

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV2016-03461

BETWEEN

SEAN CARUTH

Claimant

AND

THE TOBAGO HOUSE OF ASSEMBLY

Defendant

Before the Honourable Mr Justice Frank Seepersad

Appearances

1. Mr. Bengochea and Ms. Cooper-Leach for the Claimant.
2. Mr. Cottle, and Mr. Caesar for the Defendant.

Date of Delivery: 23rd July, 2018.

DECISION

1. By Claim Form and Statement of Case filed on the 14th October, 2016, the Claimant alleged that the Tobago House of Assembly infringed his neighbouring and moral rights in relation to his musical work “Coal Pot”:
 - a. By directly and/or indirectly reproducing 39 seconds of the Sound Recording in television advertisements for the 2012 Blue Food Festival aired on Channels CCN TV6, CNC3 and Tobago Channel 5 from 20th September, 2012 to the 14th October, 2012;
 - b. By directly and/or indirectly reproducing 39 seconds of Coal Pot in radio advertisements for the 2012 Festival broadcast on radio stations i95.5 FM, Radio Tambrin 92.1, from 20th September to 14th October 2012;
 - c. By directly and/or indirectly reproducing 39 seconds of Coal Pot in the YouTube advertisement for the 2012 Festival published over the internet from the 8th October 2012, which remains available and, at the time of filing of the Claim Form and Statement of Case, had been viewed 602 times; and
 - d. By arranging for the broadcast of the said advertisements as indicated above.
2. The Claimant is a local musical artist and composer who has written and performed hit singles such as “Hickey” and “Accident”. The latter was used by international entertainment organization ‘Nickelodeon’ in the movie, “The Wild Thornberrys”. He also participated in the Soca Monarch and Young Kings Monarch Competitions and he composed and sang the song “The Cook” also called “Coal Pot” (hereinafter referred to as “Coal Pot”).
3. In September and October 2012, the Tobago House of Assembly (hereinafter called “the THA”) used Coal Pot, to advertise for the Tobago Blue Food Festival. The song was played on television, radio and YouTube advertisements. The Claimant contends that the THA did not consult him or the Copyright Organization of Trinidad and Tobago (hereinafter called

“COTT”) for the requisite permission to use the song and its use violated his rights. The Claimant contends that his song Coal Pot was used in total disregard of his rights.

4. The law with respect of Neighbouring and Moral Rights is outlined in the Copyright Act Chap. 82:80 (the Act). Section 18, 18(4) and (21) and Section 31 (c) of the Act provides as follows:

Section 18

“(1) Independently of his copyright, and even where he is no longer the owner of copyright, the author of a work shall have the right-

- (a) To have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable;...
- (b) To object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work, which would be prejudicial to his honour or reputation.

(2) None of the rights mentioned in subsection (1) shall be transmissible during the life of the author, but the right to exercise any of those rights shall be transmissible by testamentary disposition or by operation of law following the death of the author.”

5. Section 18(4) of the Act states:

“Independently of his copyright and even where he is no longer the owner of copyright, the performer shall, as regards his live aural performances and performances fixed in sound recordings, have the right-

- (a) To be claimed to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and*
- (b) To object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.”*
- (c) Neighbouring rights are property rights which subsist in performances, sound recordings and broadcasts.”*
- (d)*

6. Section 21 (1) of the Act states:

“Subject to the provisions of Section 25, a performer shall have the exclusive right to do, authorise or prohibit any of the following acts.

- (a) The broadcasting or other communication to the public of his performance except where the broadcasting or the other communication – (i) is made from a fixation of the performance, other than a fixation made under the terms of Section 25; or (ii) is a rebroadcasting made or authorised by the organization initially broadcasting the performance;*
- (b) The fixation of his unfixed performance; or*
- (c) The reproduction of a fixation of his performance in any manner or form;*
- (d) The distribution to the public, by sale or other transfer of ownership, of a fixation of his performance or copies thereof, that have not already been subject to a distribution authorised by the performer;*
- (e) The rental to the public of a fixation of his performance or copies thereof, for the purposes of direct or indirect commercial advantage, irrespective of the ownership of the original or copy rented; and*
- (f) The making available to the public of his fixed performance through an electronic retrieval system.”*

7. Section 31 (1) states inter alia:

“...infringements of the rights of the owner of copyright or neighbouring rights shall be actionable in the Court at the suit of the owner of copyright or neighbouring right...”

