In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 454

BETWEEN:

PERFORMING RIGHT SOCIETY LIMITED

Plaintiff

-v-

BERMUDA BROADCASTING COMPANY LIMITED

1st Defendant

-and-

THE ATTORNEY-GENERAL

2nd Defendant

JUDGMENT

(in Court)[1]

Trial of preliminary issues-validity of Copyright and Designs Act 2004-whether void for repugnancy with Copyright, Designs and Patents Act 1988 (UK) as extended to Bermuda-whether Bermudian Legislature competent to afford protection to foreign copyright

Date of hearing: July 17, 2017
Date of Judgment: July 21, 2017

[1] To save costs, the Judgment was circulated without a hearing to hand down judgment.

Mr Keith Robinson, Appleby (Bermuda) Limited, for the Plaintiff ("PRS")
Mr. Peter Sanderson, Wakefield Quin Limited, for the 1st Defendant ("BBC")
Mrs Lauren Sadler-Best and Ms Tanaya J.D. Tucker, Attorney-General's Chambers, for the 2nd Defendant ("the A-G")

Introductory

1. On May 11, 2017, pursuant to an application by Summons filed by PRS on March 10, 2017, the Court ordered the trial of two preliminary issues arising from paragraphs 11 and 12 of BBC's Defence to the Plaintiff's claim for, *inter alia*, damages for breach of copyright under the Copyright and Designs Act 2004 (the "CDA").

2. PRS commenced the present proceedings against BBC alone by Generally Endorsed Writ on November 6, 2017. Because the preliminary issues ordered to be tried on May 11, 2017 sought a determination of the validity of a Public Act, the A-G was joined to the present action for the purposes of the present trial.

3. Mr Sanderson advanced two ambitious arguments in BBC's defence. Firstly he contended that CDA was, by virtue of section 2 of the Colonial Laws Validity Act 1865, entirely void from inception for repugnancy with the Copyright, Designs and Patents Act 1988 (UK) (the "1988 UK Act"), which extended to Bermuda when the CDA became operative in 2008-the application of the 1988 UK Act to Bermuda was revoked in late 2009. If correct, the result would be that Bermuda has had no statutory copyright law for nearly 8 years; however, it was contended that this legal gap could easily be filled.

4. Alternatively, it was submitted on behalf of BBC that Bermuda's colonial Legislature was not constitutionally competent to legislate in its own right in relation to foreign copyright protection as the rights conferred lacked a substantial connection to Bermuda. If correct, the result would be that Bermuda has had no mechanisms for international copyright protection for nearly 9 years, a gap which, it was contended, could also easily be filled.

BBC's pleaded case

<u>The validity argument</u>

5. Paragraph 11 of BBC's Defence reads as follows:

"*Paragraph 17 is denied and the infringement claim generally is denied. The Plaintiff relies on the Copyright and Designs Act 2004 (the "CDA"). It is denied that the CDA is a valid part of the laws of Bermuda. At the time that the CDA was enacted in 2008, Bermuda already had a comprehensive system of copyright law applying to it, namely the 1988 Act, an act of the UK parliament extended to Bermuda pursuant to the 2003 Order…it did not allow for the wholesale replacement of the 1988 Act with comprehensive local legislation. Accordingly, the CDA was void pursuant to the Colonial Laws Validity Act 1865, as it was repugnant to an existing comprehensive system of copyright law.*"

6. Paragraph 12 of BBC's Defence reads as follows:

"*Further or alternatively, the alleged infringement is of foreign copyright, not Bermuda copyright. The 1988 act provided for a system of enforcement of foreign copyright in Bermuda. However, this was repealed in respect of Bermuda in 2009 pursuant to the Copyright (Bermuda) Revocation Order 2009. Although the CDA purports at s. 194 to apply the CDA in respect of foreign countries and works published there (and purportedly implemented pursuant to the Copyright and Performances (Applications to other Countries) Order 2009), it is outside the competency of the Bermuda legislature to make laws applying to persons, property or things outside of the territory of Bermuda unless it has some substantial connection to Bermuda. The result is that the CDA cannot be used to give foreign property the benefit of Bermuda copyright protection. Such action could only be competent if authorised by the UK Parliament, and there is no such authorisation in respect of the CDA. There is, accordingly, since the revocation of the 1988 Act in respect of Bermuda in 2009 no current system of law in Bermuda for the enforcement of foreign copyright.*"

