

## THE HIGH COURT

2016 No. 10801 P.

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF

AND

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr Justice Garrett Simons delivered on 22 February 2019

**INTRODUCTION**

1. This judgment addresses a number of procedural matters consequential to the principal judgment delivered in these proceedings, *Recorded Artists Actors Performers Ltd. v. Phonographic Performance (Ireland) Ltd.* [2019] IEHC 2 (*"the principal judgment"*). More specifically, this judgment addresses (i) the form of the order to be made; (ii) the question of a stay on the order; and (iii) the issue of legal costs.

2. The principal judgment had been delivered on 11 January 2019. The matter was then put back to a date convenient to the parties (12 February 2019) for further submissions.

3. Before turning to address these procedural matters in detail, it may be helpful to recall the circumstances in which the principal judgment came to be delivered. The matter had come before the court by way of the trial of a number of preliminary issues. The substantive action has yet to be heard and determined. It is important to emphasise this because it has implications for the type of orders which the court can now make. The trial of the preliminary issues was presented at the level of general principle, with the court being invited to rule upon the correct interpretation of specific provisions of the Copyright and Related Rights Act 2000. The preliminary issues were not decided by reference to an agreed set of facts. The court did not, therefore, have to examine in detail the contractual arrangements between the parties. In particular, the court did not have to consider the factual background leading up to an application for an interlocutory injunction made at an earlier stage in the proceedings. As explained presently, this has the result that the court is not, at this stage, in a position to address the issue of costs of that application. Similarly, the court did not have to consider any evidence as to the precise arrangements which exist between the Plaintiff and its members. This latter point is relevant to an argument as to the form of order.

**FORM OF DECLARATORY ORDER**

4. The first issue to be addressed is the precise form of the declaratory order to be made in these proceedings. As noted above, the matter came before the court by way of the trial of a number of preliminary issues. The precise questions to be addressed were set out in a careful and detailed written judgment of the High Court (Cregan J.) in February 2018. The actual questions were then set out in the formal order perfected on 30 April 2018.

5. The two issues were framed as follows by the order of the High Court of 30 April 2018.

"Whether s. 208(1) The Copyright & Related Rights Act, 2000 (The Act of 2000), places the statutory obligation to determine the payments to be made by way of equitable remuneration to performers upon the Plaintiff (RAAP), and not the Defendant (PPI)?"

"Whether, under s. 281 of the Act of 2000, RAAP is entitled to receive all remuneration payable by PPI to performers arising out of the playing in public, broadcasting or cable transmission of recordings of their performances in the State."

6. I summarised my conclusions in respect of the two issues as follows at the end of the principal judgment.

"85. My conclusions in respect of the first preliminary issue are as follows. A collecting society is entitled (i) to negotiate on behalf of its members, and (ii) to collect the amounts payable in accordance with a scheme of distribution. A collecting society has no function in making the final determination as to how licence fees are to be distributed between (i) performers and producers, and (ii) performers *intra se*. That function resides with the Controller. The separate mechanical function of calculating the amount of the payments accruing to individual performers in accordance with a distribution scheme is a matter for the producer (or its representative).

86. My conclusions in respect of the second preliminary issues are as follows. Registration as a licensing body under section 280 does not confer a presumptive right to act on behalf of *all* performers within the registered classes without any requirement for assignment or licensing. Applying this to the facts of the case, RAAP is only entitled to collect the equitable remuneration on behalf of those individual performers who have actually assigned the right to do so to it pursuant to the provisions of section 208(2)."

7. The parties put forward rival proposals for what each said was the appropriate form of the order. Insofar as the first issue was concerned, PPI suggested a concise form of wording, which focused on the question of which entity was to calculate the amount of the payments accruing to individual performers in accordance with a distribution. Mr Jonathan Newman, SC, put forward the following form of wording.

"The statutory obligation of calculating the amount of the payments accruing to individual performers in accordance with a distribution scheme) is placed upon the Defendant by Section 208 (1) of the Act of 2000."

8. RAAP suggested a more elaborate form of wording which would include the following paragraph.

"2. The basis of distribution, as between individual performers, of the performers' share so negotiated and agreed or determined is also a matter to be negotiated and agreed as between RAAP as performers' CMO and PPI as the producers' CMO, subject again to final determination by the Controller in the event of a dispute in accordance with the dispute resolution mechanism set out at section 208 (5) to (9) of the Act;"

9. PPI objected to this form of wording on the basis that it was said to introduce an entirely new issue into the proceedings, i.e. as to how the division of sums between performers is to be agreed between the performers themselves.

10. Insofar as the second issue is concerned, there was a more substantive disagreement between the parties. Counsel on behalf of RAAP, Mr. Michael Collins, SC, expressed a concern on the part of his clients that certain of the language employed in the principal judgment did not accurately reflect the contractual arrangements in existence between RAAP and its members. It was submitted that in parts of the judgment (including the conclusion), the entitlement of a collecting society to collect the equitable remuneration was contingent on the performer having made an assignment or granted a licence to the collecting society. Mr Collins, SC submitted that RAAP does not have any assignment of rights, but rather enters into contractual arrangements whereby performers become members of the society and thereby empower the society to collect on their behalf.

