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# Scottish Court of Session Decisions

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**OUTER HOUSE, COURT OF SESSION****[2007] CSOH 167**

A805/05

OPINION OF LORD EMSLIE

in the cause

PERFORMING RIGHT SOCIETY LTD

Pursuers;

against

KWIK-FIT GROUP LTD

Defenders:-  
-

**Pursuers: Connal, Q.C., Solicitor Advocate; McGrigors  
Defenders: Johnston, Q.C.; Anderson Strathern**

5 October 2007

[1] This is a case in which the pursuers, as owners of the copyright in certain musical works, seek interdict and damages in respect of alleged long-term infringement by the playing of music at Kwik-Fit service centres all over the country. According to the pursuers, employees of the defenders routinely use personal radios at work in such a way as to make copyright works audible to colleagues and customers alike. This, it is said, constitutes the "playing" or "performance" of such works "in public" for the purposes of section 16 of the Copyright, Designs and Patents Act 1988, and renders the defenders guilty of copyright infringement either directly or through others authorised by them. Alternatively, the defenders are charged with infringement under section 26(3) of the same Act, by permitting employees to bring personal radios on to the premises

in the knowledge, or with reason to believe, that infringing acts were likely to occur.

[2] In the procedure roll debate which I have heard, the defenders seek dismissal of the action as irrelevant or, alternatively, on the basis that the pursuers' averments do not provide fair notice of the case they have to meet. Apart from resisting these arguments, the pursuers submit that the defenders' averments of a 10-year company policy prohibiting the use of personal radios in the workplace do not constitute a relevant defence and should not be remitted to probation.

[3] For the purposes of this debate, neither party saw fit to address me on the law as to what might properly amount to the public playing or performance of copyright works. Both maintained that difficult questions of fact and degree might arise in that area, depending on how the evidence turned out at any proof, and that there was thus little to be gained by considering such issues in any detail at the present time. At one point during his submissions, however, I understood counsel for the defenders to accept, in broad terms, that if copyright music was audibly performed to members of the public or to workers as a group that could well constitute infringement.

[4] Both parties addressed me at some length on the concept of "authorisation" for the purposes of section 16(2) of the Act. By reference to various decided cases and textbook analyses, notably the leading decision of the House of Lords in *CBS Songs Ltd and Others v Amstrad Consumer Electronics Plc and Another* [1988 AC 1013](#) (especially the speech of Lord Templeman at p.1054), the pursuers submitted that the element of control was of particular importance in present circumstances where the authorised parties were the defenders' own employees in the workplace. The defenders, as employers, were in a position to direct and control the working environment and all activities there, and accordingly the inference of authorisation, express or implied, could readily be drawn against them in the circumstances averred. For the defenders' part, they accepted that control was one of the factors which might legitimately be considered by the court, but maintained that it could

never by itself be sufficient to establish authorisation for the purposes of section 16(2). What was required, on the authorities, was something in the nature of a grant or purported grant to a third party of the right to do the act complained of, and in the defenders' submission the pursuers' pleadings in this case fell short of meeting that requirement. The defenders were simply not in a position to grant their employees the right to infringe the pursuers' copyright.

[5] Against that background the main alleged deficiencies in the pursuers' pleadings to which the defenders drew attention were (i) the absence of any offer to prove that the defenders themselves actually "played" or "performed" any musical works for the purposes of section 16 of the Act; (ii) failure to aver facts and circumstances capable of setting up "authorisation" for the purposes of section 16(2); (iii) lack of specification of the precise date, location, nature and degree of audibility of each alleged instance of infringement; and (iv) failure to aver either the permission or the state of mind necessary for secondary liability under section 26(3). In response the pursuers maintained that their averments were relevant and sufficiently specific to go to inquiry, it being impossible for the court to hold at this stage (applying the classic test for relevancy) that even if all such averments were proved the action would nevertheless be bound to fail.

[6] By way of an unopposed amendment at the Bar, the pursuers incorporated into their pleadings an extensive schedule detailing country-wide inspection data regarding the audible playing of music at Kwik-Fit premises on more than 250 occasions in and after 2005. This was allied to *inter alia* the following further averments:

"The public performance of copyright works has continued at premises controlled by the defenders by various means, primarily the use of mobile radios within the bay areas of said premises, tuned to radio stations broadcasting popular music. By the nature of the defenders' premises music from mobile radios within the bay areas is audible both by members of staff and members of the public who are within those areas or entering or leaving

them. The playing of said music will also be known to the defenders' management present on each unit. The playing of said music continues, including the playing of large numbers of works in which the pursuer holds copyright. Reference is made to the schedule produced detailing the individual units of the defenders' business inspected on behalf of the pursuers, together with the dates of inspections. ... On each of these dates music, including work copyright of the pursuers, was audible, both to workers within the workshop area and to members of the public when present in that area. On each of those occasions, music was provided by means of a radio or similar appliance in the workshop area. On a number of occasion music, audible in the same manner, was also provided within the reception area. The instances of music in reception areas are specifically identified on said schedule. ... In the period between 1997 and the present date approximately 50% of all units operated by the defenders have been playing music in that manner".

