



Neutral Citation Number: [2015] EWHC 2041 (Admin)

Case No: CO/5444/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2015

Before :

MR JUSTICE GREEN

Between :

THE QUEEN on the application of
(1) BRITISH ACADEMY OF SONGWRITERS,
COMPOSERS AND AUTHORS
(2) MUSICIANS' UNION
(3) UK MUSIC 2009 LIMITED

Claimants

- and -

SECRETARY OF STATE FOR BUSINESS,
INNOVATION AND SKILLS

Defendant

- and -

THE INCORPORATED SOCIETY OF
MUSICIANS

Intervener

Tom de la Mare QC and Tom Cleaver (instructed by Olswang) for the Claimants
Pushpinder Saini QC and Sarah Ford (instructed by Treasury Solicitor) for the Defendant

Hearing date: 3rd July 2015

Approved Judgment

Mr Justice Green :

A. Introduction

1. In this ruling I address the issues which arise out of the Judgment handed down on 19th June 2015 ([2015] EWHC 1723 (Admin)) (“the Judgment”). In the Judgment I found that in principle the application for judicial review succeeded. This was upon the basis of one of the substantive grounds advanced albeit that it was a ground going to the heart of the decision adopted by the Secretary of State to introduce Section 28B CDPA 1988. In this ruling I shall use the same abbreviations and acronyms as I used in the Judgment.
2. The following issues now arise for determination:
 - i) Whether the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361) (“the Regulations”) made on 26th August 2014 and coming into force on 1st October 2014 should be quashed?
 - ii) Whether, if the Regulations are quashed, this is *ex nunc* or *ex tunc*?
 - iii) Whether a reference should be made to the Court of Justice of the European Union (“Court of Justice”) in relation to the meaning of the concept of “harm”?
 - iv) Costs.

B. Whether the Regulations should be quashed?

3. In the Judgment I held that because of a defect in the process by which evidence was collected and evaluated during the consultation process leading up to the adoption of the Regulations which introduced Section 28B CDPA 1988 the decision to adopt those Regulations was unlawful: see Judgment Section I paragraphs [232] – [273]. The basis upon which I arrived at this conclusion was English common law, not the law of the EU. I made clear that my conclusion applied regardless of the fact that I decided a number of important points of law in favour of the Secretary of State but that there might be a case to be advanced that certain of these questions of law should be referred to the Court of Justice for determination. This was in particular in relation to the concept of “harm” considered in Issue II in the Judgment (see paragraphs [169] – [207]). I also made clear that I arrived at the conclusion that the consultation process was flawed regardless of the intensity of the judicial review process that I applied. In other words, I would have arrived at the same conclusion even had I accorded a very generous margin of appreciation to the Defendant.
4. I left open the issue of the remedy to be granted because it seemed to me, at that time, that in principle there were a number of possible alternative outcomes which might have led me to defer the consideration of a quashing Order until after a reference to the Court of Justice. Accordingly, I invited submission on appropriate next steps and remedies.

5. I have now received detailed and constructive submissions from the parties. The Secretary of State has accepted the position that the Regulations *should* be quashed. He states as follows:

“4. The Secretary of State welcomes the guidance which the Court has provided as to the correct approach to be adopted as a matter of law when considering the introduction of a private copying exception, and as to the scope and nature of the factual enquiries which are necessary. He will now take the opportunity to reflect further and in due course take a view as to whether, and in what form, any further factual enquiries should be carried out and whether a new private copying exception should be introduced. The Secretary of State has not decided on any specific course at this stage and wishes to take time to reflect before making any further decisions. He would not wish to create any uncertainty in the law by submitting that the Regulations remain in force while further policy decisions are made.

5. Given that the Secretary of State submits that a quashing order is appropriate at this stage, there is no necessity for a reference to the CJEU. As is made clear in the body of the Judgment, the Judge’s conclusion leading to the ruling that the decision was unlawful did not depend on his conclusions on issues of EU law, in particular as to the meaning of “harm” (the issue identified by the Judge is a matter for a potential reference)”.