11. Counsel further submitted that the true dispute between the parties had been directed to a different issue, namely whether RAAP had a *deemed* entitlement to collect on behalf of all members of the class of performers for which it was registered. (The implication here being that there was no dispute as to the precise form of contractual arrangements between RAAP and its members).

#### **DECISION ON FORM OF ORDER**

12. It is never going to be possible to encapsulate the findings of a lengthy judgment in one or two paragraphs for the purposes of the formal order. The most that might be achieved is to provide a fair summary in the formal order which does not give rise to possible discrepancies with the content of the judgment. In the event that the matter now moves to a substantive hearing, the trial judge will have the principal judgment before them. The formal order will have to be read in light of the full judgment.

13. Insofar as the first preliminary issue is concerned, the essence of the dispute appears to centre on which party calculates the payment to individual performers in circumstances where there is distribution scheme in existence (whether as a result of agreement between the parties or a determination by the Controller). I think that the language of paragraph [86] of the judgment encapsulates this finding.

14. Turning to the second issue, the distinction which RAAP seeks to draw between (i) the assignment or licensing of rights, and (ii) other contractual arrangements between a collecting society and its members, is not something which had been argued at the hearing before me in November 2018. As noted at the outset, the preliminary issues were presented to the court at the level of general principle only, and there was no agreed set of facts against which those issues were to be decided. In order to determine the second preliminary issue, it was necessary for this court to reach a conclusion on what formalities were required before a collecting society could collect the section 208 equitable remuneration on behalf of a performer. For the reasons set out in the principal judgment I concluded—rightly or wrongly—that assignment or licensing was required. This conclusion was based on the statutory language of section 208. Put otherwise, in order for me to determine the question of whether registration conferred a presumptive entitlement to collect on behalf of all members of the registered class, I thought it necessary to reach a view on the interpretation of section 208. If RAAP disagrees with this conclusion, then it has, of course, a full right of appeal to the Court of Appeal. The finding in the principal judgment might well be overturned, and the Court of Appeal or even the Supreme Court might decide that the correct interpretation of the legislation is that the right to collect the equitable remuneration extends to persons who are members of a collecting society but have not formally assigned or licensed any rights to it.

15. This court will do nothing which would stand in the way of that right of appeal. The one thing I cannot do, however, is to reopen the principal judgment. The conclusion as set out at paragraph [87] is a fair representation of my rationale.

16. Accordingly, I propose to make the following declarations in response to the two preliminary issues.

1. The statutory function of calculating the amount of the payments accruing to individual performers in accordance with a distribution scheme (whether as agreed between the parties or as determined by the Controller) is a matter for the producer (or its representative).

2. Registration as a licensing body under section 280 does not confer a presumptive right to act on behalf of all performers within the registered classes without any requirement for assignment or licensing. Applying this to the facts of the case, RAAP is only entitled to collect the equitable remuneration on behalf of those individual performers who have actually assigned and/or licensed the right to do so to it pursuant to the provisions of section 208(2).

#### **STAY ON ORDER**

17. The next matter to be considered is whether there should be any stay on the order of this court. I must admit that this matter has caused me some difficulty. On the one hand, I am conscious that the parties have a right of appeal, and I do not wish to do anything which might frustrate or otherwise undermine the effectiveness of an appeal. On the other hand, however, the nature of the relief to be granted following the trial of the preliminary issues is merely *declaratory* of interpretation of the Copyright and Related Rights Act 2000. It is difficult to identify anything that can be “stayed” in this regard. The decision on the trial of the preliminary issues was not intended to be self-executing. Rather, the intention of the parties seems to have been that the determination of the preliminary issues would then allow the substantive hearing to proceed in a more streamlined and focused basis.

18. There was some suggestion at the hearing before me, however, that PPI might now be seeking to rely on the judgment on the preliminary issues in order to seek to stop making payments to RAAP. This is set out in more detail in a letter dated 1 February 2019 from the solicitors acting on behalf of PPI.

“Therefore, there is no legal basis for the continuation of the Terms of Settlement, which require PPI to make payment to RAAP in respect of performers who are not members of RAAP or who have not otherwise assigned their right to receive payment of equitable remuneration to RAAP pursuant to Section 208 (2) of the Act.

The continued operation of the Settlement Terms has the very serious consequence of exposing PPI to legal claims arising from the fact that the Terms do not reflect the statutory obligation placed upon PPI by the Act, as determined by the High Court, and can also not be justified under data protection legislation.

Accordingly, the Terms of Settlement of the Interlocutory Application will cease to be operated by PPI upon the perfection of the Order of the High Court.”

