

Kluwer Copyright Blog

PRS v Qatar Airways – Take off for PRS in copyright dispute with Qatar Airways

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Summary



The judgment in *PRS v Qatar Airways* [2020] EWHC 1872 considers an interesting jurisdiction challenge in the context of international air travel. In December 2019, PRS issued a claim in the UK against Qatar Airways (QA) for a declaration that QA infringed the worldwide performing rights in its musical works, an injunction to prevent further infringement and an inquiry for damages. The Claimant was hoping to use the English courts as the means to obtain a worldwide copyright licence from QA.

Mr Justice Birss rejected QA's application for the English court to refuse to exercise jurisdiction in a worldwide copyright infringement dispute on the grounds of *forum non conveniens*. QA failed to demonstrate that Qatar has the most real and substantial connection to the dispute and consequently failed to convince the English court to refuse to exercise its jurisdiction.

The Parties

As many readers will know, the Performers' Rights Society, otherwise known as PRS, is a UK based collecting agency whose members are composers, writers and publishers of musical works. PRS is the assignee of its members' rights in their musical works, including the right to perform the works in public and communicate the works to the public. QA is a passenger airline and the

national airline for Qatar. QA has 206 commercial passenger aircrafts in operation and operates scheduled passenger flights to more than 160 destinations in 80 countries.

The wider copyright dispute and QA's application

The decision concerns an application to stay a copyright infringement claim relating to the alleged unauthorised use of a portfolio of more than 5,000 musical works whose UK and global rights are owned by PRS. PRS alleges that the playing or making available of these musical works through QA's in-flight entertainment system, the "IFE System", constitutes a public performance of the works and/or communication of those works to the public.

In December 2019, PRS issued a claim in the UK against QA for a declaration that QA infringed the worldwide performing rights in the musical works, an injunction to prevent further infringement and an inquiry for damages. The broader dispute involves UK and non-UK acts of alleged infringement, as PRS contends that an infringement takes place in the UK, Qatar, and/or any other signatory country to the Berne Convention, WIPO Copyright Treaty or TRIPS Agreement, whenever a relevant QA aircraft is present in a country, either on the ground or in the territorial airspace of a country.

QA applied to stay the infringement claim on the grounds of *forum non conveniens* or alternatively on case management grounds. For present purposes, the focus of this article is the jurisdiction challenge on the ground of *forum non conveniens*.

At the time of judgment, QA had not filed its defence, but did deny that there had been any public performance or communication to the public of the musical works, whether by the playing or the making available of such works.

The jurisdiction challenge

QA accepted that it had been properly served in the jurisdiction, namely at its London office, and therefore recognised the English court had jurisdiction to hear the claim. However, QA argued that Qatar was the most appropriate forum for the dispute and therefore the English court should refuse to exercise its jurisdiction in favour of the Qatari courts. As is commonly the case in jurisdiction challenges, QA offered an undertaking not to challenge the jurisdiction of the Qatari court. In response, PRS accepted that the Qatari court could, in principle, have jurisdiction to hear the claim, but contended that the English court was the most appropriate forum to hear the dispute.

Justiciability of foreign copyright disputes

At the beginning of his analysis, Mr Justice Birss acknowledged that following *Lucasfilm* ([2011] UKSC 39) disputes over foreign copyright are justiciable in the UK provided there is a basis for *in personam* jurisdiction. This was this case here as QA had a presence in the UK and had been properly served in the UK. However, Birss J also pointed out that the decision in *Lucasfilm* did not grapple with the issue of *forum non conveniens* as it arose in these proceedings.

Forum non conveniens – formulation of the two-stage test

Having considered the justiciability of foreign copyright disputes in principle, Birss J turned to consider the issue of *forum non conveniens*. The judge recognised that the law in this area is well-developed and the applicable principles are derived from the leading authority in the House of

Lords decision in *The Spiliada* ([1987] AC 460).

The judge adopted the following formulation:

“(1) *Is there another available forum which is clearly and distinctly the natural forum, that is to say, the forum with which the action has the most real and substantial connection?*”

(2) *If there is, is England nevertheless the appropriate forum, in particular because the court is not satisfied that substantial justice will be done in the alternative available forum?”*

Forum non conveniens – stage 1

In applying stage 1 of the test, Birss J divided the issues into the following four categories:

1. Personal connections of the parties to the countries in question:

Birss J first considered the ties of each party to the forums in question and concluded that both parties have close and genuine links to their home forums. According to Birss J, QA has a stronger connection to the UK than PRS has to Qatar, given that it has a registered UK establishment, offices in London, a presence at major UK airports, a considerable number of employees in the UK and many of its staff speak fluent English. However, on balance, the judge felt that the degree of difference between the parties’ connections to the alternative forum was marginal.

