



[2023] JMSC Civ. 227

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. SU2022CV04013**

<b>BETWEEN</b>	<b>JAMAICA ASSOCIATION OF COMPOSERS AUTHORS AND PUBLISHERS LIMITED</b>	<b>CLAIMANT</b>
<b>A N D</b>	<b>RESTAURANTS OF JAMAICA LIMITED T/A KFC</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Ms. Tashana Grant instructed by Messrs Samuda & Johnson for the Claimant  
Mr. Philmore Scott and Mrs. Camille Scott instructed by Philmore Scott & Associate  
for the Defendant**

**Civil Practice and Procedure – Application for Summary Judgment – Whether an  
Amendment to the Pleadings Before Case Management Conference but after a  
Summary Judgment Application has been Filed and Served Should Be Considered.**

**Civil Practice and Procedure – Application for Summary Judgment – Whether the  
Claimant has a Case With a Real Prospect of Success in Whole or in Part.**

**Whether Summary Judgment Should be Granted Ahead of enactment of Validating  
Legislation.**

**HEARD: November 2, 16 and 24, 2023**

**STAPLE J (Ag)**

## **BACKGROUND**

**[1] The Claimant (hereinafter JACAP) is a company with what it considers to be a  
noble purpose. According to Ms. Lydia Rose<sup>1</sup> it acts as an agent and/or licensee**

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<sup>1</sup> Affidavit 1 of Lydia Rose filed on October 26 2023 at para 12

pursuant to reciprocal collection and agency agreements with both local and international performance rights societies and music publishers who have assigned to them the sole and/or exclusive right in Jamaica to broadcast or license the broadcast of and to transmit or authorise the transmission of their musical works and/or musical works within their repertoire by radio, television (terrestrial and satellite) or otherwise. These are known as performance rights.

- [2] In other words, JACAP and other entities like them, in effect have been assigned the licenses from copyright owners to the performance rights in the copyrighted works of the owners and then JACAP issues what are in, effect, sub-licenses to persons who wish to perform the works.
- [3] The Claimant has sued Restaurants of Jamaica T/A KFC (the KFC part of the business) for Restitution for Unjust Enrichment and Copyright Infringement in relation to the Defendant's broadcast and/or transmission or authorisation of the broadcast and transmission or retransmission of musical works that the Claimant had the right to administer the public performance rights held in such musical works [sic] (the pleading is strange).
- [4] They seek an injunction restraining further broadcasts or transmissions; payment of outstanding licence fees for January 2017 to date; restitution for unjust enrichment; damages for the infringement of copyright or an account of profits for the period and payment of all sums that may be due to them after the accounting is done.
- [5] The Defendant has denied that they have done any wrong and have taken the further step of applying for the entry of Summary Judgment against the Claimant on the bases (among other things) that:
  - a) **The Claimant failed to set out or identify the copyrighted musical works which have allegedly been infringed by the Defendant.**
  - b) **The Claimant has failed to set out or show that the musical works that form the basis of the claim were subject to copyright;**

- c) **The Claimant has failed to set out or show that it has an exclusive license for the copyrighted musical works that were allegedly infringed by the Defendant and/or that it has a right to bring this claim on behalf of the authors of the musical works;**
- d) **The Claimant has failed to show that it is a licensing body.**
- e) **The Claimant has failed to set out or identify specific/individual instances throughout the period claimed that the Defendant is alleged to have infringed the copyrighted musical works.**

[6] Seemingly realising the gross deficiency in their pleadings, the Claimant filed, very shortly before the hearing of the Application for Summary Judgment, an Amended Particulars of Claim. The Amended Particulars of Claim purported to identify the copyrighted works infringed by referring to a document which they claim to be an audit report of an audit purportedly conducted at **ONE** (emphasis mine) of the Defendant's KFC Restaurants at Manor Park for one 24-hour period on the 6<sup>th</sup> October 2017.

