

**THE EASTERN CARRIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2025/0126

IN THE MATTER of section 4 of the
Copyright (Collective Management
Organisations) Regulations, 2024

BETWEEN:

**EASTERN CARIBBEAN COLLECTIVE ORGANISATION FOR
MUSIC RIGHTS (ECCO) INC.**

Claimant

and

MINISTER OF JUSTICE AND LEGAL AFFAIRS

Defendant

Appearances:

Mr. Victor Elliott-Hamilton with him Ms. Adana Romeo for the Claimant

Mrs. Simone Bullen-Thompson, Solicitor General with her Ms. Sasha Lloyd for the
Defendant

2025: November 5;
2026: February 19.

JUDGMENT

- [1] **GILL, J.:** A performance rights organisation challenges subordinate legislation governing it, alleging that the relevant Minister had no power under the enabling Act to make such law.
- [2] The claimant, the Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc. ("ECCO"), is a non-profit performance rights organisation incorporated as a St. Lucia non-profit company, which is registered as an external company under

the local Companies Act,¹ with its registered office situate at #3 Princes Street, Basseterre, St. Kitts. ECCO has been issuing copyright licences in St. Kitts and Nevis since March 2013.

- [3] On 10th December 2024, the defendant, the Minister of Justice and Legal Affairs (“the Minister”) issued the Copyright (Collective Management Organisations) Regulations, 2024 (“the Regulations”) under the Copyright Act 2024 (“the Copyright Act” or “the Act”). Section 4(6) of these Regulations (“Regulation 4(6)”) provides:

(6) No person or association of persons shall issue or grant copyright or related rights licences unless they have a certificate of authorisation from the competent national authority.

- [4] The Regulations were published on 6th December 2024.
- [5] By letter dated 10th December 2024, the Minister, attaching a copy of the Regulations, advised ECCO of the authorisation procedure, and offered expedited processing. Further, the Minister required ECCO to cease issuing licences until satisfactory compliance with the Regulations.
- [6] At that time, ECCO was in breach of its statutory obligation to file annual returns for the years 2023 and 2024 and therefore, did not satisfy the requirements to apply successfully for a certificate of authorisation. ECCO did not put its corporate affairs in order so as to take advantage of the Minister’s undertaking to expedite its authorisation process.
- [7] Instead, ECCO took the view that Regulation 4(6) effectively rendered unlawful its long-standing operations, and exceeded the Minister’s legal authority.
- [8] On 19th February 2025, through its legal practitioners, ECCO issued a pre-action letter to the Minister. There being no response to the letter, on 4th June 2025, ECCO filed a fixed date claim in judicial review seeking the following relief:

¹ Cap. 21.03 of the Laws of Saint Christopher and Nevis

- 1) A declaration that section 4(6) of the Copyright (Collective Management Organisations) Regulations, 2024 is ultra vires the Copyright Act, 2024.
- 2) A declaration that the failure to impose a transitional provision with respect to section 4 of the Copyright (Collective Management Organisations) Regulations, 2024 is in breach of the legitimate expectation of the Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc.
- 3) An order of certiorari to move this Honourable Court and quash section 4(6) of the Copyright (Collective Management Organisations) Regulations, 2024.
- 4) Costs; and
- 5) Any such order this Honourable Court deems fit.

[9] ECCO challenges Regulation 4(6), alleging that it is ultra vires the powers of the Minister to make regulations under the Copyright Act. ECCO further claims that the implementation of the Regulations without a transitional provision constitutes a breach of ECCO's legitimate expectation that the Regulations would include such provision.

[10] The Minister strenuously opposes the claim and contends that Regulation 4(6) is intra vires the Copyright Act, and asserts that the prohibition on unauthorised collective licensing flows directly from the Act, and that Regulation 4(6) merely implements and gives effect to this statutory requirement. The Minister avers that no legitimate expectation was breached, given ECCO's extensive participation in consultations on the Regulations since April 2021, and at no point requested or suggested the need for a transition period.

