

**IN THE SUPREME COURT OF BELIZE, A.D. 2011**

**CONSOLIDATED CLAIMS NOS 456 of 2011 and 26 of 2013**

**CLAIM NO: 456 of 2011**

**BETWEEN**

**ANTHONY RATH** **1ST CLAIMANT/RESPONDENT**

**NATURALIGHT  
PRODUCTIONS LIMITED** **2ND CLAIMANT/RESPONDENT**

**AND**

**BIRDSALL, VOSS & ASSOCIATES INC.** **DEFENDANT/APPLICANT**

**AND**

**CLAIM NO: 26 of 2013**

**BETWEEN**

**ANTHONY RATH** **1ST CLAIMANT**

**NATURALIGHT  
PRODUCTIONS LIMITED** **2ND CLAIMANT**

**AND**

**THE BELIZE TOURISM BOARD** **1<sup>st</sup> DEFENDANT**  
**BELIZE HOTEL ASSOCIATION** **2<sup>nd</sup> DEFENDANT**

**Keywords:** Copyright Act, Chapter 252, of the Revised Edition 2000, Laws of Belize;

Practice; Part 9 and 26 of CPR 2005; Application to set aside; Application for Summary Judgment; Application to Strike Out Statement of Case;

Jurisdiction; Copyright infringement; Inherent jurisdiction of Supreme Court; Forum non conveniens; Claim by USA company- Claim Copyright Act of Belize; Dispute jurisdiction of Belize Supreme Court in relation to Copyright and breach of contract.

**Before the Honourable Mr. Justice Courtney A Abel (Ag.)**

**Hearing Dates:** 26<sup>th</sup> July 2013;  
24th October 2013.

**Appearances:**

Ms. Pricilla Banner Counsel for the 1st and 2nd Claimants/Respondents, Anthony Rath and Naturallight Productions Ltd.

Ms. Deshawn Torres Counsel for the 1st in Claim No. 26 of 2013 the Belize Tourism Board.

Mr. Darrell Bradley Counsel for the Defendant/Applicant in Claim No. 26 of 2013 Birdsall, Voss & Associates.

**DECISION**  
**Delivered on the 24<sup>th</sup> day of October 2013**

**Introduction**

- [1] The present application, in relation to a claim for copyright infringement and breach of contract, may at first appear to be somewhat complicated because of the many different parties, the nature of the causes of action, the cross-border aspects of the claims, and the somewhat obscure grounds relating to the jurisdiction of this court, which arises.
- [2] But, as the copyrights with which the application deals, concern somewhat obscure, though significant, economic rights which creative artists (such as photographers) may have in their creative works, I will attempt to simplify matters, as best I can, for the purpose of this introduction and decision.
- [3] But out of respect and deference to the detailed and careful arguments made by the parties I have found it impossible to be perfunctory or brief in this decision.

- [4] The consolidated claims concern photographs which were used for the Belize Tourism Board's marketing campaign "Be One With Belize".
- [5] The Claimants have brought the present actions against the Defendants for infringement of copyrights in the photographs; and for breach of a licence which had been granted for the use of the photographs. The Defendants are contesting the claims.
- [6] By the application which is now for decision, Birdsall Voss & Associates Inc, (BVA), the Applicant, a company registered and doing business in the USA, are asking the court to remove them from the present proceedings because, they claim, the causes of action against them are not justiciable within Belize.
- [7] The present application raises issues of jurisdiction of the Supreme Court under the Copyright Act of Belize<sup>1</sup> ("the Copyright Act"), contract law and the practice and procedure of the court; and which will also turn on an interpretation of the laws relating to each.

### **The Parties**

- [8] Mr. Anthony Rath and Naturalight Productions Limited, the Claimants, are respectively a person who is a professional photographer and a company registered in Belize (through which the first person does business).
- [9] BVA, the Defendant/Applicant, is a marketing company acting on behalf of the 2<sup>nd</sup> Defendant, the Belize Tourism Board, which is mandated to develop all aspects of the tourist industry in Belize.
- [10] The Belize Hotel Association is a non-profit organization engaged in the promotion of the hotel industry and tourism industry in Belize.
- [11] The present application primarily concerns BVA, ("the Applicant) and the Claimants ("The Respondents").

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<sup>1</sup> The Copyright Act, Chapter 252, of the Revised Edition 2000, Laws of Belize.

## **The Photographs**

[12] The Photographs concern at least 5, original photographic images<sup>2</sup>. These images, as previously noted, were created and/or used for the Belize Tourism Board's marketing campaign of "Be One Belize various<sup>3</sup> ("the photographs ") and are the subject of copyright under the laws of Belize; and which the Respondents also allege are subject to an agreement with the Applicant.