19. With some hesitation, I have come to the view that this court does have jurisdiction to grant a stay on the declaratory orders. I

think that the justice of the case is best served by a stay on the making of the declarations until the date of the first directions hearing before the Court of Appeal. At that stage, RAAP can, if it wishes, apply to the Court of Appeal directly for an extension of the stay.

20. Accordingly, I will make an order staying the declaratory orders identified under the previous heading until the proceedings are first listed before the Court of Appeal for directions. Separately, I will impose a stay on the costs order until after the final determination of the appeal.

21. (These stays will both lapse if no appeal is, in fact, lodged with the Court of Appeal within the time allowed under the Rules of the Superior Courts).

### **LEGAL COSTS**

22. The within proceedings are proceedings within the Commercial List of the High Court. Accordingly, the court is obliged to seek to deal with the issue of costs even at the interlocutory stage. See Order 63A, rule 30.

“30. Upon the determination of any interlocutory application by a Judge, the Judge shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.”

23. This requirement is complemented by the general requirement under Order 99, rule 1(4A) (as amended).

24. The first set of costs to be addressed are those of the application for the preliminary issue itself. As discussed above, there were, in effect, two issues identified by the High Court (Cregan J.) in the order of April 2018.

25. There was some disagreement at the hearing before me as to which of the two parties had succeeded on the first issue. It was suggested that the statement in the principal judgment to the effect that PPI has no function in determining the amounts to be distributed to individual performers represents a finding against PPI.

26. My understanding of the preliminary issue is that the gravamen of the dispute between the parties was as to whether PPI had any function in calculating the amounts payable to individual performers in accordance with the agreed distribution scheme. RAAP objected to this, and sought to have a lump sum payment made to it, which would then be divided up by it. This issue was resolved against RAAP.

27. The purpose of referring to the separate role of the Controller in *determining* the amounts payable to individual performers in the event of there being no agreement was to illustrate the different functions. I had never understood it to be contended on behalf of PPI that it had this adjudicative role. It follows, therefore, that the first issue was decided in favour of PPI.

28. It is common case that the second of the two preliminary issues was clearly decided in favour of PPI. As discussed above, I have rejected the argument that registration as a licensing body under section 280 does not confer a presumptive right to act on behalf of *all* performers within the registered classes.

29. Accordingly, I propose to make an order directing that the costs of the trial of the preliminary issues be awarded in favour of the Defendant as against the Plaintiff. The costs are to be taxed in default of agreement. The costs are to include the costs of the written legal submissions; the costs of the affidavits and other pleadings; the costs of the four-day hearing in November 2018; and any other associated costs.

### **COSTS OF CONTESTED APPLICATION FOR THE TRIAL OF THE PRELIMINARY ISSUES**

30. I am not in a position to determine where liability for the costs of the contested application before Cregan J. for the trial of the preliminary issues should fall. I think that it remains to be seen whether dividing up these proceedings in this way, i.e. having a separate trial of preliminary issues, will, in fact, have the desired result of shortening the substantive hearing. With the benefit of hindsight, it may have been preferable had the hearing of the preliminary issues been informed by an agreed set of facts. This might have allowed issues such as the precise relationship between RAAP and its members to have been teased out. Accordingly, I propose to reserve the costs of the application for the trial of the preliminary issues to the judge hearing the substantive action.

### **COSTS OF INTERLOCUTORY INJUNCTIONS**

31. I have also been asked to rule on the cost of the two interlocutory applications. For the reasons set out below, I am not in a position to do so. First, as explained above, the manner in which the trial of the preliminary issues came before me was such that it was not necessary for the court to be informed of, or to determine any of the *factual issues* in dispute between the parties. Rather, the questions of law were presented at the level of general principle only. I do not, therefore, have a sufficient appreciation of the factual background to allow me to make a proper apportionment of the costs of the interlocutory hearings.

32. Secondly, and in any event, all that I have decided is the preliminary issues. I have not been asked to consider how those findings in relation to the interpretation of the Copyright and Related Rights Act 2000 will feed into the contractual dispute between the parties. The contractual documentation was not formally in evidence before me.

33. Thirdly, it appears from the terms of the order of Mr. Justice Haughton of 15 March 2017 that the costs of the interlocutory injunctions were to be reserved to the trial of the action. I think that on its ordinary meaning, this is intended to refer to the judge hearing the *substantive* action between the parties, i.e., the hearing which will follow after the determination of the preliminary issues. In this regard, I accept the submission of Mr Collins, SC.

34. For all of these reasons, then, I do not propose to make any order in relation to the costs in the interlocutory injunction matters. These are matters which can ultimately be dealt with by the judge who hears the substantive action between the parties. That judge will have a fuller understanding of the factual background, and will be in a position to make a fairer order.

35. Moreover, in any event, in circumstances where it seems that it is now likely that there will be an appeal to the Court of Appeal, any cost orders which this court would have made would almost inevitably have been stayed. The fact that I am not dealing with the costs, therefore, has no practical implications for the parties in circumstances where there would be no enforceable costs order in being in any event until the appeals are determined.