[7] Amazingly, despite the amendment, no other infringements were stated, pleaded, or supported. So on the face of it, the Claimant is asserting one 24-hour breach in one year at one restaurant and wants to get six (6) years' worth of money.

[8] The Defendant has staunchly argued that the Court should enter the Summary Judgment against the Claimant as they have no case with a real prospect of success and the Court should not take any cognizance of the Amended Particulars of Claim when determining the issue.

[9] The Claimant, on the other hand, has urged the Court to refuse the Application and instead allow for the claim to proceed to trial.

## **SUMMARY JUDGMENT**

[10] The Defendant has applied, pursuant to CPR Rule 15, for entry of summary judgment against the Claimant on the basis that the Claimant's case, as pleaded, has no real prospect of success.

[11] CPR Rule 15.2 sets out the test for Summary Judgment.

**“The court may give summary judgment on the claim or on a particular issue if it considers that –**

**(a) the claimant has no real prospect of succeeding on the claim or the issue; or**

**(b) the defendant has no real prospect of successfully defending the claim or the issue.” (Emphasis supplied)**

- [12] The issue of what is meant by a “real prospect of success” has now been firmly settled since the case of **Swain v Hillman**.<sup>2</sup> A case with a real prospect of success is one that has a realistic chance of success at trial. Realistic as opposed to fanciful.
- [13] It is for the Defendant to show that the Claimant’s claim has no real prospect of success<sup>3</sup>. According to Edwards JA in the **Blackwood v Lyew et al** decision at paragraph 55 of the Judgment, “This means that, in the light of Part 15 of the CPR and the overriding objective of dealing with cases justly, the court should examine the case which will ultimately go to trial, and if a case is so weak that it has no reasonable prospect of success “it should be stopped before great expense is incurred” (see *Three Rivers* at page 260, paragraphs 91 to 93, and 95).”
- [14] Edwards JA also went on to set out, at paragraph 69 of the said judgment, some material factors that the Court should consider when examining whether to enter summary judgment or not. Whilst the context of the judgment was whether to enter summary judgment against a Defendant, the principles are still applicable when considering whether or not to strike out a case of a claimant.
- [15] Edwards JA said, “In order to have a real prospect of success, a defence must be more than merely fanciful or arguable. If the defendant’s case taken at its highest shows a distinctly improbable defence, it will be right to enter summary judgment. On an application for summary judgment, a defendant may seek to show a

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<sup>2</sup> [2001] 1 All ER 91

<sup>3</sup> See the case of *Blackwood v Lyew et al* [2022] JMCA Civ 17

substantive defence in law, a point of law which destroys the cause of action, a denial of the facts on which the claimant relies to set up the cause of action, or further facts which answer the claimant's cause of action. Where a statement of case is contradicted by contemporaneous documents or materials on which it is based, summary judgment is appropriate (see *Three Rivers* at paragraph 95). In the case of *ED & F Man*, as well as in *Sagicor Bank v Taylor-Wright*, a defence which otherwise may have had some success was destroyed by clear written admissions by the defendants.”

[16] I remind myself that I am not to engage in a mini trial or a protracted examination of highly complex legal arguments that may be more appropriate for a full trial. Though it is equally true to note that if the question turns on the interpretation of a statute or term of a contract, it may not necessarily be a bar to summary judgment. One such case was *Jamaica Public Service Co. Ltd v Rosemarie Samuels*<sup>4</sup>. This case concerned the interpretation and application of a document being relied upon by the Appellant to have and maintain an electricity distribution tower on the Respondent's land. Despite the complex issues involved in the resolution of the dispute (the Court had to interpret the document as well as consider whether there was a contractual license expressly or implicitly created and so forth), the matter was properly resolved using summary judgment.

## **THE COPYRIGHT ACT, LICENSING BODIES and LICENSING SCHEMES**

[17] The Claimant purports itself to be a copyright licensing body within the meaning of s. 87 of the Copyright Act 1993 (as amended).

