

JAMAICA

SUPREME COURT CIVIL APPEAL NO 93/2015

APPLICATION NO 162/2015

BETWEEN	TELEVISION JAMAICA LTD	APPLICANT
AND	CVM TELEVISION LTD	RESPONDENT

28 August 2015

IN CHAMBERS

(Considered on paper pursuant to rule 2.10(3) of the Court of Appeal Rules, 2002)

BROOKS JA

[1] After considering this application for an injunction pending the hearing of an appeal from a decision handed down in the Supreme Court on 28 August, I made the following orders:

1. The application is refused.
2. The applicant may renew its application on or after 21 September 2015, if it is so minded.

These are my reasons for that decision.

[2] In assessing the application, I considered:

1. the application for injunction pending appeal dated 28 August 2015;
2. an affidavit of Mr Stephen Greig sworn to on 28 August 2015 in support of the application; and
3. the affidavits and pleadings filed in the court below.

[3] In its application the applicant asserted that it is entitled by a licence to exclusive rights to carry live television broadcast of the 2015 IAAF World Championships being held in Beijing, China from 22-30 August 2015. It also asserted that the licence extends to 31 December 2017, for the purposes of re-broadcasts of the relevant material. It contended that the respondent has breached the applicant's exclusive rights by broadcasting the material.

[4] The applicant made an application to the Supreme Court on 25 August 2015 for an interim injunction to prevent the respondent's use of the material pending trial. An interim injunction was granted on 26 August 2015, but for that day only. It expired, but was not renewed or extended.

[5] The application was considered by Batts J over the course of four days. On 28 August 2015, he refused it. Batts J also refused an application for an injunction pending appeal.

[6] The applicant immediately, thereafter, filed a notice of appeal. Although it is the legal vacation, the applicant also, on the basis that the matter is urgent, filed the present application for an injunction pending appeal.

[7] Given that the events which are the subject of the licensed broadcast would have come to an end on 30 August 2015, the matter was considered as urgent, insofar as that aspect of the dispute is concerned. It, therefore, satisfied the requirement that allowed it to be considered during the legal vacation.

[8] The critical aspect of considering an application for an injunction pending appeal is that the court should, after taking into account all the circumstances, feel a high degree of assurance that the decision it makes is the one less likely to result in injustice.

[9] In its application, the applicant pointed out that it secured sponsorship for the programming based on its assurance to the sponsors that it had exclusivity in its broadcast rights. According to the applicant, the activities by the respondent not only created competition for viewership at the times of the applicant's broadcast of live events but also took away or "diluted" viewership at the times that the respondent re-broadcasted the events in its newscasts and in sports programmes in which the games were discussed.

[10] The respondent's activities, the applicant contended, also caused the sponsors to be concerned and unhappy with their contract with the applicant, given that it was

premised on the assurance of the applicant's exclusivity. The value to the sponsors was therefore diminished. In addition, the applicant stated that it is obliged to protect the commercial interests of the licensor.

[11] The applicant asserted that the respondent infringed its copyright in the material, but that damages will not be an adequate remedy, as the loss cannot be assessed in money terms. It exhibited copies of the affidavits that it placed before Batts J. The above outline of its case has included some of the evidence set out in those affidavits.

[12] In the defence filed on behalf of the respondent, it asserted that it did not utilize material from a satellite as the applicant contended, but rather, used 'clips' of the events in the games, from the IAAF Youtube website. The respondent contended that these were not live broadcasts, but were used during the course of its newscasts and discussion programmes. It denied that it has breached the applicant's copyright.

[13] The issue of breaches of copyright brings to the fore the question of the remedy available. The type of remedy available is an important determinant as to whether or not an injunction is granted. The issue of the adequacy of damages often determined whether or not an injunction is granted.

[14] Section 32 of the Copyright Act speaks to the remedies available to the copyright owner whose work has been breached. These include damages, injunctions and an accounting. Despite the applicant's assertion that damages is not an adequate remedy for the infringement, the award of damages for breaches of copyright is very often the

remedy provided to the owner of the copyright. Additionally, both the applicant and the respondent, undoubtedly, price their product to advertisers and otherwise based on the level of their viewership at particular times in relation to their competitors. There should, therefore, be some mechanism of quantifying the value of loss of viewership at any particular point in time of the day, according to the pricing used at that time.

[15] The question of whether an interim injunction should be granted usually depends on the balance of convenience or, more accurately, the balance of inconvenience. The decision to grant or refuse an injunction often turns on the question of the identity of the party whose inconvenience is more likely to be compensated by an award of damages, if the interim decision is not in its favour.

[16] The analysis of the balance of inconvenience in this case was in the respondent's favour. The currency of the events at the time of the application was critical. This was particularly so in light of the fact that the games were drawing to an end and there would have been no opportunity to correct any error made at this stage, so as to allow the respondent to benefit from the present demand for the material by the viewers. It is, therefore, more likely for the applicant to be compensated by an award in damages, including punitive damages if necessary, if it were found that the injunction were incorrectly refused, than there is for the respondent to be compensated for the loss of the opportunity to use the material, if it were found that the injunction was incorrectly granted.

[17] The fact that the copyright is said to continue to December 2017 speaks to a second element to the dispute, that is, whether the respondent should be barred from using the material in the period after the end of the games but prior to the hearing of the appeal. That should be the subject of a hearing in which both parties are represented. The applicant was, therefore, allowed to renew its application, in respect of that second aspect, on or after the beginning of the new term on 21 September 2015, if it were so minded.