

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2015/477 JR

Between

PABLO STAR MEDIA LIMITED

Applicant

AND

E.W. SCRIPPS COMPANY

Respondent

JUDGMENT of Mr. Justice Richard Humphreys delivered on 21st day of December, 2015

1. The applicant alleges that on 20th April, 2014, the respondent copied a photograph which was the intellectual property of the applicant and placed it on its website.

2. Given that breach of copyright, inadvertent or otherwise, is so endemic on the web, in principle one might have thought that a simple letter of request would normally be an appropriate response to rectify matters and certainly should be responded to rapidly by any responsible website operator. Some correspondence did ensue between the parties which was not put before me, but I infer that it included a demand from the applicant for damages for the infringement. However the outcome of the correspondence was not deemed by the applicant to be sufficient redress and the applicant company launched a claim in the District Court on 29th July, 2014, seeking €3,000 damages from the respondent for alleged breach of copyright.

3. In the absence of an appearance being filed within the time fixed by the District Court Rules 1997, the applicant (through its managing director Mr. Haydn Price and not through a solicitor) certified that "*the sum of €3,000 is now actually due by the respondent to the claimant*". The basis for the District Court Office accepting the applicant's filings without a solicitor is highly unclear, and that decision would appear to have been incorrect. The sum of €3,000 mentioned was the applicant's claim, but the level of damages remained unliquesified in law until determined by the court. The need to ensure that court filings are correct is itself a very substantial reason why the requirement to be represented by qualified lawyers rather than unqualified persons, with the attendant safeguards and professional supervision mechanisms that are involved, is so important.

4. The matter proceeded in the District Court and a preliminary issue arose in that court as to whether the managing director of the applicant, Mr. Price, could represent the company in those proceedings. By order dated 24th March, 2015, Judge Mary Collins allowed Mr. Price "*to represent Pablo Star Media Limited ... without the necessity of being represented by a solicitor*".

5. The respondent appealed the preliminary point to the Circuit Court, which appeal came before Her Honour Judge Sarah Berkeley on 7th May, 2015. On that date, Judge Berkeley allowed the appeal and ruled that he did not have such a right of audience. Mr. Price has relied on the fact that Judge Berkeley allowed him to address the court *for the purpose of the issue as to his right of audience*, but that clearly cannot assist him. I also allowed him to do likewise, but that is not a predetermination of the right of audience issue *on the substance of the case*.

6. The applicant company then sought to initiate a challenge by way of judicial review to the order of Her Honour Judge Berkeley dated 7th May 2015. Mr. Price first obtained an *ex parte* order on 11th August, 2015, from Barton J. directing the Central Office to allow him to lodge papers to bring the application for judicial review. Again he relies on this application in support of a recognition of a substantive right of audience, which it is not. It is a facilitation of him to make a case for having a right of audience, not an acknowledgment of such right. The company's application for leave then came before me in October, 2015.

7. In that application, rather than appear by way of solicitors, with or without counsel, Mr. Price again sought to address the court on its behalf. While I was happy to hear him on the issue of whether he had a right of audience, on 19th October, 2015 I held that he did not have such a right, and I now, at his request, set out written reasons for having done so. Mr. Price is under the impression that a large number of judges have afforded him a right of audience on behalf of the company, but so far as appears from what has been submitted to me, the only judge to have done so is Judge Collins, who was reversed on appeal in relation to her decision to hear him. All other judges who have heard Mr. Price in this matter (Her Honour Judge Berkeley, Barton J. and myself) have only done so in relation to his contention that he has a right to be heard on the merits, which they either rejected or did not have to decide.

8. In *Battle v. Irish Arts Promotion Centre* [1968] I.R. 252, the Supreme Court held that "*in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant*" (at p. 254, per Ó Dálaigh C.J.).

9. However, given that the applicant's claim is based on EU law-related intellectual property rights, Mr. Price relied on by the supremacy of EU legislation, which argument was accepted by the District Court in allowing Mr. Price to represent the company. He seeks to rely on articles 2, 3 and 4 and recital 17 of the Intellectual Property Rights Enforcement Directive (2004/48/EC). Article 3.1 of the directive is particularly relevant, insofar as it provides that enforcement measures "*shall not be unnecessarily complicated or costly*".

10. He submitted that caselaw has defined that concept to mean that if one would not sensibly begin a case because it was going to cost more than the plaintiff would recover, or if the balance was 50/50 as regards what it would cost versus what one would recover, no sensible person would actually bring a case. The submission is that that is what the national court cannot allow to happen. Mr. Price submitted that this consideration is what the District Court accepted as superseding *Battle*.