[18] The Claimant and others had been operating as “licensing bodies” for quite some time but there was never any formal legal framework for them to be registered and monitored. This is because prior to 2015, the Copyright Act recognised such a concept as a licensing body (which is effectively what the Claimant is) and

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<sup>4</sup> [2012] JMCA Civ 42

copyright licensing, but there was no proper framework for how these licensing bodies were to be recognised and certified.

- [19] Enter the 2015 amendment to the Copyright Act which introduced a certification regime under the new s. 87A which required licensing bodies to obtain a certificate of registration as such. In fact, it **criminalized (emphasis mine)** any organization that purported to conduct the operations as a licensing body without having the said certificate of registration.
- [20] Section 87A(1) says that no person shall carry on the activity of negotiating or **granting (emphasis mine)** of licenses on behalf of owners of copyright unless that person is a licensing body, holding a certificate of registration.
- [21] Section 87's definition of a "licensing body" was also changed by the 2015 amendment to the Copyright Act to incorporate the new registration scheme imposed under s. 87A.

*"Licensing body" means a society or other organization which has as its main object or one of its main object, the negotiation or granting, either as Owner or prospective owner of copyright or as agent for him, of licences, and whose objects include the granting of licences covering works of more than one author, and that has obtained a certificate of registration in accordance with section 87A.*

- [22] As stated before, there were in existence, licensing bodies. These bodies were to operate what are known as licensing schemes. Section 87(1) defines a licensing scheme as follows:

*"licensing scheme" means a scheme setting out –*

- (a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant licences; and*
- (b) the terms on which licences would be granted in those classes of case,*

*and for this purpose a "scheme" includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.*

[23] The tenor and thrust of the Claimant's claim is that it is operating a licensing scheme as a licensing body under the Copyright Act<sup>5</sup>.

[24] In recognition of the fact that they were imposing a new registration and certification scheme, Parliament, as part of the 2015 amendment, enacted s. 154 which created a transitional arrangement for those bodies who had been operating as licensing bodies from before 2015. I will set it out below:

*“Notwithstanding section 87A, a licensing body operating before the date of coming into operation of the Copyright (Amendment) Act 2015, shall be required to satisfy the requirements for registration under section 87A and any regulations in relation thereto, within six months from that date or such longer period as the Minister after consultation with the Executive Director may by order prescribe.”*

[25] So the clear intent was not a “grandfathering” of the prior operators. They are to be registered, but they received an extension of time within which to be registered and certified.

### **What Happened After the Passage of the 2015 Amendment?**

[26] What followed after the passage of the 2015 Amendment can be considered, with the greatest of respect, to be quite a bureaucratic thicket which would make Sir Humphrey Appleby exceedingly proud.

[27] There was an initial extension Order gazetted by the Minister at some time in 2018 and then 2 subsequent orders (one in 2019 and the last in 2020). The latest Order was dated the 5<sup>th</sup> June 2020 and purported to extend the period for registration to May 2, 2021. The effect of this Order was that it provided that no proceedings shall be brought against any licensing body referred to in section 154 of the Act for non-compliance with section 87A during the period July 31 2015 to May 2, 2021.

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<sup>5</sup> See paragraphs 12-14 of their Amended Particulars of Claim which clearly makes reference to license fees and tariffs for multiple copyright holders.

[28] However, as it turns out, the two last extensions granted by the Minister may have been null and void. Section 154 of the Act only allowed for 1 extension (either for 6 months or for whatever period as prescribed by the Minister by Order). Consequently, at the expiration of the first Order (sometime in 2019), the Claimant, and others, unless they had been certified and registered under s. 87A, would have been operating illegally and would be subject to criminal prosecution if they purported to grant licenses or operated their licensing schemes. Indeed, the true position was that when the initial 6 months expired, the extension came to an end as the Minister's 2018 Order could not have retroactive effect.

[29] To that end in June of this year legislation was brought before the House of Representatives to fix the problem. It's the usual validation and indemnity legislation that has to be brought from time to time to fix these problems. It was passed in the House and then sent to the Senate.

