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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP217im00

UNDER the Copyright Act 1994

1313
IN THE MATTER of copyright infringement

BETWEEN **R MacDONALD**

Plaintiff

AND (1) **M WEIR**
(2) **MICHAEL WEIR SCULPTURES
LIMITED**

Defendants

Hearing: 6 and 12 October 2000

Counsel: GF Arthur and SA Fogarty on 6 October 2000 and K McLeod on 12
October 2000 for plaintiff
M Weir defendant in person

Judgment: 17 October 2000

JUDGMENT OF MASTER FAIRE

Solicitors:

AJ Park, DX SP 20065, Wellington for plaintiff
MS Weir, 1/9B Inver St, Glen Eden, defendant

[1] The plaintiff applies for summary judgment. The defendant opposes. He represents himself and his company, the second defendant. After hearing plaintiff's counsel's argument it was apparent that the defendants' opposition was confined to opposing any order for payment of money.

[2] Two preliminary matters were disposed of on an unopposed basis. I granted leave to Mr SA Fogarty to appear as second counsel for the plaintiff. He has sworn an affidavit in this proceeding. Its contents are non-contentious. I also granted leave to Mr Weir's mother to sit with him and to assist him in the defence of the application.

[3] The plaintiff seeks summary judgment for copyright infringement. He alleges that Mr Weir has copied his sculptures in the Nureyev series. He also claims that both the first and second defendants have infringed his copyright by possessing in the course of business, offering or exposing for sale in the course of business, exhibiting in public in the course of business the defendants' Nureyev sculpture which the plaintiff alleges is an unauthorised copy and in circumstances where the plaintiff says the defendants knew or had reason to believe that the defendants' Nureyev sculpture is an infringing copy of the plaintiff's artistic work.

[4] The plaintiff is a well-known sculptor. The executive director of the National Sculpture Society of New York, described the plaintiff as recognised as a most talented and successful figurative sculpture in the United States. The executive director says his work is familiar with every sculptor that the director knows and with most people in the art community in the United States. His work is widely publicised in art magazines and other news publications.

[5] In 1988 the plaintiff created a sculpture which he named "Nureyev". It forms part of his ballet series of sculptures. It is a sculpture of the dancer Rudolf Nureyev. Mr MacDonald said he studied all characteristics about the dancer such as the particular way he knots his headband. He studied video tapes of the dancer. He came upon a split second close-up back view in which the dancer was removing his costume after a rehearsal. Having selected that moment, he then created sketches

and then clay models. He developed from that a negative impression of the sculpture. Wax is then poured into the mould to retrieve a positive image. The wax is then refined until it is perfect and sent on to a foundry for casting. The foundry creates a bronze sculpture from the wax. After it is finished it is returned to the sculptor for finishing touches.

[6] The idea for the sculpture came from the split second moment I have earlier referred to when the sculptor captured the dancer removing his costume after the rehearsal. The pose is a distinctive one. Although the video only showed a back view, the sculpture in fact is a three-dimensional product. Mr MacDonald says that, apart from the sculpture which Mr Weir created, he has never seen another photograph video sculpture or other view of the dancer in the pose which is depicted by the plaintiff's sculpture.

[7] The plaintiffs sculpture of Rudolf Nureyev went on public display at the New York Art Expo in October 1988. That is one of the world's largest art expositions. It remained on display until 1997. It has been shown at the National Sculpture Society Exhibitions twice. It has been shown in national magazines. It has been published at least 30 times in national and international magazines. Its display, to say the least, has been substantial.

[8] The first defendant is a sculptor. The second defendant is a company which promotes his sculptures. The first defendant viewed a bust of the plaintiff's Nureyev sculpture at an art expo held at the Ellerslie Racecourse in Auckland in June or July 1996. In addition, there was available for him a slick, which is a single page promotion of MacDonald's work and a tri-fold which is a three page six-sided promotion of MacDonald's work. The tri-fold contained displays of Mr MacDonald's ballet series of sculptures. The slick contained the Nureyev sculpture which is at the centre of this proceeding.

[9] The defendant spoke with Ms McClelland, who was promoting the plaintiff's sculptures at the art expo. She offered the opinion that no New Zealand sculptor could match the quality of the plaintiff's work in bronze. That view angered the first defendant who felt that Ms McClelland was putting down local New Zealand

sculptors. A similar comment was repeated at an art show at Ellerslie in mid-1997. The first defendant says he was absolutely “seething” when he heard it. He decided to take a stand at an art expo in Greenlane in May 1990 because he knew that Ms McClelland would be there. I need not go into the precise detail. What he did was to produce a sculpture of Nureyev which included joining up parts of two earlier sculptures and having them reproduced in bronze.