Issues

[11] The court must determine:

- 1) whether Regulation 4(6) is ultra vires the powers of the Minister to make regulations under the Copyright Act.

- 2) whether the implementation of the Regulations without a transitional period constitutes a breach of ECCO's legitimate expectation.

Whether Regulation 4(6) is ultra vires the Copyright Act

- [12] This is the central legal battle regarding the scope of the Minister's powers to regulate collective management organisations.

ECCO's submissions - prohibition without authority

- [13] ECCO submits that Regulation 4(6) is ultra vires the enabling legislation empowering the Minister to make regulations and as such is void.

- [14] ECCO asks the court to note that intellectual property amounts to property within the meaning of sections 3 and 8 of the Constitution of Saint Christopher and Nevis and as such, the right to property ECCO has, by virtue of the assignments of its members, is a fundamental right that should not be impaired save by express provision in the legislation.

- [15] The power of the Minister to issue regulations is granted in Section 149 of the Copyright Act. It provides:

149. Regulations

The Minister may generally make regulations to give effect to the provisions of this Act, and without prejudice to the generality of the foregoing, he or she may, in particular, make regulations:

- (a) prescribing anything that this Act authorises or requires to be prescribed;*
- (b) prescribing anything that is necessary for the purpose of giving effect to this Act.*

- [16] Section 94(4) of the Copyright Act reads:

(4) This Part of the Act shall be read in accordance with any regulations or schedules adopted to regulate the actions of collective management organisations or licensing bodies.

- [17] ECCO asserts that there is no section contained in the Copyright Act that restricts the exercise of the rights of a collective management organisation ("CMO"), or expressly empowering the Minister to make regulations prohibiting such activity.

- [18] ECCO contends that Regulation 4(6) has the effect of depriving not only ECCO which is a CMO, but additionally any CMO in the exercise of its rights of ownership under the Copyright Act, a right previously enjoyed without limitation. It has the effect of rendering illegal and void any licence issued by ECCO.
- [19] Relying on the House of Lords case of **Tarr v Tarr**,² ECCO submits that while section 94(4) presumes that there can be regulations which regulate the actions of CMOs, the power to regulate does not include a power to prohibit. ECCO emphasises that the section in no way authorises the Minister with responsibility for the Act to make regulations which may impair or restrict the exercise of a CMO's property rights by way of a blanket restriction of its property right to licence copyright. This can only be done by a specific and express grant of authority by Parliament.
- [20] ECCO notes that in Jamaica, Parliament amended the Copyright Act by way of the Copyright (Amendment) Act 2015 and in particular, section 87A expressly required registration of CMOs and expressly restricted the ability to license works absent registration. By the amendment, Section 87A(1) provides:
- 87A. – (1) No person shall carry on the activity of negotiating or granting of licences on behalf of owners of copyright unless that person is a licensing body, holding a certificate of registration.*
- [21] By way of contrast, ECCO points out that there is no similar provision requiring the registration or authorisation contained in the Copyright Act here. Similarly, there is no express provision rendering illegal any licence which a CMO may make absence of registration or authorisation. The Jamaica amendment makes contravention of section 87A(1) an offence punishable on summary conviction.
- [22] ECCO makes the comparison that in certain legislation within the Federation, the express prohibition to conduct business is contained within the relevant Act, not delegated legislation, and provides examples of such restrictions being imposed by

² [1972] 2 All ER 295

clear authority of law - in the Banking Act³, the Legal Profession Act⁴, the Money Services Business Act⁵ and the Securities Act.⁶ ECCO points out that in all of these examples, there is a clear restriction imposed by Parliament on the right to do business, that is, engage in contracts for the exploitation of assets with a view to make profit. ECCO asserts that these are fundamental rights which have been restricted under clear authority of law by Parliament. They are not contained in a regulation by a Minister. ECCO maintains that there is no equivalent section contained in the Copyright Act that restricts the right of a CMO to license unless authorised by the Minister. The Regulations provided under these Acts, then implement the licensing and regulatory framework within which a licence to do the restricted activities may be granted. ECCO says that this is consistent with the observation by Lord Neuberger in **R (Public Law Project) v Lord Chancellor**,⁷ where His Lordship noted:

“Normally statutory provisions which provide for subordinate legislation are concerned with subsidiary issues such as procedural rules, practice directions and forms of notice; hence statutory instruments are frequently referred to as Regulations.”

