IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2004-485-1520

BETWEEN	KABUSHIKI KAISHA SONY COMPUTER ENTERTAINMENT (ALSO TRADING AS SONY COMPUTER ENTERTAINMENT INC.) First Plaintiff
AND	SONY COMPUTER ENTERTAINMENT EUROPE LIMITED Second Plaintiff
AND	SONY COMPUTER ENTERTAINMENT NEW ZEALAND LIMITED Third Plaintiff
AND	NICHOLAS VAN VEEN First Defendant
AND	ANDREW HELLYER (DISCONTINUED) Second Defendant

Hearing: 8 June 2009

Appearances: G. Williams - Counsel for Plaintiffs
No appearance for the First Defendant

Reasons: 10 June 2009

REASONS FOR DECISION OF ASSOCIATE JUDGE D.I. GENDALL

Solicitors: Bell Gully, Solicitors, PO Box 4199, Auckland

Introduction

[1] On 8 June 2009 a taking of an account in this proceeding occurred. This was the taking of an account of all monies received by the first defendant from sales of a program known as HD Loader, including all royalties or commissions the first defendant had received as a result of such sales.

[2] Mr Williams appeared as counsel for the plaintiff. There was no appearance by or for the first defendant.

[3] On 22 May 2009, however, the first defendant had filed in this proceeding an affidavit he had sworn on 18 May 2009 enclosing as Exhibit "A" an account of all monies he had received from the HD Loader program in question.

[4] After considering all the material before the Court including this affidavit and account from the first defendant, and a Memorandum filed by counsel for the plaintiffs dated 8 June 2009, and after hearing submissions from counsel for the plaintiffs, certain orders were made.

Orders

[5] Those orders which I now confirm, were:

> UPON THE ACCOUNT directed by the Orders of this Court dated 24 February 2009 and 13 May 2009.
>
> AND UPON hearing from Counsel for the Plaintiffs.
>
> AND UPON reading the Memorandum of counsel for the plaintiffs dated 8 June 2009 and the Account verified by affidavit by the first defendant.
>
> THE COURT DECLARES that the money received by the first defendant from sales of the HD Loader program was HK$9,000 and US$65,924.22 and that these sums are due to the plaintiffs.
>
> AND IT IS ORDERED that the first defendant do pay to the plaintiffs the sums of HK$9,000 and US$65,924.22 and compound interest thereon at the interest rates prescribed by the Judicature Act 1908 from 23 July 2004 to the date of this Order with yearly rests.

> AND IT IS ALSO ORDERED that the first defendant do pay the plaintiffs their costs of this proceeding on a 2B basis from 15 December 2006 to the date of this Order, together with the disbursements listed in Schedule 2 attached to the Memorandum from counsel for the plaintiff dated 8 June 2009."

[6] In making these orders I indicated that my reasons for the decision would follow. I now set out those reasons.

Reasons for Decision

[7] The requirements on ordering of accounts are set out in Rules 16.1-16.34 High Court Rules. Rule 16.2 enables the Court on the application of a party such as the plaintiff here to order an account or an enquiry in a proceeding.

[8] On 24 February 2009 an order was made requiring the taking of an account here of the monies received by the first defendant from sales of the program in question. It was directed that this was to occur at 2.15 pm on 8 June 2009.

[9] In addition, in that 24 February 2009 order, directions were made for the first defendant to file and serve the account in question verified by affidavit by 24 March 2009.

[10] This did not occur. Instead, on about 24 March 2009 the first defendant filed an affidavit requesting further time of some 8 weeks to file the affidavit in question so that in his words he could "make the necessary enquiries with the aim of giving an affidavit with more detail".

[11] In a Minute I issued on 13 May 2009, an amended direction was made allowing the first defendant until 5.00 pm on 19 May 2009 to file and serve his account and affidavit.

[12] As it happened, this affidavit and account was filed late on 22 May 2009, but the plaintiffs took no objection to the late filing of these documents.

[13] Instead, counsel for the plaintiff, Mr Williams, appeared before me when this matter was called on 8 June 2009 and also indicated that no issue would be taken with

the first defendant's affidavit and account and, for the purposes of the taking of the present account, the figures set out therein were entirely accepted.

