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England and Wales Patents County Court

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[2012] EWPCC 29

Case No: CC11 P 03850

IN THE PATENTS COUNTY COURT

Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London EC4 1NL
Friday, 18 May 2012

BEFORE:

MR RECORDER DOUGLAS CAMPBELL

BETWEEN:

EMMA DELVES-BROUGHTON

Claimant

- and -

HOUSE OF HARLOT LIMITED

Defendant

The Claimant appeared in person

Mr Robin Archer of the Defendant appeared for the Defendant

Hearing date: 18th March 2012

Approved Judgment

Crown Copyright ©

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(Official Shorthand Writers to the Court)

MR RECORDER DOUGLAS CAMPBELL:


1. This is an action for infringement of copyright which was commenced in this court on 4 November 2011. There was no defence as such, but a document was served by letter from the Defendants, acting by Mr Robin Archer, on 20 December 2011. Today the Claimant has represented herself, and Mr Archer has represented the Defendant.
2. A case management conference was heard on 23 February 2012, which the Claimant attended but the Defendant did not. As a result of this the Claimant was entitled to rely on certain evidence including a letter dated 14 February 2012. There was another order made on 4 April 2012 which allowed the Defendant to rely on additional evidence. This evidence has taken the form of letters of various dates, most notably a letter dated 16 April 2012 on behalf of the Defendant.
3. I heard evidence from three witnesses, but before going to the witnesses I should explain the nature of the case and the nature of the decisions I am asked to make today.
4. The case concerns the use by the Defendants for a period of six months of a particular photograph which was taken by the Claimant in 2005. The photograph depicts a model, Mrs Amber Erlandsson, in a forest wearing a garment which was supplied to her by the Defendant. The claim is for infringement of copyright, in that the Defendant used the said photograph for a period of six months on its website. It is said by Mr Archer, and not disputed by Mrs Delves-Broughton, that upon complaint being made, he promptly took it down from his website.
5. There is no dispute as to subsistence of copyright or ownership of copyright. It is accepted that the Claimant is the owner of the copyright in this picture. The only defence which is advanced for the case of copying is the defence of licence, which I will address in some detail.
6. I should mention that there is an additional cause of action complaining of derogatory treatment pursuant to section 80 of the Copyright, Designs and Patents Act 1988. This provides that:



-♦The author of a copyright literary, dramatic, musical or artistic work-♦has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment.-♦

Subsection (2)(b) of the Act defines -♦derogatory treatment-♦ as follows:

-♦The treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.-♦

7. Mr Archer, on behalf of the Defendant, says that he had consent to use of the mark pursuant to a licence in any event, but he also disputes that the changes to the work amount to derogatory treatment. The changes to the work in question are removal of the forest background, reversal of the image, and cropping, such that what was originally quite a large photograph has now become quite a small image. The image was used in a number of different parts of the Defendant-♦s website during the six months period in which it was used.
8. As I have said, the main issue in the case is the question of licence. I have to decide whether Mrs Delves-Broughton directly or indirectly licensed Mr Archer and, thereby the Defendant, for use of the

copyright image in question. I should point out that copyright infringement does not require the Claimant to show that the Defendant knew he was doing anything wrong. It is simply a question of strict liability. Did he reproduce something which was someone else-s copyright work, and did he in fact have consent? If the Defendant does not have such consent, it follows that what he is doing amounts to infringement.