[13] The Respondents claim that the copyrights have been infringed and the licensed agreement breached by the Applicant; and seek various remedies for infringement and breach of contract.

## **The Proceedings**

[14] The claims against the Applicant are particularized in an Amended Statement of Claim filed on the 27<sup>th</sup> January 2012<sup>4</sup> in which it is claimed the Applicant breached its licence with the Respondents s by publishing and reproducing the Respondents' photographic images without their permission, and also infringed the Respondents s statutory copyrights in such works.

[15] Generally, the Amended Statement of Claim is less than satisfactory for the following reasons:

- (i) The Respondents s have not clearly pleaded that either or both of them created or was the author, and thereby the copyright owner, of the photographs (other than the 5 additional contentious works), instead much has been left by the pleading to be inferred by the court by reference to the annexed attached usage licence.
- (ii) It is far from clear from the pleadings what relationship the 2<sup>nd</sup> Respondents has to the causes of action of the amended claim as it is not pleaded that the 2<sup>nd</sup> Respondents is the author or joint author of the photographs<sup>5</sup> and nor can such relationship be similarly implied from the

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<sup>2</sup> Which the Respondents allege were increased to 10 such photographic images by the addition of 5 photographs owned by the 1st Respondent

<sup>3</sup> Which 10 Photographic images for the Belize Tourism Board's marketing campaign of "Be One Belize".

<sup>4</sup> In Claim No. 456 of 2011.

<sup>5</sup> As required by virtue of Section \*

pleaded case (as may be possible in the case of the 1<sup>st</sup> Respondents ), and therefore that it had any rights in relation to the photographs.

- (iii) It is not pleaded that the 1<sup>st</sup> Respondents , as the author, is a qualified person within the meaning of the Copyright Act (is a citizen of Belize or has habitual residence in Belize<sup>6</sup>) which qualifies the photographs for copyright protection within Belize.
- (iv) The Respondents s plead at length the terms of an offer to the Applicant in relation to the grant of an exclusive licence, which terms they allege were accepted by the Applicant (without specifying whether such acceptance was oral or written and when, where and how such acceptance took place) and without specifically pleading an Agreement; leaving it to the court to imply from the alleged acceptance, that there was such an Agreement.
- (v) The Respondents s also, it seems to me, erroneously sought to rely on an annexed usage licence, and pleading that the Applicant breached its various terms, which breaches are alleged to have taken place by the Applicant using publishing, and reproducing the photographs “beyond the period of one year granted by the Respondents s (or causing the same). It seems to me that the implication of such pleading is that the usage licence is irrelevant to the claim against the Applicant. What appears to have been the intention of the Respondents s (and possibly what they intended to but did not do) was to plead, as their cause of action, the unauthorized use (use without a licence) of the photographs.
- (vi) The Respondents s also alleged that the Applicant continued to repeatedly use the photographs in advertisements and made substantial profits from same, but crucially, without at any time grounding the jurisdictional basis of its claims, in any way, or at all, by reference to such use in Belize.
- (vii) The Respondents s failed to particularise any alleged use, publication and reproduction by the Applicant of the photographs, including by placing

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<sup>6</sup> See Section 3.(1) and 8.(1) of the Copyright Act.

such photographs on the internet which was thereby accessible in Belize (as it later sought to do in an Affidavit in opposition to the Applicant's application).

(viii) The Respondents have not specifically pleaded that there was commercial publication of the photographs<sup>7</sup> whether by making the photographs available to the public by means of an electronic retrieval system<sup>8</sup> or by the internet or otherwise.

[16] The Applicant in its Defence filed on the 28th June 2012, in any event denies any breach of licence and infringement of copyright, and alleges that it was at all times acting as the duly appointed agent for the Belize Tourism Board (the 1<sup>st</sup> Defendant in Claim No. 26 of 2013), and further denies that the Court of Belize has any jurisdiction over the claim against the Applicant. The Applicant also counterclaimed for damages for the Respondents' breach of contract.

