

Wang Choong Li v Wong Wan Chin
[2015] SGHC 128

Case Number : District Court Appeal No 27 of 2014
Decision Date : 12 May 2015
Tribunal/Court : High Court
Coram : Aedit Abdullah JC
Counsel Name(s) : Bhaskaran Shamkumar (APAC Law Corporation) for the appellant; Mohamed Nawaz Kamil (Tito Isaac & Co LLP) for the respondent
Parties : Wang Choong Li — Wong Wan Chin

Copyright – assignment

Copyright – ownership

12 May 2015

Judgment reserved.

Aedit Abdullah JC:

Introduction

1 This appeal has at its centre the issue of the ownership of copyright in photographs taken of the bride and groom, both before and on the wedding day. Such issues may be far from the minds of most couples marrying, but as in many instances, the law intrudes when least expected.

2 The Appellant, who ran a business providing wedding services, appealed against the decision of the trial judge awarding the Respondent, her client, damages and an injunction for breach of copyright in pre-wedding and wedding photographs of the Respondent.

3 Having heard the arguments of the parties, and having considered the evidence, I dismiss most of the appeal, save that I find that the copyright in the wedding photographs was not shown to be vested in the Respondent. The amount of damages awarded by the trial judge is therefore reduced. Additionally, I discharge the injunction against the further use of the photographs by the Appellant as there is little risk of her using the Respondent’s pre-wedding photographs in future.

Background

4 The Respondent, who is a singer and actress, decided in 2009 to get married to her fiancé, Derek Baram (“Baram”). The couple chose 29 December 2009 as the date of their wedding. As part of the preparations for the event, the Respondent made inquiries at the wedding boutique run by the Appellant. On 2 September 2009, the Respondent engaged the Appellant to provide rental of custom made gowns and suits, flower arrangements, photography and video-taping service on her wedding day. On 2 October 2009, after visiting the Appellant’s premises, the Respondent and Baram decided that they would buy suits for the latter, and not rent them from the Appellant. They did so because they were of the view that the suits were not satisfactorily tailor-made to fit Baram.

5 On 18 October 2009, when the Respondent collected six gowns for a pre-wedding photo-shoot in London, she signed a form (“the Collection Form”). That form, aside from listing the gowns she

collected, also stated:

‘Sponsor for Photoshoot Rental FOC Dry cleaning charge in return for CD photos as sample book’.

The circumstances of the signing of the Collection Form as well as the effect of the words stated therein were disputed by the parties.

6 At the end of October 2009, the Respondent had a photo-shoot in London. She used gowns supplied by the Appellant. Photographs from this shoot (“the pre-wedding photographs”), which were taken by Ivy Lam (“the first photographer”), were handed over by the Respondent to the Appellant in a DVD. The circumstances in which these photographs were handed over were disputed. The Respondent claimed that the photographs were only for the Appellant’s personal viewing. The Appellant alleged that the photographs were given pursuant to an agreement entered between the two of them, allowing the Appellant to use these photographs in marketing her business.

7 As it was, on the day of the wedding, photographs (“the wedding day photographs”) were taken of the event by a free-lance photographer (“the second photographer”).

8 Subsequently, the Respondent discovered the use by the Appellant of both sets of photographs. The Respondent came to know that there was a coffee table book publicly displayed at the Appellant’s business containing the wedding day photographs. The pre-wedding photographs were also used by the Appellant at wedding exhibitions.

9 The Appellant asserted that she was entitled to use the photographs. In respect of the London photo-shoot, the Appellant had been prevailed upon by the Respondent to sponsor the latter’s photo-shoot in London *ie.* in exchange for the use of the photographs. As for the actual wedding day photographs, the Appellant argued that the copyright had not been vested in the Respondent. It should be noted that these photographs were not in fact used for marketing by the Appellant.

