

SingNet Pte Ltd v Composers and Authors Society of Singapore Ltd
[2020] SGCRT 1

Case Number : CT 1 of 2019

Decision Date : 15 January 2020

Tribunal / Court : Copyright Tribunal

Coram : Edwin San; Lee Ai Ming; Low Chai Chong

Counsel Name(s) : Gloria Goh and Melissa Mak (Allen & Gledhill LLP) for the applicant; Anthony Lee, Aileen Chua and Gursharn Singh (Bih Li & Lee LLP) for the respondent

Parties : SingNet Pte Ltd — Composers and Authors Society of Singapore Ltd

15 January 2020

Senior Assistant Registrar Edwin San (Deputy President):

Introduction

1. This is an application by the Composers and Authors Society of Singapore Ltd ("**Compass**"), pursuant to section 169(1) of the Copyright Act (Cap. 63) ("the **Act**"), requesting that this Tribunal in CT 1/2019 ("**this Tribunal**") refer a question of law arising in the proceedings for determination by the High Court (the "**Reference**"). SingNet Pte Ltd ("**SingNet**") opposed the application on various grounds.
2. The question of law ("the Question") stated by Compass, and refined by this Tribunal with the consent of the parties, is as follows :

"Whether the Copyright Tribunal under section 163(2), read with section 163(6)(b), of the Copyright Act (Cap. 63) ("the Act"), has the power to grant a retrospective order, specifically, an order that applies for the period 1 April 2013, up until the date of the order of the Copyright Tribunal in CT 1/2019 in the application made pursuant to section 163(2) of the Act, by the Applicant SingNet Pte Ltd, on 31 January 2019."

The Parties

3. Compass is a company limited by guarantee incorporated in Singapore. It administers the public performance, broadcast, diffusion and reproduction rights in musical works on behalf of their members. It functions as a collecting society in Singapore and represents owners of musical works of both international and local repertoires. Compass operates a Licence Scheme for Pay Television Service in Singapore, under which a licence would be offered on a yearly basis (calculated from 1 April to 31 March annually).

4. SingNet is a subsidiary of Singapore Telecommunications Limited. SingNet provides, *inter alia*, television cable services wherein it procures and broadcasts a wide range of channels through its Pay TV service, formerly known as "MioTV" and now known as Singtel TV Pay TV service.

Background

5. On 31 January 2019, SingNet filed an application to the Copyright Tribunal under section 163(2) of the Act for an order :

a. That the charges as demanded by Compass for the licence in respect of the right of communication of copyright musical works are unreasonable and arbitrary;

b. That the charges demanded should be derived only from and in relation to content of the Applicant's Singtel TV Pay TV service which utilises works for which a licence is required from Compass ("**Relevant Content**");

c. That the Copyright Tribunal fix a reasonable sum (including a reasonable tariff rate) for the charges that may be demanded by Compass in relation to the Applicant for the Relevant Content of the Singtel TV Pay TV service; and

d. That the licence issued shall entitle the Applicant to use any and all copyright works administered by Compass for the Relevant Content.

6. Compass denies that the charges, terms and conditions it demands in respect of its licence are unreasonable and arbitrary. Compass further contends that since on or about 1 April 2013, SingNet had screened or exhibited movies, shows and programmes on their various television channels through their Singtel TV television network (formerly Mio TV), and which movies, shows and programmes comprise, utilise or feature musical works of owners represented by Compass without making any application to the Tribunal pursuant to section 163 of the Act during the period 1 April 2013 to 30 January 2019.

7. SingNet's application under section 163(2) of the Act and the related matters set out in paragraphs 5 and 6 above constitutes the main proceeding before this Tribunal .

8. On 11 March 2019, Compass commenced HC/S 261/2019 ("**Suit 261**") against SingNet for copyright infringement of musical works of owners represented by Compass for the period 1 April 2013 to 31 March 2019. On 9 July 2019, the High Court ordered an interim stay of proceedings in respect of Suit 261 until the determination of the proceedings before this Tribunal .

Respective List of Issues

9. On 9 May 2019, at a Pre-Hearing Conference, this Tribunal requested parties to agree, if possible, on the issues for determination for this Tribunal in the main proceeding.