7. PRS seeks to enforce a 1991 license agreement ("the 1991 Agreement") between the parties and, in part, to recover royalties due for a period which spans the period when both the CDA and the 1988 UK Act were in force in Bermuda (assuming such claims are not time-barred, as BBC asserts they are). PRS alleges that the last royalty payment purportedly in compliance with the 1991 Agreement was made on December 29, 2006 and that the last inadequate payment was made on April 28, 2010 (Statement of Claim, paragraph 14). The alternative infringement claim relates exclusively to 2015, long after the extension of the 1988 UK Act to Bermuda had been revoked.

The legislative landscape

8. The legislative timeline is as follows:

- **June 12, 2003**: The Copyright (Bermuda) Order 2003 (the "2003 Order") made at Buckingham Palace, London. It provides for extending the 1988 UK Act to Bermuda and revoking The Copyright (Bermuda) Order 1962. It authorizes the Governor of Bermuda to issue a commencement notice by Proclamation;

- **June 17, 2004**: the CDA is enacted in Bermuda;

- **February 8, 2008**: (1) the 1988 UK Act is brought into force; and (2) the CDA becomes operative;

- **October 15, 2009**: The Copyright (Bermuda) Revocation Order (the "UK 2009 Order") is made in London with an operative date of November 12, 2009;

- **November 5, 2009**: the Copyright Performances (Application to Other Countries) Order 2009 (the "Bermuda 2009 Order") is made by the Minister under the CDA, providing reciprocal copyright protection in respect of copyrights registered in the listed foreign countries, with an operative date of November 12, 2009;

- **November 12, 2009**: (1) the 2003 Order (and the 1988 UK Act as applied to Bermuda) is revoked; and (2) the Bermuda 2009 Order becomes operative.

9. It is immediately clear from the above timeline that when the CDA was actually enacted by Bermuda's Parliament and received the Royal assent from the Governor (June 17, 2004), that the 1988 UK Act did not at that juncture extend to Bermuda because the 2003 Order was not operative until the CDA itself was brought into force on February 8, 2008.

10. The 1988 UK Act broadly provided similar domestic copyright protection under Bermuda law as did the CDA. The international protection provided by the 1988 UK Act was only provided after the UK Act ceased to apply to Bermuda. It was first supplied under Bermuda law when the CDA was supplemented by the Bermuda 2009 Order made under the CDA. There was seemingly never any competing UK and Bermudian international protection.

11. It is impossible to understand why the 1988 UK Act and the CDA were both brought into effect under Bermuda law on the same date in 2008. Mrs Sadler-Best gracefully declined to attempt to explain. Easier to understand is the subsequent carefully choreographed revocation date for the 2003 Order (and the 1988 UK Act with it) and the commencement date for the Bermuda 2009 Order.

12. In very broad terms, there was an inherent inconsistency between the two overlapping statutory schemes as Mr Sanderson complained. Moreover, the 2003 Order did not extend to Bermuda, *inter alia*, the following provisions of the 1988 UK Act:

> "*157…*
>
> *(4)The legislature of a country to which this Part has been extended may modify or add to the provisions of this Part, in their operation as part of the law of that country, as the legislature may consider necessary to adapt the provisions to the circumstances of that country-*
>
> *(a) as regards procedure and remedies, or*
>
> *(b) as regards works qualifying for copyright protection by virtue of a connection with that country….*"

13. Section 157 of the 1988 UK Act was to my mind clearly dis-applied in Bermuda's case because Part II of the Schedule to the 2003 Order actually embodied the numerous modifications required to adjust the 1988 UK Act's provisions for local application-rather than leaving this task to the local Legislature. Nevertheless, the 1988 UK Act was clearly extended to Bermuda in terms which did not permit modification by the local Legislature. It is self-evident that there was, in a very general sense at least, on the face of this dual legislative scheme an inherent illogicality and inconsistency between the 2003 Order and the CDA becoming operative under Bermuda law on the same date (February 8, 2008).