11. Mr. Price submitted that there is now a situation where, in claiming €3,000 worth of damages in an intellectual property suit, the applicant company as a plaintiff is faced with costs of between €5,000 and €8,000. (I emphasise that the value of €3,000 was that put by the applicant on its claim, and not an indication that I would have considered the claim to reach that level.) This, he submits, is disproportionate and therefore at odds with the directive. He narrowly defined the parameters of this case, stating that his point only pertains to intellectual property cases. He gave examples of what he says is practice in other EU Member States. In the Netherlands, he says that a case involving intellectual property rights can be taken without a lawyer if it involves a sum less than €24,000. In Germany, if the sum involved is less than €4,000 then he says that a lawyer is not required to prosecute a copyright case.
12. While aspects of the directive are implemented in S.I. No. 360 of 2006, the European Communities (Enforcement of Intellectual Property Rights) Regulations 2006, he submits that Ireland has not implemented the prohibition on "*unnecessarily ... costly*" measures, required by Article 3.1 of the directive.
13. Mr. Price submitted that in the absence of transposition, this provision became directly effective upon the passing of the transposition deadline, which passed in 2006.
14. The test whereby any enforcement measure should not be unnecessarily complicated or costly was applied in *Sony Music Entertainment (Ireland) Limited & Ors v. UPC Communications Ireland Limited (No. 1)* [2015] IEHC 317. In that case, Cregan J. held that measures which would cost the defendant between €800,000 to €960,000 were not "*unnecessarily*" complicated or costly in the circumstances (paras. 210-212).
15. Mr. Price submitted that the cost of taking low-value claims is disproportionate, and therefore contrary to EU law. This, he says, was accepted by the District Court in allowing him an audience. He claimed that the respondents argued that EU law was completely irrelevant and that when the case went to the Circuit Court, he says they were completely silent on the issue. He took this to mean a tacit acceptance. The respondents argued, according to Mr. Price, that the directive did not spell out a right to self-representation, which I take to mean a right of a director of a company to represent that company in court. Mr. Price stated that he never made that specific argument in the first place, rather that his argument was that the Irish courts cannot do something that creates disproportionate cost for an intellectual property plaintiff.
16. Mr. Price contended that he had already been given permission to issue and serve his claim out of the jurisdiction and that, in order to do so, he had to have a *bona fide* case with a good prospect of success.
17. The crux of Mr. Price's argument was that if there is a *bona fide* claim of copyright infringement with a claim for €3,000 in damages, and if to remedy that matter before the courts will cost between €5,000 and €8,000, then there is no point in pursuing the litigation. This, he argued, was what the EU was trying to prevent in the 2004 Directive. Without a cheaper system, copyright infringers will be allowed to continue infringing because those affected will not be in a position to sue for the infringement.
18. Mr. Price opened the Court of Justice judgment in Case C 260/11, R. (*Edwards*) v. *Environment Agency*, 11th April, 2013, which concerned the related, although not identical, requirement in the EIA directive (95/337/EEC) that judicial proceedings should not be "*prohibitively expensive*". In that case the court was concerned with the award of costs against an applicant as opposed to setting aside established procedural caselaw in order to make it easier for the applicant to take the action.
19. Mr. Price submitted that in terms of intellectual property law, *Battle* should not apply because it frustrates EU law.
20. In relation to this argument, it is clear from the judgment of Ó Dálaigh C.J. in *Battle* that the bar on directors representing a company in court arises from the very nature of the company itself. At p. 254 he said:
- "The creation of the company is the act of its subscribers; the subscribers, in discarding their own personae for the persona of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own."*
21. I do not accept that the court has the sort of wide discretion contended for by Mr. Price. Established caselaw suggests that the discretion is quite narrow, and can only be used in exceptional circumstances: see *Re Coffey* [2013] IESC 11. In that case the Supreme Court identified the very significant public policy considerations that confine the right of advocacy in the courts to either the person themselves or a qualified lawyer on their behalf. These considerations should not be departed from lightly.
22. There are a number of separate reasons why this approach should not be departed from in cases of this type.
23. Firstly, Mr. Price's argument regarding the costs of the action outweighing the damages to be recovered is predicated on the applicant bearing those costs itself. Normally however the costs would follow the event, so even if they were more than the sum claimed, the applicant would not necessarily be disadvantaged.
24. Secondly, the directive does not prohibit costly measures, but only "*unnecessarily*" costly ones. Even very expensive measures may not be unnecessary under this test (*Sony Music*). Whatever additional expense is required for a corporate plaintiff to employ a solicitor appears to me to be necessary to give effect to the important policy objectives set out in *Coffey*.
25. Thirdly, if I am wrong about that, I could only depart from the principles established by the Supreme Court in the circumstance of this case if permitted to do so by a statutory provision implementing Article 3.1, or if it could be established that that provision is directly effective so as to compel such a result. No such provision has been opened to me, and I would not accept that the general language of Article 3.1 of the directive is sufficiently "*clear and unconditional*" and "*does not require any legislative intervention on the part of the states*" so as to engage the doctrine of direct effect as envisaged by Case 26/62 *van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1 at p. 13.
26. If it is the case that Ireland's transposition of the directive is defective in some way, which I do not accept, that is a matter that the plaintiff can take up in separate proceedings, or by way of complaint to the European Commission. Such an argument does not allow me to depart from binding Supreme Court jurisprudence as set out in *Coffey* and *Battle*. Any further legislative response to the directive (which I am not accepting is required) would have to take very seriously the strong policy objectives as set out by Fennelly J. in *Coffey*.
27. I note in passing that the applicant does seem to have been quite active in raising this matter with the European Commission via