2. Factual connections which the events relevant to the claim have with the countries

As Birss J noted in his judgment, the events relevant to the claim are the playing of music in QA’s aircrafts, or at least the availability of that music through the IFE system, and understandably the locality of where those events take place depends on the location of the aircraft at any given point in time. QA relied on statistics relating to the origin and destinations of its flights, arguing that 98% of flights start or finish in Qatar, whereas only 5% start or finish in the UK. Even so, no evidence was given as to what proportion of total QA flight time is spent in international airspace or the airspace of the UK, Qatar or any other country. On balance, Birss J accepted that the aircrafts spend more time in Qatar than in the UK, but also accepted that an appreciable proportion of the relevant acts take place in the UK. Though the judge also acknowledged that a significant proportion of the relevant acts take place in countries other than the UK and Qatar.

3. Applicable law

Birss J accepted that Qatari law will apply more often than English law given that the QA aircrafts spend more time in Qatar and Qatari law is applicable when aircrafts are in international airspace. The parties disagreed on Qatari law and procedure with both sides relying on expert evidence from experienced Qatari lawyers. Regarding the development of copyright law in Qatar, Birss J rejected the contention that Qatar did not have a system of copyright protection that could be applied to the parts of the case which engaged Qatari law. On the issue of translations, Birss J concluded that the cost implications of translating documents into Arabic was relevant at stage 2 of the analysis (i.e. the risk of significant injustice), not at stage 1. The judge also decided that differences in the approach to cost recovery had no relevance to whether Qatar had the most real and substantial connection to the dispute. The parties’ experts also disagreed about how the Qatari courts would approach foreign law, however Birss J was not satisfied that the Qatari courts lacked capacity to deal with and apply foreign law where applicable.

4. Factors affecting convenience or expense, such as the location of witnesses or documents

The judge acknowledged a number of live factual disputes between the parties and noted that if those issues remained live the parties might need to adduce evidence from witnesses based in Qatar and the UK to address those issues. However, the judge felt that these issues were likely to either fall away before trial or would be a minor aspect of the dispute. The judge also recognised that if copyright infringement was made out, both sides would adduce evidence on contracts and licensing which would need translating to or from English or Arabic.

Having considered the relevant factors, Birss J concluded that the dispute clearly has close connections to the UK and Qatar, but none of the factors relied on by QA demonstrated that Qatar is clearly the natural forum for the dispute. On that basis, Birss J rejected QA's case on *forum non conveniens*.

Forum non conveniens – stage 2

After rejecting QA's case based on his conclusions at stage 1, Birss J did not need to consider stage 2 of the test.

Comment

Even though the UK and Qatar had the closest links to the dispute in question, Birss J repeatedly recognised that other countries had factual connections to the dispute and the dispute would engage the laws of many other countries. The decision illustrates the jurisdiction challenges that can arise in the context of truly global copyright disputes and the factors that need to be considered when assessing the most appropriate forum to enforce copyright on an international scale. The question of where to bring proceedings is critical, and can influence their strategic direction and indeed potential outcome.

The outcome also illustrates the difficulties of challenging jurisdiction or appropriate forums in global disputes. At the heart of QA's claim was the assertion that Qatari law would be applicable to far more of the alleged instances of infringement than UK law, which coupled with QA's close factual ties to Qatar resulted in the Qatari courts being the most appropriate forum. Birss J rejected this argument and it is clear from his reasoning that the truly international nature of this dispute heavily influenced his decision. Inevitably, the factual nature of the alleged infringement complicated the jurisdiction question and the scale of the claim diluted the connection of any one country to the dispute. Each case will turn on its own facts, but it is conceivable that other forms of infringement, particularly in an online context, are capable of having factual connections to and engaging the laws of multiple countries on the same scale as the present case. In those circumstances defendants may find it increasingly difficult to establish an alternative forum with the most real and substantial connection to the dispute.

The decision also illustrates that cases of *forum non conveniens* involve a multi-faceted assessment of the facts of each case. Not only is the decision an example of a well-reasoned application of the legal principles to a specific factual matrix, it also provides useful guidance on the relevance and weight to be attributed to facets of legal practice and procedure in different jurisdictions when applying the two-step test. Those facets of litigation practice include the relevance of differences in procedure, rules on litigation cost recovery, access to specialist courts and expertise in particular types of cases, and the relevance and weight of applicable law when applying stage 1 of the test.

After an early victory for PRS, the case will now proceed to trial unless QA takes a licence from PRS. It will be interesting to see how the substantive claim moves forward from here.

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