14. Mr Sanderson explicitly advanced his case on an "all or nothing basis", with Mr Robinson conceding that, even if the Court rejected the total invalidity argument, it should be possible at the main trial for this Court to revisit validity on a section by section basis. Accordingly, there is no need to undertake any section by section comparative analysis of the 1988 UK Act and the CDA for the purposes of determining the present trial of preliminary issues.

15. On the face of it, the dual overlapping scheme which took effect from February 8, 2008 and remained in force until November 12, 2009 seems to reflect a case of

'duelling legislatures', as far as domestic Bermuda copyright protection is concerned at least. The CDA (section 328) claimed the right to protect foreign copyrights. But the power conferred on the Minister to do so was not actually exercised until the 2009 Bermuda Order was made on November 5, 2009 with effect from November 12, 2009 when the 2003 Order (extending the 1988 UK Act to Bermuda) was revoked. It appears, without deciding the point at the present stage, that there was never any substantive conflict between the two schemes in the international copyright protection sphere.

16. However, on any view, the 2009 Bermuda Order, made on Guy Fawkes Day 2009, seems to have been more of a damp squib than a firework in Colonial Laws Validity Act repugnancy terms.

Legal findings: validity of the CDA

Preliminary matters

17. A question which appears to me to be significant to any adjudication of an alleged repugnancy between a provision of a Bermudian statute and a United Kingdom statute is what temporal lens should the issue be viewed through? The following dates are the most obvious candidates:

    - the date of enactment of the impugned Bermuda statute or statutory provision(s);

    - the operative date of the impugned Bermuda statute or statutory provision(s);

    - the date or dates relevant to the issues being determined in the proceedings in which the question of repugnancy is being determined.

18. In the course of argument I put to Mr Sanderson that his complaint fell to be determined based on the current state of the law and he insisted that it was wholly irrelevant that there was today no conflict and that the Court was entitled to look back to the date when the CDA was actually enacted (or perhaps when it became operative). This was on the hypothesis that the effect of any repugnancy in relation to the CDA as a whole was to make it void *ab initio*.

19. In my judgment it is obvious, with very little analysis, that the relevant time-frame with reference to which the issue of repugnancy must be considered will ordinarily be, to some extent at least, the date or dates which are engaged by the subject-matter of the relevant litigation. A litigant seeking a declaration that a statute or statutory provision is void for repugnancy must have a sufficient interest to properly seek such relief. The repugnancy complained of must affect the party asserting the repugnancy

to some identifiable extent. It is admittedly easier to demonstrate the absurdity of adopting the date of enactment, the operative date or indeed the hearing date in relation to attacks on the validity of a particular statutory provision (as opposed to an entire statute). For instance:

- P sues D under section 27 of a statute. D alleges that he is not liable because, although section 27 is not at the time of the claim repugnant with a UK statute extending to Bermuda, section 27 as originally enacted was repugnant. The state of the law at the date of enactment would clearly be irrelevant to the repugnancy issue before the court in this hypothetical case;

- P sues D under section 27 of a statute in its originally enacted form in relation to facts and matters occurring before section 27 is repealed and replaced. D alleges that he is not liable because the version of section 27 in force at the date of the hearing is void for repugnancy with a UK statute extending to Bermuda. The state of the law at the date of the hearing would clearly be irrelevant to the repugnancy issue before the court in this hypothetical case.

20. In the present case PRS' claim as pleaded does appear to engage a period of time when 'actual repugnancy' potentially existed, even though PRS have, by way of submission, suggested that this is not the case. So BBC can in my judgment at least raise the repugnancy argument. Even if the entire CDA was repugnant to the 1988 UK Act when it was made or brought into force, does it follow that this Court is bound to declare that the CDA was void from the outset even as regards the period (post-November 2009) when any repugnancy had purportedly been cured? Is it legally possible to cure such a fundamental invalidity? Mr Robinson made the following submission in his '*Skeleton Argument on Behalf of the Plaintiff*' which was superficially appealing, but not ultimately easy to accept:

> "*34… Any repugnancy has been cured by the British Parliament's revocation of the 2003 Order (and thus revocation of the 1988 Act) by way of the Revocation Order. Indeed throughout the period of the claim only the CDA was in operation in Bermuda.*"