[30] A report on the JIS Website<sup>6</sup> gives a report on the proceedings in the House and then in the Senate when it was passed on the 3<sup>rd</sup> November 2023. However, the Governor General's Assent has not yet been given and so the Act is not yet law.

[31] The 2023 Bill firstly repeals section 154 of the existing 2015 Amendment. It then goes further to replace that s. 154 with a new section 154 and expressly gives it retroactive effect to the 30<sup>th</sup> July 2015. I will set out the contents of the relevant sections of the Bill here:

**154(1) Notwithstanding section 87A and subject to subsection 2, an unregistered organization carrying on the activity of negotiating or granting licenses on behalf of owners of copyright immediately before the 30<sup>th</sup> day of July, 2015, may continue to do so, without the holding of a certificate of registration, during the transitional period.**

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<sup>6</sup> <https://jis.gov.jm/senate-passes-copyright-amendment-act-2023/> (accessed on November 15 2023)



- [32] Sections 154(3) and (4) together define what the new transitional period would be. That is now from July 30, 2015 to a date specified by the Minister published in the Gazette. In other words, after 8 years, there is no definite end in sight to the transition period.
- [33] Further section 154(4) defines “unregistered organization” as three specific entities, the present Claimant, Jamaica Copyright Licensing Agency and Jamaica Music Society. No other entity gets the benefit of this legislation.
- [34] It also states that no proceedings shall be brought against any person for any act done pursuant to the repealed section 154 during the period commencing on the 30<sup>th</sup> July 2015 and ending on the date of publication of this Act in the Gazette.
- [35] What this Bill purports to do is to indemnify entities such as the Claimant entirely for all their conduct from 2015 up to the date of publication of this new 2023 Act in the Gazette.
- [36] But as at this moment, it is not yet assented to nor published in the Gazette and so they would have had no authority to grant any licenses.

### **Implications for the Claimant**

- [37] The upshot of all of this is that unless the Claimant had been certified and registered, they could not grant any licenses to any entity for the period which is the subject of this claim. To do so, without legislative cover, would have been a criminal act.
- [38] It was specifically averred by the Defendant in their Application for Summary Judgment, that the Defendant was not so certified and registered under s. 87A at any time during the period the subject of this claim. The Claimant has not denied this fact. So it is not an issue in dispute needing to go to trial. In any event, it is not a factual dispute that would have prevented me from dealing with it in a Summary Judgment application. It would not be complicated or involve protracted testimony.

It would either be that they had the certificate or not. Since no such certificate has been produced, it is clear to me that none exists.

- [39] What the Claimant has instead said is that it was protected by the Orders of extension given by the Minister. Indeed, the Claimant argues, in their written submissions, that they will eventually get cover by the purported 2023 Amendment set out above. To this end, they are asking the Court not to grant summary judgment due to the fact that this Amendment, when it receives the assent of the Governor General and is published in the Gazette, would validate and indemnify their previous conduct.
- [40] Counsel for the Claimant relied on the case of *Sparks v Harland*<sup>7</sup> as authority that I could take this prospective amendment into account, rather than grant Summary Judgment, as it would allow for that aspect of the Claim to stand.
- [41] In that case the Plaintiff, who attained her age of majority in 1986, filed a claim against the Defendant in 1995 claiming damages for personal injuries arising out of indecent assaults allegedly committed against her between 1982 and 1984. The Claim was struck out by the Master as being statute barred. The Claimant then went before the High Court on appeal on the ground that the United Kingdom might, as a result of a case pending before the European Court of Human Rights, come under a treaty obligation to legislate retroactively so as to remove the time bar to such claims and that the appropriate course would be to stay the action.
- [42] Sedley J overturned the decision of the learned Master and restored and stayed the claim. The holding in the case was that there was no rule of law that impending legislative change was never a material consideration in the exercise of the Court's powers and discretions. Such a change or the possibility of it could be material where it was relevant to the issues before the Court. Having regard to both the

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<sup>7</sup> [1997] WLR 143

possibility that future legislation might remove the bar to the Claimant's claim and the potential difficulty of issuing a new writ following any change in the law, the balance of justice favoured staying the action.

