

Federal Court



Cour fédérale

Date: 20171031

Docket: T-111-13

Citation: 2017 FC 969

Ottawa, Ontario, October 31, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**907687 ONTARIO INC.
O/A THE INTERNATIONAL INSTITUTE OF
TRAVEL**

Plaintiff

and

**ABDUL SHOKOUR
A.K.A. JOE SHOKOUR, AN INDIVIDUAL
AND
1472359 ONTARIO LIMITED
O/A IBT COLLEGE BUSINESS TRAVEL &
TOURISM TECHNOLOGY**

Defendants

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiff, 907687 Ontario Inc operating as the International Institute of Travel [IIT], is a private career college established by Rudolph Nareen in 1989 or 1990. It offers certificates

and diplomas in a variety of subjects, including business management, travel and tourism, and hospitality.

[2] The Defendant, 1472359 Ontario Ltd operating as IBT College of Business Travel & Tourism Technology [IBT], is a private career college established by the Defendant Abdul “Joe” Shokour in 2001. It offers certificates and diplomas in a variety of subjects, including business management, travel and tourism, and information technology.

[3] IIT commenced this action against Mr. Shokour and IBT on January 15, 2013. IIT alleges that Mr. Shokour and IBT improperly used course materials developed by IIT to register IBT as a career college and obtain approval from the Ontario Ministry of Training, Colleges and Universities [Ministry] to offer certificates and a diploma in travel and tourism. IIT maintains that the Defendants infringed IIT’s copyright in its course materials, and seeks damages, an accounting of profits and other relief.

[4] For the reasons that follow, I find that IIT has not met its burden of proving on the balance of probabilities that Mr. Shokour or IBT improperly made use of IIT’s copyrighted materials, or that IIT sustained damages as a result. I also find that the action is barred by the operation of s 43.1(1) of the *Copyright Act*, RSC 1985, c C-42. The action is therefore dismissed with costs.

II. Background

[5] There are numerous individuals and corporations mentioned in these reasons for judgment, and a list of *dramatis personae* may therefore be useful:

- (a) Rudolph Nareen: Mr. Nareen is the owner and operator of IIT.
- (b) IIT: IIT is a private career college offering certificates and diplomas in, among other things, travel and tourism.
- (c) Sam and Banoo Bharucha [the Bharuchas]: the Bharuchas purchased and operated an IIT franchise from Mr. Nareen.
- (d) 1200462 Ontario Ltd: 1200462 Ontario Ltd is the corporation through which the Bharuchas operated their IIT franchise. When they terminated the franchise, 1200462 Ontario Ltd operated as ICM College of Business and Technology.
- (e) ICM College of Business and Technology [ICM]: ICM was the operating name of 1200462 Ontario Ltd once Abdul “Joe” Shokour acquired shares in the company. ICM never commenced operations.
- (f) Abdul “Joe” Shokour: Mr. Shokour was employed by Mr. Nareen at IIT until he left to work at other private career colleges and then opened his own private career college, Travel Technology Academy Inc.

(g) Travel Technology Academy Inc [TTA]: TTA was a private career college established by Mr. Shakour and Suleyman Odemis. TTA never commenced operations.

(h) IBT: IBT is a private career college established by Mr. Shokour after his involvement in TTA came to an end. IBT offers certificates and diplomas in, among other things, travel and tourism.

[6] IIT has operated as a private career college since approximately 1990. In 1996, IIT sold a franchise to the Bharuchas for \$35,000.00 and 5% of gross revenues. The Bharuchas operated the franchise through their corporation, 1200462 Ontario Ltd.

[7] Mr. Shokour was employed by IIT from 1990 to 1998. The employment relationship soured, and he was dismissed by Mr. Nareen. Mr. Shokour sued for wrongful dismissal, and was also involved in proceedings before the Ontario Landlord and Tenant Board respecting his occupation of an apartment owned by Mr. Nareen.

[8] Following his departure from IIT, Mr. Shokour worked for a number of different career colleges before establishing TTA with Mr. Odemis in 2000. TTA was approved by the Ministry as a private vocational school, and authorized to offer a 28-week Travel and Tourism Counsellor program. Mr. Shokour and Mr. Odemis experienced difficulties in their business relationship, and TTA never commenced operations.