The Minister’s submissions – the Act empowers the Minister

[23] The Minister submits that the prohibition on unauthorised collective licensing is a creature of statute, not regulation, and contends that the Copyright Act itself requires authorisation whereas Regulation 4(6) merely implements that statutory requirement. In support of this submission, the Minister relies on section 94(1) of the Copyright Act which defines a CMO. It reads:

³ Section 3 (1) of the Banking Act: A person shall not carry on banking business or hold himself out as carrying on banking business in the Currency Union without a licence granted by the Central Bank.

⁴ Section 19 (1) of the Legal Profession Act: An attorney-at-law who desires to practice law in any year shall apply, in the prescribed form, to the Registrar for a Practicing Certificate.

⁵ Section 4 (1) of the Money Services Business Act, Cap. 21:21: “A person shall not carry on money service business in Saint Christopher and Nevis unless that person holds a licence in accordance with this Act.

⁶ Section 7 (1): No person shall establish or operate a securities exchange in accordance with a securities exchange licence granted by the Commission in accordance with this Act. See also section 23 (clearing agency restriction), section 46 (market participants restrictions).

⁷ [2016] AC 1531 at 1556 para. 24

94. Interpretation.

In this Part,

“collective management organisation” means a registered non-profit legal entity that is authorised in accordance with this Act, to represent its members comprising authors and other right holders, both national and foreign, as well as to collect and distribute rights revenue related to the exploitation of the copyright and related rights licensed to the collective management organisation;

- [24] The Minister submits that Regulation 4(6) gives effect to the authorisation requirement contained in section 94(1) of the Copyright Act. By defining CMOs as entities that must be "authorised", the Minister argues that Parliament itself has determined that only authorised entities may lawfully engage in collective licensing. He posits that the prohibition on operating without authorisation flows directly from the statutory definition in the Act. Thus, Regulation 4(6) implements and gives effect to the authorisation requirement already established by the Act. The Regulation specifies how the statutory authorisation is to be obtained and what consequences follow from operating without it. This is precisely what section 149 of the Act contemplates when it empowers the Minister to make regulations to give effect to the provisions of the Act and to prescribe anything that is necessary for the purpose of giving effect to the Act.
- [25] The Minister submits that the principle in **Tarr v Tarr** relied on by ECCO is not applicable in this case.
- [26] The Minister maintains that the prohibition on unlicensed collective management is found in the parent Act itself, not in the Regulations.
- [27] The Minister draws the court's attention to Regulation 4(7) which expressly preserves the right of individual rights holders to license their own works. Regulation 4(7) provides:
- (7) Notwithstanding sub-regulation (6) and subject to obligations as a member of a collective management organisation, a right holder acting in his individual capacity shall have the right to grant licenses in respect of his own works.*

- [28] The Minister submits that this confirms that copyright licensing itself is not prohibited. What requires authorisation is the **collective** licensing function; the business of managing and licensing rights on behalf of multiple rights holders. He posits that is not a prohibition; it is a regulation of who may lawfully engage in a regulated activity.
- [29] The Minister further submits that this interpretation is consistent with the principle of *expressio unius est exclusio alterius*, the expression of one thing excludes another. By defining CMOs as "authorised" entities, Parliament has impliedly excluded unauthorised entities from engaging in collective licensing. The Regulation merely makes explicit what is implicit in the statutory definition.
- [30] In answer to ECCO's submission that its property rights under the Constitution of Saint Christopher and Nevis should not be impaired save by express provision in the legislation, the Minister counters that Regulation 4(6) does not interfere with fundamental rights or impair or endanger such rights. He assures that ECCO retains full ownership of its intellectual property rights and its members' rights. The regulation merely prescribes the manner in which those rights may be collectively managed and licensed. The Minister insists that this is regulation, not deprivation.
- [31] Given the foregoing, the Minister submits that Regulation 4(6) is within the scope and purpose of the Copyright Act and therefore intra vires the Act.