[10] There is a contest as to whether this sculpture was in fact offered for sale at \$3,500. However, that is not a matter that needs to be resolved in relation to the relief sought in the summary judgment application.

[11] In considering this application, I have had the benefit of extracts from videos taken of the plaintiff’s sculpture and the first defendant’s sculpture. They are certainly similar. I will attempt to list the similarities but, in doing so, make it plain that my list is not an exhaustive one. Both pieces are in a standing position. The right leg is straight and in the forward position, as if the body-weight is taken on that leg. The left leg is bent at the knee and the ankle. The left foot is lifted and is placed slightly behind the right foot. The sculptures depict Rudolf Nureyev in a leotard. The leotard is being removed by Rudolf Nureyev hooking the straps through his thumbs and pushing his arms outward from his body. In both sculptures the leotard has been removed to a position midway on the dancer’s chest. His arms are bent at the elbow. His forearms stretch out from his torso. In both cases, the head contains a broad headband with hair protruding through the headband and out of the top of the headband.

[12] Ms McClelland viewed the first defendant’s sculpture at the exhibition at Greenlane in Auckland in May 1999 which she described as follows:

At that exhibition I noticed that Michael Weir was displaying some of his work. I immediately noticed Mr Weir’s sculpture of Nureyev which I considered was undoubtedly a copy of Richard MacDonald’s Nureyev sculpture.

[13] The first defendant in fact admits copying the head for the Nureyev sculpture he put on display. He admits reproducing the stance in the MacDonald sculpture. He says that he completed the sculpture because he had to make a statement and

challenge what he considered the derogatory comments of Ms McClelland. He said no other sculpture could counteract that statement but a similar type of work. He said there was no other reason for it and for that reason no further bronzes had been cast and no bronzes have been sold. He says that his sculpture was created from his memory of the stance of the MacDonald sculpture, his general knowledge of anatomy, general ballet attire and from standing in front of a mirror himself. As I earlier recorded, the head has been copied from the MacDonald Nureyev bust.

[14] Although Mr Weir makes reference to other sources, I need not review those although I have taken them into account. I am satisfied that there in fact has been an attempted reproduction of the MacDonald sculpture.

[15] At the resumed hearing on 12 October 2000 I invited Mr Weir to address me. He frankly admitted his purpose in creating his sculpture. He told me he had no objection to the prayers for relief in the first cause of action against him personally, that is,

- (a) an injunction to restrain the first defendant from selling, sculpting, producing or otherwise creating the defendants' Nureyev sculpture or copies thereof or any other sculpture that is a reproduction of a substantial part of the plaintiff's Nureyev sculpture;
- (b) delivery up to the plaintiff of the defendant's Nureyev sculpture, any copies of that sculpture, sketch notes, moulds, models and casts.

Nor did he object to the prayers for relief against both himself and the second defendant in the second cause of action, namely

- A. An injunction to restrain the first defendant from issuing to the public, possessing in the course of business, offering or exposing for sale or exhibiting the defendant's Nureyev sculpture or any copies thereof or any other item which is an unauthorised copy of the plaintiff's artistic works and from authorising the second defendant to do the same.
- B. An injunction to restrain the second defendant, its servants or agents, from issuing to the public, possessing in the course of business, offering or exposing for sale or exhibiting the defendant's Nureyev sculpture or any copies thereof or any other item which is an unauthorised copy of the plaintiff's

artistic works and from authorising the first defendant to do the same.

- C. Delivery up to the plaintiff of the defendants' Nureyev sculpture and any copies thereof or any other copies of the sculpture including sketch notes, moulds, models and casts.

[16] He wished to make it plain, however, that he was not consenting to the torso of his sculpture being included. That is that part of the sculpture to which the copied head was added. When I asked Mr McLeod whether he sought its inclusion in the prayers for relief he advised he did not and, in my view, quite properly so. On that basis, I am satisfied that judgment can be entered for the prayers for relief that I have identified subject to the express proviso in relation to the order to deliver up that it does not relate to the torso sculptured by the first defendant.

Conclusion

[17] Accordingly, I enter summary judgment against the first defendant as follows:

- A. An injunction to restrain the first defendant from sculpting, producing or otherwise creating the defendant's Nureyev sculpture or copies thereof or any other sculpture that is a reproduction of a substantial part of the plaintiff's Nureyev sculpture.
- B. Delivery up to the plaintiff of the defendant's Nureyev sculpture, any copies of that sculpture, sketch notes, moulds, models and casts.