[9] On April 12, 2001, Mr. Shokour incorporated IBT. On June 23, 2001, IBT submitted both an Initial Application for Registration to Operate a Private Vocational School and an Application for Registration to Operate a Private Vocational School to the Ministry. The following day, IBT applied to register a 28-week program titled Travel and Tourism Counsellor Diploma and Certificates.

[10] According to Mr. Shokour, the Ministry permitted him to expedite the approval process for IBT's travel and tourism program because the same program had previously been approved for TTA. This is supported by several handwritten annotations on documents obtained from the Ministry under provincial freedom of information legislation. Mr. Shokour was required to complete the application only as far as Appendix "E", and was able to rely on the curriculum previously submitted by TTA. IBT was registered as a private career college on August 16, 2002, and given approval to offer the Travel and Tourism Counsellor program shortly thereafter.

[11] Following the terrorist attacks against the United States of America on September 11, 2001, the Bharuchas' IIT franchise struggled financially. They turned to Mr. Shokour for help. He expressed interest in acquiring shares in 1200462 Ontario Ltd, but not until the Bharuchas terminated their franchise agreement with IIT. The franchise agreement was terminated in December 2001, and thereafter 1200462 Ontario Ltd operated as ICM with Mr. Shokour as a shareholder. Mr. Shokour testified that he and the Bharuchas intended to focus ICM's course offerings on business and technology rather than travel and tourism.

[12] According to Mr. Shokour, the Bharuchas were incapable of managing a successful career college, and ICM never commenced operations. ICM nevertheless applied to renew its registration with the Ministry for 2002. Mr. Nareen suggested that this was in order to allow ICM's students to complete their studies. Mr. Shokour disagreed, and said that ICM had no students at the time he became a shareholder.

[13] In January 2002, Mr. Shokour purchased the remaining shares of ICM and became Director and President of the company. ICM applied to renew its registration with the Ministry for 2003. Mr. Nareen alleges that this was intended to facilitate Mr. Shokour's and IBT's improper use of IIT's copyrighted materials. According to Mr. Shokour, ICM applied to renew its registrations in the hope that the business could be sold, but this never came to fruition.

[14] Mr. Nareen was increasingly uncomfortable about Mr. Shokour's involvement with the Bharuchas and ICM. On July 23, 2002, a representative of IIT contacted the Bharuchas to enquire about Mr. Shokour's potential access to IIT's copyrighted materials. Mrs. Bharucha stated in a letter dated July 24, 2002 that the copyrighted materials were under "lock and key", and Mr. Shokour had never been given access to them. She said that Mr. Shokour was involved in ICM's business and technology courses, not the travel and tourism program.

[15] On August 12, 2002, IIT's legal counsel sent a letter to Mr. Shokour with the following assertions:

In light of the closure of the North York IIT franchise, the train out of existing students was addressed by Banoo. She offered same to be completed at 50 St. Clair East Fourth Floor, Toronto. This is a facility that is operated by you as IBT College. There is no doubt,

given these manoeuvres, that collaboration and collusion on the IIT training has taken place among yourselves.

I hereby notify you that course materials and system operation materials are copyright and cannot be used without first obtaining the permission and authority of the owner. No such permission or authority has been sought nor has any been granted.

If it is discovered that you have been using any copyright or proprietary materials, which belong to IIT in conjunction with the Travel and Tourism course offered at IBT College St. Clair & Yonge, Toronto, or at any other location under your sponsorship, I shall without further notice to you commence legal proceedings to stop you from continuing to do so and to seek substantial damages, punitive damages and full indemnity costs against you.

[16] Mr. Shokour ended his relationship with the Bharuchas in late 2002 or early 2003. ICM was eventually dissolved. There is no evidence that ICM ever generated revenue of any kind.

[17] In 2005, IBT changed the name of its Travel and Tourism Counsellor Diploma and Certificates program to Travel and Tourism Diploma and Certificates. Mr. Shokour testified that the word "Counsellor" was omitted from the name to avoid confusion and ensure that the program appealed to the widest possible range of students. He did not want to create the impression that the program qualified individuals to work only as travel agents when the diploma could lead to opportunities in all aspects of the travel and tourism industry. Mr. Shokour maintains that there was no change in the curriculum, and the program always remained the same.