6. The Claimants take the same position. They submit that the quashing of an Order or instrument should be the natural consequence of a finding that it was unlawfully brought about. In *R(Edwards) v Environment Agency* [2008] UKHL 22 Lord Hoffmann stated of the exercise of discretion:

“...the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it”.

Similarly, in *R(ICI Plc) v Attorney General* [1987] 1 CMLR 72 (CA) at paragraph [112] Lord Oliver stated:

“It must be wrong in principle, when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy, unless, at any rate, there are extremely strong reasons in public policy for doing so”.

7. In support of the proposition that the Regulations should be quashed the Claimants made the following additional points.
8. First, that the Judgment affects private property rights which, as matters stand, have been taken away from rightholders. Insofar as the Secretary of State has not articulated a present intent to reintroduce an exception and seeks time to think matters

over, it would be neither right nor fair to rightholders to deprive them of the fruits of victory in this litigation. This is so notwithstanding that in practice in very many instances rightholders do not enforce their rights.

9. Secondly, upon the basis of the position presently adopted by the Secretary of State the time needed by him to reconsider and then act may be significant. This is not a case where the time elapsing prior to a definitive resolution of an issue can confidently be said to be short and as such it would not be appropriate to permit what is not, upon the basis of the Judgment, a lawful scheme to remain as valid on the statute books. This is especially so given that it is possible that following thought and reflection, the Secretary of State might adopt a middle course involving a copyright exception coupled to a modified compensation scheme. It would be wrong for inconsistent unlawful regulations to have remained extant pending the new (*ex hypothesi*) lawful scheme.
10. Finally, it is submitted that in a dispute between purely private parties if the Regulations and Section 28B were left in place yet already held to be unlawful this would give rise to legal uncertainty.
11. It is clear that I should quash the Regulations. I make clear that this covers the entirety of the Regulations and all of the rights and obligations contained therein. The Judgment concerned the personal and private use exception in section 28B; but the Regulations for example also introduce analogous exceptions for performing rights in Schedule 2 paragraph 1B CDPA 1988. The Regulations are thus quashed.

C. Should the quashing Order be *ex tunc* or *ex nunc*?

12. The more difficult question arises as to whether I should quash the Regulations with prospective effect only (*ex nunc*), or, whether I should also quash the Regulations with retrospective effect (*ex tunc*).
13. It is the Claimants' position that I should quash the Regulations *ex tunc* and also that I should make a declaration reflecting this fact in the following terms:

“The Court hereby declares that the making of private copies of musical and other copyright works without consent, in the circumstances purportedly authorised by the Regulations, constitutes and has continued since 1 October 2014 to constitute an infringement of copyright”.

14. The facts relevant to this issue are that on 1st October 2014 Section 28B became effective. From there on, upon countless occasions, no doubt running into many millions, natural and legal persons performed acts of copying which were lawful under the law as it then stood. Evidence before the Court demonstrated that many people were never aware that private copying was even illegal. Other evidence indicated that many individuals refrained from copying for the very reason that they were aware that it was illegal. Indeed, the Claimants relied upon evidence (summarised in the Judgment paragraph [257]) to the effect that one of the most common reasons that people gave for not copying was that there was a current law against copying. It is therefore quite possible, and indeed probable, that very substantial numbers of persons commenced copying because they had become entitled

in law to do so. They perfectly reasonably changed their conduct and relied upon the new law as a justification so to do. The Claimants seek now to unravel the past and undermine the expectations of all those who believed that they were acting reasonably and lawfully or (irrespective of belief) now were so acting. They wish, in principle, to restore a cause of action against those same persons. This is an unattractive proposition, not the least because many of the Claimants' own members take the view that (the hitherto unlawful) personal private copying actually benefitted the market for content which expanded in consequence; and because they recognise that personal private copying is a practical and reasonable reality, and because in further consequence there has been no practice of using the Courts to enjoin or seek other monetary relief against infringers. An important and unusual characteristic of the facts of this case is that a major impetus for change which led to the adoption of the Regulations was a widespread acceptance that the law had fallen into disrepute.