The Decision of the trial judge

10 The trial judge found in favour of the Respondent. The Respondent had indeed commissioned the pre-wedding photographs. While it was disputed by the Appellant, the trial judge found that there was sufficient evidence to conclude that the Respondent had arranged and finalised the engagement of the first photographer. In any event, there was at least a joint commissioning by both the Respondent and Baram. It was sufficient for one of one of several co-owners to proceed against the infringer of copyright.

11 As to the allegation of an agreement contained in the Collection Form, the trial judge found that there was no agreement between the parties. The sponsorship deal as alleged by the Appellant was inherently improbable in light of the status of the Respondent as a celebrity in Hong Kong and the value of the rental. Furthermore, the fact that the agreement was captured in a collection form, in the form of a few words, pointed against the Respondent knowingly entering into the alleged agreement. There was evidence that the Appellant intended to benefit from the Respondent’s status as a celebrity. On the facts of the case, it was likely that the gowns were provided as compensation for the three men’s suits which were not taken up by the Respondent.

12 The wedding day photographs were found by the judge to have been commissioned by the Respondent, though the Appellant had engaged the actual photographer. The copyright was vested in the Respondent under s 30(5) of the Copyright Act (Cap 63, 2006 Rev Ed) (“the Act”) as well.

13 The judge ordered statutory damages of a total of \$44,500 for the infringement of the Respondent's copyright in the photographs. Firstly, in respect of the pre-wedding photographs, the trial judge considered that statutory damages of \$1,500 for each item infringed was appropriate in light of the various considerations in the case. There were 29 infringements of the pre-wedding photographs, giving a sub-total of \$43,500. As for the infringement in respect of the wedding day photographs, as there was no real exploitation, the trial judge awarded a sum of \$1,000. These two figures thus added up to \$44,500.

14 The trial judge additionally granted an injunction to restrain the Appellant's infringement of the Respondent's copyright.

The Appellant's case on appeal

15 In the appeal, the Appellant argued that the Respondent had not shown that she owned the copyright in the photographs. Her evidence was inconsistent. The Appellant further argued that, in any event, the evidence from the first photographer showed that she had assigned the copyright to the Respondent. Any such purported assignment was not in compliance with s 194 of the Act. Additionally, on the facts, there is no basis to conclude that the photographer was commissioned by the Respondent. In any event, a binding agreement was formed through the contract contained in the Collection Form, under which the Respondent gave a licence to the Appellant to use these photographs. The trial judge had erred in finding that the contract was against the inherent probabilities. As for the copyright in the wedding day photographs, this was not held by the Respondent either. The Appellant was not acting as an agent of the Respondent in engaging the second photographer. Neither was the second photographer an employee of the Appellant – he was an independent contractor. The injunction should also be discharged.

The Respondent's case on appeal

16 The Respondent contended that the evidence was clear that she commissioned the photographs taken at the pre-wedding photo shoot. As for the photographs taken on the wedding day, the Appellant acted as the Respondent's agent in engaging the photographer. The Respondent thus commissioned these photographs as well. There was also no agreement in the Collection Form for the Respondent to grant the Appellant a licence for the use of the photographs. The injunction should remain.

My decision

17 I am satisfied that the Respondent had the copyright in the pre-wedding photographs and that there was no agreement licensing the use of these photographs to the Appellant. I dismiss the appeal as regards this part of the trial judge's decision. However, I find that the copyright in the photographs on the wedding day did not vest in the Respondent. She thus had no standing to proceed against the Appellant for infringement of the copyright in these photographs. I also find that the injunction awarded by the trial judge against the Appellant should be discharged as there is little or no risk at this time of the Appellant's continued use of the pre-wedding photographs.

18 I note that no arguments were made on appeal on whether the Appellant's acts constituted an infringement of copyright under the law, and no issue was also taken with the quantification of the damages made by the trial judge.

19 The decision thus turned on the following issues:

- (a) the ownership of copyright in the pre-wedding photographs;
- (b) whether a contract to licence the pre-wedding photographs was formed; and
- (c) the ownership of copyright in the wedding day photographs.