[17] In their Reply and Defence to Counterclaim, filed on the 12th July 2012, the Respondents respond to the Applicant's allegations in the following manner:

- a) By pleading clearly, for the first time, the 1st Respondents' authorship of the photographic works.
- b) At paragraph 25 the Respondents plead for the first time that the 1<sup>st</sup> Respondent is a Belizean citizen (and is thereby a qualified person within the meaning of the Copyright Act) and thereby capable of being the owner of the copyright in the photographic works.
- c) The Respondents sought to correct the omission in their Statement of Claim to plead unauthorized use by the Applicant of the photographs amounting to breach of contract/and or copyright infringement" by pleading for the first time such unauthorized use.
- d) At paragraph 6 the Respondents aver, somewhat cryptically, in relation to the worldwide licence (in the usage licence) which it had provided the

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<sup>7</sup> See Section 23 of the Copyright Act.

<sup>8</sup> Ibid. Section 23 (b) of the Copyright Act.

Applicant to use the photographs, by stating: “...and also that the magazines in which the images were to be used are available worldwide via the internet and postal services. The advertisements were therefore available worldwide, including in Belize”. This seemed to be suggesting that such availability of the advertisements was in the context of the previously granted and expired licence. Thus the Respondents were for the first time pleading in a general way that “The advertisements were therefore available worldwide, including in Belize”. Resulting in a most unsatisfactory and confusing state of the pleading and of the Respondents’ case. All without giving particulars of any unauthorized use of the photographs in Belize or elsewhere (including by publication “by making it available to the public by means of an electronic retrieval system<sup>9</sup>”). In any event there was no cause of action pleaded of infringement of the economic rights of the Respondents<sup>10</sup>.

- e) At paragraph 4 the Respondents sought to remedy the defect of its Statement of Claim by explicitly pleading for the first time an agreement in relation to the user licence (by stating “the First Respondents contracted solely with the Applicant in respect of the photo shoot in which the First Respondents was retained...”).

### **The Grounds of the Application**

[18] The complete grounds of the present application, as contained in the Applicant’s application, are as follows:

- a) Respondents claim that the Applicant made unauthorized use of five images for print ads or five layered photographs and that this unauthorized use constituted copyright infringement.
- b) The five images for print ads or five layered photographs were procured by the Applicant for the Belize Tourism Board as part of a print ad marketing

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<sup>9</sup> Contrary to Section 5.(1) of the Copyright Act.

<sup>10</sup> Contrary to Section 33(1) of the Copyright Act

campaign targeted to the North American tourist markets to promote Belize as a premier tourist destination.

- c) The unauthorized use of the five images for print ads or five layered photographs being alleged and being the subject of the instant claim was confined to North America and none of the prints ads or layered photographs were published or circulated in Belize. Any alleged infringing act then would have occurred outside Belize.
- d) The Applicant is not a resident of Belize and the Applicant would incur substantial costs in having to litigate the matter in Belize.
- e) The Applicant's witnesses are not residents of Belize and it has no business presence or operation within the jurisdiction of Belize.
- f) The only factor linking the claim for copyright infringement to Belize is the fact that the Respondents are residents of Belize.
- g) The Applicant says that copyright infringement is a jurisdictional claim and requires that there be publication or circulation within the jurisdiction of Belize.
- h) In all the circumstances the Applicant says that Belize is not the most appropriate forum to hear and determine this matter.
- i) In respect to the claim for breach of contract, the said claim discloses no reasonable grounds for bringing the claim owing to the fact that at the material time the contract which is the subject of the Respondents' claim had terminated by effluxion of time and was fully discharged by both parties and there were no expressed or implied terms continuing in force in relation to any of the provisions of the said contract. Therefore the Respondents cannot point to any contract valid and in force at the time of the alleged infringing acts that would make the alleged infringing acts breach of contract.

### **The Evidence**

[19] Affidavit evidence has been filed by the Applicant and the Respondents but it seems to me that the affidavit in relation to the application for strike out carries very little weight as such application must depend on the sustainability and coherence of the claim against the Applicant on its face and not by reference to any evidence to which

the Applicant deposes. The situation may be different in relation to the summary judgment application and the application for a stay on the basis that the Supreme Court of Belize is not the most appropriate forum.

- [20] Unfortunately the affidavit evidence of the Applicant does not specifically address any of the matters which are relevant to the application for a stay and in particular does not provide evidential support for the grounds of the application in relation to the Applicant's allegation that Belize is not the appropriate forum for the copyright and contractual claims brought against it.

### **The law in relation to Copyright**

- [21] The Copyright Act provides a comprehensive and complete statutory scheme governing copyrights or rights in the nature of copyright in which the photographs, irrespective of artistic quality, would be included within the definition of an "artistic work" and that the author of such work is the person taking them.

- [22] Under the Copyright Act the author of the photographs has to have some connection with Belize (in the case of an individual, by being a citizen, having habitual residence in Belize, or if it is a body corporate it is a body incorporated or established under any written law of Belize) in order for them (published or unpublished) to enjoy protection in Belize.