21. I prefer the view, supported by Mr Sanderson's citation of *Rediffusion (Hong Kong) Ltd.-v-Attorney-General of Hong Kong* [1970] A.C. 1136 and *A Solicitor-v-The Law Society of Hong Kong,* Hong Kong Court of Final Appeal, FACV No. 7 of 2003 (Li CJ at paragraph 20), that if an Act or a provision in it is void for repugnancy, its invalidity cannot subsequently be impliedly cured. Fortunately no need to determine this difficult question head on arises in the present case. Counsel for both PRS and the A-G primarily chose to oppose the validity argument on the fundamental ground that,

putting aside the current legal position, there was no tenable basis for finding that the CDA as a whole was at any juncture void for repugnancy in the requisite Colonial laws Validity Act sense.

Section 2 of the Colonial Laws Validity Act 1865

22. Section 2 of the 1856 UK Act provides as follows:

> "***Colonial Laws, when void for repugnancy***
>
> *2 Any colonial law which is or shall be in any respect repugnant to the provisions of an Act of Parliament extending to the Colony which such law may relate or repugnant to any order or regulation made on the authority of such Act of Parliament or having in the Colony the force and effect of such Act shall be read subject to such Act order or regulation and shall, **to the extent of such repugnancy but not otherwise**, be and remain absolutely void and inoperative.*" *[emphasis added]*

23. The short title to which is "*An Act to remove Doubts as to the Validity of Colonial Laws*". The other provisions in the Act may be summarised as follows:

- section 3 states that colonial laws shall only be invalid pursuant to section 2;
- section 4 provides that any colonial law assented to by a Governor shall not be void merely for inconsistency with any Instructions;
- section 5 confirms that colonial legislatures have always been empowered to pass laws establishing and regulating courts;
- section 6 provides that a certified copy of an act passed by a colonial legislature shall be *prima facie* proof that it has been validly passed; and
- section 7 resolves doubts about certain South Australia laws.

24. Mr Robinson submitted that section 2 ought properly to be seen as a provision designed to support the validity of colonial legislation rather than to undermine it. He found support for this proposition in a case upon which BBC's counsel relied, *Union Steamship Company of New Zealand-v-The Commonwealth* [1925] 36 CLR 130. In that case (at 155-156, commenting on the statutory words reproduced and emphasised above) Higgins J stated:

"*Now, I do not think that the full effect of these latter words in sec. 2 has been sufficiently appreciated. They really convey a positive grant to the colonial legislature-a grant of validity to the Act; of the legislature even where they deal with matters dealt with by a British Act extending to the colony; for the colonial Act is to be valid except to the extent of any actual repugnancy or direct collision between the two sets of provisions. Such a concession on the part of the supreme Parliament marks a very high level of liberality, foresight, statesmanship…*"

25. Mrs Sadler-Best also relied upon the plain words of section 2 of the Colonial Laws Validity Act ("*to the extent of such repugnancy but not otherwise*") to commend an approach to construing the validity of the CDA which was consistent with the presumption of validity. This was, standing by itself, dispositive of this sub-issue. She also cited in this regard my own decision in *Bermuda Emissions Control Ltd-v-Premier of Bermuda et al* [2016] SC (Bda) 82 Civ where I noted that "*there is general legal policy interpretation leaning in favour of upholding the validity rather than the invalidity of statutory and other legal instruments (ut res magis valeat quam pereat)*" (at paragraph 24(b)).

26. I have little difficulty in accepting these submissions as accurately reflecting the correct interpretative approach. Mr Sanderson had no coherent response to them, supported as they are by a straightforward reading of the relevant words of section 2 of the 1865 statute, in its wider statutory context. Viewing the 1865 Act as seeking to empower rather than weaken the authority of colonial legislatures is not just consistent with the terms of the statute, but the overarching British constitutional pro-autonomy approach to its self-governing colonies over the centuries, especially as regards settled colonies.

27. Viewing the 1865 Act through this lens may admittedly at first blush seem somewhat counterintuitive to those familiar with deploying this statute in aid of establishing the supremacy of the fundamental rights and freedoms provisions contained in Chapter I of the Bermuda Constitution. Properly understood, however, the generous interpretation given to those fundamental rights and freedoms and their ability to curtail the authority of the local Legislature stems from the content and character of the constitutional provisions themselves. It does not reflect construing the 1865 Act as having a stifling 'imperial' effect on colonial legislatures.