Ownership of copyright in the pre-wedding photographs

20 The question here is whether the Respondent had commissioned the pre-wedding photographs. I am satisfied that the Respondent has made out her case, as was accepted by the trial judge, that these photographs were indeed commissioned by her by the operation of s 30(5) of the Act. At the very least, as the trial judge found, the photographs were commissioned by both the Respondent and Baram. If so it was sufficient for one of them, *ie*, the Respondent, to pursue an action for an infringement of copyright.

The law on commissioning

21 The present appeal did not engage issues regarding the law on the commissioning of works, which is clear. Section 30(5) of the Act has not attracted much judicial attention in Singapore. That section reads, as relevant:

... where —

- (a) a person makes, for valuable consideration, an agreement with another person for the taking of a photograph ... by the other person; and
- (b) the work is made in pursuance of the agreement,

the first mentioned person shall be entitled to any copyright subsisting in the work by virtue of this Part, except that if the work is required for any particular purpose, that purpose shall be communicated to that other person and that other person shall be entitled to restrain the doing, otherwise than for that particular purpose, of any act comprised in the copyright in the work.

Thus, under s 30(5), a person who commissions another to take a photograph is entitled to the copyright in such photograph. Otherwise, by virtue of s 30(1), copyright is normally vested in the author of the work. An exception also arises under s 30(3), which provides that the operation of s 30(5) can be excluded or modified by agreement.

22 In this case, therefore, the question is whether the facts do establish that the first photographer was commissioned by the Respondent.

Findings of facts in relation to the pre-wedding day photographs

23 The trial judge found that the photographs were in fact commissioned by the Respondent. I found nothing to cause me to disturb his findings. The trial judge accepted the evidence of the first photographer that she had spoken to and reached an agreement with the Respondent, as well as her explanation with respect to Baram's role in arranging the trip to London for her. The trial judge found that Baram had taken the lead in the arrangements and payment as he was familiar with London. I saw nothing that called for these findings to be disturbed.

24 The Appellant contended that the evidence pointed against this. There were three main factual

contentions made by the Appellant:

- (a) the first photographer transferred the copyright in the pre-wedding photographs to the Respondent;
- (b) the pre-wedding photographs were in fact commissioned by Baram, not the Respondent; and
- (c) the Respondent was inconsistent as to what had transpired in respect of the pre-wedding photographs.

Alleged transfer of copyright by the first photographer

25 The Appellant argued that the evidence of the first photographer was that she had given the copyright to the Respondent. This, the Appellant said, showed that what was intended was an assignment of copyright by the maker of the works. The Appellant argued that there was no proper assignment as required by law.

26 However, this makes too much of the words used by the first photographer, a lay person. While the language used by the witnesses was indeed not precise, the distinctions between the terms "giving", "assigning" and "being commissioned" may not be apparent or live in the mind of a layperson, even someone who is actively involved in creating works on a daily basis. What matters is the legal characterisation that may be attributed when all the facts and circumstances are looked at. The first photographer did say when questioned by counsel for the Appellant that she gave full copyright to the Respondent. However, it is clear from the context that when this occurred, this was part of a general discussion between the first photographer and the Respondent. "Giving" the copyright in this context did not signify an actual assignment, but rather that it was not disputed that the copyright would reside in the Respondent from the very beginning. The first photographer was clear that the copyright was with the Respondent.

27 Additionally, the Appellant contended that the testimony from the Respondent showed that she did not regard herself as having commissioned the first photographer. It is true that there is no direct statement by the Respondent that she "commissioned" the first photographer. Had there been such a statement, this issue would not have been a live one. Again, in the context of discussions between laypersons, it is not surprising that there is no such statement. The testimony of the Respondent did show that she regarded herself as being the one who engaged the first photographer, and that shows on the facts that it was the Respondent who commissioned the first photographer.

