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H.C.A. 499/1993 - CCN Television Ltd & Prime Radio Ltd v Copyright Organisation of 121

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 499 of 1993

IN THE MATTER OF THE TERMS AND
CONDITIONS OF THE GRANT OF
CERTAIN GENERAL LICENCES AS
DEFINED BY SECTION 54 OF THE
COPYRIGHT ACT, 1985

AND

IN THE MATTER OF THE COPYRIGHT
ACT 1985

BETWEEN
CCN TELEVISION LIMITED
and
PRIME RADIO LIMITED

Applicants

AND

THE COPYRIGHT ORGANISATION OF
TRINIDAD AND TOBAGO LIMITED

Respondent

Mr. A. Jacelon S.C. and F. Hosein
for Applicants

Mr. E. Prescott for Respondent

BEFORE THE HON. MR. JUSTICE CARLTON BEST

J U D G M E N T

On 17th February 1993 the applicants herein filed a Notice of
Originating Motion seeking:

- (1) a declaration that the applicants ought to be granted general licences to record certain copyrighted musical works and performances and to make reproductions, records and copies thereof for sale within the four month period provided for in section 36(2) of the Copyright Act 1985;
- (2) a declaration that the terms and conditions on which the respondent is prepared to grant the applicants general licences as defined by section 54 of the Copyright Act 1985 for radio and television broadcast respectively of certain copyright musical works and performances are unreasonable; and
- (3) that pursuant to the provisions of section 57 of the said Act, the Court should determine the terms and conditions on which the said licence ought to be granted to the applicants.

The grounds upon which the application was founded, were that a dispute had arisen between the parties as to the quantum of the respective licence fees payable to the respondent for the said licences. The respondent maintained that the proper licence fees should be two and one half percent (2.5%) of "net advertising revenue" in the case of radio broadcasts, and one point six two five percent (1.625%) of "gross advertising revenue" in the case of television.

On the said 17th instant my learned brother Mr. Justice Razack granted the applicants leave to serve the respondent with short notice of the said Notice of Originating Motion and the matter was listed in the Motion Court on 18th instant.

The evidence on behalf of the applicants consisted of an affidavit with exhibits, sworn by Mr. Richard Anthony Henderson, Managing Director of the applicant Companies. Senior Counsel sought and was granted leave to allow Mr. Selby Wilson to give viva voce evidence on behalf of the applicants, but at the crucial time Mr. Wilson could not be located, so the matter proceeded on the affidavit of Mr. Henderson alone. The respondent did not offer any evidence.

This paucity of evidence on the part of both parties has left this Court in a most invidious position, as the Court is required to pronounce on the reasonableness of the actions of the respondent without the benefit of the evidence of the respondent. However, this Court will make the best of the evidence presented. The situation is further compounded by the fact that Counsel on both sides were unable to offer authorities as assistance to the Court, save a fleeting reference to paragraphs 16.26 and 16.27 of The Modern Law of Copyright (1980 ed.) Laddie, Prescott & Victoria.

THE BURDEN OF PROOF:

In The Modern Law of Copyright (supra) at paragraph 16.27 the learned authors stated:

"On such/...3

"On such an application to the Tribunal the burden of proof is on the applicant to show that the licence offered to him is unreasonable, but he does not have to show that the proposals of the licensing body are unreasonable on any footing..."

PRIME RADIO LIMITED:

As at October 1992 Prime Radio Ltd. (Prime Radio) had been in operation for 16 months, without a licence or without making any payments to the respondent. Prime Radio admitted that performance royalties had to be paid to the respondent on behalf of its members, but insisted that the basis for payment (one of the terms and conditions) was subject to mutual agreement through negotiation.

THE RESPONDENT'S FORMULA FOR PAYMENT OF ROYALTIES: (the existing rates):

In the respondent's view, the size of the audience the station reaches determines the advertising rates - larger audiences meant higher rates and in turn higher revenue. The respondent claimed 2.5% of Prime Radio's Net Advertising Revenue (NAR). NAR being defined as Gross Advertising Revenue (GAR) minus 15% Trade Commission. It did not consider as deductables the 2% commission paid to Prime Radio's salesman and the 2% annual telecommunications licence from GAR. This tariff the respondent suggested would apply, with necessary rebate, until 31st December 1993. (The proposed rates). - The proposed rates of 5% of NAR was suggested for the years 1994 and 1995. If Prime Radio's use of copyrighted music was 25% less than its transmission hours, the station would be considered a Talk Station and in such a situation the tariff would be 3.5%. The existing rates were applied evenly by the respondent throughout the industry.