15. There was some debate before me as to the extent to which the Court has the power to impose a temporal limitation upon a quashing Order. In my judgment it is clear that the Court has a discretion to limit the effects of such an Order. In *Mossell (Jamaica) Limited v Office of Utilities Regulations Cable and Wireless Jamaica Limited* [2010] UKPC 1 Lord Phillips described the jurisprudence on the question of the effect of executive orders and administrative decisions before a final judgment was reached on their validity as “*vexed*” (ibid. paragraph [43]). In paragraph [44] Lord Phillips summarised the position in the following terms:

“44. What it all comes to is this. Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found *ultra vires*, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called “third actors”) during the period before their invalidity is recognised by the court – see, for example, *Percy v Hall* [1997] QB 924. All these issues were left open by the House in *Boddington*. It is, however, no more necessary that they be resolved here than there”.

16. It is clear that in the different, but loosely analogous, context of judicial rulings and Orders, the Court has the power to limit those effects to the future only. So, for example, in *Sabha v Attorney General* [2009] UKPC 17 at paragraph [42] a declaration was not to be treated as retrospective so as to affect honours previously granted. In *R v Governor of Brockhill Prison ex p. Evans (No 2)* [2001] 2 AC 19 at page [26H] it was stated:

“...there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial ruling should be prospective or limited to certain claimants”.

See more generally Fordham, *Judicial Review Handbook* (6th Edition) page 278 paragraph 24.4.9.

17. The context in which the Claimants' proposed declaration operates is private litigation between a rightholder and an alleged infringer in which it is alleged that the infringement occurred whilst Section 28B was in force. That is, of course, very different to the present case which concerned broad points of law and policy argued out between the State and representative trade associations. Mr Saini QC, for the Secretary of State, submits that it is inappropriate to deal with the issue of retrospection now. He points out that parties to such hypothetical private litigation are not before the Court and their voice has not, thereby, properly been heard, and the submissions of the Secretary of State in this litigation are not a substitute or proxy for those of directly affected rightholders and alleged infringers. He makes the point that the effect of public law illegality on rights as between private parties is a difficult and complex issue and the consequences of quashing the Regulations, in particular with retroactive effect, may be to complicate unnecessarily and unreasonably future litigation between private parties. In De Smith's *Judicial Review*, 7th Edition, Chapter 19 paragraph [25], the following is stated:

“A finding by a Court that a public authority, in performing a public function, has breached a ground of judicial review does not of itself provide a basis for entitlement at common law to compensation...To recover damages, a recognised cause of action in tort must be pleaded and proved – such as negligence, the tort of breach of statutory duty, misfeasance in public office, false imprisonment or trespass. So while in some cases it may be a necessary condition, it is never a sufficient one for the award of damages that the act or omission complained of be “unlawful” in a public law sense”.

18. In *Robert Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 472 Lord Justice Pitchford explicitly approved of the above paragraph from De Smith. Having cited cases which addressed the appellant's submission that there was “...no such concept as public law unlawfulness that [was] distinguishable from unlawfulness for all other purposes”, he made the following observation when rejecting it:

“These [authorities]...demonstrate clearly, in my view, recognition of the distinction to be drawn between public law unlawfulness entitling a person affected to challenge the Order made by a judicial review (and its execution), and private law liability for damages of those acting under judicial authority in its execution. Contrary to the submission made on behalf of the appellants, the term public law unlawfulness is a term recognised by the law and, in my judgment, is apt to distinguish between public and private law consequences of an act unlawful in public law”.

19. In the circumstances of this case I will declare that the Regulations are prospectively unlawful. However, I am not prepared to rule upon the position *ex tunc*. It seems to me that the declaration sought raises potentially complex and far reaching issues which it is appropriate to address in the circumstances of private law litigation

between a specific rightholder and an alleged infringer. It will be for a defendant in future proceedings to explore and raise this issue, including whether the effect of the fact that they relied at the time upon Section 28B creates some species of estoppel, legitimate expectation or fair use defence in private law and whether, if such exists, this goes to the cause of action or the remedy or both.