Alleged commission by Baram

28 The Appellant also attempted to show that because Baram had paid for the flights and accommodation of the first photographer, he was the one who had commissioned the first photographer. As noted by the trial judge, the first photographer gave evidence that she had been the Respondent's friend for a number of years, and the Respondent was responsible for most of the wedding arrangements. Taken as a whole, it is more probable than not that the Respondent was the one who commissioned by the Respondent. Again, as found by the trial judge, Baram would not have made the arrangements he did but for the fact that the Respondent had commissioned the first photographer. I accept this conclusion reached by the trial judge.

29 The Appellant attacked the credibility of Baram, particularly his being called late in the day to give evidence orally at trial. However, while this would not have been the best way for the evidence

to be introduced, I do not think it affected Baram's credit or credibility.

Alleged inconsistencies in the evidence

30 The Appellant has made much of supposed inconsistencies in the evidence, particularly of the Respondent. Some of these alleged inconsistencies related to the dealings with the first photographer. As noted above, I did not find however that any of these inconsistencies could be taken to be anything more than an expression of the understanding of a lay person of what the legal arrangements were. What the court has to determine ultimately is what legal character and legal impact should follow from what these parties did regardless of how they may describe it.

31 The trial judge having accepted that the evidence pointed to the Respondent commissioning the pre-wedding photographs, and there being nothing before me to conclude that the trial judge was in error, I decline to disturb his findings. It follows then that the Respondent had commissioned the first photographer to take the pre-wedding photographs, and therefore she was entitled to the copyright under s 30(5) of the Act.

Ability of one of several co-owners to sue for infringement

32 The trial judge found that even if copyright was jointly held by the Respondent and Baram, either of them singly may sue for infringement, citing George Wei, *The Law of Copyright in Singapore* (SNP Editions, 2nd Ed, 2000) at p 388, fn 66. That passage discussed *Mail Newspapers Plc v Express Newspapers Plc* [1987] FSR 90 and referred specifically to an observation of Millet J (as he then was) in the case (at 93–94). The relevant paragraph of Millet J's judgment reads:

It is settled law that one joint owner cannot grant an exclusive licence without the consent of the other owner or owners. Even if it were possible for one co-owner to grant a licence without the consent of the others, such a licence could not possibly be an exclusive licence, since he would not be able, without the consent of the others, to exclude the others or their licensees. Accordingly, it is self-evident that an exclusive licence can be granted only by all co-owners. A single co-owner can, of course, sue to restrain infringement ...

That last sentence is the basis of the footnote. The relevant authorities were not cited by Millet J, but it is likely that one of the cases he had in mind was probably *Lauri v Renad* [1892] 3 Ch D 402

33 In that case, Kekewich J adopted the reasoning of counsel for the plaintiff in that case, that one co-owner may be able to sue to prevent interference with the rights of the co-owners by a stranger. This position was not doubted on appeal in that case. The analogy accepted by Kekewich J was founded on an action for trespass by tenants-in-common of land. In the earlier decision of *Powell v Head* (1879) 12 Ch D 686, Jessel MR stated that a part-owner could not lend or deal with the entirety of the copyright without the authority of the other part-owners. Kekewich J noted that such a proposition went against the ability of one co-owner to maintain an action on his own, but was in the end persuaded by the analogy put to him, and did not think that the plaintiff's action should be defeated on that ground.

34 While the English cases were concerned with English legislation, the issue of who had standing to sue was decided on general principles of property law and these principles are applicable in the local context and under the Act. I see nothing in the Act which militates against the adoption of the same position in Singapore. As against a stranger or third party, any of the co-owners of copyright must be able to sue without having to join the other co-owners.

35 In any event, the other co-owner, Baram, was a witness for the Respondent. Given his support for the Respondent's position, the only thing lacking in the present case was the formal joinder of Baram. It is highly doubtful, I think, that in these circumstances the failure to join Baram in the proceedings should prove fatal to the Respondent's claim.

