Case No: IP17S00135

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (Ch)
INTELLECTUAL PROPERTY ENTERPRISE COURT
SMALL CLAIMS TRACK

Thomas More Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th April 2018
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Before:

DISTRICT JUDGE HART

- -

Between:

JONATHAN C K WEBB	**Claimant**
- and -	
CARDIFF STEEL ERECTION LIMITED	**Defendant**

- -
- -

The Claimant appeared in person
The Defendant was not represented

- -

APPROVED JUDGMENT

(Approved by District Judge Hart)

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District Judge Hart:

1. This is a claim by Mr Jonathan C K Webb, who is a professional photographer specialising in aerial photographs, which he licenses via his website. The defendant, Cardiff Steel Erection Ltd, operates a steel construction business, and has a website at www.cardiffsteelerectionltd.co.uk (the 'Website'). Mr Webb's claim is for infringement of copyright in an aerial photograph of Sophia Gardens Cricket Ground in Cardiff, the 'Image'. I have had the benefit of considering Mr Webb's claim form and particulars of claim, and also a helpful bundle of documentation and evidence prepared for his hearing, which includes a full witness statement. The defendant has only provided a short form defence.

2. Mr Webb alleges infringement under the Copyright, Designs and Patents Act 1988. All sections referred to in this judgment are sections of that Act unless stated otherwise.

The Claim

3. The claimant's case is that he is the author and owner of the copyright in the Image, which he submits is an original artistic work as defined by Sections 1 and 4. Mr Webb relies on the presumption in Section 104(2). I find there is no evidence to dispute that he is the author and copyright owner. I also accept that the Image was created in June 2008. The defendant reproduced the Image on the Website - this is accepted in the defence.

4. The claimant asserts primary infringement pursuant to Section 16. By that section the claimant, as copyright owner, has the exclusive right within the UK to undertake the various acts specified in that section. Copyright is infringed if the defendant has, without licence, done or authorised another, to do any restricted act. The restricted acts include those listed in Section 17 (copying or reproducing the work in any material form) and Section 20 (communicating the copyright work to the public by making it available by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them).

5. Pursuant to Section 77, the claimant, as author, has the right to be identified as such. The claimant's rights as author was asserted as required in accordance with Section 78, and Mr Webb identified himself in the metadata attached to the Image. Mr Webb also asserts a breach of Section 296ZG on the basis that the defendant has knowingly, or without authority, removed or altered electronic rights management information, which appears in connection with the communication of the work to the public, and that the defendant knew, or had reason to believe, that by doing, so he was inducing, enabling, facilitating or concealing an infringement of copyright.

6. The claimant asserts that the Image appeared on the Website in a modified form, without numerous copyright notices which appeared on it on the claimant's website. Mr Webb's case is that some thirty copyright notices were reduced in size so as to effectively remove them when the Image was reproduced on the defendant's Website. The notices consisted of a copyright sign, together with details of the claimant's website. The metadata was also amended to remove reference to Mr Webb.

7. Under Section 96 an infringement of copyright is actionable by the owner, and Mr Webb seeks damages in relation to the infringement.

The Defence

8. The defence refers to the fact that, in 2011, the defendant's then project manager appointed a company, Digital Nation Ltd, to design and create the Website. This was to include images of projects in which the defendant had been involved. By implication, the cricket ground was such a project, and the image was uploaded as part of the creation of the website. It follows that its use was for a commercial and promotional purpose. By way of a direction given in January 2018, the defendant was granted permission to apply to add Digital Nation Ltd as an additional party by 27 February 2018. No such application was issued, and it appears that Digital Nation Ltd may, in fact, have been dissolved.

9. There is no evidence of the contractual terms which applied between the defendant and Digital Nation Ltd. In those circumstances I find that the defendant, as the Website owner, is, in the absence of any evidence to the contrary (beyond the assertion in the defence), responsible for the primary infringements under Sections 17 and 20. It is not sufficient to avoid liability for the defendant simply to point to the fact that it has employed another entity to produce the website (*Hoffman v Dare [2012] EWPCC 2).*

10. In those circumstances I find that there has been primary infringement and turn to the assessment of damages. I propose to deal with the substance of the breach asserted under Section 296ZG as part of the totality of that assessment. The principles to be applied are not controversial; damages are compensatory, not punitive, but damages are to be liberally assessed. The burden is on Mr Webb to establish the loss that has been caused by the infringement. This is a lost royalty type case under Category 2 of the categories identified in *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd [1975] 2 All ER 173)* because Mr Webb's business takes the form of licensing his images. This is almost always on the standard terms and conditions set out on his own website. His current going rate is £390.00. This fee is the licence fee that Mr Webb charges for use of an image without attribution, although his terms require that the metadata remain intact. The licence is a simple and generous one; it is non-transferable, without time limit, and permits any web use, including commercial use. The standard fee, as at the date of infringement, which appears to have occurred at some point in 2011, or at the latest in 2012, would have been somewhat less.