[7] According to the pursuers, their pleadings were more than sufficient to warrant a proof at which, through a modest number of inspectors, they would expect to establish everything allegedly found and recorded on each inspection visit. The key point to note, it was said, was that the findings on each occasion were the same, with music audibly "blaring" from employees' radios in such circumstances that the defenders' local and central management could not have failed to be aware of what was going on. Moreover, this state of affairs had continued over many years in the face of repeated correspondence from the pursuers alleging infringement and seeking remedial action. All necessary inferences could thus be drawn against the defenders for the purposes of infringement under section 16 and/or section 26(3), and matters were placed beyond doubt by the defenders' own company policy which expressly proceeded on the basis that the playing of radios in the workplace was against the law and liable to constitute copyright infringement. In addition the defenders' own recent survey, narrated in the pleadings, apparently confirmed that

"... 51% of their garages were using music in the manner hereinbefore condescended upon."

[8] In my opinion there is some force in the defenders' contentions regarding lack of specification in the pursuers' averments. By way of illustration, I think that the precise conduct alleged against the defenders themselves could have been more clearly and specifically averred; more could have been said about the degree of audibility of music played at different premises at different times; the same applies to the extent to which copyright works were involved; and explicit averments might have been included as to the defenders having done or authorised infringing acts, or as to their having permitted the use of personal radios in the workplace in the knowledge, or with reason to believe, that copyright infringement was likely to occur. However, looking broadly at the pursuers' averments as a whole, I am not persuaded that they are irrelevant in the sense that, if they were all fully proved, the case would nevertheless be bound to fail. Equally, it does not seem to me that the defenders are currently denied fair notice of the case against them to such a degree that dismissal, or partial exclusion from probation, could be regarded as a realistic option.

[9] As characterised in the course of the debate, the pursuers' allegations are of a widespread and consistent picture emerging over many years whereby routine copyright infringement in the workplace was, or inferentially must have been, known to and "authorised" or "permitted" by the defenders' local and central management. If that picture were to be satisfactorily established after proof, it is in my view at least possible that liability for copyright infringement would be brought home against the defenders under either or both of sections 16 and 26(3) of the Act. At this stage, certainly, such an outcome cannot be ruled out, especially in circumstances where the true scope and application of the law regarding the "playing" or "performance" of copyright works "in public" have not been explored in argument. On relevancy grounds, therefore, the pursuers are in my view entitled to the inquiry which they seek. Having reached that conclusion, however, I am not

to be taken as accepting that, on proof of the averments in question, the pursuers would necessarily succeed in their claims against the defenders. In the course of the debate various hypothetical situations were figured in which charges of copyright infringement might arguably go beyond the contemplated scope of the legislation and/or offend against common sense. Whether, in the event, any such difficulties materialise in this case will depend on how the evidence turns out at the proof.

[10] Reverting to the defenders' complaint of a lack of fair notice, it seems to me that, with the assistance of the incorporated schedule, they now know the scale and geographical extent of the picture which the pursuers seek to paint against them. They also know from the associated averments that the pursuers are offering to prove consistent findings on each recorded inspection visit, to the effect that copyright works played on personal radios are routinely audible to the workforce and customers alike. In addition the pursuers offer to prove a long-term state of awareness on the part of the defenders' central and local management from which inferences of "authorisation" and "permission" may legitimately be drawn. Against that background, it is hard to see what further notice the defenders can now truly require, bearing in mind that formal averments of the statutory wording of sections 16 and 26(3) of the Act would tell them nothing that they do not already know. The defenders fairly acknowledge that proof of every single instance of alleged infringement might be an unwieldy and excessive exercise, but for the pursuers it was stressed that without some agreed identification of a representative sample for the purposes of proof there might be little alternative but to go the whole way. At this stage, all I need to say is that I am not persuaded that the court can or should curtail the pursuers' freedom to lead evidence, if they have to, on all of the matters particularised on Record and in the incorporated schedule.

[11] Finally, as regards the defenders' averments of their long-standing company policy prohibiting the use of personal radios in the workplace, I am satisfied that they are relevant to go to inquiry and that the pursuers' challenge is not well founded. At the very least, as it seems to me, the existence of such a policy must be

one of the many factors to be considered in any assessment of the defenders' alleged responsibility for primary or secondary infringing acts.

[12] For all of these reasons, I shall allow a proof before answer of the parties' whole averments on Record, reserving in the meantime their respective preliminary pleas.



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