**[43]** This principle has been applied in other decisions. In *Re: A Company (Injunction to Restrain Presentation of Petition)*<sup>8</sup> A company traded from leased retail premises until it was required to shut down by the government's lock-down instructions in response to the 2020 COVID-19 pandemic. The company thereafter failed to pay rent and service charges and on or about 15 April 2020 the lessor (the creditor) served, or purported to serve, a statutory demand for arrears of rent and service charge and indicated its intention to present a winding-up petition under s 122(1)(f) of the Insolvency Act 1986 on the ground that the company was unable to pay its debts, probably intending to rely on the definition of inability to pay debts in s 123(1)(a) (failure to comply with a statutory demand) but possibly also on the definition in s 123(1)(e) (cash flow insolvent) or s 123(2) (balance sheet insolvent).

**[44]** In May 2020 the Corporate Insolvency and Governance Bill 2020<sup>a</sup> was presented to Parliament. Paragraph 1 of Sch 10 to the Bill prohibited presentation of a winding-up petition based on failure to comply with a statutory demand served between 1 March 2020 and 30 June 2020 or one month after the coming into force of Sch 10, whichever was the later. Paragraphs 2(1) and (3) restricted presentation of petitions on various grounds, including non-compliance with a statutory demand and being cash flow or balance sheet insolvent, unless the creditor had reasonable grounds for believing either that coronavirus had not had a financial effect on the company or the facts on which the petition was based, i.e. inability to pay debts, would have arisen even if coronavirus had not had a financial effect on the company. Paragraph 5(3) provided that a winding-up order could not be made under ss 123(1)(e) or (2) unless the court was satisfied that the company would

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<sup>8</sup> [2021] 1 All ER (Comm) 181

have been unable to pay its debts even if coronavirus had not had a financial effect on the company. The company applied for an injunction to restrain presentation of the petition, on the grounds that it was unlikely that it would be granted if presented and presentation of the petition would have a seriously damaging effect on the company.

**[45]** The Court ruled that when the court had to decide **whether to grant relief, in particular relief which involved the court controlling or managing its own processes (emphasis mine)**, it could take into account its assessment of the likelihood of a change in the law which was relevant to its decision. Since the winding-up petition, if presented, was most unlikely to be heard before the Corporate Insolvency and Governance Bill was enacted, on the hearing of the petition after the Bill had been enacted the court would have to ask itself whether coronavirus had had a financial effect on the company before the presentation of the petition, and if that was held to be the case, the court could only wind up the company if it was satisfied that the company would have been unable to pay its debts, on which a petition under s 123(1) or (2) of the 1986 Act was based, even if coronavirus had not had a financial effect on the company.

**[46]** The court had power to act to prevent its procedures being used otherwise than for the purpose of obtaining a winding-up order and for the purpose, or with the effect, of causing serious damage to the company. Given the likelihood of the change in the law represented by Sch 10 to the Corporate Insolvency and Governance Bill being enacted by the end of June 2020, the fact that it was improbable that a winding-up order would be made, and the damage which would be caused to the company by the presentation of a winding-up petition, an injunction restraining presentation of the petition would be granted. As the injunction granted was not a final injunction, but an interim injunction until the insolvency application for a final injunction would be heard, it was appropriate to require the applicant to give an undertaking in damages. The injunction would accordingly be granted on terms that the company provided the usual cross-undertaking in damages.