10. On 17 June 2019, the solicitors for SingNet informed this Tribunal that parties were unable to come to an agreement on the issues for determination by this Tribunal . However, parties agreed to place their respective List of Issues before this Tribunal .

11. In this regard, having perused the respective List of Issues, we pause to mention that one issue that both SingNet and Compass did agree upon was whether this Tribunal can make an order that applies retrospectively for the period from 1 April 2013 to 1 December 2018 (according to SingNet), or for the period from 1 April 2013 to 31 March 2019 (according to Compass).^[note: 1]

12. For completeness, we note that the factual issues sought to be raised by SingNet, as set out in the List of Issues submitted, include (a) how Compass determines the tariff rates that it is seeking to impose on SingNet, (b) how the tariff rates can be considered reasonable rates in so far as SingNet is concerned, (c) whether the tariff rate calculated as a percentage of SingNet's revenue accounts for the fact that entertainment channels feature more extensive use of music whilst sports feature less extensive use of music.

13. As for Compass, amongst the issues set out in its List of Issues include (a) whether their proposed tariff rate (based on all subscription fees received by SingNet) is reasonable in its application to SingNet, and (b) if it is not reasonable, what are the charges and conditions this Tribunal considers reasonable in the circumstances.

14. It is clear to this Tribunal that, at the hearing of the main proceedings, evidence (from both factual and expert witnesses) will have to be adduced by the parties in relation to the foregoing issues mentioned in paragraphs 12 and 13 above.

The Reference

15. On 20 September 2019, the solicitors for Compass requested a preliminary hearing for a fresh timeline with regard to the furnishing of documents by SingNet, and also requested this Tribunal to consider a reference of a question of law to the High Court. On 3 October 2019, this Tribunal directed Compass to file a formal application in accordance with Regulation 47(1)(a) of the Copyright Tribunals (Procedure) Regulations ("**Regulations**") with regard to the proposed reference of a question of law. Compass duly complied by filing the prescribed Form 23 on the same day.

16. It is further noted that as of 3 October 2019, parties had yet to complete the discovery of documents, and the affidavits of evidence of the witnesses to be called had also not been furnished and exchanged.

17. In support of its application for the Reference, Compass advanced several arguments :

a. First, Compass contended that the Reference will lead to savings in time and cost. Compass submitted that the determination of the question of law by the High Court at this stage will allow the issues to be heard by this Tribunal to be streamlined, which will in turn enhance efficacy of the proceedings before this Tribunal. Compass further submitted that this will lead to a fairer and more efficient dispensation of justice in this case.

b. Second, a determination by the High Court of the Reference would benefit this Tribunal in that this Tribunal would know the precise ambit of its jurisdiction. Compass submitted that the evidence and the issues to be adduced before the Tribunal would be clearer once this Tribunal knows its precise jurisdictional ambit.

c. Third, Compass, in referring to section 169(5) of the Act, submitted that if the question of the law is referred to the High Court only after this Tribunal has given its full decision, and should the High Court then decide that the question was erroneously determined by this Tribunal, then there is a real risk of the Tribunal having to reconsider the matter in dispute and further time and costs would have to be expanded in having the matter re-opened/resumed before this Tribunal.

18. SingNet objected to the reference on various grounds. In summary, SingNet contended that:

a. this Tribunal has full power and jurisdiction to determine the Reference, and that the determination of the Reference is within the expertise and experience of this Tribunal ;

b. a reference to the High Court would delay proceedings and incur unnecessary costs;

- c. policy reasons support this Tribunal's determination of the Question; and
- d. if a reference is ultimately made to the High Court, the High Court would benefit from having this Tribunal's decision and its reasons for the decision in the High Court's determination of the Question.

Our Decision

19. We heard the Reference application on 15 November 2019. Having heard and considered the detailed written and oral submissions from both counsel for Compass and SingNet, we decide that the application for the Reference should be allowed for reasons which we elaborate below.

20. Section 169(1) of the Act provides that a Tribunal may, of its own motion or at the request of a party, refer a question of law arising in proceedings before it for determination by the High Court.

21. It is plain that section 169(1) does not oblige a Tribunal to refer a question of law to the High Court, even at the request of a party. The Tribunal has the full discretion in deciding whether such a reference ought to be made, and this is an undisputed point between both parties.