Validity of the CDA

28. Mr Sanderson nevertheless submitted that the CDA was in its entirety void for repugnancy with the 1988 UK Act and/or the 2003 Order because it brought into operation a "*wholesale competing statutory regime, which was not mutually consistent with the 1988 Act enacted on the same day*" ('*First Defendant's Skeleton Argument on Preliminary Issue*', paragraph 3.9). He sought to substantiate this proposition by reference to three authorities, none of which, carefully read, supported the central thesis that a colonial statute should be regarded as wholly void because it covers the same ground as UK statute which also extends to the territory.

29. *Union Steamship Company of New Zealand-v-The Commonwealth* [1925] 36 CLR 130 was the main authority BBC's counsel relied upon. There are, of course, judicial statements in this case which make reference to the general incompatibility of the competing statutory schemes. However, to properly understand any judicial decision, it is trite law that one must distinguish the legal basis for the decision (*ratio decidendi*) from collateral reasoning amounting essentially to 'side-bar' remarks (*obiter dicta*). For present purposes, the Australian High Court decision can be explained in the following way:

    - the overlapping statutes were the Merchant Shipping Acts 1894 to 1906 (UK) and the Australian Navigation Act 1912-1920;

    - the legal dispute centred on whether section 60 of the Navigation Act and regulation 9 of the Navigation (Master and Seamen) Regulations 1922 (relating to the discharge and engagement of seamen and requiring certain fees to be paid) were inconsistent with specific provisions of the UK Act;

    - the decision of the Court was pithily summarised in the headnote to which Mr Robinson referred, as follows:

        > "*Held, by Knox C.J., Isaacs, Higgins, Rich and Starke JJ., that, with respect to discharges, and (Higgins J. dissenting) engagements, of seamen, the master was not required by law to comply with such conditions, on the ground that the impositions of such conditions by the Commonwealth Parliament in respect of such discharges and engagements was repugnant to the provisions of sec. 124 of the Merchant Shipping Act 1894 and of secs. 30 and 31 of the Merchant Shipping Act 1906 respectively.*"

30. I am accordingly bound to find that the *Union Steamship Company of New Zealand* case did not decide that the enactment of a competing colonial legislative scheme alongside a UK Act extending to the colony, containing some provisions which are

inconsistent, justifies declaring that the entire colonial act is void for repugnancy. The judicial statements which Mr Sanderson relied upon were merely underpinning for the primary analysis of whether specific provisions of the colonial statute were repugnant to specific provisions of the also applicable Imperial statute. It follows that the cases confirming that similar principles apply to the field of copyright law (*Wea International Inc and Wea Music Pty Ltd-v- Hanimex Corporation Ltd* [1987] FCA 379; *Re Interlego Ag and Lego Australia Pty Ltd-v-Croner Trading Pty Ltd*) can take BBC's submission no further. The proposition that the CDA as a whole was void for repugnancy because it implemented a competing scheme to that extended to Bermuda by the 2003 Order was, at the end of the day, a bare submission, unsupported by any direct authority. A submission which invited this Court to adopt an approach wholly inconsistent with the governing provisions of section 2 of the Colonial Laws Validity Act 1865, properly construed.

31. For completeness I should note that none of the above conclusions are to my mind undermined in any way by the Judicial Committee's decision in *Rediffusion (Hong Kong) Ltd.-v-Attorney-General of Hong Kong* [1970] A.C. 1136. Mr Sanderson relied on this case as illustrative of an entire copyright bill being held to be void under the Colonial Laws Validity act 1856. However, as Mr Robinson pointed out, that case was argued before the bill was passed on the assumption that the entire bill would be repugnant to the UK Act.

Summary: finding on validity issue

32. The validity issue is accordingly resolved in favour of the Plaintiff. This finding is without prejudice to the 1st Defendant's right to contend at the main trial (should the need arise) that any specific provisions of the CDA are void for repugnancy with the 1988 UK Act as extended to Bermuda by the 2003 Order between February 8, 2008 and November 12, 2009. This issue will, of course, fall away altogether if the Plaintiff pursues no claim in respect of the pre-November 12, 2009 period.