public representatives already, and with Government authorities here. As against the case made by the applicant for removing restrictions for plaintiffs, however, there is the policy consideration that actions for breach of copyright impose burdens on defendants also, and to make such actions significantly easier may be oppressive on defendants, particularly those who inadvertently breach copyright in re-publishing photographs that are already elsewhere on the web. Demands for €3,000 per photograph published seem to me to be generally disproportionate in principle, and the District Court would need to be highly sceptical of such claims of "damage" for brief, on-line publication of material that is already published elsewhere on the web. The "user principle" measure of damages would normally be the cost to the user of legitimately obtaining some suitable alternative photograph, if one was required. Often this will be nil. In *Absolute Lofts South West London Ltd. v. Artisan Home Improvements Ltd.* [2015] EWHC 2608 (IPEC), replacement stock photographs cost £300, which was the level of damages under normal heading based on cost to the user. Additional damages would only arise where unfair profits were being obtained, as was the case in *Absolute Lofts*, where a further award of £6,000 was made in view of the fact that the defendant unfairly attracted business by in effect pretending that it had carried out loft works such as illustrated in the 21 photographs at issue. In that case, profits could be directly related to a misrepresentation as to the quality of the work being performed, such misrepresentation being embodied in the use of the photographs. Unfair profits do not arise merely because the publication is for commercial purposes. Even where unfair profits arose, the calculation in *Absolute Lofts* amounted to £285 per photograph. In general, a level of damages above the nominal would seem proportionate only if the defendant persisted in publication despite a request (unaccompanied by a demand for damages) to remove the material, or if the publication could be proven to have occasioned genuine and real damage or clearly in itself occasioned real and unfair profit to the defendant above and beyond the fact that it was used for commercial purposes. In the present case, the photograph seems to have only illustrated an article and did not misrepresent the respondent as having rights over the photograph or what it depicted. Generally, nominal wrongs require only nominal damages. The courts also have a discretion in the interests of justice to dismiss claims if a party tries to insist on strict legal rights in circumstances where it would be disproportionate and oppressive to do so (for example, inadvertent mistake that was rapidly corrected).

28. In the circumstances, I must conclude that I cannot allow Mr. Price to represent the applicant company. In my view the Circuit Court in this case was correct in law to have refused to allow him to do, so as it would have required exceptional circumstances to take him outside the general rule laid down by the Supreme Court in *Coffey and Battle*. No such circumstances exist merely because the company's claim is one to enforce EU intellectual property rights. There is no discretion to permit representation of a company by a director in the absence of such exceptional circumstances.

29. While in one sense, the determination of the right of audience for the leave application almost inevitably determines that application, I should record that following my refusal to allow Mr. Price to appear for the applicant, I adjourned the matter to enable legal representation to be obtained. The company was then represented by solicitor and counsel (Mr. Brendan Guildea B.L.), but the papers were incomplete and the matter was further adjourned, at which point there was no appearance by the applicant's lawyers, even to indicate that the matter was being withdrawn. This was perhaps somewhat unfortunate but Mr. Price did however attend and informed me that it was now felt by the applicant that legal representation would make the claim too expensive. In the circumstances I struck out the application for leave for non-attendance on behalf of the applicant.