

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2017/0032

BETWEEN:

EASTERN CARIBBEAN COLLECTIVE ORGANISATION
FOR MUSIC RIGHTS (ECCO) INC. (formerly Hewanorra
Musical Society (HMS) Incorporated)

Applicant

and

MEGA-PLEX ENTERTAINMENT CORPORATION

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore, QC with him, Ms. Sueanna Frederick for the Applicant
Mr. Gregory Delzin with him, Ms. Diana Thomas and Ms. Cleopatra McDonald
for the Respondent

2019: April 8;
2019: July 4.

Application for conditional leave to appeal to Her Majesty in Council – Appeal concerning question of standing of applicant to sue respondent on behalf of copyright owners for copyright infringement – Whether appeal lies as of right pursuant to section 108(1)(a) of Constitution of Saint Lucia – Whether applicant satisfies threshold for grant of conditional leave pursuant to section 108(2)(a) – Whether question involved in appeal is one that by reason of its great general and public importance, or otherwise ought to be submitted to Her Majesty in Council

Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc (“ECCO”) is dissatisfied with the decision of the Court of Appeal dated 30th January 2019 allowing the appeal of the respondent, Mega-Plex Entertainment Corporation, (“Mega-Plex”) and holding that ECCO lacked standing to sue Mega-Plex for copyright infringement on behalf of copyright owners. In arriving at its decision, the Court of Appeal found that: the right to sue for breach of copyright is a statutory right conferred on the owner of the copyright by section 35 of the Copyright Act of Saint Lucia (:the “Act”); section 110 of the Act does not confer on any other person (including ECCO) the right to sue for breach of the owners copyright; the right to sue has not been assigned to ECCO by the copyright owners and the non-exclusive licences that ECCO holds from its counterparties do not confer the right to sue.

ECCO applied for conditional leave to appeal to Her Majesty in Council against the judgment of the Court of Appeal pursuant to section 108(1)(a) and/or 108(2)(a) of the Constitution of Saint Lucia.

Held: dismissing the application and awarding costs to the respondent in the sum of \$3000.00, that:

1. ECCO is not entitled to leave to appeal to Her Majesty in Council as of right under section 108(1)(a) of the Constitution because **the Court of Appeal’s order** is not a final order and the matter in dispute is not of the prescribed value of \$1,500.00 or more. The sole issue decided by the Court of Appeal was the preliminary issue of **ECCO’s** standing to sue Mega-Plex for copyright infringement. The resulting judgment of the Court on this issue was therefore an interlocutory judgment requiring leave to appeal to the Privy Council pursuant to section 108(2)(a) of the Constitution.

Rule 62.1(3) of the Civil Procedure Rules 2000 applied; Daryl Sands Controller of Bank of Crozier Limited v Garvey Louison Liquidator of Bank of Crozier Limited (in liquidation) et al GDAHCVAP2007/0001 (delivered 16th September 2008, unreported) followed.

2. A person applying for conditional leave to appeal under section 108(2)(a) of the Constitution must satisfy the Court of Appeal that the issue arising on the appeal is one of great general or public importance by virtue of being a serious issue of law that has not been settled, or an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public. The findings of the Court of Appeal do not suggest that the Court was dealing with difficult or serious issues of law, areas of the law that are unsettled, or any matter of great general or public importance for which guidance of the Privy Council is needed. ECCO has failed to meet the required threshold.

Martinus Francois v Attorney General SLUHCVP2003/0047 (delivered 7th June 2004, unreported) followed; Olasemo v Barnett Ltd (1995) 51 WIR 191 applied.

JUDGMENT

- [1] WEBSTER JA [AG.]: This is an application by the Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc (**"ECCO"**) for conditional leave to appeal to Her Majesty in Council against the decision of the Court of Appeal delivered on 30th January 2019. In that judgment, the Court allowed the appeal of the respondent, Mega-Plex Entertainment Corporation (**"Mega-Plex"**) holding that the learned judge erred in finding that ECCO had standing to sue Mega-Plex for infringement of copyright.