Legal findings: competence of Bermuda's Legislature to enact the CDA

33. The alternative argument that Bermuda's Parliament had no constitutional competence to legislate on the subject of foreign copyright protection, which BBC relied on, was even more ambitious than its main argument. It was based on a clearly defined principle, but the application of that principle was hard to marry with the legal context of the present case.

34. Our Legislature's constitutional authority, as Mrs Sadler-Best pointed out, derives from section 34 of the Bermuda Constitution, which provides as follows:

> "***Power to make laws***
> *34 Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Bermuda.*"

35. Mr Sanderson aptly relied, for the purposes of delineating the limits of this legislative competence, on the following judicial statement found in the Privy Council decision in *Jersey Fishermen's Association Ltd and Others-v-States of Jersey* [2008] LRC 198 (Lord Mance):

> "[33] *The principle governing the extra-territorial jurisdiction of colonial legislatures is stated in Halsbury's Laws of England (4th ed; 2003 reissue), volume 6 title: Commonwealth, paragraph 840 as follows:*
>
> > *'The rule is not that the territorial limits of a legislature define the possible limits of its legislative enactments; rather the rule is that those enactments which purport to have an extra-territorial operation, application or effect will be valid only if they bear a substantial relationship to the peace, order and good government of the territory concerned, whether generally or in respect of particular subjects. In particular, legislation creating any liability must base that liability on some fact, circumstances, event or thing which is relevantly connected, to a sufficient degree, with the territory concerned.'...*" [Emphasis added]

36. It is helpful to remember precisely what aspects of the CDA it is complained fall afoul of the limits of legislative competence by having an extra-territorial "*operation, application or effect*". The impugned provisions, despite their apparently broad global sweep, are in practical legal terms merely designed to allow foreign copyright owners to be able to prevent their rights being infringed by persons or entities in Bermuda. The crucial statutory provision in the CDA[2] is the following:

> "***Application of this Part to foreign countries***
> *194 (1) The Minister may by order make provision for applying in relation to a foreign country any of the provisions of this Part specified in the order, so as to secure that those provisions—*

[2] Complementary provisions include sections 22-26, which in defining the duration of copyright distinguish between Bermudian and overseas copyright owners.

(a) apply in relation to persons who are citizens or subjects of that country or are domiciled or resident there, as they apply to persons who possess Bermudian status or who are domiciled or resident in Bermuda;

(b) apply in relation to bodies incorporated under the law of that country as they apply in relation to bodies incorporated under the law of Bermuda;

(c) apply in relation to works first published in that country as they apply in relation to works first published in Bermuda; or

(d) apply in relation to broadcasts made from or cable programmes sent from that country as they apply in relation to broadcasts made from or cable programmes sent from Bermuda.

(2) An order may make provision for all or any of the matters mentioned in subsection (1) and may—

(a) apply any provisions of this Part subject to such exceptions and modifications as are specified in the order; and

(b) direct that any provisions of this Part apply either generally or in relation to such classes of works, or other classes of case, as are specified in the order.

(3) Except in the case of a Convention country, the Minister shall not make an order under this section in relation to a country unless satisfied that provision has been or will be made under the law of that country, in respect of the class of works to which the order relates, giving adequate protection to the owners of copyright under this Part.

(4) In subsection (3) "Convention country" means a country which is a party to a Convention relating to copyright, which Convention also applies to Bermuda.

(5) An order made under this section is subject to negative resolution procedure."

37. Section 194:

- empowers the Minister to extend the Act to other countries, based either on reciprocity or being parties together with Bermuda to a copyright convention; and

- explains that the legislative purpose of this power is to ensure that the CDA will apply to overseas individuals, companies and works in the same way as the Act applies to local individuals, companies or works.