The existence of a contract to licence the use of the photographs

36 The next issue that was raised was that the Appellant had been given a licence to make use of the pre-wedding photographs. This contract was supposed to have been captured in the Collection Form. The Collection Form contained the following handwritten note

Sponsor for Photoshoot Rental FOC Dry cleaning charge in return for CD photos as sample book.

37 The Appellant argued that the Collection Form captured an agreement that the Appellant was sponsoring the pre-wedding photo-shoot in London, giving free rental of gowns, but with dry-cleaning charges applying, for which the Appellant would receive a compact disc of photographs which could be used by the Appellant as marketing samples for her boutique business. It was said that the Appellant did receive a DVD containing photographs from the Respondent.

38 The Respondent argued that it was not believable that the Respondent would have given a sponsorship agreement on a form contract meant to record the collection of the gowns. It was contended that the Respondent was experienced, knowing how endorsement contracts were drafted, and would not grant a licence without the involvement of her agent. There was no such agreement, and the words were added without the Respondent's knowledge. The Respondent had not noticed the added words when she took her copy of the form. Even the allegation of the agreement between the parties which was captured in the Collection Form was made only at trial and was an afterthought. Furthermore, it was the intention of the Respondent to keep her wedding private. The evidence from another wedding boutique showed that an equivalent package would not be worth anywhere as much as the \$10,000 claimed by the Appellant. There was no certainty in the terms added, indicating there was no agreement between the parties. In any event, even if there was a contract, the term had to be read against the Appellant, and could not be interpreted as allowing the use for marketing. The DVD was given only to allow the Appellant to view the photographs for her own use. And even if there was an agreement, it had been terminated by the Respondent.

39 I am satisfied that no contract was in fact formed.

Formation of the contract

40 It is highly doubtful that the contract as alleged by the Appellant was in fact formed. All that the Collection Form had covered was the collection of the gown, and it was nothing more than a documentary record of the collection of the gowns and related matters. The contract governing the relationship between the parties was what was agreed to previously between them, entered into on or about the 2 September 2009. This contract was evidenced by an invoice listing out a contract price of \$5,288 for the package, which included, amongst other things, the rental of various dresses and suits, and photography services for the wedding day.

41 The supposed licence agreement was alleged to be found in a form that was concerned with the collection of gowns. As noted by the trial judge, to have a sponsorship agreement contained in such a document goes against the probabilities. Even if the agreement was entered into between laypersons without the involvement of lawyers, it would have been expected that there would be more details, including the limits of the use of the photographs, either in time or in terms of circulation

or media. Sponsorship without any demarcation of the benefit of making use of the Respondent's image would not be likely at all. Given that the arrangements were also entered into because of the Respondent's status as a celebrity, which the Appellant accepted, it would have been expected that the arrangements would have more detailed. The perfunctory nature of the sponsorship agreement suggests strongly that it was not a true agreement between the parties.

42 There were a number of other points that militated against the agreement being formed. As noted by the trial judge, the alleged bargain or price for the supposed sponsorship deal was not very high. The cost of the gowns that were traded for the use of the photographs was only about \$10,000. The Respondent made the point that the rental of six dresses would not on the evidence be worth anything close to \$10,000. Evidence was given of another boutique's package for six dresses which amounted to only \$1,888, and that included rental of men's clothing, and other services. The Appellant contended in the oral hearing of the appeal that the \$10,000 claimed was for a ten day rental. Even so, the figure does seem high on balance. In return for this service, the Appellant was to have unqualified use of the photographs without a time limit. The Appellant argued that this went to questioning the sufficiency of the consideration given. That is not so. The point of the trial judge's analysis of the facts was not whether valid consideration was given. It was to deal with a different point – whether the evidence showed on the balance of probabilities that there was an agreement between the parties.