22. Therefore, the central issue before the Tribunal, insofar as the Reference application is concerned, is whether we should exercise our discretion to grant the application.

23. Counsel for SingNet, however, suggested that there is a distinction between a reference made before a Tribunal has given its decision, and a reference made only after the Tribunal has given its decision; and submitted that this Tribunal "should be slower to refer a question of law to the High Court before it had issued its decision.". Counsel for SingNet, pointed out that, like section 169(1) of the Act, section 30(1) of the UK Copyright Act 1956 provided that "Any question of law arising in the course of proceedings before the tribunal may, at the request of any party to the proceedings, be referred by the tribunal to the court for decision, whether before or after the tribunal has given its decision in the proceedings". However, this approach was abandoned in the Copyright, Designs and Patents Act 1988 ("CPDA"), in that section 152(1) of the CDPA now only allows an appeal on a point of law arising from a decision of the Copyright Tribunal to the court. Counsel for SingNet therefore argued that the UK legislature took the position that a reference to the court before the tribunal has given its decision is of lower utility, and that a reference that is made only after the tribunal has issued its decision is preferable. As such, in the present matter, counsel submitted that this Tribunal should be slower to refer a question to the High Court before it has issued its decision.

24. We are unpersuaded by this submission. The plain language of section 169(1) of the Act does not place any limits on the exercise of our discretion as to the point of time in which a reference on a question of law can be made to the High Court. In this connection, Regulation 49 of the Regulations provide for consequential procedural steps to be taken in the event a Tribunal refers a question of law under section 169(1) for determination to the High Court before giving its decision, while Regulation 50 provides for the same in the instance where such a reference is made after the Tribunal has given its decision. We are unable to agree with the contention that references on a question of law made before a Tribunal has made its decision must necessarily be of "lower utility" as appeared to be suggested by counsel for SingNet nor are we able to discern any policy ground or reason supporting such a contention. In our view, whether or not a Tribunal decides to exercise its discretion to refer a question of law to the High Court, pursuant to section 169(1) of the Act, will very much depend on the nature of the question of law framed, as well as the factual matrix and prevailing circumstances of the case at hand.

25. We reiterate that the question in the Reference had separately been raised and identified by both parties in submitting their respective List of Issues, and the question concerns a fundamental issue of whether the Tribunal has the power to make a retrospective order. In our view, the nature of the question of law in the

Reference is neither frivolous nor ill-considered, and in fact had arisen in a previous Copyright Tribunal decision in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCR 1 (“**Sunvic**”).

26. In *Sunvic*, the Tribunal ruled, at [3.7] of its Grounds of Decision, that the Tribunal does not have the jurisdiction to make a retrospective order under section 163(2) of the Act. The Tribunal further observed that its remit under section 163(6)(b) of the Act was to simply set out the charges and the conditions that it considers reasonable in the circumstances in relation to the applicant. However, at [15.2], the Tribunal opined that from the facts of that case, it may be desirable for the Copyright Tribunal to have the powers to make its orders retrospective, and expressly pointed out that, subject to any decision of the High Court on whether such a power already exists, it will be for the law makers of Singapore to determine whether such a power should be conferred on the Tribunal.

27. While the decision in *Sunvic* is not binding on this Tribunal, it does underscore the importance of the nature of the question of law sought to be referred, and this factor, by itself, is one which points in favour of this Tribunal exercising its discretion to allow the Reference in the present case.

28. Furthermore, in exercising our discretion, we think it is necessary, after considering the nature of the question framed, to weigh the advantages and disadvantages of making the Reference in the factual matrix and circumstances of the present case.

29. Counsel for Compass contended that this is an opportune time to make the Reference, given that the Reference pertains to an important question of law that would have a material impact on the proceedings proper before this Tribunal as well as on Suit 261. It was submitted that it would be more efficacious to refer the question for determination by the High Court at this juncture while proceedings were at a relatively early stage, with discovery yet to be completed and neither side having exchanged affidavits-in-chief of their respective witnesses.