20. I also take account of the utility at this stage of addressing the past, before a live issue actually arises. I am fortified in my conclusion that I should not address the point now by the undeniable fact that private rightholders do not, in practice, bring infringement proceedings against erstwhile infringers of copyright. This is for all the reasons set out extensively in the Judgment. As such the granting of the declaration sought may be academic.
21. The net effect is that I quash the Regulations in their entirety. I rule that the quashing has prospective effect. I decline to make any ruling as to whether or not the Regulations are void *ex tunc*.

D. Whether a reference to the Court of Justice should be made?

22. I turn next to consider whether to refer any question, and in particular that relating to the concept of “harm”, to the Court of Justice. Consideration of this issue necessarily follows on from my ruling as to the quashing of the Regulations. The starting point is therefore that the Regulations are quashed and have no effect (prospectively). As such, the Claimants succeed in the judicial review upon a definitive basis. *Prima facie* there is no need for a reference to the Court of Justice because there is no need for this Court to have answers to the questions posed in order to determine the outcome of the case. When giving judgment as observed above I left the issue open and was prepared in principle to refrain from making Orders such that a *lis* would persist between the parties. Moreover, I considered, again at least in principle, that were the Court of Justice to adopt a different test of “harm” to that set out in the Judgment that this might represent a material consideration in the formulation of the relief granted when the Court came ultimately to make final Orders. However, as matters now stand, the position has changed and the Regulations have been quashed.
23. In these circumstances, the Secretary of State submits that I should make no reference to the Court of Justice. He submits that were I to do so there would be a risk that it would be considered inadmissible. In Case C-279/12 *Fish Legal v Information Commissioner* (19th December 2013) the Court of Justice identified the circumstances when references were appropriate, at paragraph [30]:

“30. Questions on the interpretation of EU law referred to by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the court to determine enjoy a presumption of relevance. The court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it...”

24. The Defendant submitted that this Court, having quashed the Regulations, would be at risk of sending a hypothetical reference to the Court and, thereby, of the Court declining to answer the question posed. In my judgment, this is a real risk. In any event it is not appropriate for Courts to send questions to the Court of Justice simply because they are interesting or important, where they do not represent real issues in dispute between the parties before the national court. In my judgment, since I have quashed the Regulations, the essence of the case has disappeared.
25. It is true that there remained on the pleadings a claim for damages of the “*Francovich*” type pursuant to which a Member State may incur liability for breach of a rule of law intended to confer rights upon individuals where the breach is sufficiently serious and where there is a direct causal link between the breach of the obligation resting upon the State and the damage sustained by the injured parties (see for example *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at pages [200H] – [201G]). The question of “harm” could have been said to be relevant to whether the test for liability damages had been met. This might, at least theoretically, have provided an ongoing *lis* between the parties which would have rendered a question posed to the Court of Justice admissible. However, there are insuperable problems confronting this possibility. The first is that the Claimants no longer pursue a claim for damages. Secondly, it would in any event have been a highly artificial and contrived means of creating a platform for a reference. Thirdly, the claim for damages is (as the Claimants now recognise) exceedingly tenuous not least because the basis upon which I have quashed the Regulations a deficiency of evidence which is as much a domestic as it is an EU law ground. Accordingly, there is, in my judgment, no basis upon which an existing reference could be made. There is no present dispute between the parties which requires an answer to a question before its resolution.
26. Mr de la Mare QC submitted that a reference should nonetheless be made in the context of the existing dispute. In advancing this submission he properly did not overlook the obvious complications inherent in this submission which are:
 - a) That prima facie having succeeded in quashing the Regulations the Claimants do not need a reference;
 - b) That the Secretary of State has indicated, in my view reasonably, that he wished to have time to consider all options and that he did not now intend to give an indication of when, if at all, he would seek to reintroduce a copyright exception; and
 - c) That therefore as matters stood there was no dispute or *lis* between the parties about which the Court of Justice could give a ruling which would be relevant thereto.
27. To overcome this problem the Claimants suggested (a) that they be given leave to amend the claim form to introduce an application for a declaration that the Secretary of State had acted, and intended to act, unlawfully in relation to “harm” but (b) that the application for a declaration would thereafter be stayed pending a crystallisation on the part of the Secretary of State of his thinking such that if the Secretary of State sought to so conduct himself in the manner which was inconsistent with the Claimants’ conception of “harm”, the Claimants could thereafter return to Court to