Breach of Legitimate Expectation - lack of transitional provision/period

- [32] This issue concerns the fairness of the immediate implementation of the Regulations.

ECCO's submissions

- [33] ECCO submits that the failure to allow for a reasonable period to comply with the Regulations constitutes a direct violation of ECCO's legitimate expectation that any policy change affecting their fundamental right to property would not be imposed without transitional arrangements to safeguard its ability to exercise that right.
- [34] ECCO advances that the effect of Regulations 4(1) [dealing with compliance requirements for authorisation] and 4(6) is to immediately render illegal ECCO's

longstanding practice of licensing copyrights to which it holds ownership - a practice it has consistently conducted for the past 12 years.

- [35] It asks the court to note by way of contrast, in Jamaica, where similar provisions were implemented by the Parliament in an amendment Act, provision was made for a transitional period of six months or a longer period that the Minister may prescribe by Order. Section 32 of the Copyright (Amendment Act), 2015 amends the principal Act by inserting the following as section 154 -

154. Notwithstanding section 87A, a licensing body operating before the date of coming into operation of the Copyright (Amendment) Act, 2015, shall be required to satisfy the requirements for registration under section 87A and any regulations in relation thereto, within six months from that date or such longer period as the Minister, after consultation with the Executive Director, may by order prescribe.

- [36] ECCO alleges that the evidence of prior consultation (relied upon by the Minister) is irrelevant to the analysis of whether or not a transitional period is required. Given the serious consequences imposed by the Act, it asserts that the deprivation of ECCO's right to license its property rights, the immediate application of the Act, is unjustified, irrational and unreasonable.
- [37] In the circumstances, ECCO submits that it is entitled to a declaration that the failure to provide a transitional period was in breach of its legitimate expectation.

The Minister's submissions

- [38] The Minister contends that in determining whether a legitimate expectation exists, it is necessary to examine ECCO's conduct. The evidence demonstrates that prior to the passing of the Copyright Act and the Regulations, there were consultations which included ECCO, and that ECCO had extensive notice of the impending regulatory framework. The evidence indicates the following:

- (a) From April 2021 to January 2023, the World Intellectual Property Organisation (WIPO) facilitated a regional project to draft model Regulations for CMOs in the Caribbean. ECCO, as a member of the

Association of Caribbean Copyright Societies, was represented in these negotiations.

- (b) On 8th September 2022, the Minister convened a meeting at his office with ECCO's local directors to discuss the state of collective management in St. Kitts and Nevis and the forthcoming Regulations.
- (c) On 13th October 2022, the Intellectual Property Office (IPO), in collaboration with the Ministry of the Creative Economy and ECCO, held a joint press conference on music licensing, aired widely on ZIZ Radio, social media platforms, and Channel 4 Cable TV.
- (d) On 1st and 2nd November 2022, public consultations were organised by the IPO in collaboration with the Ministry of the Creative Economy and ECCO in St Kitts and Nevis, aired widely on media platforms.
- (e) On 22nd March 2023, the Registrar sent draft Regulations and the draft Copyright Bill by email to ECCO's local directors, explicitly inviting feedback.
- (f) On 3rd April 2023, a third public consultation was organised by the IPO to specifically discuss the proposed Regulations.
- (g) The Copyright Bill was debated on 10th May 2024, and the Copyright Act was published and passed into law on 4th July 2024.
- (h) On 13th May 2024, the IPO issued a public release indicating that new regulations would be in place to regulate CMOs such as ECCO.
- (i) The Regulations were published in the Official Gazette on 6th December 2024.
- (j) On 10th December 2024, the Minister wrote to ECCO advising of the procedure for authorisation and offering swift review to minimise interruption to operations.

