

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 15/2019
[2019] NZSC 48**

BETWEEN

EIGHT MILE STYLE, LLC
First Applicant

MARTIN AFFILIATED, LLC
Second Applicant

AND

NEW ZEALAND NATIONAL PARTY
First Respondent

GREG HAMILTON
Second Respondent

Hearing: 2 May 2019

Court: William Young, Glazebrook and O'Regan JJ

Counsel: G C Williams for First and Second Applicants
G F Arthur, G M Richards and P T Kiely for First and Second Respondents

Judgment: 14 May 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay costs of \$4,500 plus usual disbursements to the respondents collectively.

REASONS

Background

[1] The applicants (collectively, Eight Mile) commenced proceedings in the High Court against the respondents (the New Zealand National Party and its secretary, Greg

Hamilton) for breach of copyright involving the use in a political advertisement of a soundtrack infringing the copyright in the musical work *Lose Yourself*.¹ Eight Mile succeeded in establishing a breach of copyright and an award of damages of \$600,000 was made in favour of Eight Mile.² However, its claim for additional damages under s 121(2) of the Copyright Act 1994 failed.

[2] The National Party did not appeal against the finding of breach of copyright, but appealed to the Court of Appeal on the quantum of damages. The Court of Appeal allowed the appeal and reduced the damages award from \$600,000 to \$225,000.³ Eight Mile cross-appealed against the refusal of the High Court Judge to award additional damages, but the cross-appeal was dismissed.

Grounds

[3] Eight Mile now seeks leave to appeal to this Court against the Court of Appeal's decision. It seeks to raise three issues, namely:

- (a) the assessment of compensatory damages under the user principle;
- (b) the basis for an award of additional damages under s 121(2) of the Copyright Act; and
- (c) the appellate approach to appeals against the quantum of a damages award.

Damages: user principle

[4] Counsel for Eight Mile, Mr Williams, argued that there were a number of errors in the Court of Appeal's approach to the assessment of damages, applying the user

¹ We will refer to the respondents collectively as the National Party.

² *Eight Mile Style, LLC v New Zealand National Party* [2017] NZHC 2603, (2017) 127 IPR 318 (Cull J) [*Eight Mile* (HC)].

³ *New Zealand National Party v Eight Mile Style, LLC* [2018] NZCA 596, [2019] 2 NZLR 352 (Cooper, Brown and Clifford JJ) [*Eight Mile* (CA)].

principle.⁴ In particular, he criticised the Court of Appeal’s preference for the evidence of the experts called by the National Party in the High Court over that of the experts who had been called by Eight Mile. This contrasted with the High Court Judge’s approach. Eight Mile wishes to argue on appeal, if leave is given, that the Court of Appeal erred in a number of respects in its application of the user principle.

[5] We have considered these points carefully but we are not persuaded that they are matters of public importance or general commercial significance that would justify a further appeal.⁵ In most cases, they are fact-specific and we do not see any appearance of a miscarriage of justice arising from the way they were addressed by the Court of Appeal.⁶

Additional damages

[6] Section 121(2) of the Copyright Act allows the court to award additional damages “as the justice of the case may require” for infringement of copyright. The court is required to have regard to the circumstances of the case and, in particular, to “the flagrancy of the infringement” and “any benefit accruing to the defendant by reason of the infringement”.

[7] Eight Mile argues that the approach taken by the Courts below to its claim for additional damages was too restrictive. We accept that the approach to the consideration of claims under s 121(2) may be a matter of public importance or general commercial significance. But we are not satisfied that the present case is an appropriate vehicle for the consideration of the issue by this Court. Given the concurrent findings of fact in the Courts below rejecting the contention that the National Party turned a blind eye to the risk of infringement or was reckless, we do not see sufficient prospect of success in an argument that additional damages should have been awarded in this case to justify the grant of leave for a further appeal.⁷

⁴ In broad terms, the user principle is a technique for assessing damages where the holder of the copyright has not sold or licensed the work by reference to what would have been payable if the infringer had licensed the work: see *Eight Mile* (HC), above n 2, at [379]–[416]; and *Eight Mile* (CA), above n 3, at [28]–[30].

⁵ Senior Courts Act 2016, s 74(2)(a) and (c).

⁶ Senior Courts Act, s 74(2)(b).

⁷ *Eight Mile* (HC), above n 2, at [453]–[459]; and *Eight Mile* (CA), above n 3, at [148].

Appellate approach

[8] The Court of Appeal commented that an argument could be advanced that the traditional constraints on appeals against damages awards should not be maintained in New Zealand.⁸ *Eight Mile* says this statement conflicts with an earlier Court of Appeal decision and argues that this Court should clarify the position.⁹ We are not prepared to grant leave on this ground. The statement made by the Court of Appeal in this case was not a decision on the point and, in view of our declining leave on the issues discussed above, the point is academic in the present case.

[9] The application for leave to appeal is dismissed.

[10] We award costs of \$4,500 plus usual disbursements to the respondents collectively.

Solicitors:

Lindsay Litigation and Arbitration Ltd, Auckland for First and Second Applicants

Kiely Thompson Caisley, Auckland for First and Second Respondents

⁸ *Eight Mile (CA)*, above n 3, at [110], citing *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

⁹ *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.