9. In certain circumstances it may be possible for a Defendant to issue separate proceedings or related proceedings for an indemnity or a contribution against the person whom he thought did give consent, but no such application was made in this case. That would have provided the mechanism whereby the Defendant could effectively put the blame, and hence liability, onto someone else.
10. I heard evidence from Mrs Delves-Broughton for the Claimant. Mr Archer conducted the cross-examination, which was brief. Mr Archer put to her the proposition that he had in fact a licence to reproduce the work, but Mrs Delves-Broughton denied that.
11. It was also established in the cross-examination of Mrs Delves-Broughton that she was prepared to license other examples of her work, and in particular other photographs, for much lesser sums than are claimed in these proceedings. Mrs Delves-Broughton made the point that those were licences to which she consented, and such licences were granted to persons to whose use she had consented. She also stressed at this point (and in other documents which I have seen) that she is concerned to ensure that all photographs of hers which are used contain a sufficient acknowledgment of her authorship as the photographer. I infer that this is important to Mrs Delves-Broughton. Nevertheless, it was established that there are other figures out there other than those for which Mrs Delves-Broughton contended.
12. Mr Archer was the first of the two witnesses for the Defence. He was an extremely fair and honest witness, and I was impressed by his candour. He made the point that there was a widespread practice in the industry of people borrowing clothes from companies such as his own; that there were tight controls on such use of these clothes; and that, in return, he expected he would have their permission to use any photographs which resulted. I have no doubt that there may be a general practice to that effect, but the question for me to decide is whether the particular photograph in this case was licensed in this way.
13. My attention was drawn to the fact that when Mr Archer released clothes, there was a particular document (the -press/stylist loan record-) which was required to be signed. This was to ensure control over clothing which could amount to up to £500 in value. The point in this case was that the loan-out record had been signed by the model, Mrs Erlandsson, and not by Mrs Delves-Broughton herself. The loan-out record also said that it was for personal use rather than for commercial use.
14. Quite properly, it was never suggested that Mrs Delves-Broughton had ever signed any such documentation in relation to the photograph in issue in this case. It emerged in cross-examination that on various occasions in the past it is possible that Mrs Delves-Broughton had signed such releases in relation to different photographs. Mr Archer gave this evidence in answer to a question from Mrs Delves-Broughton. It seems the parties disagreed as to whether this ever occurred. I do not need to resolve that dispute. But it does seem to me that, if there were such a practice and if Mrs Delves-Broughton had signed such documents in the past, the absence of any such signature on the documentation relating to this photograph is particularly striking.

15. I now come to the question of whether a licence was granted. In particular, as I have already said, it is Mrs Delves-Broughton's contention, as maintained in cross-examination, that no such licence was granted. Mr Archer accepted that he was not present on the occasion when the licence is said to have been granted. The only person said to have been present, apart from Mrs Delves-Broughton herself, was Mrs Erlandsson. She also gave evidence before me.
16. I was shown documentary evidence, which still exists despite the passage of time from 2005, relating to Mrs Erlandsson's involvement. For instance, I was shown some emails passing between Mrs Delves-Broughton and Mrs Erlandsson dated on and around 9 August 2005. There is nothing in these emails which demonstrates that Mrs Delves-Broughton was conferring Mrs Erlandsson any rights to grant licences for the use of the photograph in question, as Mrs Erlandsson accepted.
17. I was also shown an additional letter which was sent by Mrs Delves-Broughton on August 24 2005 to Mrs Erlandsson. That letter is important and I read it in full as follows:

- Dear Amber,

Thank you so much for visiting Bath, and modelling for me. I think you look really great! I'm enclosing a CD of low resolution jpegs from our session. I hope you like them as much as I do.

As agreed, you can use them on your web site. The images are all for your personal use, the copyright still remains with me, so no one else can use them. If anyone else wants to use them, please let me know. If you are sending them as emails or have them on your website please keep - Copyright Emma Delves-Broughton - on them. I have put two sets of images on the CD. One set doesn't have any writing on it so that you can view them, but if you are sending them out please use the ones with my copyright on them.

I work on a Mac, so if you have a PC they may appear a bit darker. If you are shrinking them down for website use they will probably need to be lightened a bit. Let me know which are your favourite pictures.

Kind regards, Emma Delves-Broughton.

