

Qatar Airways grounded by English court in PRS copyright claim

The High Court has dismissed Qatar Airways' application to stay a copyright claim brought by the Performing Right Society over use of PRS music repertoire in QA's in-flight entertainment system.¹ QA argued that Qatar was the natural forum, contending that most of the acts of alleged infringement occurred there, rather than in the UK. Yet the judge found that the courts of either forum would have to apply laws other than their own, given the multi-national use of the music, and while the case had real connections to both England and Qatar, the connections to Qatar were not significantly stronger than those to England.

Background

PRS is a UK collective management organisation. The CMO's members consist of writers, composers and publishers of musical works. Its repertoire consists of over 5.5 million musical works. PRS members assign the "performing right" to it, including the rights: (a) to perform their musical works in public; and (b) to communicate their musical works to the public within the meaning of sections 19 and 20 of the Copyright, Designs and Patents Act 1988. As well as being the assignee of the UK performing right, PRS is the assignee of the equivalent performing right worldwide.

QA is a passenger airline and the national airline for Qatar. It has 206 commercial passenger aircraft in operation and operates scheduled passenger flights to over 160 destinations in 80 countries. During flights, the aircraft pass through the airspace of non-destination countries, as well as destination countries and international airspace.

Like many other international airlines, QA offers an in-flight entertainment system. Airlines offering such IFE systems are generally granted licences by copyright CMOs that are domiciled in the same country as the airline. CMOs also tend to have reciprocal agreements that allow them to grant licences in relation to rights assigned to foreign CMOs. There is, however, no equivalent CMO to PRS that is based in Qatar.

Claim

PRS asserted that musical works within its repertoire were included in the content provided on QA's IFE system, and issued a claim against QA in England for: (a) a declaration that QA had infringed the worldwide performing rights; (b) an injunction to prevent further infringement; and (c) an inquiry for corresponding damages.

QA was served with the claim at the London address of its UK branch. It accepted that it had been validly served, but applied to stay the claim on grounds of *forum non conveniens*, or alternatively on case-management grounds. It argued that Qatar was the appropriate forum for the proceedings. PRS accepted that the Qatari courts could have jurisdiction to hear the claim, but contended that the English courts were the most appropriate forum.

PRS and QA both agreed that the claim was, in principle, justiciable in England and Wales, despite the involvement of foreign copyright infringement. This was on the basis that it had been established by the Supreme Court in the *Lucasfilm* case² that the English courts can have jurisdiction over claims for infringement of copyright by non-UK acts and under non-UK law, where there is a basis for *in personam* jurisdiction.

¹ *Performing Right Society Limited v Qatar Airways Group* QCSC [2020] EWHC 1872 (Ch).

² *Lucasfilm Limited v Ainsworth* [2011] UKSC 39.

Issues

The issues in this case were, in accordance with the two-stage “test” under the leading case on *forum non conveniens*, *The Spiliada*.³

- whether there was another available forum that was clearly and distinctly the forum with which the claim had the most real and substantial connection; and
- if so, whether England was nevertheless the appropriate forum, in particular because the court was not satisfied that substantial justice would be done in the alternative available forum.

A further issue, if QA’s forum submission failed, was whether the court should stay all of the non-UK copyright claims by applying the overriding objective under the Civil Procedure Rules.

Judge’s approach

Mr Justice Birss noted that some practical aspects of litigation in a given forum might have a bearing on stage 1. On the other hand, some matters of procedure were likely to be relevant (if at all) only at stage 2. Yet the fact that a foreign forum might have features that the claimant would regard as less advantageous was not enough to determine the matter at stage 2.

In considering stage 1, Birss J considered the issues under the following headings:

- the parties’ personal connections with England and Qatar;
- the factual connections that the events relevant to the claim had with the countries;
- applicable law; and
- factors affecting convenience or expense, such as the location of witnesses or documents.

