Deluxe Lido Palace Pte Ltd v Innoform Entertainment Pte Ltd [2013] SGCRT 2

Case Number : CT 1/2013

Decision Date : 30 August 2013

Tribunal/Court : Copyright Tribunal

Coram : James Leong; Lau Kok Keng; Susanna Leong

Counsel Name(s) : Ross Tan from Rodyk & Davidson LLP for the applicant; Terence Tan Li-Chern from Dodwell & Company for the respondent

Parties : Deluxe Lido Palace Pte Ltd — Innoform Entertainment Pte Ltd

30 August 2013

District Judge James Leong (President):

Introduction

This was an application by the Respondent to strike out CT 1 of 2013 that was filed by the Applicant on 18 Mar 2013. On 18 Jun 2013, we heard the Respondent's striking out application dated 27 May 2013. At the conclusion of the hearing, we reserved our decision. Having considered the matter, the Tribunal has decided to strike out CT 1 of 2013 with costs fixed at $4,000 in total inclusive of disbursements. These are our grounds of decision.

Background Facts

2 CT 1 of 2013 is an application by the Applicant under S 163 (2) of the Copyright Act (CA) for an order specifying the charges and the conditions that the Tribunals considers reasonable in the circumstances in relation to the Applicant. As gleaned from the application, the Applicant requires a "Karaoke-on-Demand" license granted by the Respondent licensor in accordance with a scheme operated by the Respondent for which the Applicant is charged at the rate of $ 30,000 (excluding GST) annually. It is the Applicant's position that the Respondent has refused to grant or procure the grant of the license except upon charges, terms and conditions that are unreasonable.

Respondent's Grounds for Striking Out

3. On 27 May 2013, the Respondent filed the present application to strike out CT 1 of 2013. This application was supported by an affidavit of their Senior Manager, Mr Chua Kian Hwee dated 27 May 2013. The grounds of the application are listed thus:

(a) that the order sought by the Applicant specifying the charges and the conditions that the Honourable Tribunal considers reasonable in the circumstances in relation to the Applicant have already been substantially and/comprehensively determined in the Grounds of Decision dated 19 October 2011 for CT 1 of 2010 and the Applicant, at this time, are bound by that decision;

(b) further and/or in the alternative, CT 1 of 2013 ought to be struck out on the grounds of *res judicata;*

(c) further and/or in the alternative, that CT 1 of 2013 ought to be struck out on the grounds of issue estoppel;

(d) further and/or in the alternative, that the Copyright Act (Cap 63) precludes the Applicant from applying for an order from the Honourable Tribunal on the grounds as specified in its application;

(e) further and/or in the alternative, that CT 1 of 2013 ought to be struck out, in the circumstances, for being frivolous, vexatious and/or an abuse of process.

Applicant's Grounds for Resisting the Striking Out

4. In opposition to the Respondent's striking out application, Mr Yong Foong Fah, a manager of the Applicant filed an affidavit in reply dated 18 Jun 2013. The material portions of his affidavit at [4] to [14] provide thus:

"4. I wish to respond to some of the Respondent's contentions in Chua's affidavit namely that:

a. CT 1 of 2010 is binding on the parties in the present proceedings.

b. CT 1 of 2013 is purportedly part of continued, repeated and vexatious attempts by various applicants acting in concert to mount frivolous, unfounded, unmeritorious applications to the Copyright Tribunal and this amounts to an abuse of process and a collateral attack on the decisions of CT 1 of 2010 and CT 1 of 2012.

c. *CT 1 of 2013 is allegedly a pre-cursive attempt to forestall proceedings in the Subordinate Courts to recover license fees due and owing from the Applicant.*

5. In response, the Applicant's position is that:

a. The decisions in CT 1 of 2010 or CT 1 of 2012 are not binding on the Applicant because the Applicant was not a party to those determinations. Neither is it related to the applicants in CT 1 of 2010 or CT 1 of 2012.

b. CT 1 of 2013 is the first reference which the Applicant is making to the Copyright Tribunal in relation to a request for a determination of the charges and conditions which the tribunal considers reasonable pursuant to section 163(2) of the Copyright Act (Cap 63) ("the Act").

c. *At the time CT 1 of 2013 was filed with the Copyright Tribunal, the Applicant was unaware of any intention on the Respondent's part to commence legal proceedings in the Subordinate Courts to claim for the alleged outstanding licence fees.*

6. At the outset, I wish to highlight to that the Applicant was <u>not</u> a party to the proceedings in CT 1 of 2010 and CT 1 of 2012. It is also <u>unrelated</u> to the other applicants in CT 1 of 2010 and CT 1 of 2012 namely, Tiananmen KTV & Lounge Pte Ltd, Club Infinitude Pte Ltd, Grand Century Nite Club Pte Ltd and

Orchard Supreme KTV Pte Ltd.

7. Indeed, a review of the business profile of each of the aforesaid parties would show that they do not share the same shareholders and officers as that of the present Applicant. Copies of the business profile searches of Tiananmen KTV & Lounge Pte Ltd, Club Infinitude Pte Ltd, Grand Century Nite Club Pte Ltd and Orchard Supreme KTV Pte Ltd are now exhibited in "YFF-1 ". A copy of the Applicant's business profile search is exhibited in "CKW-1" of Chua's Affidavit.

8. The Applicant is also not privy to the terms and conditions of the licences which were granted to the abovementioned parties in CT 1 of 2010 and CT 1 of 2012. Suffice to say. the terms and conditions of the licence that were granted to the present Applicant may differ from those granted to the other applicants in CT 1 of 2010 and CT 1 of 2012.