30. We had earlier referred to some of the issues that parties had identified which will require determination at the main proceedings proper. We take the view that the evidence to be adduced at the hearing of the main proceedings would necessarily have to be circumscribed by the fundamental question as to whether this Tribunal has the power to make an order that applies retrospectively to 2013. In this regard, we are inclined to agree with counsel for Compass, that with the benefit of a High Court ruling on the question of whether this Tribunal has the power to grant a retrospective order, the issues to be heard by this Tribunal at the hearing proper would be more streamlined. Accordingly, the evidence to be adduced and heard from the witnesses to be called, would be more delineated and focused, and this would result in savings of costs and time.

31. In addition, we agree with counsel for Compass that there is also a real risk of incurring additional costs unnecessarily if this Tribunal were to proceed to make a ruling on the said question of law and then proceed further to determine the main proceedings, and the High Court subsequently decides that the said question of law was erroneously determined by the Tribunal, as this will require the Tribunal to have to reconsider the matter in dispute.

32. In this regard, we find the Australian case of *Application by Fueltrac Pty Ltd* [2018] ACopyT 2 (“**Fueltrac**”), which was cited by counsel for Compass, to be most helpful. In that case, the question of law at issue was whether the jurisdiction of the Tribunal was in fact engaged. The respondent, the State of Queensland, sought to refer the question of law to the Federal Court of Australia by way of a preliminary application under section 161 of the Copyright Act 1968. Section 161 (which is similarly worded to section 169(1) of the Act) provides that the Tribunal may, of its own motion or at the request of a party, refer a question of law arising in the proceeding before a Tribunal, for determination by the Federal Court of Australia (“**Federal Court**”). This preliminary application was opposed by the applicant Fueltrac Pte Ltd. The applicant recognised and accepted that there were questions of law which needed to be determined relating to issues of subsistence, ownership and the contended exercise of rights. However, notwithstanding this, it argued that the

Tribunal ought to proceed to hear and determine all of the factual questions, and thereafter, the legal questions be referred to the Federal Court for determination against the background of the Tribunal's fact-finding.

33. This argument was rejected by the Tribunal. In deciding to refer the question of law to the Federal Court, the Tribunal noted, at [21] and [22] of the Reasons for Determination, the concern that "...time and costs might be wasted if it is later found that the Tribunal's jurisdiction was not properly engaged in undertaking the methodology suggested by Fueltrac" and that "... [t]he most efficient course would be to stay these proceedings pending the determination of Federal Court proceedings. These proceedings in the Tribunal could be reinvoked should it emerge that Fueltrac is successful in its claim... The Tribunal can then discharge its statutory role of fixing the terms confident that the anterior questions are resolved and there is no likelihood of a challenge to jurisdiction which would waste everybody's time and money."

34. We agree with the reasoning and approach adopted by the Tribunal in *Fueltrac*. The question of law sought to be referred in this instant case relates to whether this Tribunal has the power to grant a retrospective order dating back to 1 April 2013. It is clear to us that a determinative decision by the High Court on this question of law will confer the advantage of this Tribunal knowing the ambit of its jurisdiction as regards its powers to make a retrospective order as well as the corollary advantage of streamlining the main proceedings before this Tribunal, with both parties aware of the scope of the evidence to be adduced before this Tribunal, especially on evidence dating back to 2013. This will facilitate savings in terms of both time and costs for both parties.

35. Finally, we are unpersuaded by the argument canvassed by Counsel for SingNet that a reference to the High Court would delay proceedings. We do not agree that this would invariably be the case since it would be reasonable for this Tribunal to assume that parties will be at liberty to request for a suitable hearing date in the High Court. But more importantly, in its arguments before us, SingNet has failed to show any real unfairness or prejudice which may arise if this Reference is allowed on account of any delay in these proceedings. We reiterate that at this juncture, proceedings are at a relatively early stage, with discovery yet to be completed and neither side having exchanged affidavits-in-chief of their respective witnesses. In the premises, we find that there is little merit in this argument, and any disadvantage arising from a potential delay in the hearing of the main proceedings by virtue of this Reference being allowed is clearly outweighed by the advantages which we have alluded to above.

36. For the reasons given above, we hereby allow the Reference.

[note: 1] Letter dated 17 June 2019 from Allen & Gledhill to the Copyright Tribunal, exhibited in Annex 1 of the Applicant's Submissions dated 24 October 2019 (marked as "A1").

BACK TO TOP

Copyright © Government of Singapore.