- [23] Sect 9.-(1) of the Copyright Act provides as follows:

*"By virtue of and subject to the provisions of this Act, the owner of the copyright in a work shall have the exclusive right to do or to authorise other persons to do any of the following acts in Belize or on any ship or aircraft registered in Belize -*

*(a) to make copies of the work;*

*(b) to issue copies of the work to the public;*

*(c) to perform the work in public or, in the case of a sound recording, film, broadcast or cable programme, to show or play the work in public;*

*(d) to broadcast the work or include it in a cable programme service;*

*or*

*(e) to make an adaptation of the work and, in relation to such adaptation, to do any or all of the foregoing acts.”*

[24] Thus such copyright works, such as the photographs, are protected by the Copyright Act if the owner of the copyright has the exclusive right to do or authorise other persons to do the variety of specified acts in Belize. As noted these acts include making copies of the work, issuing copies of the work to the public etc.

[25] It is to be noted that the protection granted to acts in Belize is granted for a period of fifty (50) years from the end of the calendar year in which the author dies , thus making such rights of considerable economic value.

[26] Section 33.-(1) of the Copyright Act further provides:

*“(1) The copyright in a protected work is infringed by any person who, not being the owner of the copyright and without the licence of the owner thereof*

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*(a) in respect of the work, does, or authorises another person to do, any of the acts mentioned in section 9, in relation to that work;*

*(b) imports an article (otherwise than for his private domestic use) into Belize which he knows or has reason to believe, is an infringing copy of the work;*

*(c) in Belize, or on any ship or aircraft registered in Belize -*

*(i) possesses in the course of business;*

*(ii) sells, lets for hire, or by way of trade offers or exposes for sale or hire; or*

*(iii) by way of trade exhibits in public,*

*an article which he knows or has reason to believe, is an infringing copy of the work.*

*(2) Subsection (1) (c) shall apply, in relation to the distribution of any article either -*

*(a) for the purposes of trade, or*

*(b) for other purposes, but only to such an extent as to affect prejudicially the owner of the copyright, as it applies in relation to the sale of an article.*

*(3) Copyright in a work is infringed by a person who, without the licence of the copyright owner -*

*(a) makes;*

*b) imports into Belize;*

*(c) possesses in the course of a business; or*

*(d) sells or lets for hire or offers for sale or hire, any article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies.*

*(4) Copyright in a work is infringed by a person who, without the licence of the copyright owner, transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service) knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in Belize or elsewhere.”*

[27] It is important also to note that the Copyright Act is entirely self-contained and provides that “No copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or some other enactment in that behalf .”

[28] The copyright act also provides that any infringement of copyright shall be actionable in the Supreme Court at the suit of the owner of the copyright and shall have all the rights of other proprietary rights owners .

### **The CPR 2005 Procedure and law in relation to strikeout**

[29] Part 9.7(1) of the Supreme Court (Civil Procedure) Rules 2005 (CPR 2005) provides:

*“A defendant who –*

*(a) disputes the court's jurisdiction to try the claim; or*

*(b) argues that the court should not exercise its jurisdiction;*

*may apply to the court for a declaration to that effect.”*

[30] Part 9.7(6) of the CPR 2005 provides:

*“Any order under this Rule may also –*

*(a) strike out any statement of claim;*

*(b) set aside service of the claim form; and*

*(c) discharge any order made before the claim was commenced or the claim form served.”*

[31] Part 26.3(1) of the CPR 2005 provides:

*“In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*

*(a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;*

*(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings*

*(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim. “*

[32] I am prepared, therefore, for the purpose of the present application, to accept the Respondents’ submission that a strike out, as applied for by the Applicant, should be exercised sparingly and is appropriate only in the most plain and obvious case.

[33] Sir Dennis Byron, the then Chief Justice of the Eastern Caribbean Supreme Court, in relation to a similar provision of its Civil Procedure Rules, in the case of *Baldwin Spencer v The Attorney General of Antigua et al* (Civil Appeal No. 20 A of 1997, stated with authority as follows:

*“This summary procedure should only be sparingly exercised in clear and obvious cases when it can clearly be seen, on the face of it, that a*

*claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court”*

[34] I also accept the dicta of Mde, Justice Edwards in *CITCO Global Custody NV v Y2K Finance Inc*, HCVAP 2008/022, in the British Virgin Islands case, of the Eastern Caribbean Supreme Court, Court of Appeal, where she states:

*“Striking out under the English CPR, r3.4(2)(a) which is the equivalent of our CPR 26.3(1)(b) is appropriate in the following instances: where the claim sets out no fact indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim against the Applicants .”*

[35] Mde. Justice Edwards in the same case, in reviewing the governing principles in strike out applications indicated in which cases it may be appropriate to strike out a statement of case, stated as follows:

*“Among the governing principles stated in Blackstone’s Civil Procedure 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or were the strength of the case may not be clear because it has not been fully investigated. It is well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination an cross-examination of witness of ten change the complexion of a case. Also, before using CPR 26.3(1) to dispose of ‘side issues’, care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any*

*parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly”*

[36] From the authorities supplied to the court, it is clear that a court may conclude that a statement of case (including a Statement of Claim) ought to be struck out in a case where there is coherent set of facts, and that such facts, even if true, do not disclose any legally recognizable, or valid claim, as a matter of law, against the Applicant.

[37] Thus I am prepared to consider the present case on the basis that the court should only strike out the claim against the Applicant if it considers that such claim is bound to fail.

### **The Law in Relation to Summary Judgments**

[38] Part 15.2 of the CPR 2005 provides:

*“The court may give summary judgment on the claim or on a particular issue if it considers that –*

*a) the claimant has no real prospect of succeeding on the claim or the issue; or*

*b) the defendant has no real prospect of successfully defending the claim or the issue.”*

[39] Part 26.3(1) of CPR 2005 provides:

*“In addition to any other powers under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court: -*

*(b) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.*

*(c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.”*

[40] Part 15 sets out the types of proceedings for which summary judgment is not available (which do not apply to the present proceedings), the procedure for summary judgment, the evidence which is required for the purposes of such applications, and the powers of the Court on such applications.

[41] The powers of the Court are specifically set out at Part 15.6(1) of CPR 2005 which provides:

*“The court may give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.”*

[42] The summary judgment application may be defeated if the Defendant can show some “prospect” or chance of success.

[43] In determining whether there is some real prospect of success, the Court is thereby entitled to consider the merits of the case to the extent, and only to the extent necessary, to determine whether the Defendant’s case has sufficient merit to proceed to trial.

[44] It is also clear that where the Court, in a summary judgment application such as the present one, has to consider short points of law or construction, the Court is entitled to decide such points of law or construction, if it has all the evidence before it for a proper determination, and it is satisfied that the parties have had an adequate opportunity to address the points in argument.

#### **The Law of ‘Forum Non Conveniens’.**

[45] Apart from the rules to strike out statements of case above, the Supreme Court of Belize has various inherent jurisdictions to regulate its own proceedings, including by staying proceedings which have been served on persons within Belize, in order to prevent injustice.

[46] One such inherent jurisdiction is on the grounds of what has been called ‘forum non conveniens’ where “the court is satisfied that there is some other tribunal, having

competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”<sup>11</sup>.

[47] The applicable principles of law, in relation to Belize, on the grounds of ‘forum non conveniens’, as set out in the UK case of *Spiliada Maritime Corporation v Cansulex Ltd*<sup>12</sup>, appears to be as follows:

- a) Such a stay may be granted, where there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action, that is, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
- b) The burden of proof rests on the Applicant to persuade the court to exercise its discretion to grant a stay but the evidential burden may shift, if the court is satisfied that there is another available forum, on to the Respondents to show there are special circumstances.
- c) In considering the question whether there is some other forum which is the appropriate forum for the trial of the action it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the Belize court will not lightly disturb jurisdiction so established.
- d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. So it is for the connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business.

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<sup>11</sup> See the House of Lords case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] A.C. 460, as set out in the Judgment of the Court by Lord Goff in citing with approval a dicta of Lord Sumner.

<sup>12</sup> *Ibid.*

- e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.
- f) If however the court concludes at that stage that there is some other available forum, which prima facie is clearly more appropriate for the trial for the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

[48] Thus the jurisdiction to grant a stay of Belize proceedings, in appropriate cases, is highly discretionary and is to be exercised with care, even extreme caution.

[49] Further in determining whether or not Belize is the appropriate forum for the trial of the present claims against the Applicant, the Court has to consider what forum has the most real and substantial connection to the pleaded causes of action.

#### **Submissions of the Applicant**

[50] Counsel for the Applicant made detailed submissions, in support of the Applicant's grounds of its applications which attack the two separate claims for copyright infringement and for breach of contract. The effect of such submissions, if successful, would be the Respondents' claim being struck out.