[18] According to Mr. Nareen, Mr. Bharucha approached him in 2011 and admitted that ICM had retained IIT's copyrighted materials, and permitted Mr. Shokour to use them in order to

register travel and tourism courses. Counsel for the Defendants objected to this evidence as hearsay. Neither of the Bharuchas testified in these proceedings. At the request of IIT's legal counsel, Mr. Bharucha provided a written statement on October 16, 2013. This was admitted into evidence on consent, but only as proof of Mr. Nareen's state of mind in 2011.

III. Issues

[19] This case raises the following issues:

- A. Did Mr. Shokour or IBT infringe IIT's copyright in its course materials?
- B. Is IIT's action against Mr. Shokour and IBT barred by s 43.1(1) of the *Copyright Act*?

IV. Analysis

- A. *Did Mr. Shokour or IBT infringe IIT's copyright in its course materials?*

[20] There is no serious dispute that IIT held copyright in the curriculum and other materials it developed to register its courses in travel and tourism with the Ministry. Mr. Nareen applied for and received a certificate of copyright dated May 10, 1996 for the course outlines. Even if he had not obtained the certificate, the materials were subject to copyright to the extent that they contained original expressions of ideas. It is well established that a training manual or course curriculum may benefit from copyright protection (*École de Conduite Tecnic Aubé Inc v 1509*

8858 *Québec inc* (1986), 12 CIPR 284 (Qc Sup Ct); *Market Traders Institute Inc v Mahmood*, [2008] OJ No 5065(Ont Sup Ct)).

[21] Mr. Shokour says that there is no evidence that he or IBT were ever given access to IIT's copyrighted course materials by the Bharuchas or anyone else. He notes that the letter from Mrs. Bharucha dated July 24, 2002 included a specific denial of this allegation:

1. All Agreements, Manuals, Student and other files relating to International Institute of Travel were under lock & key under the control of the undersigned at all times and Joe Shokour had no access to them at any time, nor did we ever show him any item relating to the travel business.

2. Joe Shokour's involvement was only regarding the Information Technology Computer side of the business, and nothing else. Moreover he was not interested in the Travel part of our business.

[22] Mr. Bharucha's written statement dated October 16, 2013 says only that ICM "maintained the same system of operation" after Mr. Shokour joined the business. This evidence is admissible only to illustrate Mr. Nareen's state of mind, and provide a foundation for IIT's response to the Defendants' limitations defence.

[23] Given that ICM never commenced operations or generated any revenue, it is unclear how ICM can be said to have infringed IIT's copyright to its detriment. ICM applied to renew its registrations twice after Mr. Shokour joined the business, but Mr. Shokour testified that this was only to facilitate a sale of the company that never materialized. ICM is, in any event, not a Defendant in these proceedings.

[24] Counsel for IIT argues that there must be a connection between ICM's renewal of its registrations and IBT's ability to offer a diploma in travel and tourism. He places significant emphasis on the change in the name of IBT's program in 2005 from Travel and Tourism Counsellor Diploma and Certificates to Travel and Tourism Diploma and Certificates. He suggests that a counsellor program comprises only one course of study, and therefore differs from a diploma program.

[25] There are numerous difficulties with IIT's theory of the case. The evidence establishes that IBT's travel and tourism program always encompassed both certificates and a diploma. From the time it was first established in the summer of 2002, the diploma has consistently required 28 weeks of study. The course curriculum was approved by the Ministry when it was initially submitted by TTA. Mr. Shokour testified, and documents obtained from the Ministry confirm, that IBT's travel and tourism program obtained expedited approval based on the previous approval of the same program offered by TTA.

[26] Mr. Shokour testified that IBT was given approval for its travel and tourism program based on curricula and text books developed and sold commercially by the Canadian Institute of Travel Counsellors [CITC]. This is consistent with the handwritten annotations that appear on documents obtained from the Ministry.

[27] Coralie Belman, who worked as a CITC executive for more than 25 years, testified that CITC sells both curricula and text books that may be used to register private career colleges and courses with the Ministry. Mr. Shokour presented copies of invoices for both curricula and text

books purchased from CITC. He was also able to produce the curriculum submitted to the Ministry on behalf of TTA, which is clearly distinct from the one developed by Mr. Nareen for IIT.

