CLAIM NO. 214175
Date: 20040423

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Southwood v. El-Hawary, 2004 NSSM 41

BETWEEN:

Name	Charles Michael Southwood	Claimant
Name	Dr. M. E. El-Hawary	Defendant

D E C I S I O N

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on August 22, 2007. This decision replaces the previously distributed decision.

Appearances:

Charles Michael Southwood, on his own behalf;
Carl R. Seidenz, on behalf Dr. El-Hawary;
Michael Maddalena on behalf of EPIC.

[1] Three matters came on before me on April 13, 2004.

[2] Since all three claims involved common issues and common witnesses, if not parties, all three parties agreed to their consolidation and joinder. I accordingly ordered that all three would be heard at the same time and that they would all be joined under the first claim, that of Southwood v. El-Hawary (SCCH 214175).

[3] To understand the various claims it is necessary to understand the background.

[4] EPIC Educational Program Innovations Centre (“EPIC”) puts on specialized seminars for, among other things, professionals and students with an engineering background.

[5] EPIC retains lecturers who prepare course notes and outlines and then put on seminars.

[6] Mr. Southwood was one such lecturer; Dr. El-Hawary was another.

[7] Mr. Southwood alleged some time ago that Dr. El-Hawary had used notes and outlines that had been prepared by three people, one of whom was Mr. Southwood; and that Dr. El-Hawary had then passed off these notes and outlines as his own work. Mr. Southwood accordingly claimed that his copyright in his work had been breached by Dr. El-Hawary, and that these breaches had occurred on a total of seven occasions over the period December 1998-March 2002.

[8] A list of the allegedly breaching seminars taught by Dr. El-Hawary was entered as Exhibit D-1, and includes the following:

a. Philadelphia;
b. Detroit;
c. Chicago;
d. Houston;
e. Montreal;
f. Iberville; and
g. Toronto.

[9] Mr. Southwood was not aware of the sixth seminar (Iberville) until the hearing of the matter before me.

[10] On October 29, 2001 Mr. Southwood sued Dr. El-Hawary in respect of the first five seminars (that is, Philadelphia through Montreal, as set out in Exhibit D-1).

[11] Dr. El-Hawary was represented by counsel at the hearing. Mr. Southwood represented himself.

[12] The hearing went before Adjudicator Cooke on February 19, 2002, in SCCH No. 113804.

[13] Adjudicator Cooke made an Order which included the following:

> "A significant amount of evidence was submitted by both parties, comprising I would estimate, at over 600 pages. I have read or scanned all of the material submitted as well as my notes of the hearing. From my review I have concluded that the Defendant has in fact infringed the copyright of the Claimant in the materials that he

> produced for the lectures that he gave under the sponsorship of EPIC (Educational Program Innovations Centre).
>
> "Although I have concluded there has been a breach I am not satisfied that the claim can be designated by me as a breach of contract calling for damages in that sphere. In order to do so I would have to actually speculate as to what the appropriate figure to award would be. This, in my view leaves me with the conclusion that the only remedy that is available to me is to award general damages, which I do, in the amount of $100.00, to the Claimant, which is the maximum under the *Small Claims Court Act*.
>
> "The Claimant has provided to me an accounting for his total costs in this matter in the amount of $665.12 which I accept.
>
> "The Claimant shall have judgment, inclusive of costs, in the amount of $765.12."

[14] The Order was dated April 19, 2002 and date stamped by the Court April 22, 2002.

[15] It is important to note that the hearing of this matter took place after the seminar in Iberville (number six in Exhibit D-1) and before the seminar in Toronto (number seven in Exhibit D-1). The Order was received by the Court on April 22, 2002 which was after the seminar taught in Toronto by Dr. El-Hawary on March 13-15, 2002. In other words, when Dr. El-Hawary presented the seminar in March 2002 he was aware that the issue of copyright had been litigated and disputed by him in front of Adjudicator Cooke; but he was unaware of the decision, which was then under reserve.

[16] Neither Mr. Southwood nor Dr. El-Hawary appealed the Order of Adjudicator Cooke. Dr. El-Hawary paid the amount of the judgment within 30 days of the Order.

[17] Notwithstanding the wording of Adjudicator Cooke's Order, Mr. Southwood chose to interpret it as merely a finding on liability. He concluded that there was no binding decision on him concerning the damages that he was entitled to by reason of the breach of copyright, and he accordingly began to pursue Dr. El-Hawary on that topic.