43 The Appellant also argued that the fact that the Respondent gave to the Appellant a DVD with the pre-wedding photoshoot photographs supported the existence of the agreement. As noted by the Respondent's counsel in arguments, the Respondent gave evidence that the DVD was provided by her to allow the Appellant to view the use of the wedding gowns. I accept the evidence of the Respondent in this regard. The giving of a single DVD without more does not positively show that such an act was pursuant to an agreement. The explanation proffered by the Respondent that she felt obliged to do so because she had rented the Appellant's gowns was plausible and likely.

44 As also noted by the trial judge, the terms were inserted as handwriting, and in a part of the document concerned with administrative details. Given the title of the document, and the absence of any evidence that the Respondent's attention had been specifically drawn to the handwritten portions at the time, I am of the view that there was, on the balance of probabilities, no agreement reached between the Appellant and Respondent of the nature alleged by the Appellant. The Appellant argued that it was highly improbable for her to sneak in terms. That to my mind was more probable than the Respondent agreeing to such terms.

45 There was also a question of who actually signed another document, another collection form dated 28 December 2009. In that form, an extra gown, beyond the gowns stipulated in the invoice, was collected by the Respondents' sisters. This was material in the mind of the trial judge as it showed that there was a substitution of one additional gown for the men's suits. There was also expert testimony that the signature on that December collection form was not that of any of the Respondent's sisters. The expert evidence instead showed that it was more likely than not that the documents was instead signed by the Appellant. This was particularly disturbing. Given all of this, the trial judge was justified in finding that the evidence showed there were doubts as to the credibility of the Appellant. I accept that these reasons point to concerns about the credibility of the Appellant in this area, and would further support the conclusion that her evidence should not be accepted on the point of the supposed Collection Form licence.

46 The trial judge also rejected the evidence of an ex-employee of the Appellant who had testified that the Respondent requested sponsorship. For the reasons stated by the trial judge in his judgement, I accept that there were a number of inconsistencies in her evidence, and that there were

difficulties with her demeanour. I thus do not find anything that would lead me to disturb the trial judge's findings in this area.

47 The trial judge found that the evidence of the Respondent was to be preferred. I saw nothing to disturb his conclusions as to whose evidence should be accepted.

Parole evidence

48 The parole evidence rule is only relevant when there is a contract in existence. In view of my agreement with the finding of the trial judge that there was in fact no contract for sponsorship, the application of ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) does not arise.

49 Section 93 provides:

When the terms of a contract ... have been reduced by or by consent of the parties to the form of a document ... no evidence shall be given in proof of the terms of such a contract ... except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

Section 93 thus limits proof in respect of a contract in writing to the document itself or permitted secondary evidence. But it requires that the contract has been reduced to writing by the parties or with their consent.

50 Section 94 provides:

When the terms of any such contract ... have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument ... for the purpose of contradicting, varying, adding to, or subtracting from its terms ...

Section 94 excludes evidence of any oral agreement or statement if a written contract falls within the ambit of s 93.

51 Both sections are predicated on the existence of a contract. All the cases considering the application of ss 93 and 94, such as *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029 are concerned with the interpretation of contracts between the parties, and not with the actual formation and existence of such contracts.

52 In the present appeal, the position of the Appellant is that that Collection Form with the words in handwriting formed a binding agreement – six gowns would be taken for free by the Respondent in return for which the photographs in the CD would be available for use by the Appellant as samples for her business. It was not the argument of the Appellant that the license to make use of the pre-wedding photographs had been agreed upon *ab initio* in the contract which was entered into originally for the Appellant to provide wedding boutique services to the Respondent. There were thus, on the Appellant's case, at least two agreements – one on 2 September 2009 for the initial engagement of the Appellant and one contained in the Collection Form.

53 In my view, no contract had arisen under the Collection Form, and the Collection Form was simply an acknowledgement and evidence of receipt or collection of the gowns pursuant to that original contract, without the handwritten words having any effect

54 I note that the trial judge had considered various matters surrounding the Collection Form

contract on the basis that he could look at the surrounding circumstances as the contract was *incomplete* on its face. The trial judge found that the supposed terms were brief, and many details were left unsaid, and did not capture even what the Appellant argued were to be part of the terms governing their relationship. These various matters to my mind are actually relevant in terms of the *existence* of this Collection Form contract, and would have been better analysed on that basis.