Background

- [2] ECCO is a registered collective society under the Copyright Act¹ of St Lucia (**"the Act"**) and is authorised to administer licences for the performing rights of its members under the provisions of the Act. ECCO entered into reciprocal agreements with a number of collective societies such as Broadcast Music Inc (BMI) and American Society of Composers Authors and Publishers (ASCAP), which it claimed, along with the provisions of the Act, allowed it to pursue proceedings for breach of copyright on behalf of the owners of the copyright.
- [3] Mega-Plex owns and operates a cinema in Saint Lucia. ECCO alleged that Mega-Plex was screening movies at its cinema that included music soundtracks in breach of the owners' copyright. It brought a claim against Mega-Plex alleging breach of copyright and seeking damages or an account of profits. Mega-Plex denied liability and pleaded various defences on the merits of the claim. The learned judge commenced the trial and at the close of the evidence directed counsel for the parties to file written closing submissions. Mega-Plex raised for the first time in its closing submissions **the issue of ECCO's standing to bring the claim**. The learned judge allowed ECCO additional time to respond to the standing issue raised by Mega-Plex.

¹ Cap.13.07, Revised Laws of Saint Lucia 2013.

- [4] The learned judge found that ECCO had standing to sue Mega-Plex for breach of copyright and entered judgment for ECCO for damages to be assessed and costs. Mega-Plex appealed **against the judge's decision**. The sole issue on appeal to the Court of Appeal was whether ECCO had standing to sue for breach of copyright on behalf of the owners of the copyright. The Court of Appeal allowed the appeal finding that ECCO lacked standing to sue on behalf of the owners as it was neither an owner of the copyright nor an exclusive licensee.
- [5] ECCO was dissatisfied with the judgment of the Court of Appeal and applied for conditional leave to appeal to the Judicial Committee of the Privy Council pursuant to section 108 (1)(a) and/or section 108(2)(a) of the Constitution of Saint Lucia² **(the "Constitution")**. Leave to appeal under section 108(1)(a) is granted as of right provided the stipulations in the section are satisfied. Leave to appeal under section 108(2)(a) is at the discretion of the Court of Appeal based on the criteria set out in the section as interpreted and applied by the courts.

Section 108(1)(a)

- [6] To qualify under section 108(1)(a), the applicant must satisfy the conditions in the section, that:
- (a) the decision appealed against is a final decision; and
 - (b) the matter in dispute is of the prescribed value of \$1,500.00 or more; or
 - (c) the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards.

An application for leave to appeal against an interlocutory order or judgment falls under section 108(2) and is dealt with below.

² Cap. 1.01, Revised Laws of Saint Lucia 2013.

[7] Mr. Dexter Theodore, QC, who appeared for ECCO, did not seriously dispute that this Court applies the application test in determining whether the decision being appealed is final or interlocutory. The test is now set out in rule 62.1(3) of the Civil Procedure Rules 2000. CPR 62.1(3)(b) provides that ‘an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided.’ Mr. Theodore, QC submitted that the application test did not apply in this case because what was before the trial judge was a split trial and he decided the first stage of the trial by finding that ECCO had standing to bring the claim and reserved the assessment of damages to the second part of the trial. He relied on the case of *White v Brunton*³ which stands for the proposition that where a trial is to be heard in two stages and one of the parties wishes to appeal against an order made at the end of the hearing of the first stage of the trial, the first order is a final order and leave to appeal is not required. This approach was described by Mendonca JA in the Court of Appeal of Trinidad and Tobago in *The Attorney General v Lennox Phillip and others*⁴ as an exception to the application test and **that ‘ the decisive feature as was said in *White v Brunton* is that, when analysed, the issue may properly be regarded as the first part of a final hearing and not preliminary to a final hearing.’**⁵

[8] The split trial exception was approved by the Privy Council in *Strathmore Group Limited v Fraser and others*⁶ on appeal from the Court of Appeal of New Zealand, and by the Court of Appeal of Trinidad and Tobago in *Motor and General Insurance Company Limited v Gail Sanguinetti et al.*⁷

[9] The facts of this case do not quite fit in with the definition of a split trial as outlined in the cases. In the first place, there was no order for a split trial. The learned judge heard the entire case and the issue of standing was not raised by Mr.

³ [1984] QB 570.

⁴ Civil Appeal No. 155 of 2006 at para. 19.

⁵ At para. 21.

⁶ [1992] 2 AC 172.

⁷ Civil Appeal No. 158 of 2003.