I enter summary judgment against the first and second defendants as follows:

- A. An injunction to restrain the first defendant from issuing to the public, possessing in the course of business, offering or exposing for sale or exhibiting the defendant's Nureyev sculpture or any copies thereof or any other item which is an unauthorised copy of the plaintiff's artistic works and from authorising the second defendant to do the same.
- B. An injunction to restrain the second defendant, its servants or agents, from issuing to the public, possessing in the course of business, offering or exposing for sale or exhibiting the defendant's Nureyev sculpture or any copies thereof or any

other item which is an unauthorised copy of the plaintiff's artistic works and from authorising the first defendant to do the same.

- C. Delivery up to the plaintiff of the defendants' Nureyev sculpture and any copies thereof or any other copies of the sculpture including sketch notes, moulds, models and casts.

For the avoidance of doubt I declare the orders that I have made do not relate to the torso created by the defendant and in relation to the relief sought in the first cause of action being relief "B" and in relation to the second cause of action the relief sought under "C".

Orders and directions

[18] A statement of defence has been filed. I questioned whether the plaintiff would wish to proceed further as he has for all intents and purposes achieved his purpose. There is no evidence of sale and, indeed, in my view, it is not appropriate to enter summary judgment on the material placed before for the balance of the relief sought.

[19] If the matter proceeds it is clear it should proceed as an ordinary proceeding and that the next step should be a conference where interlocutory directions can be disposed of.

[20] Accordingly, I direct that the Registrar allocate a directions conference and notify counsel for the plaintiff and Mr Weir. Unless the plaintiff files a notice of discontinuance prior to that conference, counsel for the plaintiff and Mr Weir shall file memoranda which indicate what further interlocutory direction is required for this proceeding. Such memorandum should be filed and served three days before the date nominated by the Registrar for the conference.

Costs

[21] The plaintiff has been successful in this proceeding. It is apparent, having regard to the concessions made by Mr Weir at the end of the plaintiff's case, that

much of the argument may have been unnecessary. However, in my view, the plaintiff cannot be blamed for taking the care that counsel did in preparing this case. I need only mention the letter sent by the solicitors acting for the defendants to the plaintiff's solicitors on 17 May 1999. That letter stated inter alia

Our client produced his sculpture without reference to your client's work other than his recollection of its general stance. Quite clearly, the pose is not original and unique to your client as the photograph demonstrates. It is patently obvious it is not a copy, the arms are much closer to the body, at different angles and the musculature is clearly different, taken from real photos of Nureyev.

Accordingly our client will not be delivering up the sculpture or the artists proofs. The sculpture was created as an artistic study without a view to selling it or making copies but our client reserves the right to do so if it thinks fit. Our client will certainly not be recalling promotional material and indeed will continue to use pictures of the sculpture as an example of his exceptional ability as a sculptor. He obviously undertakes not to copy any sculpture of your client.

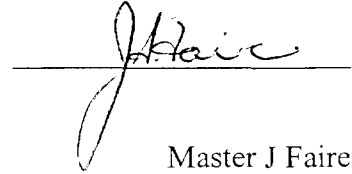
Our client views your letter as nothing more than a bullying tactic to cause the withdrawal of his exceptional sculpture from the viewing public. He will not succumb to such pressure and if your client wishes to commence proceedings we are authorised to accept service. The publicity will make the point that our client's sculpting abilities are of international standard.

[22] This proceeding, clearly in terms of the High Court Amendment Rules 1999 is a Category 2 proceeding. I am satisfied that Band B is appropriate for all steps that have been taken save for the mentions which Mr McLeod conceded should not be included. When that exercise is completed as it was with counsel and Mr Weir it is apparent that a figure for costs of \$6,305 together with disbursements as fixed by the Registrar is justified. In my view there is no basis for reducing that sum. It is my view that it is the appropriate award for costs having regard to the matters that I am required to take into account under the High Court Amendment Rules 1999.

[23] Accordingly, there will be an order that the defendants pay the plaintiff's costs in the sum of \$6,305 together with disbursements as fixed by the Registrar.

[24] I add a point of clarification in relation to costs. The order that I have fixed is the order for costs that I have made. Arrangements regarding payment of these costs

are matters that Mr Weir and his company may take up with the plaintiff directly, including the time within which payment of costs is to be made.

A handwritten signature in cursive script, appearing to read 'J. Faire', is written over a horizontal line.

Signed at 10.25 am/pm on 17-10-2000. Master J Faire