[14] The plaintiffs therefore sought from the Court a certification that those sums specified by the first defendant were to be the result of the Account and they requested that judgment be entered for those amounts together with interest and costs.

[15] As I noted at the outset of this judgment, on 8 June 2009 there was no appearance by or for the first defendant. Although Rule 16.15 High Court Rules seems to envisage compulsory attendance by the parties either in person or by their solicitor or counsel at the commencement of an accounting, Rule 16.15(2) enables the Court if it is "satisfied that notice of the time and place (of the account herein) has been given and received" to proceed with the account hearing in the absence of any party.

[16] In the present case, I am satisfied that the first defendant was given proper notice of the time and place of this account hearing and that this occurred on several occasions. The first of these was in the Minute I issued in this proceeding on 24 February 2009. Then, in a further Minute I issued on 13 May 2009 in response to the first defendant's request for further time to file his affidavit, the date, time and place for taking of the account was again confirmed.

[17] There is no doubt in my mind that the first defendant had proper notice of the time and place of the account hearing and I am satisfied under all the circumstances that it can proceed in his absence.

[18] I say this bearing in mind also that, in terms of Rule 16.13 High Court Rules, the plaintiff has accepted without question that the items listed in the first defendant's account and affidavit are not in dispute and are to be treated as correct.

[19] Finally, in terms of Rule 16.14 High Court Rules, I note that the time appointed for the account hearing being 2.15 pm on 8 June 2009 was set and notice initially provided to all parties including the first defendant over 3 months ago on 24 February 2009.

[20] Turning now to the first defendant's account and affidavit, this sets out the amounts that he acknowledges having received from sales of the HD Loader program. The amounts he has deposed that he received were as follows:

No. of Item	Date when received	Names of persons from whom received	On what account received	Amount received
1	21/5/2004	Brian Kane	HK Standard Chartered 325-1-015374-0	HK$9,000.00
2	21/5/2004	Brian Kane	HK Standard Chartered 325-1-015374-9	US$21,426.82
3	27/5/2004	Brian Kane	HK Standard Chartered 325-1-015374-9	US$11,998.70
4	10/6/2004	Brian Kane	HK Standard Chartered 325-1-015374-9	US$32,498.70

[21] It must follow that, as the first defendant acknowledges in his sworn statement, he has received HK$9,000.00 and US$65,924.22 from sales of the HD Loader program. Paragraph 3 of the first defendant's 18 May 2009 affidavit confirms these payments and states:

> "3. I have now obtained copies of bank account records which show payments I received relating to sales of the HD Loader software; this has allowed me to provide an accurate account.
>
> 4. Accompanying this affidavit is the account of all monies received by myself from sales of the HD Loader program …".

[22] As I have already noted, these amounts of HK$9,000.00 and US$65,924.22 are entirely accepted as correct by the plaintiff.

[23] On this basis, I certify that these sums are due in terms of the account sought by the plaintiffs. Judgment is entered against the first defendant for these amounts of HK$9,000.00 and US$65,924.22. Orders to this effect were made on 8 June 2009 as I have noted above.

[24] This leaves for consideration two additional matters:

(a) The first is a request by the plaintiffs for compound interest (with yearly rests) on these outstanding amounts at the respective interest rates under the Judicature Act 1908 that applied at the relevant dates; and

(b) The second is a claim by the plaintiffs for the costs of this proceeding and disbursements.

Compound Interest

[25] Compound interest is sought by the plaintiffs here on the amounts of HK$9,000 and US$65,924.22 certified for payment above.

[26] Although it is clear from s. 87(1) Judicature Act 1908 that interest on interest (that is compound interest) cannot be awarded under the Act on sums for which judgment is given, such compound interest, however, can be awarded in equity – *Equiticorp Industries Group Limited (in statutory management) v The Crown* (No. 3) (Judgment No. 51) [1996] 3 NZLR 690.