seek a reference. By these two steps the Claimants submitted that the Court could enable a reference to be made once the matter became live again.

28. The assessment I have to make in this case is, in many respects, to find the least worst option. For the reasons set out in the Judgment I recognise the utility of making a reference to the Court of Justice about the concept of “harm”. I accepted in the Judgment that this was an important issue and that the answer was not *acte claire*. However, if I allow the Claimants to amend and then stay proceedings I would do so knowing that on the present stance of the Secretary of State there is no outstanding *lis* nor, critically, would there be a guarantee that one would necessarily arise in the future. I would thus be countenancing the creation of a litigation platform for (at this stage) a hypothetical judicial review and application for a reference. I am unpersuaded that it is good practice to create what is in effect a forensic sword of Damocles to be dangled over the head of the Secretary of State. He is entitled to reconsider the position free from pressure. This is especially the case where he has a number of options to choose from. He is not bound to adopt an option which necessarily engages the issue of “harm” at all. For these reasons I am not attracted to the Claimants’ suggestion.
29. If the Claimants’ mid-course suggestion is not attractive then I am left with the option of simply refusing to make a reference and making an order which brings the litigation to a definitive end with the consequence that the Claimants would have to start entirely new proceedings if they wished to seek a reference at some future point, which of course might be in the relatively near future. In the course of the hearing a further alternative arose. This was that I would decline to make any reference at the present time or to permit any further amendments but would not preclude that, in this litigation, a reference might be made at some point in the future. In order to achieve this I would do no more than grant the parties liberty to apply as part of the final Order in this case. This would have the advantage of enabling the Claimants to avoid the costs and effort of commencing entirely fresh judicial review proceedings if the Defendant’s ongoing reconsideration crystallised into a dispute between the parties which raised questions as to the meaning of “harm”. Having given this matter consideration Mr Saini QC, for the Secretary of State, indicated that he would not oppose this course of action. This reflected a recognition that since the referability of the meaning of “harm” was now acknowledged as at least a possibility (and the hare was hence running) that there was pragmatic common sense in enabling an application for a reference to return to court in a cost effective manner in the future. This seems to me to be a sensible compromise (the least worst outcome). I therefore intend to refuse to make any reference at the present stage but to leave open the possibility that a reference may be made at some future point in time by introducing a liberty to apply into the final Order.
30. In this regard I should make one thing clear. Nothing that I have said in this ruling should be taken as an indication as to the decision that a future Court might make upon an application by the Claimants (or others) for a reference in the future. This is not an encouragement to a further application. It is clear from the Judgment that I considered a reference to be appropriate essentially because of the importance of the issue. I did not, however, consider the issue ultimately to be one of great difficulty. To succeed upon the issue before the Court of Justice the Claimants would have to persuade the Court of Justice that there was no discretion on the part of the Member

States as to the choice of test for the computation of harm (as to which in the Judgment I set out fully the relatively extensive case law of the Court indicating that such a discretion *did* in fact exist), and, that the only lawful test was the licensing test. Alternatively, the Claimants would have to convince the Court that if there was a discretion conferred upon Member States, that it was outwith the appropriate margin of appreciation accorded to Member States for the Defendant to adopt the “lost sales” test. I consider that achieving success on a reference raising these issues would be no mean feat.

31. For all these reasons, I refuse to make any Order for reference now. However, liberty to apply will be incorporated into the final Order in this matter.