55 What had happened in the circumstances was what the Respondent had testified – that six gowns were provided to the Respondent for her use in London as compensation for the three men's suits not being ready.

56 Again, I did not think there were sufficient grounds to disturb the findings of fact made by the trial judge.

Non est factum

57 The Appellant referred to the fact that *non est factum* was not in fact pleaded. However, to my mind, *non est factum* was not the applicable doctrine or plea. The Respondent did not deny her signature, and did not deny the operation of the Collection Form in so far as it operated as a collection form. What was in issue, and what she denied, were the handwritten portions. The very inclusion of the handwritten portions was in doubt, throwing in issue when it could have been added. This could have been after the Respondent had signed. In these circumstances, as there is doubt about the effect of the signature, and what that signature bound the Respondent to, the *non est factum* doctrine does not come into play. Accordingly, I do not find that any of the usual authorities for the doctrine are relevant here.

Ownership of copyright in the actual day photographs

58 The trial judge found that the photographer for the actual day was commissioned by the Respondent through the Appellant. What was said at [40] of the Grounds of Decision was:

In relation to the Actual Day Photographs, it is clear that the Plaintiff had commissioned and paid for the Actual Day Photographs. The actual day photograph service was part of the Wedding Package, covered by the \$5,288 package price paid by the Plaintiff. The fact that the Plaintiff engaged the Defendant for such services, and the Defendant in turn engaged DW2 to take the Actual Day Photographs, does not change the result. The fact remains that consideration for the photography work is ultimately attributable to, and paid for by, the Plaintiff. The Plaintiff therefore owns the copyright to the Actual Day Photographs under Section 30(5) of the Act.

59 Conceptually, the approach appears to have been that the Appellant commissioned the second photographer on behalf of the Respondent, *ie*, the Appellant acted as the agent for the Respondent. This was the characterisation of the trial judge's reasoning adopted by the Appellant.

60 I find that agency is not borne out on the facts or by the law. The point that consideration ultimately came from the Respondent cannot determine the outcome – back-to-back contracts are common in many contexts. It does not follow that in such situations that the intermediate contracts can be disregarded, and that privity is established between the parties at the two ends of the chain of transactions.

61 Privity can be so established if the intermediary was an agent. This requires that the erstwhile agent act not for herself, but for the benefit of the supposed principal. Certainly, as argued by the Respondent, there may be undisclosed agency, but such absence of disclosure of the fact of agency

only affects the third party. As between the principal and agent, there should be consent on both sides for the latter to act for the former: see *Chitty on Contracts Volume II: Specific Contracts* (H G Beale, gen ed) (Sweet & Maxwell, 31st Ed, 2012) at para 31-006.

62 There is nothing in the evidence adduced at the trial that would establish this on the balance of probabilities. The issue appears to have received little attention in testimony and in the arguments below. On appeal, there was little examination and elucidation of this issue in the arguments. There was nothing in terms of any agreement between the Appellant and the Respondent for the Appellant to act for the latter. There was nothing to show that there was a direct contractual relationship between the Respondent and the second photographer. There was nothing in any documentation, nor was there any testimony to this effect. There was nothing in terms of the instructions that the Respondent would have been expected to give to the second photographer before the event as to the scope of the work required, terms of payment, or requirements as to the precise services or equipment that would be deployed. Certainly, it is conceivable that the second photographer would have taken on board on the wedding day the requirements and requests of the bride, the parents, the maids of honour, and just very possibly, the groom. But that is a different matter from being in a direct contractual relationship with any of them. In this context, any supposition that the Appellant may have thought that he was an employee of the Respondent is irrelevant.