[18] In the course of that pursuit he learned of the seminar that had taken place in Toronto in March 2002. When he asked to review the lecture notes that had been provided to the students by EPIC, he discovered that the lecture notes were the same as those used by Dr. El-Hawary in Houston. In other words, the students had

been given the same copyright infringing materials that had been used in Houston. Being of the view that this represented a further breach of his copyright, Mr. Southwood commenced negotiations with EPIC.

[19] EPIC conducted its own investigation, and appears to have concluded that there had been an innocent breach of Mr. Southwood's copyright. According to EPIC, it had sent the Toronto students the Houston materials without knowing that the Houston materials contained breaching material. EPIC and Mr. Southwood then entered into a settlement agreement, dated May 28, 2003, wherein EPIC agreed to pay Mr. Southwood $3,000 "for the alleged use of your notes" in the seminars listed in Exhibit D-1, including the Toronto 2002 seminar (see Exhibit D-2).

[20] Mr. Southwood then began to pursue Dr. El-Hawary, without any success, and on January 20, 2004 he issued the claim against Dr. El-Hawary in SCCH No. 214175. Dr. El-Hawary then "third partied" EPIC in SCCH No. 216708; and EPIC "third partied" Mr. Southwood in SCCH No. 219177.

[21] Having heard the evidence of Mr. Southwood and Dr. El-Hawary, and in particular Mr. Southwood's admission that the first five seminars listed in Exhibit D-1 had formed part of the claim adjudicated by Adjudicator Cooke, I was satisfied that there was an issue estoppel against both Dr. El-Hawary and Mr. Southwood. Accordingly, it was my finding that:

a. Mr. Southwood cannot relitigate the issues insofar as the first five seminars are concerned; and

b. in particular, he is bound by the finding that his damages in respect of those five infringements of copyright total no more than $100 (as found by Adjudicator Cooke); and

c. Dr. El-Hawary is bound by the finding that he was in breach of Mr. Southwood's copyright in respect of seminar number five (at Montreal in December 1999).

[22] In my view this case really turns on what was entered as Exhibit D-8. These are the notes that Dr. El-Hawary says he prepared for himself and that were intended to be used by the students in Montreal in December 1999. His evidence was that Exhibit D-8 was used by these students in Montreal and again at Iberville in April 2000.

[23] Dr. El-Hawary also said that when he agreed to teach the Toronto course in March 2002 he was asked by EPIC what notes to use. He told EPIC to use the Montreal notes (i.e. Exhibit D-8), being under the impression that EPIC had a copy of those notes.

[24] It turns out that EPIC did not have a copy of the notes, and what they had in their files was in fact the student materials that had been handed out in Houston. These were the materials that EPIC duplicated and sent out to the Toronto students for the March 2002 seminar. (Everyone agreed that the materials that the Toronto students received were copies of the Houston materials that had been given out in October 1999, and were admittedly materials that infringed on Mr. Southwood's copyright.)

[25] EPIC, not realizing at the time that there was an issue, sent out the Houston notes to the Toronto students.

[26] Dr. El-Hawary's evidence was that he did not realize, at the time of his presentation in Toronto in March 2002, that there was a difference between the notes he was using (Exhibit D-8) and the notes that the Toronto students had because he did not review the Toronto students' notes; and did not receive any questions from the Toronto students concerning any difference between what they had and what he was using.

[27] Mr. Southwood questioned this evidence for a number of reasons.

[28] First, his evidence was that Exhibit D-8 was much more complicated and advanced than one would expect in a seminar.

[29] Second, and more importantly in my mind, he stated that Exhibit D-8 had not been introduced into evidence in the hearing before Adjudicator Cooke, notwithstanding the fact that the Montreal seminar and the alleged infringement that had taken place at the Montreal seminar was in front of Adjudicator Cooke. This evidence was not challenged on cross-examination.

[30] I find that I am bound to conclude that Dr. El-Hawary did infringe Mr. Southwood's copyright at the time of the Iberville and Toronto seminars.

[31] I say this based on the following reasoning.

[32] Mr. Southwood's evidence, not challenged on cross-examination by EPIC or Dr. El-Hawary, was that Exhibit D-8 had not been introduced at the hearing before Adjudicator Cooke; and that Dr. El-Hawary had never shown him the student notes (Exhibit D-8) until the hearing before me.

[33] Adjudicator Cooke, based on Dr. El-Hawary's evidence and more than 600 pages of material, concluded that the Montreal notes did infringe on Mr. Southwood's copyright.

[34] Since no evidence was called to explain why Exhibit D-8 was not put in front of Adjudicator Cooke, I am bound by the principals of *res judicata* to conclude that whatever was put before the Montreal students was in fact an infringement of Mr. Southwood's copyright, because Adjudicator Cooke found that it was.

