

may be incalculable. At any rate injunctive relief after a trial will be of no moment and amount to no effective remedy. The Defendant on the other hand, and with equal weight, states that if they in fact have used the material lawfully, the grant of a remedy at this interlocutory stage will forever deprive them of their right. This too will result in incalculable loss.

- [3] That which makes the loss incalculable for each is the nature of the material and the industry in which the parties are involved. Viewership and listenership, the advertiser's response to the cancellation of programming, all these are difficult to predict. Who can say with certainty the reputational harm suffered when sponsors perceive that copyright has been breached with impunity on the one hand, or wrongfully claimed, on the other.
- [4] In a nutshell in this case injunctive relief at this stage, or its refusal, will give to one side or the other the substantive relief that party requires. There will only be one 2015 IAAF World Games. Damages it seems may not be able to compensate either party adequately. Each party I should indicate has placed before the court evidence to suggest that they would be able to honour any award as to damages a court may ultimately make and also honour any necessary undertaking as to damages.
- [5] In a case such as this, where injunctive relief will, for all practical purposes, give the entire remedy, a court at this interlocutory stage has to examine far more closely the merits of the matter. Findings of fact, without witnesses being tested in cross-examination, are to be eschewed, however the court has to form a view as to the likelihood or otherwise of success at trial of one party over the other. In other words a determination as to the relative strengths of each party's case on the facts and on the law becomes of cardinal import when deciding, in these circumstances, whether or not to grant interlocutory injunctive relief.

[6] It is significant that both parties relied on the case of ***NCB Ja. Ltd. V. Olint Corporation [2009] 1 WLR 1405***. In that case, whilst reaffirming the well established principles of American Cyanamid, the Judicial Committee of the Privy Council underscored the point that the question at the end of the day is whether the grant or refusal of the Injunction will produce a just result.

“18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670, 680. But this is no more than a generalisation.

What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

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[2009] 6 WLR 140 SC 1409 E-H.

- [7] It seems to me that in a situation where the grant or refusal will effectively be the entire remedy, the need for that “high degree of assurance” that at trial it will appear the injunction was rightly granted, becomes all the more important.
- [8] There have been several affidavits filed in this matter. Each counsel also made extensive oral submissions and cited authority. In the interest of time I do not propose to review that evidence or restate the submissions. I will reference them only to the extent necessary to explain my decision. In this regard also I remind myself that at this interlocutory stage I make no findings of fact, I am only I think, required to express my perception of the possible or likely findings of a tribunal of fact after a trial. I will however where necessary state my view of the law.
- [9] Having reviewed the evidence and the law it is my considered judgment that this application for interlocutory relief must be refused. My reasons are as follows:
- [10] It is not contested that the Claimant at great expense obtained copyright in the material utilised by the Defendant. The evidence of that is to be found in the Affidavit of Stephen Greig filed on the 25th August, 2015 Exhibit SG1 thereto. Significantly the events which are the subject of the copyright are defined in the agreement and set out in Schedule I thereto as inter alia:
- “2015 IAAF World Championships Beijing China 22 -30 August”
- The rights, as Claimant’s Counsel was at pains to point out, include a “Licence to exploit the materials of each event via the Designated Rights in whole or in part, live or delayed.”
- [11] The Claimant be it noted acknowledged, that “the rights granted hereunder are subject to all applicable laws and regulations.” See Article 2.2 of the Terms and Conditions Exhibit SG1.

[12] It is admitted that one of these laws is the Copyright Act of Jamaica and in particular Sections 53 and 54.

Section 53-

(1) Subject to section 54-

- (a) *fair dealing with a protected work for the purposes of criticism or review of that or another work or of a performance of a work; and*
- (b) *fair dealing with a protected work (other than a photograph) for the purpose of reporting current events,*

does not infringe copyright in the work so long as it is accompanied by a sufficient acknowledgement.

- 2) *No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.*

Section 54.

For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including-

- (a) *the nature of the work in question;*
- (b) *the extent and substantiality of that part of the work affected by the act in relation to the whole of the work;*
- (c) *the purpose and character of the use; and*
- (d) *the effect of the act upon the potential market for, or the commercial value of, the work.*

[13] The question therefore is whether at trial a court is more likely than not to find that the Defendant's use of the material fell within the General Exceptions in Sections 53 and 54. In other words, was it fair dealing with the protected work?

It will be if:

- a) It was for purposes of criticism or review
- b) It was for the purpose of reporting current events
- c) There was sufficient acknowledgement with the caveat that no acknowledgement is required in connection with the

reporting of current events by means of a sound recording, film, broadcast or cable programme.

d) When assessing whether there has been a fair dealing the trial court must take into account all relevant factors including:

- The nature of the work in question
- The extent and substantiality of that part of the work affected by the act in relation to the whole of the work.
- The purpose and character of the use and ,
- The effect of the act upon the potential market for or the commercial value of the work.

[14] Having viewed the programmes aired by the Defendant which allegedly infringed the copyright, I am satisfied that a Court at trial will more probably than not find that the use was fair within the meaning of Sections 53 and 54. This is because in the first place the presenters were reporting on current events: the championship is ongoing. They were also reviewing the material and discussing the events that occurred and those to come. I pause to say that I accept Mr. Piper QC's submission, that it is the entire event, which is copyrighted, and hence review of the championship is review of the work as a whole, similarly for review of individual races.

[15] In the second place the producers regularly and prominently displayed the IAAF name and insignia. Viewers would be in no doubt that the feed being seen and the event commented on was owned by the IAAF.

[16] In the third place, the presenters did not purport to give live or direct coverage of the event. If they had it would be difficult to maintain it was a review programme or a mere reporting on events. Indeed the presenters told viewers that in order to see the event live they should go to the IAAF YouTube website or some such location. Clearly, the Defendant was not seeking to compete with the Claimants right to live coverage of the events taking place in China.