18. The essential point to note from this letter is that this is a personal permission given by Mrs Delves-Broughton to Mrs Erlandsson for use on her website in circumstances where the copyright still remained with Mrs Delves-Broughton and no one else could use them. Mrs Delves-Broughton also stresses - *If anyone else wants to use them, please let me know.* She also requires of Mrs Erlandsson that if she is sending them as emails or having them on her own website, she has to keep a copyright notice saying - *Copyright Emma Delves-Broughton*. It seems extremely clear to me from this letter that Mrs Delves-Broughton, far from granting any licence of any sort or permission to grant a licence, is keeping extremely tight controls over the use which Mrs Erlandsson was entitled to make of the photographs in question.
19. There is no dispute that the source of the photographs which appear on the Defendant's website must have been Mrs Erlandsson, who must have given them to Mr Archer. Mr Archer told me in his

evidence that the copyright notice was not on them. Therefore, I infer that Mrs Erlandsson must have sent copies of the photographs missing the copyright notice to Mr Archer, in circumstances whereby Mr Archer did not know, or had no reason to believe, that these photographs were in fact the copyright of Mrs Delves-Broughton.

20. I now come to a statement which Mrs Erlandsson submitted on behalf of the Defendants. I do not need to read this in full, but I will focus on the key passage. That states as follows:

- When myself and Emma Delves-Broughton arranged the shoot in question i told her i was going to ask Robin if i could borrow some latex clothing for the shoot, which he seemed pleased to hear. On the day we mainly shot artistic nude for Emma- s use and during the other part of the shoot she shot me clothed in House of Harlot- s outfits with the understanding that both myself and Robin could use these images for promotional use on the internet.

- It was my understanding that the pictures were not to go into printed magazines without her consent and that the images were not to be sold and those conditions have been upheld. Neither myself or Robin have gained financially from Emma- s images and to the best of my knowledge they have only been used for portfolio and promotional use.-

21. The first point to make about this is that this evidence appears inconsistent with the letter dated August 24 2005, to which I have already referred. The understanding to the effect that the pictures were not to go into printed magazines without Mrs Delves-Broughton- s consent is an incomplete statement of the terms on which the pictures were given to Mrs Erlandsson. But I wish to focus on the suggestion that there was an understanding that both Mrs Erlandsson and Mr Archer could use the images in question for portfolio and promotional use on the internet.

22. In her oral evidence Mrs Erlandsson went further than this. She said that it was not merely an understanding, but there had in fact been an oral discussion between Mrs Erlandsson and Mrs Delves-Broughton during the shoot to the effect that Mr Archer and his company would have been licensed to use the photographs in question. It seems to me inherently implausible that there would have been a discussion of that nature between a photographer and the model. The photographer and the model are far more likely to have discussed the sort of things that appear in the emails at the time, which do not include any discussion of copyright licensing. But, more importantly, the suggestion of an oral agreement goes substantially further than the statement which Mrs Erlandsson had given and which she said was her own statement. This suggestion only emerged during her cross-examination. The suggestion that there was an actual express discussion was not put to Mrs Delves-Broughton in cross-examination, but is inconsistent, in any event, with Mrs Delves-Broughton- s evidence.

23. Looking at the evidence as a whole, it therefore appears plain to me that there is no sufficient evidence of any discussion about copyright or licensing having taken place on that date. The written material, such as it is, goes firmly against it. I include in my description of - written material- Mrs Erlandsson- s own witness statement. I was not satisfied by her evidence and I have no hesitation in preferring the evidence of Mrs Delves-Broughton on this issue. It follows that there was no licence to use the copyright material in question.