E. Costs

32. I turn to the final issue which is costs. I propose to address this relatively briefly. It is common ground between the parties that the starting point for analysis is that the Claimants, having succeeded, are entitled to their costs. However, it is also common ground that this is ultimately a matter for the discretion of the Court and that, in an appropriate case, the Court may depart from this starting point and direct that costs may be allocated upon an issue by issue basis. This is generally appropriate where a party which is successful overall as to the result has not prevailed on all issues. Where the Court decides to apply an issues based approach the Court should then consider whether to take account of temporal considerations (e.g. costs to/from a certain date) and/or whether to make the parties bear their own costs: See generally White Book (2015) Vol. 1 paragraph [4412.7].
33. In my view it is appropriate to determine costs upon an issue by issue basis. From my perspective, the issues were reasonably discrete and identifiable in their nature and in the effort (including the evidence) required to advance them. This I believe is evident from the Judgment itself. As to who won on each issue this is straight forward. The Secretary of State prevailed on Issues II, III, V and VI; but he failed on Issue IV. This is set out in the Judgment: see for example paragraphs [19] – [20].
34. There is an issue as to who prevailed in respect of Issue I, the relevant legal principles. This concerned the margin of appreciation and the intensity of review, the direct effect of Article 5(2)(b), and the law relating to consultations and the appraisal of evidence. With regard to this, the result was mixed. However, on balance, I take the view that the Claimants prevailed. In allocating a victory to the Claimants on Issue I, I take into account that the Claimants were overall winners and succeeded in obtaining the substantive relief that they sought.
35. I have considered whether I should simply order each party to bear its own costs on those issues where the Secretary of State prevailed. I have concluded that I should not adopt this course. There are two main points. First, this was high level, high stakes, litigation between the State and entire sectors of an industry. Whilst the litigation was conducted appropriately by all parties it encourages discipline generally if there is a risk as well as a reward in relation to the conduct of litigation. Making parties bear the costs of the winning party on an issue by issue basis is consistent with incentivising good litigation practice. Secondly, I have taken account of the overall economic effect of the alternative orders I could make. I have seen the Claimants’ bill of costs. For litigation of this sort it is high but not exorbitant. I recognise that my ruling will, in its

effect, involve the Secretary of State making a significant net payment to the Claimants which is, on balance, a fair reflection of the fact that the Claimants did obtain a significant portion of the relief they sought (the quashing order).

36. For these reasons the Claimants are entitled to their costs against the Secretary of State in relation to Issue I and Issue IV and the Secretary of State is entitled to his costs as against the Claimants in relation to Issue II, III and V.
37. So far as the costs as between the Secretary of State and the Intervener are concerned, the Secretary of State prevailed. Upon this basis, the Secretary of State is entitled to his costs against the Intervener attributable to Issue VI.
38. All costs are to be subject to detailed assessment if not agreed.
39. A dispute exists between the parties as to the extent to which I should require the Secretary of State to pay the costs incurred by the Claimants in the instruction of experts. I do not have before me any detailed breakdown allocating expert costs as between different issues. Upon the basis that costs are determined on an issue by issue basis this is now likely to be far less of an issue, if it is one at all. Expert evidence played a major part in relation to Issue III (upon which the Secretary of State prevailed) since it was here that the reports of Professor Liebowitz and Compass Lexecon / FTI were principally deployed. I am unable at this stage to identify what portion of the Claimants' costs (if any) may be attributable to Issue IV. Various references are made in the section of the Judgment addressing that issue to expert evidence. However, this appears to be expert evidence produced for the purpose of the consultation and decision making process, rather than for the purpose of this litigation.
40. As to the costs of the hearing leading up to this ruling the Claimants are to have these costs. The issues I have addressed in this ruling had to be argued out at a hearing. The Claimants prevailed overall. It is appropriate to reflect this in awarding the Claimants their costs of this particular hearing.

F. Conclusion

41. The parties will draw up for approval a final Order reflecting these rulings.