[28] IIT called Carol Brun as an expert witness on regulatory compliance with provincial legislation governing career colleges. Ms. Brun is a consultant who has been approved by the Ministry as a compliance monitor and adult education assessor. In this capacity, she provides independent assessments to the Ministry regarding whether an applicant's proposed college or program of study meets regulatory standards.

[29] Mr. Shokour and IBT did not dispute Ms. Brun's expertise, but argued that she could not be received by the Court as an impartial witness because she once assisted Mr. Nareen in registering a program for IIT. Counsel for Mr. Shokour and IBT did not pursue the objection with much vigour. Nor did they take issue with the substance of Ms. Brun's testimony.

[30] Expert witnesses have a duty to the Court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty, and able and willing to carry it out. If they do not meet this threshold requirement, then their evidence should not be admitted (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 30, 32 [*White Burgess*]).

[31] Once this threshold is met, concerns about an expert witness' independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. The threshold requirement is not particularly onerous, and a proposed

expert's evidence will only rarely be excluded for failing to meet it. It is the nature and extent of the interest or connection with the litigation which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible (*White Burgess* at paras 46-49).

[32] Ms. Brun testified that she had read and understood the Court's Code of Conduct for Expert Witnesses, Schedule to the *Federal Courts Rules*, SOR/98-106. There was nothing in her brief and professional association with IIT to suggest that she would improperly favour its position in this litigation. On the contrary, she explained that her role as an independent assessor for the Ministry requires her to be impartial at all times.

[33] While I have no hesitation in accepting Ms. Brun as an expert witness, her evidence does not assist IIT. Ms. Brun was asked to examine a selection of CITC textbooks and an Appendix "E" of an application to register a travel and tourism program. IIT was unable to produce a copy of Appendix "E" to the Court, and it was not included in Ms. Brun's report. Ms. Brun expressed the view that these documents would not be sufficient for a career college to obtain approval from the Ministry for a travel and tourism program. Mr. Shokour and IBT do not dispute this proposition.

[34] Ms. Brun based her opinion on documents provided to her by counsel for IIT. IIT argued that if the documents were insufficient to register a travel and tourism program, then Mr. Shokour must have used IIT's copyrighted course materials to register his program. The problem with this argument is that Ms. Brun does not appear to have been given the course

materials that were in fact used by Mr. Shokour and IBT to register their travel and tourism program.

[35] I accept Mr. Shokour's testimony that IBT's travel and tourism program was registered using curricula and textbooks purchased from CITC. Mr. Nareen's contention that they must have relied upon copyrighted course materials that were prepared for IIT is circumstantial and speculative. It is contradicted by the preponderance of the evidence adduced in these proceedings.

[36] The only admissible evidence that potentially supports IIT's contention that IBT must have relied on its copyrighted materials to register IBT's travel and tourism diploma program is an affidavit that Mr. Shokour swore in these proceedings on July 8, 2015, in response to a motion by IIT for further production of documents. In the affidavit, he deposed as follows:

I do not have a copy of IBT's originally developed curriculum. This does not exist. The Ministry did not require a curriculum of IBT because IBT has always used CITC approved programs.

[...] The Module Outline was prepared for a Travel Program originally prepared by "Travel Technology Academy". This Module outline was prepared by me personally. [...] IBT never made use of the Module Outline. By the time I began IBT, I began to use the CITC program materials, which was confirmed by the Minister.

[37] Mr. Shokour was cross-examined on this confusing and possibly inconsistent statement. He said that he didn't think to mention IBT's reliance on TTA's curriculum to register its travel

and tourism program in his affidavit. Counsel for IIT did not pursue the point, or rely on it in closing submissions.

[38] Instead, IIT relies heavily on the change in the name of IBT's program in 2005 to omit the word "Counsellor". However, from its inception in 2002 to the present day, IBT's program has always required 28 weeks of study for a diploma, and has always provided the option of certificates for completion of specific courses, or a diploma for completion of the full program.

[39] I am not persuaded, in the context of these proceedings, that a counsellor program is a single course, and a diploma program is necessarily something different. It appears that the travel and tourism diploma offered by IBT was approved by the Ministry when it was first submitted by TTA in 2000. This was before Mr. Shokour entered into a business relationship with ICM and the Bharuchas.

[40] I therefore conclude that IIT has not met its burden of proving on the balance of probabilities that Mr. Shokour or IBT improperly made use of IIT's copyrighted materials, or that IIT sustained damages as a result.