[39] The Minister asserts that at no point during this extensive two-year consultation process did ECCO request, suggest, or make mention of the need for a transitional period. ECCO's agents were present at consultations, received draft regulations in March 2023, and had multiple opportunities to raise concerns about implementation timelines. The Minister contends that ECCO cannot now claim surprise or unfair

treatment when it actively participated in the process that led to the Regulations' adoption.

[40] Further, the Minister advances that ECCO cannot point to any clear and unequivocal assurance from the Government that a transitional period would be provided. No such promise was made during consultations, in correspondence, or in any public statement, so that ECCO's expectation was not based on any representation by the Minister.

[41] Additionally, the Minister explains that there are different types of transitional provisions and submits that Regulation 4(4) is such a provision. Regulation 4(4) provides:

(4) Where a collective management organisation existed prior to the introduction of these Regulations, regulations 4(2)(b), 4(2)(f) and 4(3) shall not apply provided that the collective management organisation meets all the other requirements subject to these Regulations.

[42] Certain requirements for authorisation, that is, the requirement to demonstrate a substantial catalogue of rights and membership/affiliation with an international umbrella organisation, shall not apply. The Minister avers that Regulation 4(4) provides easier transition to the new regulatory framework vis-à-vis authorisation of CMOs by dispensing with some of the requirements for authorisation in relation to CMOs that existed prior to the introduction of the Regulations. This provision was specifically designed to facilitate the transition of existing operators like ECCO to the new regulatory framework.

[43] The Minister explains that this transitional provision was determined in accordance with the policy. The policy that can be gleaned from the legislation is that the Copyright Act was intended to protect the rights of rights holders. The policy of the Copyright Act is that CMOs should not operate without authorisation from the relevant authority. The authorisation process is to ensure that CMOs are in good standing and in compliance with their legal and corporate obligations and in a position to represent the rights holders. Moreover, the implementation of the Regulations represents a policy decision by the Government to regulate an industry

that had operated without oversight. The Minister argues that such policy decisions do not ordinarily give rise to legitimate expectations.

[44] The Minister understands ECCO's contention in respect of a transitional provision to mean that a time period for the transition to the regulatory framework ought to be included. However, the Minister submits that this must be considered in light of the course of dealings outlined at paragraph 38 above, in particular, the fact that on 22nd March 2023, the Registrar sent draft Regulations and the draft Copyright Bill by email to ECCO's representatives, the 3rd April 2023 public consultation on the proposed Regulations, the passing of the Copyright Act on 4th July 2024 and the IPO press release of 13th May 2024, indicating that new regulations would be in place to regulate CMOs such as ECCO. Additionally, the Minister asks the court to note that the documents which ECCO needed to produce for authorisation are documents that it ought to have in the course of its business.

[45] The Minister asserts that ECCO had over two years' notice of the impending regulatory framework, and propounds that this constitutes, in substance, a transitional period. The Minister alleges that ECCO evidently chose not to prepare itself to transition to the regulatory framework of which notice was given. The Minister submits that based on the level of consultation in which ECCO was involved, the prior notification of the fact that regulations would be implemented, and the time frame involved, there is no legitimate expectation of the inclusion of a transitional provision as claimed by ECCO.

“Authorised”

[46] As a result of oral arguments coming out at trial, learned counsel for the parties requested time to file closing submissions, which were so ordered and duly filed. These submissions turned out to be, essentially, a full-blown debate on the meaning of the phrase “authorised in accordance with this Act” in section 94(1) of the Copyright Act.

ECCO on “authorised”