Review of forum issues

Personal connections with the countries

Birss J noted that PRS is a company limited by guarantee incorporated in England and Wales, with 480 members of staff, of which only two were based outside the UK and none in Qatar. Its employees and representatives are primarily native English speakers. PRS had also indicated that it envisaged calling evidence of content provided to QA from representatives of Global Eagle Entertainment, another company incorporated in England and Wales, which provided music content to airlines.

QA is a company based in Qatar and wholly owned by the State of Qatar, with 128 offices in 73 different countries and approximately 46,000 staff worldwide. QA envisaged calling evidence from staff based in Qatar only for flight data and QA’s IFE system. Many of the staff based in Qatar speak fluent English. QA has a UK establishment named Qatar Airways Group QCSC and registered as an overseas company at Companies House in England and Wales. QA’s evidence was that the UK company is maintained purely for administrative purposes, and that the UK branch assists with UK operations, regulatory compliance and sales only. QA maintains two offices in London and, in June 2020, the UK branch employed 220 individuals, although that was expected to fall to 180 by August 2020. QA has a presence at Birmingham, Cardiff, London Harrods, London Heathrow and Manchester, although its

³ *Spiliada Maritime Corp. v Cansulex Ltd (The Spiliada)* [1987] AC 460.

evidence was that these are mainly desks staffed by third-party handlers doing work on behalf of QA, and had no relevance to the proceedings.

PRS submitted that the UK was an important market for QA and referred to various marketing and financial materials of QA in support. QA submitted that, in context, the UK was not a particularly important destination to QA.

Overall, Birss J concluded that each of PRS and QA had a close and genuine link to its own home state. He considered it fair to say that QA had rather stronger links to the UK than PRS had to Qatar, but found that the degree of difference was small.

Factual connections with the countries

The relevant events were the playing of music in QA's aircraft, or at least the availability of that music. The judge noted that where that occurred depended on where the aircraft were.

QA's evidence was that about 98% of QA's flights either start or finish in Qatar, whereas 5% of QA flights either start or finish in the UK and UK destinations represent 3.4% of QA destinations. On QA's case, the periods in the air were most significant because the IFE system was only available during the flight itself, but this a matter of dispute between the parties. There was no calculation in the evidence as to what proportion of total QA flight time was in international airspace or the airspace of the UK, Qatar or any other country.

Birss J noted that QA's aircraft spend more time in Qatar than they do in the UK, but considered that to an appreciable degree relevant acts did take place in the UK. He also noted a great deal of the activity in question took place in other countries.

Applicable law

The parties agreed that, when the aircraft are in Qatar, including Qatari airspace, Qatari law applies to the claims of copyright infringement, and that when the aircraft are in a destination country or its airspace, the law of that country applies. It was also common ground that Qatari law would apply in international airspace.

As the aircraft would spend more time in Qatar than they did in the UK, it followed that Qatari law would apply for more of the time than UK law. But Birss J noted that English law would apply to the acts carried out in the UK, and that relevant acts had taken place in the UK to an appreciable degree.

The judge went on to comment on a number of disputed submissions, concluding that none had a bearing on connection to Qatar. Those included a suggestion that the law of Qatar was not equipped to deal with the case because there were few copyright cases in Qatar. This was rejected by Birss J, because Qatar clearly has a copyright law that could be applied, and there are copyright decisions in the Qatari courts, even if not all of them are reported. Another submission was that the approach to costs recovery in the Qatari courts was less generous to a successful party than in England and Wales, but the judge found that had "nothing to do" with real and substantial connection.

PRS also submitted that the High Court had particular expertise in intellectual property cases and dealing with the relatively complicated law on the right of communication to the public. QA responded that it was by no means clear that the communication right as enacted in ex-EU countries would or should necessarily be interpreted in the same way as in the EU. Birss J did not consider, however, that the potential for such divergence weighed in favour of PRS or QA, for the same reason that many of the other points did not. He noted that whichever court tried the case would have to grapple with the laws of other states and the particular issues to the same extent.

Factors affecting convenience or expense

Birss J noted the dispute about how QA's IFE system operated, and that, if it were unresolved by trial, there would need to be some evidence from witnesses based in Qatar and production of documents that were in Qatar. Yet he was doubtful that the dispute would still be live by the time of any trial so as to require witnesses.