[51] The first argument was that the copyright claim, based on the Copyright Act (specifically Sections, 9 33 and 148) is based on the notion that for the Respondents' claims to subsist there would have had to be publication within Belize. Submitting that Copyright is a jurisdictional type of claim, a necessary part of the Respondents' claim would be for the Respondents to make reference to unlawful publication and infringements by the Applicant, within Belize, for it to be actionable, which reference was absent in the Respondents' pleadings.

[52] Also the Respondents' claim is defective because the Respondents failed to identify or specify any alleged infringing or offending act or acts:

- a) Firstly, the Applicant in its Defence and Counterclaim and at Paragraph 5 denies publication within Belize.

- b) Secondly, the Respondents' in their Reply, makes reference to infringing publications by the Applicant on the internet, but in any event the Copyright Act is statutory and makes no reference to internet and has failed to have caught up with the internet.
- c) Thirdly, the Respondents' do not dispute that the magazines were not sold on the ground in Belize which sale is the subject of this case.

[53] The second argument is that in any event, and even if the court were to find, that the Respondents' claims against the Applicant could be maintained within Belize, the court should not exercise its discretion to try the claims against the Applicant in Belize, because Belize is not the most appropriate forum, relying on the case of Spiliada.

[54] The Applicant observes that the only nexus, or connection with the pleaded case is that the Respondents carry on business within Belize.

[55] The Third argument raised by the Applicant is that the alleged infringing works do not come within the ambit of the contract.

### **Submissions of the Respondents**

[56] In relation to the strike out application the Respondents' submit that:

- a) the principles in relation to strike out are not satisfied in the present case;
- b) it is not a plain and obvious case for strike out on a close examination of its claim against the Applicant, which claim is coherent, makes sense and disclose a legally recognizable claim against the Applicant;
- c) that defence has been served by the Applicant; and
- d) the law in relation to the internet is in a state of development and will otherwise deprive the Respondents of a right to a fair trial, with the ability to strengthen its case through the process of disclosure, examination and cross-examination etc.

[57] In relation to the question of Jurisdiction and the interpretation of the Copyright Act, the Respondents submit that:

- a) the Copyright Act is to be interpreted as applying in a technologically neutral manner and does not require for an infringement to occur that there has to be an act or hard copy publication within the county of Belize (that the nature of the technology used must be that this act contemplates publication by way of internet which publication is accessible to members of the public within Belize and which may be purchased by persons within Belize).
- b) copyright infringement occurs when protected works are infringed by any person who is not the owner of the copyright and who does not have a licence and who goes on to do any of the acts listed in section 9 of the Copyright Act
- c) In any event, the publications occurred within Belize and even if it took place outside of Belize, it would still be covered by the Copyright Act as such publications are governed by the Copyright Act if they fall within the listed acts under section 9 and 33(4).
- d) According to Section 33(1)(c) the work is infringed where there is commercial dealings with copyright works within Belize.

[58] With regard to (d) above the Respondents rely on the principle that pleadings should not be prolix but that it is nevertheless sufficient to show that the court has got jurisdiction.

[59] In relation to the question of ‘forum non conveniens’ the Respondents generally rely on its detailed written Submissions. Specifically they rely on the case of *Spiliada* and that the Applicant must show (1) the alternate available jurisdiction and (2) the alternate jurisdiction is clearly or distinctly more appropriate.

[60] The Respondents also rely on the case of *Credit Chimique v James Scott Engineering Group Ltd*<sup>13</sup>. and they submitted that an important factor in determining the appropriate forum for the trial of the action is the law that is to be applied to the matters in issue. That in particular the agreement conferring a licence, which dealt

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<sup>13</sup> [1982] SLT 131

with the ownership rights of the Respondents , was an agreement governed by and made pursuant to Belize Law. That in view of the fact that the Respondents' principal place of business is Belize, and that the complex issues of law that are likely to arise are better suited to be determined by a Belizean Court, applying the laws of Belize avoids the real risk that a foreign court may reach a wrong conclusion.

### **Determinations on the questions of Jurisdiction**

[61] I have determined that Section 9 of the Copyright Act is clear in its terms and allows the owner of the copyright in the photographs to have the exclusive right (so called economic rights) to do or to authorize other persons to do, the specified acts in Belize, and when combined with the jurisdictional basis of the court, that section 9 provides a clear geographical jurisdictional basis for actionable claims within the Supreme Court of Belize.

