

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

26/1

NOT
RECOMMENDED

CP 148/94

BETWEEN S. HUNT

Plaintiff

3

AND NESTLE NEW ZEALAND LIMITED

First Defendant

AND J. WALTER THOMPSON
INTERNATIONAL (NEW ZEALAND)
LIMITED

Second Defendant

Hearing: 9 November 1995

Counsel: H. Rennie QC & Mr Gibson for Plaintiff
S.A. Dyhrberg for Defendants

Judgment: - 9 JAN 1996

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:

Russell McVeagh McKenzie Bartleet & Co, Wellington, for Defendants

On 27 May 1994 the plaintiff, in this case Sam Hunt, issued proceedings against the defendants. In his proceedings he claims he is a poet and entertainer known throughout New Zealand and in 1993 the first defendant conducted a television advertising campaign for its confectionery product "Oddfellows". It appointed the second defendant to act as its agent for that campaign. It is pleaded that in the advertisement the plaintiff was depicted consuming one of the first defendant's products and addressing the confectionery before consumption in terms indicating approval and endorsement of the product. It is claimed that the principal depiction of the plaintiff was an appropriation of a material part of the script of another television advertisement in which the plaintiff appeared, which script was written by and is the copyright property of the plaintiff. The part so appropriated comprised the dramatic performance of the plaintiff and the words "God speed, you are on your way". The plaintiff pleads that at no time did he agree to the creation or transmission of the advertisement by the first defendant and the second defendant.

Three causes of action are pleaded against the defendants. Firstly breach of the Fair Trading Act 1986. The second cause, breach of copyright. The third cause is a claim of right of publicity, pleading that the defendants by their actions, without the consent, or agreement, of the plaintiff, falsely represented to the public that he had either personally endorsed the product "Oddfellows" or had agreed to permit that endorsement to be given by an actor representing the plaintiff.

A statement of defence was filed on 11 July 1994. On 1 August 1994 a notice by defendants for discovery was issued against the plaintiff and he filed a list of documents on 20 September 1995 and a supplementary list on 6 April 1995. The second defendant filed a list of documents on 15 August 1995. In June

1995 the defendants filed a notice to the plaintiff to answer interrogatories and the plaintiff filed his verified answers on 8 September 1995.

Thus as to the documentation it seems that delays in that area rest with the plaintiff. On 3 November 1995 the plaintiff filed an application to set the proceeding down for hearing pursuant to R.437. On 20 October 1995 the defendants filed a notice for discovery against a non-party and an application requiring the plaintiff to answer interrogatories. I heard the latter application which is the subject of this decision and adjourned the discovery application and the plaintiff's setting down application. The interrogatory application seeks orders:

- 1 That the plaintiff provide sufficient answers to the interrogatories numbered 1 and 4 (d), in the defendants' notice to answer interrogatories dated 29 June 1995.
- 2 The defendants be permitted to ask the following set of interrogatories:
 - a In respect of the draft hand written script, document number 2 of the plaintiff's supplementary list (annexed as schedule A to the notice to answer interrogatories dated 29 June 1995) please
 - i Identify the author or authors of the document in terms of the Copyright Act 1962 (as opposed to whose writing appears on the document).
 - ii Specify whether the content of the document is a result of the contribution of one or more persons.

- iii Identify the persons referred to in the answer (ii) above.
- iv Identify which part of the handwritten script was contributed by each person.
- b To the extent that the contribution to the script was sourced from another literary work or any other written work, please identify the work.

The application is made on the grounds that -

- a The order sought in paragraph 1 above was necessary on the ground that the plaintiff has failed to provide a specific and substantial answer without evasion to interrogatories numbers 1 and 4 (d) in the defendants' notice to answer interrogatories dated 29 June 1995.
- b The order sought in paragraph 2 above is necessary because the plaintiff's answer to interrogatory
 - i Discloses additional facts relating to the creation of the script.
 - ii Gives rise to a number of ambiguities.

The plaintiff is opposed to answering the interrogatories. Ms Dyhrberg in support of the application submits that the defendants' application for an order requiring the plaintiff to better answer specified interrogatories and allowing the defendants to ask a second set of interrogatories dealing with issues arising from ambiguous answers given to the initial interrogatories should be dealt with and answers given before trial. She submits the initial interrogatories which

were filed on 29 June this year were essentially concerned with Mr Hunt's claim to copyright ownership of the New Zealand Endeavour script and that the plaintiff's answers to two of the specified interrogatories are insufficient and are ambiguous. They are -

a **Interrogatory 1.**

Interrogatory 1a required the plaintiff to identify the author of the New Zealand Endeavour script. It states: "In respect of the handwritten script, document number 2 of the plaintiff's supplementary list please identify -

a the author of the document.