[47] Counsel for the Defendant countered with the case of ***Willow Wren Canal Carrying Company Limited v British Transport Commission***<sup>9</sup>. In this case, the plaintiffs carried on the business of operating vessels for the purpose of carrying merchandise on canals. The Kennet and Avon Canal had, by virtue of the Transport Act, 1947, become vested in the defendants who became bound by a statutory obligation to keep the canal open and navigable for all persons desiring to use it. The canal had become unfit for navigation and the plaintiffs desired to use it. The plaintiffs brought an action against the defendants alleging that the defendants were wilfully refusing to carry out their statutory obligations in regard to the canal and claiming, among other relief, injunctions to prevent the defendants allowing the canal to remain unnavigable. The defendants admitted that the canal was not in navigable condition but denied any default on their part. They applied for a stay of the action, except for the purpose of obtaining an inquiry as to damages, until a Bill, which was then before Parliament and which in its then form would relieve the defendants of their statutory obligations, might become law.

[48] Upjohn J held that the plaintiffs were entitled to have their action tried and the court would not take into account the possible effect of the Bill then before Parliament; accordingly, the defendants' application would be refused.

[49] Upjohn J opined as follows<sup>10</sup>:

*“This court is not concerned with what Parliament may think it wise to do in relation to the rights of the parties, but the plaintiff is entitled to come to this court and say, “In the normal course of events my action will very soon be ripe for hearing. I desire that the court should hear it.” If subsequently to that Parliament in its wisdom thinks it right by some enactment to affect the rights of the parties even to the extent of modifying or abrogating the effects of any judgment which the plaintiffs may be fortunate enough to obtain, no one doubts the*

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<sup>9</sup> [1956] 1 All ER 567

<sup>10</sup> Id at p. 569

*right and power of Parliament to do so. It is plain, however, that it is not right for this court either now or at the hearing to take into account the possible effect of a Bill which is at present before Parliament and which, so far as this court is concerned, may never become law, or, if passed into law, may contain provisions which ultimately do not affect the rights of the parties before the court. In other words, it is a matter of speculation on which this court will not embark whether a Bill at present before Parliament will be passed into law in its present form.”*

**[50]** So whilst it is true that the Court may take into account legislation that is to come in determining an application for relief or whether to stay an action, it is not always appropriate so to do. So what factors should a Court take into account? These, I believe, are some of the key factors, having considered the authorities:

- (a) The nature of the relief being sought;**
- (b) The stage of the application in the overall course of litigation;**
- (c) Whether the proposed legislation will materially affect the outcome of the case for either party and the extent of the impact i.e. who is likely to be more prejudiced in the conduct of their case by the passage of the legislation;**
- (d) The stage at which the proposed legislation has reached in its passage;**
- (e) The effect of the legislation being proposed (whether it will have retroactive effect or not).**
- (f) The conduct of the parties.**

**[51]** The Claimant is not seeking any specific relief other than for the Court to take into account, in relation to the determination on the application for summary judgment, that this legislation is to come. The Claimant is not asking for a stay of the proceedings. This makes this situation distinguishable from the cases cited as those persons were usually asking for some specific relief.

**[52]** Where we are now is that the Defendant has applied for summary judgment. Whilst certainly not a late stage of the litigation (chronologically speaking), it is a stage at which the case could come to an end. So the stakes for both parties is quite high. Indeed, it is self-evident that the legislation, once it comes into effect, will have a significant impact on the case for the Claimant as it would, in practical effect, validate the actions of the Claimant that are presently unlawful. So it would salvage

their case right now. On the other hand, the Defendant would potentially lose a significant arrow from their quiver in seeking a potentially complete victory and put this matter to bed if the legislation were put into effect.

[53] The 2023 legislation has been passed in both Houses of Parliament, but the Governor General has not yet given his assent and the assent has not been gazetted which it would give it legal effect. At this point therefore, it is still a Bill and not an Act<sup>11</sup>. When the assent is published in the Gazette, the amendments created therein will be **deemed to have come into operation** from the 30<sup>th</sup> July 2015. It has now been 3 weeks since this Bill was passed in the Senate.

[54] Taking these factors into account, I am not minded to take into account the proposed legislation in considering the application for Summary Judgment. The Claimant is seeking to enforce licenses that, but for this proposed legislation, it would not have been able to grant as it would have had no authority to issue the licenses. That is the current state of the law. It is heightened by the fact that the granting of the licenses, as the law currently stands, was and remains a criminal offence.