THE APPLICANT FORMULA FOR PAYMENT OF ROYALTIES:

The rationale for Prime Radio refusing to pay royalties on all advertising revenue was that all revenue was not generated by music. Prime Radio was not prepared to make payments from revenue arising from programmes in which there was no musical input. An unspecified percentage of Radio Prime's programming was talk shows from which a

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higher rate was available and from which 40% of its advertising revenue was derived. The applicant moved from a negotiated position of payment on music actually broadcast, to 60% of net revenue after commissions, to 2.5% of 60% of NAR after deductions of 15% agency commissions, 2% in-house salesperson's commission and 2% annual telecommunications licence.

PRIME RADIO GETS AN INTERIM LICENCE:

In the spirit of establishing a good working relationship with the respondent, Prime Radio issued two cheques in the sum of \$50,000.00 each on 3rd and 30th November 1992, and was issued with an interim licence up to 31st December 1992. However, Prime Radio insisted that the outstanding payments were subject to negotiations.

THE NATIONAL CARNIVAL COMMISSION'S (NCC) SALE OF BROADCAST RIGHTS:

The respondent indicated that its concern with the sale of the broadcasting rights by NCC to Prime Radio, through CCN, was that the copyright under the said contract would be respected and that its members were adequately remunerated. The respondent insisted that for Prime Radio to exercise its contract with NCC, Prime Radio must obtain the respondent's authority to use its repertoire music. Further, that its authorisation was needed to make audio tapes for commercial purposes within the four months period of the release of the latest piece of music on the said tape.

The respondent was willing to facilitate Prime Radio in this endeavour on condition that:

- (1) Prime Radio sign back dated agreements for broadcasting licences.
- (2) That all outstanding licence fees be paid in the following manner - 50% immediately and the balance by 3 equal instalments on the last day of February, March and April 1993;
- (3) This schedule of payments should be kept current with monthly payments due in the year.

By two notifications dated 9th and 12th February 1993, the respondent informed Prime Radio that it should desist immediately from making unauthorised use of its copyrighted music on its

always. On 16th February 1993, Prime Radio responded reminding the respondent that it had forwarded \$100,000 on account of its indebtedness to the respondent and offered to repay the balance due to the respondent, by whatever formula adopted by three instalments at the end of February, March and April 1993. On 17th February 1993 Prime Radio commenced these proceedings.

DECISION:

I have compared and contrasted the conflicting bits of evidence with that upon which there has been agreement, and on a balance of probabilities I hold as a fact:

- (1) Prime Radio did make unauthorised use of the respondent's copyrighted material until an interim licence was issued to it in December 1992.
- (2) Prime Radio acknowledge a debt to the respondent on unpaid royalties and made a payment on account of \$100,000.
- (3) Prime Radio and the respondent differed as to how the acknowledged debt was to be calculated.
- (4) Despite protestations that it wished to improve its relationship with the respondent, Prime Radio allowed the debt to accumulate.
- (5) Prime Radio landed a contract with the National Carnival Commission for coverage of Carnival 1993. This contract involved making use of copyrighted material owned by the respondent.
- (6) That the respondent considered the said contract a good bargaining point upon which to have all its affairs financial and legal, tidied up with Prime Radio on its own terms.
- (7) On 16th instant Prime Radio capitulated to the terms dictated by the respondent and on 17th commenced these proceedings.

I have borne in mind that this is a dispute between businessmen, and that a Court should make no attempt to impose its will upon them, as they are the best judges of what are in their best interests.

The canons of capitalism may shock the sensitivity of certain sectors of the society. In this world doctrines akin to equity do not exist as was suggested by Counsel for the respondent. Be that

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as it may, business persons have set certain standards for themselves and they must be judged by those standards.

Bearing the foregoing in mind, I ask myself:

- (1) Would a reasonable business person, similarly circumstanced as the respondent, have acted in the manner in which the respondent did? and
- (2) Looking at the respondent's actions from a holistic point of view, would the respondent have had the approbation of all reasonable minded business persons?

Before I answer the questions posed, I wish to indicate that prayers nos. 1 and 3 of the Originating Motion filed herein, I disallow on the ground of insufficiency of evidence. I turn now to deal with the remaining prayer - that of no. 3 and I would answer both questions in the positive.

I have not dealt with the first applicant's claim as I consider that of the 2nd applicant's, though different, to run on parallel tracks and the finding I make in respect of the 2nd applicant, I apply to the 1st applicant. In the premises I hold that this application has failed and the Originating Motion filed on 17th February 1993 be dismissed. The costs of this application is to be taxed and paid by the applicant to the respondent certified fit for Advocate Attorney. However, the costs on the preliminary point raised by the respondent is to be taxed and paid to the applicants by the respondent.

Dated this 19th day of February 1993.

Carlton Best
Judge