[27] Courts of equity have a jurisdiction to award interest which is outside and additional to this statutory power contained in s. 87(1) Judicature Act 1908 – *Rama v Millar* [1996] 1 NZLR 257 (PC) and see McGechan on Procedure Para J87.03.

[28] That courts have the power to award compound interest in equity, as I have noted above, was confirmed in *Equiticorp Industries Group Ltd (in stat man) v The Crown (No 3) (Judgment No 51).* In that case, the Court held that compound interest, like all interest awarded in equity, was not to be awarded as a punishment; rather, an award of compound interest stemmed from the principle that equity would not allow a trustee to make a profit as a consequence of breaching his or her trust. If the trustee was presumed to have earned compound interest through the use of trust money, then equity would award compound interest as part of the restitution. But, in that case the Court refused to award compound interest against the Crown as a constructive trustee

because the Crown was not engaged in trade or commerce and, therefore, could not make a profit out of the use of the money in question: *Sims Court Practice*, para JUD87.13.

[29] Equity's general approach to interest was summed up by Lord Woolf in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 WLR 803, 852 (and cited in *Equiticorp*) in the following way:

> "In his review of the authorities, Hobhouse J drew attention to two lines of authority, one where simple interest is being awarded, and the second where compound interest is being awarded. In the former situation, the court, according to Hobhouse J, is concerned to compensate the party for what he has lost in consequence of not receiving the money to which he was entitled. In the latter situation the court is concerned with the benefit which the payee has derived as a result of the payment having been made. The distinction is a valid one if what is being considered is the right to interest on the one hand under the statute or common law and on the other in equity. The distinction is not valid if a different position is being considered, namely, whether simple or compound interest should be awarded in equity. Equity, in the case of both simple and compound interest, will look at the benefit which the payee has derived. If it is equitable so do to, the payee will be ordered to pay simple or compound interest depending upon the benefit which has resulted from the payment. [emphasis added]

And in that case, Lord Goff said (at 821):

> "In my opinion the jurisdiction should now be made available, as justice requires, in cases of restitution, to ensure that full justice can be done. The seed is there, but the growth has hitherto been confined within a small area. That growth should now be permitted to spread naturally elsewhere within this newly recognised branch of the law. No genetic engineering is required, only that the warm sun of judicial creativity should exercise its benign influence rather than remain hidden behind the dark clouds of legal history."

[30] An award of compound interest with regard to damages for an intellectual property wrong does not appear to have been considered yet in New Zealand. However, in the Australian case *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 1141 the Federal Court of Australia did extend compound interest to intellectual property damages. At para 40 of its decision, the Federal Court found that the rationale for awarding compound interest in cases of an accounting by a defaulting fiduciary was also applicable "where a person, in the course of business, infringes another's copyright and is required to account for profits arising from the infringement": The decision went on to say at para. 40:

> "That rationale is simply that the defaulting fiduciary or copyright infringer should not be allowed to make any profit from the breach of fiduciary duty or infringement of copyright and should therefore be required to account for all profits made from the breach or infringement. In the present case, I infer that the profits made by Eagle were "used as working capital for earning further profits". It is therefore proper to award compound interest in order that Eagle will disgorge all the profits it made from the infringement."

[31] In my view the present case has direct similarities to the situation described in *LED Builders Pty Ltd.* The decision of the Federal Court of Australia there is based on the same well-established equitable principles as apply in New Zealand (as established in cases such as *Equiticorp Industries Group*), and as I see it, there is no reason why the decision in *LED Builders Pty Ltd* could not be applied to similar circumstances in New Zealand.

[32] I conclude that it is proper here to award compound interest in favour of the plaintiffs in order that the first defendant will either give up the benefit or profit he has derived from his copyright infringement or at least go some way to "disgorging all the profits he made from that infringement."

[33] I find therefore that compound interest should be awarded to the plaintiff here in equity and that in terms of establishing a proper rate of interest, the rates set out in the Judicature Act 1908 at the respective times are appropriate.

[34] As I have noted at para [5] above, an order was made therefore that the first defendant was to pay to the plaintiffs compound interest on the sums of HK$9,000.00 and US$65,924.22 at the interest rates prescribed from time to time by the Judicature Act 1908 from 23 July 2004 to the date of the Order with yearly rests.