Gregory Delzin who appeared for Mega-Plex until he filed his written closing submissions. This was a most unusual time to raise a point that was in substance a preliminary objection to the trial of the action. Nevertheless, the judge heard submissions from the parties and allowed Mega-Plex to take the point. As an **objection to the court's jurisdiction to hear the claim**, it would have the effect of either stopping the action if successful or proceeding with the action if it failed. The point had to be resolved before dealing with the substantive issues in the claim. This is in fact what had happened. The learned judge, having decided the point on standing in favour of ECCO proceeded to deal with the substantive issues. Had he decided the issue in favour of Mega-Plex the trial would have ended subject to ancillary matters such as costs. This is the classic illustration of the working of the application test, albeit at the end of the trial in this case. The tardiness in raising the preliminary issue may be taken into account when the costs of the trial are being assessed.

[10] The learned **judge's order on the** preliminary issue of standing was therefore an interlocutory order. This became more apparent in the Court of Appeal where the sole issue considered was the standing of ECCO to bring the claim. The Court of Appeal's **order** was therefore an interlocutory order which requires leave under section 108(2) of the Constitution to appeal to the Privy Council.

[11] I also considered the alternative **possibility that the Court of Appeal's order was a** final order falling under section 108(1)(a) of the Constitution. If that were the case, Ecco would have had to meet the additional criteria in the section that: (a) the matter in dispute in the appeal is of the prescribed value of \$1,500 or more or; (b) the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or more.

[12] The matter in dispute in the proposed appeal is **ECCO's** standing to sue Mega-plex for breach of copyright. That matter does not have a monetary value and therefore would not meet the requirement of having a value of \$1,500.00 or more. This is

illustrated by the decision of this Court in *Daryl Sands, Controller of Bank of Crozier Limited (in Liquidation) v Garvey Louison Liquidator of Bank of Crozier Limited (in Liquidation) et al*⁸ where the matter in dispute in the application for leave to appeal to the Privy Council involved the applicant's claim to a right of indemnity which, of itself, had no monetary value. The application was refused.

[13] **ECCO's claim for monetary loss is unparticularised.** It is a claim for unliquidated damages. If the Court of Appeal had found that ECCO had standing to sue, and that Mega-Plex was liable for damages, the case would have proceeded to an assessment of damages. The Privy Council has ruled in *Zuliani and others v Veira*,⁹ on appeal from this Court, that the statutory right to appeal under the equivalent provision of section 108(1) of the Saint Lucia Constitution must be strictly construed and an application for leave to appeal against an award of unliquidated damages does not meet the monetary threshold in the section.¹⁰

[14] In the circumstances I find that ECCO is not entitled to appeal to the Privy Council as of right. The decision being appealed is not a final decision and even if it were, the matter in dispute (**ECCO's standing to sue**) does not have a monetary value and therefore does not satisfy the monetary threshold in section 108(1) of the Constitution. The application under section 108(1) therefore fails.

Section 108(2)

[15] The alternative basis of **ECCO's application for leave to appeal is that this Court** should exercise its discretion and grant leave under section 108(2) of the Constitution. Section 108(2) reads-

"An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases—

⁸ GDAHCVAP2007/0001 (delivered 16th September 2008, unreported).

⁹ (1994) 45 WIR 188.

¹⁰ At p.195, per Lord Nolan.

- (a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council;”

[16] The section speaks for itself. The Court of Appeal has a discretion to grant conditional leave to appeal if the applicant can establish, that:

- (i) the question arising on the proposed appeal is of great general or public importance; or

- (ii) there are good reasons why leave should otherwise be granted.

I will deal with both bases for applying as they apply to this case.

Great general or public importance

[17] The guidance most often referred to for what constitutes a matter of great general or public importance in the context of section 108(2) of the Constitution is the dictum of Saunders JA in *Martinus Francois v Attorney General*¹¹ where he said

–

“Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase **“great general or public importance”**, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire **consequences for the public.**”

Following this guidance, a person applying under section 108(2) must satisfy the Court of Appeal that the issue arising on the appeal is one of great general or public importance by virtue of being a serious issue of law that has not been settled, or an area of law in dispute,¹² or a legal question the resolution of which poses dire consequences for the public.¹³

¹¹ SLUHCVP2003/0037 (delivered 7th June 2004, unreported) at para. 13.

¹² For example, where there are conflicting judicial dicta from the Court of Appeal on a disputed point that needs to be resolved by the highest appeal court: *Etoile Commerciale SA v Owens Bank (No. 2)* (1993) 45 WIR 136.

