Alterm Consortech Pte Ltd *v* Public Prosecutor and other appeals
[2013] SGHC 189

Case Number : Magistrate's Appeals No 194, 195 and 196 of 2011

Decision Date : 27 September 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Vignesh Vaerhn and Eunice Lim Ming Hui (Allen & Gledhill LLP) for the appellants; Tan Bar Tien (B T Tan & Company) for the respondents

Parties : Alterm Consortech Pte Ltd — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – appeals

27 September 2013 Judgment reserved

Choo Han Teck J:

1 The three appellants were charged with offences under s 136(3)(a), s 136(2)(b) and s 136(3A) of the Copyright Act (Cap 63, 2006 Rev Ed) ("the Act"). Alterm Consortech Pte Ltd ("the first appellant") is a company carrying on the business of pest control generally and in particular, the control of termites. Chew Choon Ling Michael ("the second appellant") was the managing director of the first appellant. He died before the appeal could be heard but I granted leave for the personal representative of his estate to continue the appeal in his name. Teng Siew Chin ("the third appellant") was an employee of the first appellant. The three charges were brought by way of private summonses of the complainant Cheng Wai Meng ("CWM") who was the managing director of a rival termite control company called Termi-mesh Singapore Pte Ltd ("TSPL").

2 The first appellant was convicted of five charges and fined a total of $32,000. The second appellant was also convicted of five charges and fined a total of $21,000. The third appellant was convicted of two charges and fined a total of $8,000. The schedule of charges and convictions are set out in pages 401 to 404 of the Record of Proceedings Volume 1.

3 The subject matter of the copyright infringement was "the Termi-mesh specification and markings on construction drawings for the proposed installation of the Termi-mesh Barrier System". The system was a physical barrier created by TSPL to prevent termites from passing through. The complainant claimed that he was the creator of the above described copyright protected specifications and drawings. The court below found that the complainant came to know of the alleged breaches sometime in 2006 when he compared a drawing admitted as "P7" with the specifications of TSPL, admitted as "P4". The complainant testified that specifications provided by him to an architect company called DP Architects were later found in the first appellant's possession. The complainant also claimed that TSPL's markings were found on the drawings given by the first appellant to a contractor known as Kajima. He claimed that there were substantial similarities between the first appellant's drawings and the construction drawings submitted by TSPL for a project known as "The St Regis Project". It appears that TSPL, who submitted their specification and construction drawings to the main contractor and architect, was not eventually appointed to provide the anti-termite barrier system. That job was given to the first appellant.

4 The appellants' defences were, first, that there was no basis for TSPL to claim copyright in the

specifications and drawings. In particular, the drawings were mere tracings by TSPL of the original drawings given to TSPL by the main contractor. Secondly, the appellants did not know that TSPL were the owners of the copyright. Thirdly, they claim that their specifications were not distributed to the recipients as alleged by the complainant.

5 Mr Vignesh Vaerhn, counsel for the three appellants, based his appeal on the same defences that the appellants relied on at trial. Mr Vaerhn in his oral and written submissions, however, raised some distinguishing matters that were not, in counsel's views, submitted to or considered by the court below. Counsel submitted that the appellants obtained what was alleged to be the copyright protected documents of TSPL from the architects, namely, DP Architects and RSP Architects. They could naturally and rightly assume that the architects had the copyright, not TSPL. Further, in respect of the drawing admitted as P14(6), the Takenaka Corporation, who gave the alleged infringing documents to the appellants, wanted the appellants to follow the specifications there as specified by the architect, and it did so without telling the appellants that the copyright in the specifications belonged to someone else and in particular, to TSPL.

6 Counsel also submitted that at the time of the offences in respect of the first and third amended charges, "none of the specifications that the appellants were ever in possession" of bore the names of TSPL or the complainant. There was no indication that copyright in them was being asserted by anyone at the time. More crucially, the specifications were fundamentally different. TSPL uses a 'stainless steel mesh' whereas the first appellant's specifications related to a 'marine grade aluminium Series 5005 anti-termite barrier system'. The evidence of the prosecution was based mainly on the oral assertions of the complainant that were not supported by the documentary evidence.

7 There were two types of documents involved in the 12 charges against the appellants. They were the specifications (referred to above at [6]) and the drawings claimed to be the original works of the complainant, but the documents specific to each of the charges were not set out in the charges or in any annexure to the charges. In this regard, the charges were defective because important particulars of the charges were missing. The specifications that were alleged to be the subject of infringement must be set out in the charge and correspond to the evidence at trial. In this instance, the problem was not that the defence did not know what specifications and drawings were referred to, but, in one set of charges, the specification admitted as P4 was admitted to prove the two offences that were meant to have been committed in 2003 but P4 itself was a 2004 document. That being the case, what was the article that the appellants infringed in 2003? At the very least, in spite of Mr Tan's contention for the prosecution that P4 originated earlier (the evidence does not show that), the benefit of doubt should be given to the appellants.

8 In respect of the charges that relate to the drawings, examining the three drawings tendered in evidence, it was obvious that they were construction plans that were drawn up by the architects whose name appeared on the drawings. The name of Kajima was also imprinted to show that that might be a copy in Kajima's possession. Nothing on the drawings indicated that the appellants who had been given the drawings by Kajima knew that the drawings were subject to copyright protection of the complainant or TSPL. Furthermore, the complaint of infringement, from the evidence, was that the appellants had traced over the border that the complainant or TSPL had drawn over the architect's original copy. The complainant claimed that his and TSPL's tracing of the border amounted to an artistic work that merited protection. The fact here was that the appellants had merely traced over the tracing of an unknown copier. To regard that as an infringement of an artistic work would not be right. The first appellant was doing exactly what the complainant and TSPL themselves were doing. The learned judge below was right in law in saying that drawings can have artistic value and that there was no need to mark © on a document to lay claim to copyright protection. However, it appears that she was swayed by the prosecuting counsel into accepting that a commercial value of

the drawings is equivalent to artistic value that attracts copyright protection. However, counsel for the prosecution did not appreciate that a document with commercial value is not the same as a document with artistic value in the copyright sense. It is a fundamental principle of copyright law that no claim for copyright may be made in respect of ideas and information. All that the said specifications (P4) and the drawings amounted to were mere information at best. Perusing the record, I agree with Mr Vaerhn that the distribution of the first appellant's specifications to the alleged recipients was not adequately proved and the benefit of doubt may be given to the appellants on this issue although for the reasons above, distribution would not have been relevant if the documents of the complainant and TPSL were not infringed.

9 There is also another ground so far as the third appellant is concerned. She was merely an employee who happened to be in the office of the first appellant when the complainant raided it and seized the documents used to found the charges. There was no evidence that she was either a principal or an agent to the alleged offences. There was no evidence as to how she had abetted the offences. The documents in question were not proved to be in her personal possession. On that ground alone the convictions against her ought to be set aside.

10 I agree with Mr Vaerhn that there was no evidence sufficient to show any act of connivance. The mere fact that the second appellant was a director was not enough. A company might have several directors, and none of them would be guilty under a charge of connivance unless the connivance is proved.

11 For the reasons above, the charges against all three appellants were flawed and the convictions cannot stand. The appeals must be allowed and the convictions hereby dismissed. The fines are to be refunded.

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