Costs and Disbursements

[35] Costs are sought by the plaintiffs here on a category 2B basis from 15 December 2006. Counsel advises that the plaintiff has already received an order of costs up to that 15 December 2006 date.

[36] In addition, disbursements totalling $37,807.42 are sought in terms of Schedule 2 of the Memorandum dated 8 June 2009 from counsel for the plaintiff.

[37] As to costs, the plaintiff has been successful in this application and in my view is entitled to an award of costs here. The category 2B costs sought are entirely appropriate. An order for 2B costs from 15 December 2006 was made on 8 June 2009 as I note at para. [5] above.

[38] So far as disbursements are concerned, the amounts sought by the plaintiff include independent barristers' fees in relation to execution of an Anton Piller Order from Russell McVeagh dated 30 July 2004 totalling $11,193.75 and from David Laurenson dated 18 August 2004 totalling $3,375.00.

[39] In addition, two accounts from eCrime (NZ) Ltd for forensic expert searches of the defendant's computers (dated 26 August 2004 and 24 September 2004) totalling $13,591.67 are sought here.

[40] And finally, expert witness fees of Mr Adrian Speck, Barrister, London totalling £1,350 (converted to NZ$ at .3888 and amounting to NZ$3,472.00) and from Mr John Yan SC, Barrister, Hong Kong totalling HK$30,000.00 (converted to NZ$ at 4.8582 and amounting to NZ$6,175.00) are sought from the first defendant here.

[41] On the question of disbursements, Rule 14.12 of the High Court Rules states as relevant:

> "**14.12 Disbursements**
>
> (1) In this rule, -
> **disbursement**, in relation to a proceeding, -
> (a) means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and
> (b) includes –
> (i) fees of court for the proceeding:
> (ii) expenses of serving documents for the purposes of the proceeding:
> (iii) expenses of photocopying documents required by these rules or by a direction of the court:
> (iv) expenses of conducting a conference by telephone or video link; but
> (c) does not include counsel's fee.
>
> ……
>
> (2) A disbursement must, if claimed and verified, be included in the costs awarded for a proceeding to the extend that it is -
> (a) of a class that is either -
> (i) approved by the court for the purposes of the proceeding; or
> (ii) specified in paragraph (b) of subclause (1); and
> (b) specific to the conduct of the proceeding; and

(c) reasonably necessary for the conduct of the proceeding; and
(d) reasonable in amount."

[42] As McGechan on Procedure at HR14.12.01(3) notes, witnesses' expenses are a disbursement: *Progressive Enterprises Ltd v North Shore City Council* (2005) 17 PRNZ 919 at paras. 22-29. But, as they are not listed in r 14.12(1)(b), they need to be approved by the court under r 14.12(2)(a)(i). And, the costs of expert witnesses are recoverable to the extent they meet the r 14.12(2) criteria and are not disproportionate under the circumstances: *Air NZ Ltd v CC* [2007] 2 NZLR 494 (CA).

[43] The rule that expert fees are a recoverable disbursement was extended to the costs of an independent barrister attending execution of an Anton Piller order in *Hoole v Darby* (High Court, Auckland CIV 2006-404-5235, 30 March 2007, Venning J).

[44] In the present case, the items noted at para. [38] above relate to independent barrister fees in relation to the execution of Anton Piller orders. The two accoutns from eCrime (NZ) Ltd noted at para. [39] above I am satisfied were reasonably necessary to enable forensic searches of the defendant's computers to be carried out. And the expert witness fees of the barristers noted at para. [40] above for the affidavit evidence in question in my view were also reasonably necessary under all the circumstances here. Finally, I am satisfied that the amounts charged in each of these disbursements accounts is reasonable and could not be considered to be disproportionate under the circumstances prevailing in this case.

[45] That said, as I have noted at para. [5] above, an order was made for payment by the first defendant of the plaintiff's disbursements listed in Schedule 2 attached to the plaintiff's memorandum dated 8 June 2009 (totalling $37,807.42).

'Associate Judge D.I. Gendall'