However, provision in an Agreement about the law which governs it is relevant to the issue of jurisdiction. My opinion in relation to Mr. Kelman’s, submission that it is the law of Germany and

England that is material in this dispute is the clauses of the assigned Agreement extended the operation of copyright to any country and the law of that country.

Mr. Kelman also submitted the Affidavit in support does not disclose either that;

- (a) the agreement was made in Jamaica
- (b) any breach of rights took place in Jamaica
- (c) the defendant is resident or domiciled within the jurisdiction
- (d) the Agreement operated within the jurisdiction.

FINDINGS

The quoted evidence contained in the affidavits on behalf of claimants is sufficient to support a tort claim that breaches and damages arising from infringement of copyright occurred within the jurisdiction of Jamaica. I accept Mr. Hyman's submission on this issue. I am unable to accept Mr. Kelman's submission to the contrary on this issue accords with my considered opinion it is accepted.

I find there is some evidence that disclose the place where the Agreement assigning the copyright in dispute was made within and extended to the jurisdiction of Jamaica. Although the claim is not essentially based on contract it relates to the transfer and ownership of property rights under contract.

The exhibited Agreements of artistes/composers Keith Blair and "Sizzla" a.k.a Miguel Collins were signed with "Kingston Songs c/o Hammer Musik GMBM of Stuttgart, Germany" These Agreements were signed by "K. McGregory" on behalf of the 1st Claimant's company. I draw the reasonable inference that the Agreement which assigned the copyrights was made by or through an agent trading or residing in the

jurisdiction. This would give the court jurisdiction in contract based upon Jamaica as the place of contract. I accept Mr. Hyman's brief submission to that effect

Beyond that the recital to each of the Agreements provides as follows:-

".....the composer or beneficial owner hereby assigns to the publisher the copyright as listed in SCHEDULE A hereto throughout the world (hereinafter called the territory)by the law of any country in the territory"

The jurisdiction conferred by the Agreement for copyright is extensive and not exclusive. This, no doubt, is so due to the nature of personal property rights which is created by copyrights. Jurisdiction is very much in Jamaica.

Therefore I hold the court had power to make the order that the claim form can be served outside the jurisdiction.

Application to set aside order for service of claim form outside the jurisdiction refused.

a) Contract claims

When a party to a contract seek any remedy for its breach the offending party must show either the contract was made within a jurisdiction; made by an agent trading or residing in the jurisdiction, it was to be preferred in the jurisdiction or the breach of the contract was committed in the jurisdiction or it is governed by the law of Jamaica (R. 7.2, 7.3(3), CPR 2002)

b) Tort Claim

When any damage arising from a tort is committed within the jurisdiction or simply the damage from the tort sustained within the jurisdiction (R.7.4 CPR 2002)

c) Injunction

When a Claimant seek the remedy of an injunction arising from a claim and in relation to any act to be restrained within the jurisdiction (R.7.3(2)(b))

Under R.7.5(3) a court must be satisfied that Jamaica is a proper place in which to bring the claim before it exercised its discretion to permit service outside the jurisdiction.

Application to Set Aside Order for Service

Jet Set Photographics Ltd. applied on 3rd March to set aside the Order of 25th November 2005 permitting service on them outside the jurisdiction. They rest this application essentially on the ground that “the case is not a proper one for the Court’s jurisdiction” (R. 7.7 (1) and R.7.7(2)(b) CPR 2002)