63 Furthermore as noted by the Appellant, the Respondent engaged the Appellant to provide photography. This must mean there was no intention for the Respondent to enter into a contract with the photographer. Finding that agency arose between the Respondent and the Appellant in respect of the dealing with the second photographer is highly artificial. I accept the arguments of the Appellant that an agency was not in the contemplation of either the Appellant or the Respondent.

64 In the absence of any evidence of an actual commission of the second photographer by the Respondent, the copyright in those photographs reside either with the maker, *i.e.* the photographer, or with the Appellant. It is not, however, necessary for me to decide the matter in this appeal. It suffices that I find that the copyright does not reside with the Respondent.

65 I would also emphasise that the position as to the existence of agency will vary with the facts. The conclusion here is based on the evidence adduced in this case only.

Control of the use of the actual day photographs

66 An alternative argument, which was not actually put forward by the Respondent, nor pleaded, would have been for an equitable assignment. However, I find that this too is not made out, even had it been permitted to be argued.

67 If the concern was with whether the Appellant could use the photographs as she pleased, however she may have obtained them, the solution could lie in the implication of terms in the contracts between the Respondent and the Appellant, and the Appellant and the Photographer respectively, that exploiting the photographs for other purposes would be prohibited. This, however, was not pleaded, though I note that one of the authorities cited by the Respondent in the context of commissioning under s 30(5) of the Act – *Pollard v Photographic Company* (1888) 40 Ch D 345 – would actually be relevant in the context of implication of terms.

68 In any event, the issue does not arise as the Appellant did not commercially exploit these photographs, as found by the trial judge.

Damages awarded

69 The damages awarded needs to be reduced by an amount of \$1000. This was the amount awarded by the trial judge for the use of the wedding day photographs. There was as found by the trial judge little or no exploitation of these photographs. Since I find that copyright of these photographs did not reside in the Respondent, the Respondent is not entitled to damages for any alleged exploitation of the photographs by the Appellant.

Injunction

70 It was argued that the injunction should be discharged.

71 My finding that the copyright in the wedding photographs was not vested in the Respondent means that there was no basis for the injunction on that ground. Additionally, the Appellant stated in arguments that there was no danger of any further use of the Respondent's photographs in any event. I have also referred above to the possibility that there may be an implied term in the contact between the Appellant and Respondent. That issue is left to another forum to determine whether there is such a term in the present case; it would be a factor that the Appellant would have to take into account if she were to consider using the Respondent's photographs in future. Overall, I am satisfied that there is little danger of the Appellant's future use of the photographs. In the exercise of my discretion, I accordingly discharge the injunction in respect of both the pre-wedding and wedding photographs.

Miscellaneous issues

72 The Respondent argued that celebrities have a heightened need for protection of the use of their image and privacy. No authority was cited for this proposition. As a matter of principle, a person claiming to be a celebrity is not entitled to any special treatment under copyright law. Neither is there any special protection of privacy of such a person.

73 In the trial below, there were also matters touching on possible estoppel against the Appellant in respect of the allegations of the use of photographs, and some other matters going to her credibility, as well as matters arising out of the Respondent's non-disclosure. I did not think these matters were significant in the appeal and they did not affect the outcome.

74 I should also note, and this was raised in passing by Counsel for the Appellant, that at least some of the words that supposedly captured the licence agreement should be excluded. The way the handwritten note appeared in the Collection Form was as follows:

Sponsor for Photoshoot Rental FOC Dry cleaning charge

in return for CD photos as sample book.

There was a bit of space between 'FOC' and 'Dry Cleaning charge'. It may be that the phrase 'Dry Cleaning Charge' was a separate entry. The Appellant could not really assist on this in her testimony. If so, the licence agreement would have been contained in the following words

Sponsor for Photoshoot Rental FOC in return for CD photos as sample book.

Be that as it may, this would not have affected the reasoning and outcome.

Costs

75 I will hear the parties on the costs of the appeal.

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