¹³ For example, the interpretation of a procedural rule that has a draconian effect: *Pacific Electric Wire & Cable Company Limited v Texan Management Limited and others – BVIHCVP2006/0019* (unreported); See

[18] Mr. Theodore submitted that the appeal may be of great general or public importance in two ways. Firstly, the fact that ECCO cannot sue on behalf of its members will have dire and far-reaching consequences for copyright owners and the flood gates of copyright infringement **will be opened**. **Mr. Delzin's response** to this suggestion was simple. The finding that ECCO cannot sue on behalf of its members is not a new situation. That has always been the state of the law and the industry in Saint Lucia. Further, the fact that the owners have to sue may be inconvenient, but inconvenience is not a ground for saying that the procedure for suing is a matter of public importance. Mr. Delzin also submitted that the policy behind section 35 (owner suing) is deliberate to avoid situations where claims could be brought on behalf of an owner without his knowledge and approval.

[19] Secondly, that the bylaws of ECCO can be interpreted as allowing ECCO to sue on behalf of its members and section 110(3)(d) of the Act incorporates this power and elevates it to a statutory power. Mr. Theodore did not provide any authority for this novel proposition but urged the Court that that is why the issue should be submitted to the final court of appeal for consideration and guidance. I do not find any merit in this submission. Section 110(3)(d) of the Act provides that:

“Subject to such conditions as may be prescribed, a copyright society may –
....
(d) **perform any other functions consistent with its rules and bylaws.”**

Even if the bylaws do authorise ECCO to sue on behalf of the owners for breach of copyright (and no such finding is made), section 110(3)(d) cannot be used to elevate a right in a private document (the bylaws) to undermine or add to the clear statutory right in section 35 of the Act given to the owners to sue for breach of copyright. This is not a matter of public importance.

also Privy Council judgment in *Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46 at paras. 24 and 48.

[20] As stated above, the issue in the appeal was **ECCO's** ability to sue for breach of copyright on behalf of the owners of the copyright. The owners of the copyright are members of the associations with which ECCO has reciprocal agreements. ECCO has the non-exclusive right to administer in Saint Lucia the copyright of the owners. ECCO alleged that the copyright to various musical works owned by the members are being breached by Mega-Plex. The Court of Appeal found, without any apparent hesitation, that the right to sue for breach of copyright is a statutory right conferred on the owner of the copyright by section 35 of the Act. Further, that section 110 of the Act on which ECCO relied is an administrative provision and does not confer on any other person (including ECCO) the right to sue for breach of **the owners' copyright**. Finally, that the right to sue has not been assigned to ECCO by the owners and that the non-exclusive licences that ECCO holds from its counterparties do not confer the right to sue.

[21] These clear findings by the Court of Appeal do not suggest that the Court was dealing with a difficult or serious issue of law, an area of the law that is unsettled, a legal question the resolution of which poses dire consequences for the public ,or any other matter of great general or public importance. I do not think that guidance is needed from the Privy Council on any of these issues.

“or otherwise”

[22] The Court of Appeal of Jamaica recognised in the case of *Olasemo v Barnett Ltd*¹⁴ **that the phrase “or otherwise”** in identical legislation in Jamaica allowed the Court of Appeal to “...refer a matter to their lordships' Board for guidance on the law.”¹⁵ I have already found that the judgment of the Court of Appeal is absolutely clear and no guidance is needed from their Lordships.

¹⁴ (1995) 51 WIR 191.

¹⁵ *Ibid* per Wolfe JA at p. 201

- [23] **Another aspect of the “or otherwise” category is where the** Court of Appeal has any reasonable doubt as to the accuracy of its decision.¹⁶ I do not entertain any doubt as to the accuracy of the decision of the Court of Appeal.

Conclusion

- [24] In conclusion, I find that the application for conditional leave to appeal is against an interlocutory judgment of the Court of Appeal and discretionary leave to appeal is required under section 108(2) of the Constitution. ECCO has failed to meet the threshold for granting leave under section 108(2) because the matter in dispute is not one that by virtue of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council. I would dismiss the application with costs to the respondent summarily assessed at \$3,000.00.

Order

- [25] The application for conditional leave to appeal to Her Majesty in Council is dismissed with costs to the respondent summarily assessed at \$3,000.00.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar

¹⁶ Per Mendoca JA in *Attorney General v Lennox Phillip and others* at para. 35 – supra n. 4.