B. *Is IIT's action against Mr. Shokour and IBT barred by s 43.1(1) of the Copyright Act?*

[41] Subsection 43.1(1) of the *Copyright Act* provides that an action for copyright infringement must be commenced within three years of the time when a plaintiff first knew, or could reasonably have been expected to know, of an act or omission contrary to the *Act*. The discovery of material facts involves an exercise of reasonable diligence (*Central Trust Co v*

Rafuse, [1986] 2 SCR 147 at 224). The subsequent discovery of additional evidence that supports a claim does not extend the limitation period (*Lindhorst v Cornwall*, 2010 ONSC 3882 at para 33).

[42] The letter sent by IIT's legal counsel to Mr. Shokour on August 12, 2002 establishes that IIT was aware of Mr. Shokour's involvement with ICM and the Bharuchas at that time. The letter also confirms IIT's concern about Mr. Shokour's potential access to and unauthorized use of IIT's copyrighted materials.

[43] IIT argues that the limitation period only began to run in 2011, when Mr. Bharucha allegedly informed Mr. Nareen that ICM had continued to use the copyrighted materials in its operations after Mr. Shokour joined the company. IIT maintains that before Mr. Bharucha admitted the truth, there were only suspicions. Mere suspicions are not the equivalent of actual knowledge (citing *Central-Epicure Food Products Ltd v Weinberg*, 2015 ONSC 5539 at paras 20-21).

[44] Even if IIT did not have actual knowledge of the alleged infringement until 2011, the question remains whether the material facts were discoverable earlier through an exercise of reasonable diligence. Discoverability is a question of fact (*Pooni v Aziz*, [1999] OJ No 3864 (Sup Ct) at para 10).

[45] What constitutes reasonable diligence depends on the circumstances of the case. Mr. Shokour and IBT say that IIT could have taken several reasonable steps in 2002 to determine

the nature of IBT's certificates and diploma in travel and tourism: it could have obtained a brochure, sent someone to register for IBT's program, or made a request to the Ministry under freedom of information legislation, as it did many years later. Mr. Nareen testified that he did not request disclosure from the Ministry in 2002 because, despite being represented by counsel, he was unaware of this option at the time.

[46] IIT also says that it was entitled to rely on Mrs. Bharucha's representation in 2002 that Mr. Shokour had not been given access to the copyrighted materials. Reliance on a party's good faith has been accepted in cases of fraud (*Faye v Roumegous* (1918), 42 DLR 533 at 543 (Ont CA), citing *Betjemann v Betjemann*, [1895] 2 Ch 474 (CA)), and where there is evidence of willful concealment (*Underwriters' Survery Bureau Ltd v Massie & Renwick Ltd*, [1938] 2 DLR 31 at 51 (FCTD)). However, there is no evidence in this case that Mr. Shokour or IBT ever engaged in fraud or willful concealment.

[47] Where a limitations defence is raised, a plaintiff has the burden of proving that the cause of action arose within the prescribed limitation period (*Clemens v Brown* (1958), 13 DLR (2d) 488 at 491 (Ont CA)). I am not persuaded that IIT has met this burden. The evidence adduced in this case, particularly the strongly-worded demand letter of August 12, 2002, demonstrates that the material facts were discoverable with reasonable diligence in 2002. This action is therefore statute-barred.

V. Conclusion

[48] The action is dismissed with costs. If the parties are unable to agree upon costs, the Defendants may make written submissions respecting costs, not exceeding five pages, within 10 days of the date of this judgment. The Plaintiff may make written submissions in reply, not exceeding five pages, within 10 days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that this action is dismissed with costs. If the parties are unable to agree upon costs, the Defendants may make written submissions respecting costs, not exceeding five pages, within 10 days of the date of this judgment. The Plaintiff may make written submissions in reply, not exceeding five pages, within 10 days thereafter.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-111-13

STYLE OF CAUSE: 907687 ONTARIO INC., O/A THE INTERNATIONAL INSTITUTE OF TRAVEL v ABDUL SHOKOUR, A.K.A. JOE SHOKOUR, AN INDIVIDUAL AND 1472359 ONTARIO LIMITED, O/A IBT COLLEGE BUSINESS TRAVEL &, TOURISM TECHNOLOGY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 16, 17 and 18, 2017

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: OCTOBER 31, 2017

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