Equally, there might need to be some evidence from witnesses based in the UK if issues arose relating to Global Eagle Entertainment, the London-based company that had provided the works to QA. QA contended that there would be no need for that evidence, essentially because it would make admissions. The judge thought that likely too.

For Birss J it followed that at some stage both parties were likely to want to call evidence about contracts and licensing. On each side this would require evidence from the UK and Qatar respectively.

Birss J noted that, for whichever court heard the matter, there would be a need to translate into or out of English or Arabic.

Decision on forum

Overall, Birss J considered the position to be clear. The case had real connections to England and real connections to Qatar. As to the factual events and location of witnesses and documents, there were also connections to both places. Qatari law would apply to many more instances than English law, in terms of the amount of time or the number of plays of a work, but the judge did not consider that the whole story. The case was not a Qatari copyright dispute in which the events in and laws of England and other countries were an ancillary aspect: every international flight engaged the copyright laws of at least two states. So the case was really a global copyright dispute between an English holder of worldwide rights and a Qatari user of the protected content, which was using it all over the world. The dispute had a connection to every state to which QA flew planes. Nonetheless it clearly had a more real connection with England and Qatar than with any other state. As between the two, the fact that a higher share of any damages might be due for acts to which Qatari law applied than those for which English law applied did not make Qatar clearly and distinctly the forum with which the dispute had the most real and substantial connection. Overall, Birss J did not agree that the connections to Qatar in terms of applicable law were significantly stronger than those to England.

The dispute concerned events that had taken place in a large number of countries, for which the applicable law of a large number of states was relevant, and so whichever court handled the case would be required to examine laws other than its own. Debates about the Qatari legal system, its approach to copyright and to evidence of foreign law were not relevant, in the judge's view, at stage 1.

So Birss J did not consider that Qatar was clearly the natural forum for the dispute, and he rejected QA's case on forum. He saw no need to consider stage 2, although he noted *obiter* that, if he had found Qatar to be the natural forum, he would have stayed the English claim, as he would then be doubtful about PRS's argument at stage 2.

Decision on Civil Procedure Rules

Birss J also rejected QA's submission that, even if its forum submission failed, all of the non-UK copyright claims should be stayed by applying the overriding objective. QA's submission was that those claims, or at least the ones based on Qatari law, had their most real connection with Qatar, and the court should in those circumstances be careful not to allow PRS to bring what were manifestly non-UK claims against a Qatari-domiciled company in the English court. Following *Lucasfilm*, however, claims for foreign-copyright infringement were justiciable in the English courts. In this claim QA was within the jurisdiction of the court, and the court had rejected the forum submission. It accorded with the overriding

objective for the case to be managed in a proportionate manner, which would involve finding a suitable way to manage the aspects of the claim to which foreign law applied. The judge had no doubt that expert evidence on Qatari law would be required, but how the other foreign laws would be managed was, in his view, a matter to consider at a CMC.

QA's application was therefore dismissed.

Comment

QA has been refused permission to appeal by Birss J. PRS has indicated that it intends to press ahead with its claim unless QA agrees to take a licence and to settle its liability for past infringements.

PRS views the action as a landmark case because, from May 2020, PRS has not directly licensed any airline that is domiciled outside the UK. Its position is that QA must take a licence for the works within its repertoire, either on a worldwide or territory-by-territory basis. Sami Valkonen, the Chief International and Legal Officer of PRS, commented that "Gulf-based airlines have spent more than a billion pounds on various sports endorsements, yet refuse to remunerate our members for the use of their music on the airlines' award-winning in-flight services". He added that the ruling was "an important first step in our unyielding quest to correct this long-standing injustice", and that PRS hopes "to resolve this matter as efficiently as possible" on behalf of its members.

It seems that, if the PRS claim ultimately succeeds (whether in the courts or through a settlement), PRS may well look to license other airlines domiciled in territories that do not have established CMOs for the collective licensing of musical works.

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