11. In addition, Mr Webb seeks an order of additional damages, alternatively under Section 97(2) or Article 13 of the Enforcement Directive. Pursuant to Section 97(2) the Court may, having regard to all the circumstances, and, in particular, to the flagrancy of the infringement, and any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require. Flagrancy may be demonstrated by scandalous or deceitful conduct on the part of the defendant.

12. Article 13 of the Enforcement Directive is in somewhat broader terms, and provides that: '*where the defendant knowingly or with reasonable grounds to know, engaged in infringing activity, the damages awarded must be appropriate to the actual prejudice suffered as a result of the infringement'*. The Court shall take into account all

appropriate aspects, including negative economic consequences, such as unfair profits made by an infringer. Article 3(2) of the Enforcement Directive requires that remedies for infringement should be dissuasive.

13. In this case there is no need to consider the difference between these two formulations since I am satisfied on the facts that, not only did the defendant have reasonable grounds to know that they engaged in infringing activity, but that the defendant was guilty of flagrancy. The reasons for that are as follows: firstly, the removal of the copyright notices and metadata from the Image will have required some work and care, and that was clearly done knowingly. It is not a matter that the defendant commented upon, and doubtless, had they done so, they might have professed ignorance and sought to blame Digital Nation Ltd. However, Mr Webb has pointed out that the consequence of the removal of the copyright notices is a somewhat blurry image. I find that this should have been sufficient to put the defendant on enquiry. Secondly, the infringement is a long standing one. Thirdly, the matter was first drawn to the defendant's attention by way of a letter dated 11 July 2017.

14. Mr Webb has produced evidence of receipt of this letter, but it was ignored. The defendant denied receipt which I do not accept. There was one response to Mr Webb's various correspondence via an e-mail of 29 August 2017, which takes much the same form as the defence. Mr Webb responded forthwith, informing the defendant that they might have a claim against Digital Nation Ltd, but it did not absolve the company of responsibility as infringer. Mr Webb has produced a read receipt in relation to his e-mail response dated 30 August 2017. The defendant did not respond to Mr Webb's e-mail, and the letter of claim was then ignored, although the Image was removed from the defendant's website around the end of August 2017. Accordingly, it is fair to say that the defendants were slow in removing the Image, and unresponsive in relation to compensation. In addition, the defendant's Website included a generalised assertion of copyright, the 'Cardiff Steel Erection Ltd, Copyright 2011'.

15. I am satisfied that the defendant will have derived some commercial benefit from the use of the Image over the years 2011/2-2017. In those circumstances, I propose to grant damages, including additional damages, in a total sum of £1,500. In addition, I grant interest at 3% over base from the date the cause of action arose, which I will take to be from the start of 2012. Roughly speaking, that amounts to interest for a period of 6 years 3 ½ months. For ease of calculation I will apply a global rate of 3.25%, despite the change in the base rate.

16. Mr Webb seeks an order for his costs as a litigant in person in relation to this claim on the basis of unreasonable behaviour under Civil Procedure Rule 27.14. I understand that he requested small claims mediation in this matter, but heard nothing further, and, therefore, assumes that mediation was not requested by the defendant. I am satisfied that the defendant appear to be a reasonably substantial company, which has been aware of this matter since the summer of 2017, but which has refused to engage except by filing the unsuccessful defence. They filed no evidence in relation to today's final hearing, and have given no reason why they have not appeared.

17. In those circumstances I am satisfied that the defendant's conducted has amounted to unreasonable behaviour in the face of a clear claim for infringement, and I therefore propose to award litigant in person costs at the usual rate of £19.00 per hour. Mr

Webb has prepared his case thoroughly and in detail. It has plainly cost him some considerable trouble, and he estimates that he has spent, taking into account his time today, a little over fifty hours on this matter. Copyright is a complicated area, and Mr Webb's thoroughness is of assistance to the Court. I therefore propose to award his costs in a total of thirty hours, which I regard as reasonable and proportionate, at the rate of £19.00 per hour, which amounts to costs of £570.00. I am aware that he has incurred various stationery and postage fees, but, unfortunately, those are not available as a separate head of claim. He is, however, entitled to recover his Court fees of £285.00 per hour, and his expenses of attending today, which is a train fare of £189.70.

18. Taking the interest into account, the defendant is ordered to pay the total sum of £2,851.42 within fourteen days.