24. I then turn to the second cause of action, which is the right to object to derogatory treatment of the work. This is a question for me to decide on the basis of the admitted changes which were made. It seems to me that considerable time and effort went into the composition or creation of the original photograph, and it was important to the photographer that the forest background appeared in the particular photograph for artistic reasons. I am satisfied that the changes which have been made do amount to distortion of the work. I would not say that it was mutilation and I would not say that it was prejudicial to the honour or reputation of the author or director, but I am satisfied that it amounts to distortion of the photograph in question and that the treatment of the work is therefore derogatory.
25. Next I come to the question of quantum. There was a substantial dispute about quantum. Mr Archer, for the Defendant, made the point that the sums claimed by the Claimant were, in his view, excessive. He relied on two factors in particular. First was the use of a figure of £450 for the use of the photograph which he said was too high in any event. He explained that the figure of £450 was arrived at by Mrs Delves-Broughton on the basis of National Union of Journalists guidelines. These, I understand, are industry-wide generalised figures which indicate the appropriate sums which may be charged across a range of industries and photographs for use of a single photograph on an online site for a 6-month period. The figure given there was £675. Mrs Delves-Broughton was of the view that there had been 8 separate uses of this, so she knocked the figure down to £450, but then she multiplied it back up by 8, reflecting her belief that it was 8 separate uses.
26. So far as the number of uses is concerned I am satisfied that this is a case where there was only one use, and the only use was on the website. Mrs Delves-Broughton made the point that website use is equivalent to brochure use in this day and age, and I accept that, but I do not accept the fact that the same thing appears on 8 different pages amounts to 8 different uses. I am satisfied that there is a single use.
27. That leaves the question of how much is a fair sum to award for that single use in question. I have already identified that Mrs Delves-Broughton contends for £675. She did reduce that to £450, but that was on the basis that there were 8 uses.
28. For his part, Mr Archer drew my attention to material that he has submitted to the court. One was - ♦Stockphoto-♦, which was a library of photographs showing similar garments being advertised at a much lower rate for use of these photographs. However, it seems to me that the photographs used in the Stockphoto collection are very much catalogue photographs taken for the purpose of appearance in a catalogue rather than artistically composed photographs by a professional photographer. It does not seem to me that the Stockphoto is an appropriate level for comparison.
29. What was a much more convincing comparison was some pictures that he had downloaded from Getty Images. The particular example he relied on was a picture depicting the well-known singer Katy Perry, and he produced a figure of £640 for a type of use which was described as -♦Web-corporate and promotional site-♦. He therefore said that if £640 was the correct figure for an artist of such renowned fame as Katy Perry, then it followed that even £450 was far too much.
30. In reply, Mrs Delves-Broughton countered on two grounds. Firstly, she said that the Getty Images use was not in fact £640, but a greater sum which I believe is £1,150. She also said that the use was different, in that the Getty Images use figure related to non-commercial use. She drew my attention to a web printout demonstrating that if commercial use had been intended, an additional clearance would

have been necessary. (In particular, it said -♦*Any commercial use (eg ad campaigns) requires additional clearance*-♦). Mr Archer, for his part, accepted that an additional clearance would have been necessary, but pointed out that, in his view, this could be easy to obtain, and in fact he had made enquiries which had established that it was easy to obtain.

31. In my view, it is difficult on the material before me to come to any definitive view. Any figure I produce is likely to be an inexact figure. In favour of the NUJ figure, it does appear to have some credibility coming from an independent source and to be averaged across a wide variety of potential uses. But then again it is only a guideline. Mrs Delves-Broughton also drew attention to the way in which the photograph was depicted on the website, in that it was flashing and prominent, and so forth. So far as the Getty Images material is concerned, it does appear to me that the fee is very much going to be dependent on individual pictures. The problem is that if one has, on the one hand, a generalised source across the industry and, secondly, a single example, one never knows how representative the actual example is. It seems to me, taking everything into account, that the best evidence I have as to a fair rate remains the NUJ figure. As I made plain, I do not regard it as appropriate to multiply any figure by 8, but I will award a figure of £675 under that head.
32. So far as the derogatory treatment is concerned, I am satisfied that there has been derogatory treatment, but having regard to the sum already awarded for damages and also having regard to the nature of the right in question, it seems to me that the figure must be substantially lower than this. The primary remedy for the right to object to derogatory treatment is normally injunctive, but no injunction is sought in this particular case, I infer because the use has ceased, and taking everything into account I award a sum of £50 under this head for the derogatory treatment.
33. Therefore, I grant judgment for the Claimant. I award the sums of damages that I indicated, and I will now hear the parties briefly on the question of costs.

Post script

34. I have annexed reproductions of the Claimant-♦s original photograph, and samples of the Defendant-♦s use on its website, to this judgment.

Annex



The Claimant-s photograph



Examples of the Defendant-s website use

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