[62] I have also determined that the section of the Copyright Act dealing with infringement of the economic rights in copyrights, created by Section 9 and Section 33.(1) of the Copyright Act, makes it clear, yet again, that any such infringement of Belize copyrights, similarly provides a clear geographical jurisdictional basis for actionable claims within the Supreme Court of Belize, by indicating that such infringements must occur with reference to doing in Belize, importing into Belize or while in Belize possessing, selling, letting for hire, offering or exposing for sale or hire, or trading by exhibition in public, which the infringing party knows or has reason to believe is an infringing copy of the photographic works.

[63] I have come to the conclusion that based on the unsatisfactory nature of the Respondents' amended Statement of Claim and Reply, their claim and case against the Applicant is defective for the following reasons:

- a) There is no reasonable cause of action by the 2nd Respondents against the Applicant as the 2nd Respondents is not alleged to be author or owner of the photographic works, and has any copyright in relation thereto.

- b) There is no reasonable cause of action by the Respondents that the Applicant without the licence of the owner of the copyrights in the photographs (assuming that such owner is one or both of the Respondents ) used and/or made unauthorized uses of the photographs whether in advertisements or otherwise and made substantial profits therefrom, as the Respondents , crucially failed to ground the jurisdictional basis of their claims against the Applicant, in any way, or at all, by reference to any use in Belize.
- c) The Respondents failed in their pleadings to sufficiently or at all particularise any alleged unauthorized use (or use without a licence) of the alleged publication and reproduction by the Applicant of the photographs , including by placing such photographs on the internet which was thereby accessible in Belize.

[64] Based on the facts and circumstances of the present case, as pleaded by the Respondents in relation to the infringement of copyright and breach of licence, and a careful interpretation of the relevant provisions of the Copyright Act, the Respondents' case does not amount to a coherent case or set of facts, against the Applicant and, even if it did, and was true, discloses no legally recognizable, or valid claim, as a matter of law, against them.

[65] For the above reasons I have come to the conclusion that the pleadings as they stand, show and constitute a plain and obviously unsustainable case against the Applicant in relation to infringement of copyright and that the Respondents' claims cannot succeed against them in this regard.

[66] I must say that I also carefully considered, and pondered long and hard, as to whether, in the absence of clear legal authority on the position of the applicability of the internet to the clear jurisdictional provisions of the Copyright Act, requiring infringements etc. to be within Belize, that there may be a substantial point of law to be considered, or that the law may be in development; and/or that the state of law may not admit a plain and obvious answer. But in the circumstance of the pleadings I felt constrained to determine, which I do, that such a point of law does not arise

within the context and on the pleading of this case. I have therefore found, that by reason thereof the Respondents's case is bound to fail in this regard.

- [67] In the instant case, the photographs, the subject of the alleged copyright infringement, were published in North America, as the Applicant contends and pleads, to target the North American tourist markets, and this was not counterbalanced by any plea to the contrary by the Respondents . The targeting of the North American market in any event will hold sway over any possible accessibility by way of the internet which the Respondents may be able to prove and will trump any vague allegation of general accessibility on the internet to persons in Belize of the photographs.
- [68] I accept that the publication outside of Belize of the photographs may have been unauthorised or without the licence of the Respondents , but I am not satisfied on the pleadings that any such publication were alleged to have been done, imported into Belize or possessed by anyone while in Belize, or sold, let for hire, offered or exposed for sale or hire or traded by exhibition in public, by the Applicant knowing or having reason to believe the same is an infringing copy of the photographs, such that the geographical jurisdictional basis for actionable claims within the Supreme Court of Belize by and with reference to Belize, may be triggered under the Copyright Act.
- [69] In relation to the suggestion by the Respondents that the internet was used as a method of publication within Belize, and that the photographs were not thereby confined to North America, but indeed were received and accessible in Belize, I am far from satisfied, on a careful examination of the Statement of Claim and even the Reply (where reference was first made to the internet) that these contained actionable allegations on the basis of which would ground the jurisdiction of this court against the Applicant. In fact, I am satisfied that the reverse is the case.
- [70] In any event having carefully read the Copyright Act, which was enacted after the advent of the internet and digital technology, I am not satisfied that it is technologically neutral as submitted by the Respondents . On the contrary the Copyright Act in many places makes reference to digital or internet technology by

referring to ‘computer program’ and ‘computer language code’<sup>14</sup> “computer-generated” works<sup>15</sup>, ‘wireless-telegraphy’<sup>16</sup>, ‘electronic retrieval system’<sup>17</sup> ‘encrypted transmissions and broadcasts’<sup>18</sup> etc.