[55] This has been the state since 6 months after the passage of the 2015 Amendment and it has not changed since then. That was over 8 years ago.

[56] The Claimant, perhaps with justification, argues that the legislative state of affairs has nothing to do with them and that their cause is a noble one and they acted in good faith at all times. However, noble as it might have been, the fact is, at this stage, their actions in seeking to grant licenses between 2017-2022 were, on the face of it, illegal. This therefore distinguishes the ***Sparks v Harland*** case. The issue there was simply whether to stay the claim to allow for a Claimant to have a chance to pursue a claim that was otherwise statute barred. Here, they are asking

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<sup>11</sup> See ss. 13-16 of the Interpretation Act

the Court not to enter summary judgment, but to take into account the fact that the law will soon change and so, essentially, give them a chance.

[57] But I can only rule on the state of the law as it is before me. It is important to note that the Claimant has not applied for a stay of the proceedings. What they ask is for me to adjudicate on the summary judgment as though the law has changed. This I cannot do.

[58] In the circumstances of this case, I find that the Claimant had never had any authority to grant licenses for the period the subject of this claim as it never received a certificate of registration under s. 87A of the Copyright Act and so was never a licensing body within the meaning of that Act capable of granting licenses under any licensing scheme.

[59] Accordingly, whatever action it took would have been a breach of s. 87A(1) (as the law currently stands) and therefore illegal by virtue of s. 87A(6) and so not capable of being actionable in a civil suit.

[60] Therefore, their entire claim, since founded upon an illegality, is unsustainable and the Defendant is entitled to summary judgment.

**IF I AM WRONG ON THE STATUTE, DOES THE CLAIMANT HAVE A CLAIM WITH A REAL PROSPECT OF SUCCESS?**

[61] In the event that I am wrong in my consideration of the Claimant's statutory position, do they otherwise have a claim with a real prospect of success? In my view, they have failed to put forward a claim with a real prospect of success. The Claimant has failed to plead any facts to support that the Defendant played any music at any of their branches for the period 2017 to 2022 as claimed by the Claimant.

[62] Cases for Summary Judgment stand or fall on the pleadings filed and the Affidavit evidence filed in Support or in Response.

**Should I Consider the Amended Statement of Case?**



- [63] Whilst counsel for the Defendant have urged me not to consider the Amended Particulars of Claim, I am not minded to accede to that request and I would consider the pleadings as amended. I consider that the authority submitted by the Claimant of ***Beep Beep Tyres, Batteries and Lubes Ltd v DTR Automobile Corp***<sup>12</sup> represents the current approach the Court should take when addressing amendments to statements of case filed **after** an application for Summary Judgment is made but before the first case management conference has taken place.
- [64] I will not go so far as the Claimant as to say that the position of Mangatal J in the case of ***Index Communications Network Limited v Capital Solutions Ltd et al***<sup>13</sup> has been overruled.
- [65] In the ***Index Communications Network*** case, Mangatal J was dealing with an application to strike out a statement of case. After the application was filed, and in the middle of the hearing of the application, counsel for the Claimant applied to amend the Particulars of Claim to make new allegations for the first time and raise a new cause of action.
- [66] Mangatal J accepted (at paragraph 41 of her judgment) that the Civil Procedure Rules at rule 20.1 allows for 1 free amendment without permission of the Court. The ruling from Ms. Mangatal highlights that the Claimant had already made multiple amendments to their statement of case before it made the impugned application.
- [67] So in my view, *Index* is distinguishable from this case on the facts as presented as in this case at bar, this would be the first amendment that the Claimant is making to their statement of case. They are entitled so to do.