8. **“Neighbouring rights” constitute *inter alia* the right to publicly perform or broadcast a sound recording and the right to be identified as the producer and/or performer of the song. “Moral Rights” are the rights of an author or other creative artists to protect the integrity and ownership of his/her work. These are inalienable rights because they are intrinsically linked to the artist’s identity and integrity and they may subsist even after the artist has assigned the copyright interest in his/her work.**

Neighbouring and morals rights are important because upon them an artist's identity, dignity and respect is forged and rests.

9. **The contention is that the THA infringed the Claimant's rights to have his name indicated prominently in or on all advertisements which referred to or used Coal Pot and that his rights were violated when Coal Pot was used in connection with images of pork. Association with pork he stated was contrary to his lifestyle and the association of his work with pork amounted to a derogatory action which was prejudicial to his honour and reputation.**
10. The Defendant challenged the Claimant's claim by way of an Amended Defence and alleged *inter alia* that:
 - a. The Defendant was not a proper party to the proceeding.
 - b. The Claimant lacked the proper locus to bring the action
 - c. The claim is instituted outside the relevant limitation period.
 - d. The Claimant is estopped from suing the Defendant or from claiming money from the Defendant.
11. At the trial the Claimant and his agent Ms Reshma Ramlal testified. No evidence was adduced on behalf of the Defendant.
12. There was no dispute on the evidence that the song Coal Pot was played at the Blue Food Festival and by the Defendant's failure to adduce evidence, the Court, based on the Claimant's uncontradicted evidence and on a balance of probabilities found the following facts:
 - i. The song "Coal Pot" was used for the 2012 Blue Food Festival.
 - ii. There was no attempt by the Defendant to negotiate with the Claimant prior to the use of the song Coal Pot.
13. By virtue of the provisions of the Act, the Claimant assigned his music to the Copyright Organization of Trinidad and Tobago (COTT). Neighbouring rights can exist

independently from economic rights and remains vested with the artiste unless they are also assigned. In relation to moral rights it applies to the author of the original literary, dramatic, musical or artistic work and the author alone has dominion over same during his/her lifetime.

14. In **Copinger and Skone James on Copyright 14th Edition** at pages 11-44, the authors wrote that a treatment of a work is “derogatory” if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director. Any alteration of the author’s work which makes him appear *inter alia* inept, untruthful or bigoted are examples of derogatory treatment.

Limitation Defence

15. Section 59 of the Copyright Act, Chap.82:80 expressly adopts the provisions of the Section 3 (1) of the Limitation of Certain Actions Act, Chap. 7:09.
16. Section 3 (1)(b) of the Limitation Act imposes a limitation of 4 years on actions to recover any sum recoverable by virtue of any enactment and the Court is of the view that rights under the Copyright Act would fall within the ambit of the said section.
17. The case law as it has developed has recognised that time would run for the purpose of calculating the relevant limitation period from the point at which the cause of action accrued i.e. when the alleged act of infringement was occasioned.
18. The Blue Food Festival was held on the 14th October, 2012 and the advertisements complained of which were circulated via traditional medium ran during the month of September 2012 and for part of October 2012 and there is no evidence to suggest that any advertisement using the song ‘Coal Pot’ ran after the date of the festival on the 14th October 2012. In any event, on a balance of probabilities, such a circumstance is unlikely given that the festival was a ‘one day event’.

19. On his pleaded case the Claimant outlined that as at the 20th September, 2012 his rights were infringed and at the latest any further alleged infringement would have been occasioned on the date of the festival i.e. 14th October 2012.
20. In relation to the “YouTube” advertisements, the Claimant’s uncontradicted evidence as outlined in his witness statement established that he was able to replay the advertisements as at November, 2016. The uploading of the advertisement on the worldwide web via Facebook and YouTube, resulted in a circumstance where a degree of permanency was affixed to same. Consequently, long after the conclusion of the 2012 festival, persons without restriction could have accessed the advertisement via the internet and the Claimant did so in November, 2016. Accordingly, the Defendant’s argument in relation to the limitation period has no merit with respect to the YouTube advertisements.

Is the Defendant a proper party?