In verified answers to the interrogatories, dated 31 August 1995, the plaintiff answered that interrogatory as follows:

"The document is in my handwriting, I am the major contributor of its content".

Ms Dyhrberg submits the Copyright Act 1994 provides for the question of authorship of a work made before the commencement of that Act to be determined in accordance with the earlier Act. (First Schedule, section 7). The Copyright Act 1962 she says does not contain a definition of "author" but in practice a distinction has always been drawn between an author or originator of a work and, at the other extreme an amanuensis - a person who merely transcribes the creator's material. The distinction she says was well stated by Mr Justice Farwell in *Donoghue v. Allied Newspapers* (1937) All ER 503 at 507, where he said:

"If an author employees (sic) a shorthandwriter to take down a story which the author is composing, word for word, in shorthand and the shorthandwriter then transcribes it, and the author then has it published, the author and not the shorthandwriter is the owner of the copyright. A mere amanuensis is not, by taking down word for word the language of the author, become in any sense the owner of the copyright."

Definitions of "author" can be found outside the Copyright Act, Walker in the *Oxford Companion to Law* defines an author in terms of copyright law as:

"The person, including a translator, who creates a literary work by selecting the language used..."

Copinger and Skone James suggest:

"... prima facie the author of a literary work is the person who originates the language used..."

It is submitted that those definitions clearly demonstrate that authorship of a document and the question of whose handwriting are on the document are entirely separate issues.

Ms Dyhrberg says that by stating "The document is in my handwriting. I am the major contributor of its content", Mr Hunt has not answered Interrogatory 1(a) which specifically addresses authorship of the document. The interrogatory she says is precise, and there is long established authority that a party is entitled to be asked if he or she wrote a document (*Dalrymple v. Leslie* (1881) 8 QBD 5). The plaintiff it is submitted is required under rule 283 to answer the substance of the interrogatory without evasion, to the best of his knowledge, information and belief.

The defendants submit that the plaintiff's answer is insufficient and evasive and consequently does not satisfy this rule. The defendants do not go so far as to

suggest that Mr Hunt acted as an amanuensis for the script, but the possibility of joint authorship, ie, Mr Hunt creating some lines but not others, it is claimed, cannot be ruled out.

Ms Dyhrberg submits that as stated by Mr Justice Kirpal in *Najma Heptulla v. Orient Longman Limited* (1989) 1 FSR 598:

"...if there is intellectual contribution by two or more persons, pursuant to a pre-concerted joint design, to the composition of a literary work then those persons have to be regarded as joint authors."

Because of the answer given and the refusal of the plaintiff to give any clarification of it the defendants seeks an answer to the second set of interrogatories which they wish to deliver. As to interrogatory 1(a) Mr Rennie argues that when one refers to the statement of claim and relates it to the question asked then the answer given is sufficient. Further he says the question really goes to a substantive matter involving mixed questions of law and fact which the plaintiff will have to prove at trial. He says (like the application seeking a better answer to interrogatory 4) that the defendants have had sufficient time to have had all interlocutory matters settled and that the present application represents an attempt to litigate issues before trial which can only be properly determined there. Despite Mr Rennie's submissions as to interrogatory 1(a) I do think the defendants raise an argument of substance and that the issue of authorship should be clarified as a matter of fairness to the defendants before trial and I think the best way to clarify such issue is to allow an interrogatory, in the form set out in para (2) of the defendants' application to be asked, and I order accordingly.

It is also claimed that the plaintiff has failed to properly answer a second interrogatory, namely Interrogatory 4. It required for the plaintiff to answer the following:

- 4(c) "Whether agreed to or not, was the plaintiff aware of any term or condition relating to copyright ownership or any other ownership of the script or performance by the plaintiff."

The plaintiff answered:

"I was aware of terms of copyright, ownership and film rights."

Interrogatory 4(d) required the plaintiff to answer the following:

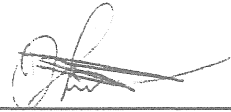
"If so, what was that term or condition?"

The plaintiff answered:

"I understood, by the time of the making of the commercial, because of the use of my poetry, that my copyright was protected and my ownership of performance was protected."

The defendants allege those are not sufficient answers because they do not state how, on the plaintiff's understanding, his copyright was protected and are ambiguous with regard to the subject matter of the alleged copyright. However given the form in which the questions are asked I think the answers are sufficient. I therefore make no order in respect of Interrogatory 4. It seems to me that the plaintiff's knowledge of copyright law is a matter which should be properly explored at trial rather than have the matter opened up by a series of interrogatories now. Further I do not think much will be gained by attempting to explore in detail the plaintiff's knowledge of copyright law at this time. The interrogatories are to be answered within 14 days of 21 November 1995.

Costs reserved.



Master J.C.A. Thomson