[35] That conclusion forces me to the corollary that Exhibit D-8 was not the document given to the students in Montreal.

[36] Since Dr. El-Hawary's evidence was that he asked EPIC to put the Montreal materials before the Toronto students, I am also bound by *res judicata* to conclude that Dr. El-Hawary knew that infringing material (i.e. the Montreal notes) would be put in front of the Toronto students.

[37] Having come to that decision, I must now determine the damages to be awarded in respect of the infringement.

[38] Mr. Southwood claims that he ought to be paid an amount equivalent to his time; or what he would have been paid he been asked to make the presentation instead of Dr. El-Hawary.

[39] There is no evidence that Mr. Southwood would have been hired had Dr. El-Hawary not done the seminars. Moreover, not all of the material used in the infringing presentations was his; some of it was prepared by other people.

[40] Finally, the items that he highlighted in Tab 4 of Exhibit C-3 as infringing strike me as relatively innocuous, in that they often represent common combinations of common technical terms and explanations that might have occurred in any event.

[41] I am also influenced by the fact that Mr. Southwood was paid $3,000 by EPIC for the various breaches over time and that this payment was for what was, in essence, the same infringement. In other words, the fact that Dr. El-Hawary presented using the infringing notes does not really advance Mr. Southwood's claim, since the same infringement happened regardless of whether the students heard the material or read the material.

[42] Mr. Seidenz argued the limitation period, but Exhibit D-8 was not provided to Mr. Southwood until this hearing. Mr. Southwood's uncontradicted evidence was that he was never given copies of the lecture notes that would have enabled him to determine whether or not there had been an infringement until the hearing before me and in those circumstances I am not prepared to consider whether or not the limitation period applies.

[43] Taking all of these considerations into account, I am satisfied that $100 would represent a reasonable award for the Iberville infringement; and $100 for the Toronto infringement, for a total of $200.

[44] As for costs, I am not persuaded that in this case any party should get costs.

[45] Mr. Southwood, while successful in his claim, has clearly overstated the degree of harm suffered by him; and more importantly, has clearly ignored the clear meaning and scope of Adjudicator Cooke's Order by pursuing Dr. El-Hawary for more than he was awarded.

[46] EPIC's poor paper management and its failure to produce to Mr. Southwood the notes used by Dr. El-Hawary, made this claim at least partly necessary.

[47] Finally, Dr. El-Hawary's failure to produce Exhibit D-8 until the present, made this hearing necessary.

[48] Given my findings with respect to *res judicata*, I am driven to dismiss Dr. El-Hawary's claim against EPIC; and EPIC's claim against Mr. Southwood.

[49] Dealing with Dr. El-Hawary's claim, since I have found that Exhibit D-8 was not used by the Montreal students, I am driven to the conclusion as well that Dr. El-Hawary must have been aware that the Montreal and Toronto students were receiving materials that infringed on Mr. Southwood's copyright. Accordingly, he has no grounds for complaint about EPIC's mistake.

[50] Turning to EPIC, it claimed against Mr. Southwood on the basis that its settlement agreement (Exhibit D-2) barred Mr. Southwood from making any claims against anyone else that might result in a claim for contribution against EPIC. Having read Exhibit D-8, I do not agree with this submission. The settlement agreement states that "by signing this letter you [Mr. Southwood] agree that EPIC has no responsibility for any **continuing dispute** you may have regarding the notes used for the above listed courses." In my view, the document contemplated and accepted that there was a continuing dispute, and accordingly contemplated the possibility of a claim by Mr. Southwood against Dr. El-Hawary. If EPIC was concerned that Dr. El-Hawary might claim contribution against it, it could have inserted a clause in the agreement to deal with that situation. It did not.

[51] Accordingly, for reasons set out above, I make the following Orders:

a. I consolidate the three Small Claims Court actions bearing numbers 214175, 216708 and 219177;

b. I find that Mr. Southwood's claim with respect to seminars one through five (Exhibit D-1) was already determined in the hearing in front of Adjudicator Cooke in SCCH No. 113804;

c. Dr. El-Hawary infringed on Mr. Southwood's copyright in respect of the Iberville and Toronto presentations;

d. Mr. Southwood is awarded $100 with respect to each infringement;

e. Dr. El-Hawary's claim against EPIC (being SCCH No. 216708) is dismissed;

f. EPIC's claim against Mr. Southwood (being SCCH No. 219177) is dismissed; and

g. no costs are awarded to any party.

Dated at Halifax, Nova Scotia this 23rd day of April 2004

ADJUDICATOR
W. Augustus Richardson

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