- [17] The work in question is a sporting event consisting of many activities, interviews, opening and closing ceremonies, etc. It spans several days of competition. It is I dare say of great interest to the Jamaican public and hence newsworthy. The creation by the Defendant of a programme to carry news and reviews of the event is understandable and reasonable. The title “Return to the Nest” is indeed appropriate.
- [18] Nor is there unfairness as regards the extent and substantiality of the parts used when compared to the whole. The video I observed consisted mainly of clips of parts of races usually as the athlete completes the event. There were segments of interviews. Interestingly however the greater part of the programme involved a discussion among panellists interaction with callers to the programme, and giveaways. I do not see that a court at trial could reasonably conclude that there was a disproportionate use of the copyrighted material by the Defendant.
- [19] As regards the purpose and character of the use, I do not accept the submission of Counsel for the Claimant that commercial use of copyrighted material is not covered by the exception. Mrs. Gibson Henlin relied on a case from the United States District Court of California ***Don Henley v Charles S De Vore 733 F Supp. 2 Ed. 1144.***

However, section 107 of the Copyright Act which was considered in that case, stated:

“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) *The purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes”*

Clearly, their Act specifically invited consideration of commercial use. Even so, the question as the court observed, is whether the user stands to profit without

paying not whether the motive is monetary gain. The Jamaican Act has no such expressed provision.

[20] It is true that when considering the “purpose” a trial court may well ask whether the primary aim was to directly profit from the material. Such for example was the situation in *Associated Newspapers Group PLC v. News Group Newspapers Ltd. [1986] RPC 515*, when having accessed copyrighted material the newspapers merely reproduced it in its entirety. The motive here was clearly to sell its newspaper because of the content of the material, not because of any review or report on its content. In the case before me, the focus of the Defendant’s programme is the expert commentary of its analysts. The extracts from the copyrighted work are merely the backdrop or stage against which the review and commentary is done. There is therefore no direct commercial exploitation. The commercial benefit is incidental to the report and review of the event; or so it seems to me, a tribunal of fact is likely to conclude.

[21] As regards the effect upon the market for, or the commercial value of the work, of the Defendants use of it, there is not much evidence in this regard. It is clear on viewing the programme however that the Defendant has not sought to denigrate, criticize or impugn the copyrighted work. If anything, the commentary and the discussion of events to come are likely to cause the viewer to want to see the event. In so doing it will enhance the value of live coverage offered by the Claimant. The Claimant may counter that the Defendant’s programme may reduce the value of its right in the delayed broadcast. However, given that the proportionate part of the event utilised is relatively small, it seems hardly likely that a court will find any significant diminution in the value of such delayed broadcast. Track fans who wish to see the entire race again will not flock to the defendant but will need to seek out the Claimant’s rebroadcast.

[22] I therefore find that when at this interlocutory stage I compare the relative strength of the cases, it is the Defendant who I find is more likely to be ultimately successful at the trial. The other factors being more or less equally balanced, viz

– adequacy of damages as a remedy and ability to pay damages, means that in the circumstances of this case fairness dictates that the application be refused.

[23] Finally and out of deference to some submissions made, I make the following observations. It was submitted that the Defendant was wrong to access the material from the IAAF website and use it in this way. That may or may not be so however, the protection afforded by Sections 53 and 54 of the Copyright Act will have availed the Defendant even had they taped the Claimant's own live broadcast. The source of access to the copyrighted material is not so important as the use to which it is put, for the purpose of Section 53 and 54. Secondly, Mr. Piper QC with assistance of authority tried to rely on estoppel praying in aid a letter written by Mr. Gary Allen. At this juncture, I of course make no finding one way or the other, save to say that I am not at all persuaded that a person can be barred from exercising a legal right or remedy, if in ignorance of the extent of that right or remedy, he expresses a contrary viewpoint. Be that as it may, the email of 23rd August 2015 rightly states that reports, features, build up coverage. analysis are permissible. His belief however that the law limits such use to "unsponsored reportage" does appear flawed. Suffice it to say I do not find that an estoppel is likely to succeed at trial.

[24] As regards the complaint that two entire races were shown (See Affidavit of Stephen Greig filed on the 25th August 2015 Para. 8; and Milton Walker filed 25th August 2015 Para 5 and 6); the context in which those were shown has not been established to my satisfaction. The Defendant on whom the onus lay to explain, was content in the Affidavit of Mr. Richard Delaphena filed on 26 August 2015, to state "Mr. Walkers recording of the clips must have been taken from one or other of these programmes and I do verily believe that the use of the clips by the Defendant does not constitute an infringement of any of the Claimant's rights." The programmes being "news broadcasts" and "Return to the Nest." Let me be clear, my conclusion on the matter of fair dealing has been strongly influenced by the fact that in the programme observed parts of races were what was shown for

the most part. It would be a disproportionate and hence an unfair use for the Defendant to transmit the entirety of races in its report or review feature. In this regard, it matters not whether the race lasts 10 seconds or 10 minutes. However, the screening of two races simpliciter is not such as to move the court to apply injunctive relief particularly as the visually demonstrated evidence is that for the most part only parts of races were shown.

[25] Let me express my gratitude for the able assistance provided by both Counsel and for the authorities cited. In particular that of ***British Broadcasting Corporation v. British Satellite Broadcasting [1991] 3 All ER 833*** a decision at first instance by Scott J whose approach to a not dissimilar issue I found most enlightening.

[26] The Application for Injunction is refused with costs to the Defendant to be taxed if not agreed. I am prepared to make Case Management Orders if the parties are so minded.

[27] Application for Injunction pending appeal is refused.

David Batts
Puisne Judge