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<sup>12</sup> [2022] JMCA App 18

<sup>13</sup> [2012] JMCA Civ 50

[68] What *Beep Beep* went on to hold was that the Court can consider an application to amend a statement of case even if that application was filed after an application for summary judgment was made. Indeed, this is consistent with the position taken by Mangatal J in the ***Index Communications*** case that the statement of case can be amended, even after the application for summary judgment, but that leave would have been required in the circumstances of that case as it was not the first “free” amendment.

**Has The Claimant in their Amended Case Pleaded Sufficient Facts to Ground their Claim?**

[69] It is exceedingly important for the Claimant to set out all the material facts upon which they rely to ground their claim.

[70] Rule 8.9 sets out the requirement for the Claimant to plead their case fully:

- (1) **The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.**
- (2) **Such statement must be as short as practicable.**
- (3) **The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.**

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[71] This is given further power by rule 8.9A that says that a Claimant cannot rely on any allegation or factual argument not set out in the particulars unless the Court gives permission.

[72] The case of ***Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack***<sup>14</sup> is instructive. This was an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago, regarding the interpretation to be placed on provisions in the Civil Proceedings

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<sup>14</sup> [2010] UKPC 15

Rules of Trinidad and Tobago. That case held, speaking generally, that the claimant's duty in setting out his or her case to include a short statement of all facts relied on, meant that each head of loss the claimant was seeking to recover should be identified in the statement of case. Where that was not done, an amendment is required.

[73] The Privy Council had regard to the case of *McPhilemy v Times Newspapers Ltd*<sup>15</sup> and Lord Woolf's observation that even in the new CPR era, the Witness Statement was no substitute for a properly pleaded case and that parties were required to set out a short statement of **all the facts** being relied on by the pleader.

[74] In the case at bar, the Claimant has asserted at paragraph 12 of the amended claim as follows:

**“For the period January 1, 2017 until the commencement of these proceedings, the Defendant has on a daily basis locally transmitted and/or authorised the transmission of and/or retransmission on its premises or modalities either directly or embedded in the programming, one or more of the musical works in the Claimant's repertoire without first obtaining the permission or consent of the copyright owner and/or the Claimant and/or paying the requisite license fee.”**

[75] The Defendant specifically denied the allegations at paragraph 19 of their Amended Defence. But what is particularly revealing is that there were no specifics as to where this breach took place, what music was played or anything to show that the music played was subject to copyright protection in Jamaica or anywhere else and that the music played was part of the Claimant's repertoire.

[76] When the Claim was amended, the only thing that changed about this was the attachment of an unsigned document, bearing no clear reference to the location pleaded in paragraphs 15 and 17 of their Amended Particulars of claim purporting to be evidence of the Defendant playing music at their Manor Park location. Indeed, Ms. Lydia Rose, in her Affidavit sworn on the 25<sup>th</sup> October 2023, makes

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<sup>15</sup> [1999] 3 All ER 775

reference to this at paragraphs 7 and 8. However, the exhibited document at LR 1, the same as that attached to the Amended Particulars of Claim, is evidentially worthless as it is unsigned and bears nothing on it which has any connection to the Defendant or their Manor Park Location.

**[77]** The upshot of this is that the Claimant's Amended Particulars of Claim is still devoid of any pleaded facts of the breaches they assert.

**[78]** In those circumstances, the Claimant has not put forward, even now, any facts to ground their claim that the Defendant has been playing musical works, the subject of copyright owned or licensed by the Claimant, at any of their restaurants and so would have required a license from the Claimant so to do.

**[79]** Accordingly, the Court finds that the Claimant has not put forward a case with any real prospect of success if it were to go to a trial. There is simply no factual base which they have advanced for a trial.

## **DISPOSITION**

- 1 Summary judgment is entered for the Defendant against the Claimant.**
- 2 Costs to the Defendant to be taxed if not agreed.**
- 3 Leave to Appeal is refused.**
- 4 Defendant's Attorneys-at-Law are to prepare, file and serve this Order on or before the 1<sup>st</sup> December 2023 by 4:00 pm**

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**Dale Staple**  
**Puisne Judge (Ag)**