21. The Defendant is a corporate body established by statute and all of its rights and responsibilities are outlined in the Tobago House of Assembly Act Chap. 25:03. Section 25(1) outlines that it is responsible for the formulation and implementation of policy and it is empowered to do all such acts and take all such steps as may be necessary for or incidental to the exercise of its powers or discharge of its duties, including entering into such contracts as deemed fit for the efficient discharge of its functions.
22. **The Court did not have the requisite evidence before it so as to conclude on a balance of probabilities that the Blue Food Festival was not organized by or on behalf of the THA in furtherance of its mandate to formulate and implement policy in relation to tourism. Accordingly, the Court finds that there is no evidence adduced upon which it can hold on a balance of probabilities that the Defendant is not a proper party in this action.**

Does the Claimant have locus standi to bring this action?

23. By virtue of a Deed of Assignment, the Claimant assigned what was termed as the ‘under mentioned rights’ to COTT and Clause 26.1 of the Deed stated that:

“ ...and all such parts or shares (whether limited as to time, place, mode of enjoyment or otherwise) of and all such interests in, any such rights as so belong to or shall so be acquired by or become vested in the Assignor (all of which rights hereby assigned or expressed or intended to be assigned are hereinafter collectively referred to as ‘the rights assigned’) TO HOLD the same unto COTT for is exclusive benefit during such time as the rights assigned continue to subsist and remain vested in or controlled by COTT.”

24. Section 28(1) of the Copyright Act, provides that:

“Copyright and neighbouring rights shall be transmissible in whole or in part by assignment...”

In accordance with Section 28 (2) of the Copyright Act, the Claimant’s Assignment was in writing and the terms of the Assignment are such that the Claimant’s neighbouring rights were assigned to COTT.

25. Having therefore considered the Copyright Act and Clause 2 of the Deed of Assignment, the Court is of the view that as a matter of contract, the Claimant assigned his neighbouring rights to COTT and therefore, he cannot institute an action in relation to same. There is no evidence to suggest that his moral rights were so assigned nor does the law seem to contemplate an assignment of same. Accordingly, the Court is of the view that the Claimant does have the requisite locus to advance a claim premised upon an alleged infringement of his moral rights.

Was there an infringement of the Claimant’s moral rights?

26. The Court considered whether the ‘moral rights’ of the Claimant were infringed specifically by the association of his work with ‘pork’ and whether such an association legitimately offended his lifestyle choice and occasioned harm to his honour and reputation.

27. **The Claimant testified that he does not associate with pork and any connection with his work and pork would contradict his lifestyle beliefs. Under cross examination, the Claimant accepted that he subsequently performed at the Blue Food Festival in 2013.**
28. **It is well known that pork is an integral part of the Tobagonian diet and at the Blue Food Festival, all popular dishes, including pork dishes are served and promoted. If as the Claimant contends, the use of his song in relation to ‘pork’ offended his lifestyle and reputation then it is difficult to understand why he participated at the very same festival the following year, a festival at which pork would have been highlighted. In 2013 the Claimant should have been concerned that any engagement with the Festival given, that pork was served, would have offended his lifestyle, honour and/or reputation, yet he performed and received remuneration without complaint. The course of action as aforementioned established in the Court’s mind on a balance of probabilities that there can be no merit to the Claimant’s contention that there was a distortion or mutilation of his work or that prejudice was occasioned to his honour or reputation.**
29. **The rich, vibrant musical talent with which the Republic is blessed cannot be trivialised or ignored. Artistes need to be nurtured, encouraged and afforded due recognition. It must be understood that they serve as Ambassadors and promoters of our rich cultural heritage and neither they nor their works, should be exploited. Just compensation must always be offered to them as they have an entitlement to derive an income from their creative work. It must also be understood that the use of their work should not be undertaken in a manner which distorts or mutilates same.**
30. **In the circumstances the claimant’s claim is dismissed. The Court is of the view that this matter raised novel issues of law which are important in the context of the local musical landscape. Accordingly, though unsuccessful, the claim provided a forum where the law as to Neighbouring and Moral rights and the time period within which**

same can be enforced has been clarified and the Court hereby orders that the Claimant shall pay $\frac{1}{2}$ of the prescribed cost in the sum of \$7000.00 to the Defendant.

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FRANK SEEPERSAD

JUDGE