9. Therefore. I am advised that the decision of CT 1 of 2010 is not binding on the Applicant. Neither will the outcome of CT 1 of 2013 have any impact on the rights of the applicants in CT 1 of 2010 and CT 1 of 2012 whether in relation to their existing or future licences or arrangements with the Respondent. The Applicant's solicitors will be making the necessary submissions during the hearing of the Respondent's application to strike out CT 1 of 2013.

10 Therefore, contrary to the Respondent's allegations, the Applicant is not part of a concerted attempt by related parties to mount similar applications to exhaust the Respondent's reserves and wear down the Respondent's will. Neither is the present application frivolous, vexatious or an abuse of process.

11. The Applicant is simply seeking a legal recourse available to all licences of copyright under the Act which it is rightfully entitled to.

12. In fact, this is the Applicant's first application under section 163(2) of the Act or for that matter, the Copyright Tribunal under the Act. To shut the Applicant out at this stage of the proceedings without a hearing on the substantive merits of the application, would be inimical to the very purpose of the Act which was to afford licences the opportunity to refer licence schemes or licences to the tribunal for a determination of the reasonable charges and conditions given that Collective Management Organisations, such as the Respondent, have considerable bargaining power and enjoy a dominant position in the market place for the licences of rights and are at liberty to impose excessive loyalties or licence fees.

13. Further, the respondent contends that CT 1 of 2013 is "likely a pre-cursive attempt to forestall proceedings in the Subordinate Courts to recover license fees due and owing from the Applicant." The Applicant categorically denies these allegations. At the time CT 1 of 2013 was filed before the copyright tribunal, the Applicant was unaware of any intention on the Respondent's part to commence legal proceedings to recover the licence fees which are allegedly due and owing by the Applicant. The Respondent's allegations are a mere conjecture and have no basis.

14. In light of the foregoing, the Applicant requests that the tribunal dismissed the Respondent's application to strike out CT of 2013. "

Tribunal Hearing on 18 Jun 2013

5. For the hearing on 18 Jun 2013, counsel for the Respondent relied on Skeletal Submissions dated 17 Jun 2013. At [6] of these submissions, it was highlighted that the Applicant in the present case was one of the five organisations that were made a party to the proceedings in CT 1 of 2010. This may be discerned from [18] of the Grounds of Decision in CT 1 of 2010. At the commencement of the hearing, counsel for the Applicant confirmed that his client was the same party. Accordingly, in one fell swoop, the entire basis of the Applicant's affidavit in opposition to the Respondent's application to strike out was undermined.

6. Undaunted by this, counsel for the Applicant elected to proceed to continue to resist the application, arguing without any affidavit in support that the licence in question in CT 1 of 2010 was different from that in CT l of 2013. In this regard, relying on the closing submissions of the Respondent in CT 1 of 2010, he highlighted that the licenses were different in substance because the record companies and music videos were different, and as a result, there was the possibility of a net reduction in the number of music videos available for use by the licensee under the licence in question in CT 1 of 2013. However, counsel for the Applicant conceded that he had no instructions on whether between 2010 and now, there had in fact been a significant net reduction in the number of such available music videos.

7. Further, counsel for the Applicant argued that as CT 1 of 2010 did not determine that the charges were indeed reasonable, he was not precluded from seeking a determination of this issue by the Tribunal here. He also argued that it was not the purpose of the CA to prevent licensees from bringing further references for agreements lasting 10, 20 or l 00 years. When asked by the Tribunal what were the special or change in circumstances, he noted that the rights attributed to the licence are different, making it a different licence altogether, without citing specific examples from the licence or authority for his submission.

8. In urging the Tribunal to strike out the application, counsel for the Respondent highlighted that the licence fee of $ 30 000 has not changed since CT l of 2010. He also noted that the Applicant had provided no evidence of any material change of circumstances despite having had opportunity to do so for the purposes of the hearing.

Decision of the Tribunal

9. Considering that the Applicant was indeed a party to CT 1 of 2010, contrary to all the earlier assertions of the affidavit they filed in opposition to the Respondent's application at [3] above, we agree with the Respondent that this was a plain and obvious case for striking out based on the interpretation of S 163 of the CA by the Tribunal in CT 1 of 2012.

10. If that interpretation of S 163 is erroneous and parties can make further applications so long as the licence subsists (as so emphatically submitted by counsel for the Applicant), in order to take into consideration changes in circumstances in the next 10, 20 or 100 years, we would still have exercised our powers to strike out. This is because the Applicant has not produced any evidence by way of affidavit to show any material changes or special circumstances. While we appreciate that this is a striking out application and such evidence can be produced at the hearing proper, it is incumbent upon the Applicant to take a clear stand on this to oppose the Respondent's application, or at least have firm and proper instructions regarding the intended factual matrix of their case. Based on counsel's responses and submissions, it did not seem to the Tribunal that this was the case.

11. We also note that the actual time that has elapsed between the decision in CT 1 of 2010 dated 19 Oct 2011 and the present application taken out on 18 Mar 2013 is just one year five months. This is relatively short in the scheme of things, and much less than the 10, 20 or I 00 years cited by counsel for the Applicant. While it is always possible that much could have changed within such a short space of time, there was no evidence of this. It is also pertinent to note that the Applicant did not tile any affidavit to controvert the facts as set out in Mr Chua 's affidavit dated 27 May 2013 even though they had ample opportunity to do so.

Conclusion

12. In light of the above, we struck out CT 1 of 2013 with costs fixed at $4,000 in total inclusive of disbursements to be paid by the Applicant to the Respondent.

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