[71] It seems to me that if the draftspersons of the Copyright Act had intended to make provisions for the internet then they would have done so and would not have specifically provided a geographical jurisdictional basis for copyrights by reference to Belize, and for their infringement in the same way. In any event the Respondents did not in their pleadings raise this as a matter of fact or law which would make such a determination by the courts a live issue or question.

[72] In relation to the separate argument on ‘forum non conveniens’, for the above reasons, I consider that the Applicant has in any event, discharged the burden on it by showing that Belize is not the natural or appropriate forum for the trial as there is insufficient connection for the Supreme Court of Belize to accept jurisdiction of the claims against the Applicant. This is because the Copyright Act would not apply to the consolidated claims against the Applicant and that Wisconsin, USA, where the Respondents has a registered office, or the USA generally (where any alleged unauthorized publications of the Respondents’ works were likely published) is an available and appropriate forum having competent jurisdiction for the trial of the claim against the Respondents. I accept, however, that the evidence on this question is scanty on both sides and far from satisfactory.

[73] In my view, based on the scanty evidence available, the evidential burden had therefore shifted to the Respondents to show there are special circumstances not to grant the stay. In all the circumstances, including my finding that the copyright law of Belize does not govern the relevant transactions and the lack of other (real or substantial) connecting factors generally with Belize, I would in any event be minded to grant the stay of proceedings.

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<sup>14</sup> Section 3(1) with reference to “adaption” and “computer-generated work”

<sup>15</sup> Section 3(1) with reference to “artistic work”

<sup>16</sup> Section 3(1) with reference to a definition of “wireless telegraphy”

<sup>17</sup> Section 5(1) with reference to “publication” and Section 23(b)

<sup>18</sup> Section 6(1) with reference to lawful reception of encrypted broadcasts.

[74] If I am wrong about the jurisdictional basis of my conclusions, including the non-applicability of the copyright law of Belize, then Belize would of course be the appropriate forum and I could not, therefore say that the Applicants have discharged the burden on them under the *Spiliada* case in persuading me to exercise the court's discretion to grant a stay.

**Determination on the issues of breach of contract**

[75] I have also determined that the cause of action for breach of contract in relation to the photographs is entirely derived from and created by the Copyright Act and that all dealings with Belize copyrights, including the granting of a licence in relation to same, is derivative and thereby dependent on the said Act.

[76] In relation to the licence agreement I am not satisfied, that on a clear and liberal reading of the Respondents' pleadings, that the licence is at all relevant to the present proceedings. This is because it is clear that the actionable basis of the Respondents' contractual claims is the unauthorized use (use without a licence) of the photographs under the Copyright Act. All references within the Respondents' pleadings to the licence appear to be based on a confused and incoherent basis of the Respondents' causes of action (the somewhat contradictory claims for breach of the licence agreement and for use of photographs without a licence) and is irrelevant to the stating of the Respondents' case.

[77] In this context the reference to Clause 12 of the terms and conditions of the expired licence agreement between the Respondents and the Applicant, does not, it appears to me, assist the court one way or another in the determination of any of the questions before the court, including in determining what is the applicable law to be applied. Any such term certainly, in my view, cannot trump the clear jurisdictional basis of the Copyright Act as outlined above.

[78] I therefore find that the claim by the Respondents for breach of contract discloses no reasonable grounds for bringing the claim against the Applicant as at the material time, as pleaded, the licence had expired and no surviving term was in existence such that the Applicants could be said to be in breach of contract. As a result, I have determined that the claims for breach of contract should be struck out.

[79] Alternatively, for the same reason, I would grant the Applicants summary judgment in relation to the claim for breach of contract as the Respondents have no real prospect of succeeding on the claim for breach of contract.

### **Costs**

[80] I therefore Order that the Respondents pay the Applicant costs to be agreed or prescribed under Part 64.5 – 64.7 of CPR 2005.

### **Disposition**

[81] For the reasons given above, this court hereby grants the Applicant the following reliefs:

- a) That it is declared the Supreme Court of Belize has no jurisdiction to try the part(s) of the claim against the Applicant relating to copyright infringement.
- b) That it is ordered that all part(s) of the claim relating to copyright infringement against the Applicant be struck out.
- c) That it is ordered that all part(s) of the claim against the Applicant relating to breach of contract is similarly struck out.
- d) Alternatively that it is ordered that summary judgment be granted in favour of the Applicant against the Respondents in respect to the part(s) of the claim for breach of contract.
- e) Finally that it is ordered that the case against the Appellant is dismissed with prescribed costs or costs as otherwise agreed.

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**The Hon Mr. Justice Courtney A. Abel (Ag)**