38. The Copyright and Performances (Application to Other Countries) Order 2009 (BR71/ 2009) made under section 194 gives effect to this legislative intent. The suggestion that the following paragraph in the Order is extra-territorial is plainly misconceived:

> "*5. All the provisions of Part I of the Act, insofar as they relate to broadcasts (other than wireless broadcasts), apply in relation to the countries indicated in the fifth column of the table set out in the Schedule so that those provisions apply—*
>
> *(a) in relation to persons who are citizens or subjects of, or are domiciled or resident in, those countries as they apply to persons who have Bermudian status or are domiciled or resident in Bermuda;*
>
> *(b) in relation to bodies incorporated under the laws of those countries as they apply in relation to bodies incorporated under the law of Bermuda; and*
>
> *(c) in relation to broadcasts made from those countries as they apply in relation to broadcasts made from Bermuda.*"

39. Paragraph 5(c), on superficial analysis, may appear to be clearly extra-territorial in its purported application. However, read together with section 194(1)(d), it becomes apparent that what is regulated is broadcasts in Bermuda which originate from countries to which the Order applies.

40. Mrs Sadler-Best and Ms Tucker accurately described the effect of section 194 in the following way in their '*Submissions for the Second Defendant*':

> "*The effect of this provision is to allow the Minister to extend copyright protection in Bermuda to those entities or individuals who may be based outside of Bermuda. That does not alter the fact that the rights relate to acts in Bermuda. This is entirely within the broad legislative powers conferred on the Bermuda legislature. It is on the basis of such arrangements that reciprocal*

protection is granted to Bermuda Copyright holders, in the United Kingdom[3]*…*"

41. The territorial scope of the CDA overall is also clearly illustrated by a key provision upon which Mr Robinson relied:

> "*27(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in Bermuda…*" [Emphasis added]

42. The Act in its wider context primarily provides protection for copyright and creates remedies for infringements enforceable by, *inter alia*, legal action before the local courts (mirroring similar protections which it is envisaged Bermudian copyright will receive under the corresponding laws of foreign countries). I find that it is clear beyond sensible argument that:

- the Act wholly or substantially operates within Bermuda;
- the Act wholly or substantially applies within Bermuda;
- the Act only incidentally and indirectly has effects outside of Bermuda (most significantly by recognising the rights of foreign authors and copyright owners) but those effects are for the dominant purpose of enabling such foreign parties to enforce their rights within Bermuda.

43. The CDA does not impose liabilities on overseas persons or entities at all. It will only be extended to such overseas parties as part of a *quid pro quo* for similar protection being granted to Bermudian authors and copyright owners in other jurisdiction under corresponding foreign law. The territorial centre of gravity of the CDA is Bermuda. The presumption that a colonial legislature cannot impose liabilities on foreign citizens (*Johnson-v-Stamp Duties Commissioner* [1956] AC 331 (PC)) is not engaged by the legal matrix of the present case. The scheme of reciprocal recognition of copyright which section 194 of the CDA provides for is entirely consistent with the pronouncements made in *Jefferys-v-Boosey* [1854] IV HLC 814 upon which BBC's counsel relied. Those pronouncements were of course made in an era when international copyright protection did not exist. But the modern approach of creating a global network of national legal protection for copyright is still in substance

[3] S.I. 2009 No. 2745 (UK): The Copyright and Performances (Application to Other Countries) (Amendment) Order 2009.

consistent with Baron Alderson's observation (at [912]-[913]) over 160 years ago that:

> "…*this* [copyright], *which is in truth, a profitable monopoly, is a species of territorial property, which must be regulated, as to its transmission, extent, and duration, by the law of this country, which creates and regulates it*…"

44. In summary, the CDA was clearly within the competence of Bermuda's Legislature to enact and the argument that it is invalid because it has impermissible extra-territorial effect must be firmly rejected.

Conclusion

45. For the above reasons the preliminary issues are resolved in favour of the Plaintiff:

(1) The Copyright and Designs Act 2004 is not in its entirety void for repugnancy with the Copyright, Designs and Patents Act 1988 (as applied to Bermuda by The Copyright (Bermuda)Order 2003), by virtue of section 2 of the Colonial Laws Validity Act 1865. Whether or not any specific provisions of the Bermudian Act are repugnant is reserved to the main trial;

(2) The Copyright and Designs Act 2004 was validly enacted by the Legislature within section 34 of the Bermuda Constitution and is not ultra vires because it had extra-territorial effect.

46. Unless any party applies by letter to the Registrar within 21 days to be heard as to costs, the 1st Defendant shall pay the costs of the Plaintiff and the 2nd Defendant in relation to the preliminary trial, to be taxed if not agreed.

Dated this 21st day of July, 2017_____

IAN RC KAWALEY CJ