- [47] ECCO submits that the Minister’s argument that Regulation 4(6) gives effect to section 94(1) of the Copyright Act must fail. First, the extraction of the words “*authorised in accordance with this Act*” completely disregards the text which follows namely, “*to represent its members comprising authors and other right holders, both national and foreign, as well as to collect and distribute rights revenue related to the exploitation of the copyright and related rights licensed to the collective management organisation,*” and the context of the entire paragraph, in contravention of the interpretation principle of *noscitur a sociis*⁸.
- [48] ECCO further submits that section 94(1) of the Copyright Act is a definition section. Its purpose is to define key terms for Part VII of the Act. This means it describes the state of being authorised but it does not contain any substantive provision that it actually grants the Minister the power to enact the authorisation process through a regulation. In this context, Section 18.1 of Benion, Bailey and Norbury on Statutory Interpretation reads:
- As a general rule substantive provision will not be incorporated in a definition. This is for the simple reason that the reader approaching a definition would not normally expect it to be more than a definition. Where there is doubt in relation to a provision framed as a definition the courts will tend to construe it restrictively and confine it to the proper function of a definition.*
- [49] Therefore, ECCO argues that the correct construction of the section is found from looking at the provisions of the Copyright Act. For a CMO to effectively discharge its function of representing its members, as contemplated by section 94(1), it must be so authorised to grant licences authorising the public performance of the works of its members and be authorised to sue for infringement. It can only do so as the copyright owner. The Copyright Act makes clear that only the owner of copyright in

⁸ See Section 23.1 of the Benion, Bailey and Norbury on Statutory Interpretation - A word or phrase in an enactment must always be construed in light of the surrounding text, as per Lord Simmonds in *A-G v HRH Prince Ernest Augustus of Hanover* [1957] A.C. 436

a work shall have the exclusive right to do or to authorise other persons to perform a work in public. Section 7(1)(c) of the Copyright Act reads:

(1) By virtue of and subject to the provisions of this Act, the owner of the copyright in a work shall have the exclusive right to do or to authorise other persons to do any of the following acts in Saint Christopher and Nevis:

...

(c) perform the work in public, or in the case of an audio-visual work, sound recording or broadcast, to play or show the work in public;

- [50] ECCO explains that the right to sue is also equally vested in the copyright owner, as the act of infringement is expressly defined as doing any of the exclusive rights without licence of the copyright owner.⁹ The Act also sets out limited circumstances in which an exclusive licensee and a non-exclusive licensee may bring an action.
- [51] ECCO further explains that the Act itself sets out the requirements for determining ownership and the transfer of ownership. The author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary (section 20(1) of the Copyright Act). However, copyright in a work may be transferred as a personal or moveable property by assignment and a transfer pursuant to assignment shall not be effective unless it is in writing and signed by or on behalf of the assignor (section 21(1) of the Copyright Act).
- [52] The act of granting licences to music ownership can only be vested in the CMO in accordance with the Copyright Act by an assignment which complies with the requirements contained in section 21(1) of the Act. Therefore, ECCO submits that “authorised in accordance with this Act” refers to the requirement for an assignment in compliance with section 21(1) of the Act.
- [53] ECCO further submits as originally outlined in its submissions that the right to regulate does not include a right to prohibit, and the argument that in order to effectively ensure that the regulations are complied with must imply such a right fails

⁹ See section 29 of the Copyright Act

given that it falls afoul of section 21(b) of the Interpretation Act¹⁰ which prescribes the penalty that may be stipulated for the breach of any regulation as follows:

(b) there may be annexed to the breach of any regulation, rule, by-law or order such penalty not exceeding two thousand five hundred dollars as the authority making the regulation, rule, by-law or order may think fit.

- [54] In addition, ECCO expresses that the submission of the Minister with respect to Regulation 4(7) also raises the same concern. It purportedly grants the right to licence works by the members. ECCO argues that this raises a fundamental question given that in ECCO's view, it plainly contradicts section 7(1) of the Copyright Act, which grants clear authority on the Minister to override or amend the circumstances in which the exclusive right to license, which is a fundamental right of property vested in the copyright owner under section 7(1) of the Copyright Act, and vest it in, presumably, the first author.

The Minister on "authorised"

- [55] The Minister submits that a statute must be read as a single coherent instrument, with every part informing the meaning of the others. It is a well-established principle of statutory interpretation that courts should avoid constructions that produce absurd or unreasonable results, or that render statutory provisions otiose or meaningless. In **Adler v George**,¹¹ the Divisional Court refused to adopt a literal interpretation that would have produced an absurd result where a person inside a prohibited area could not be charged with obstruction "in the vicinity of" that area, while a person just outside could be so charged.
- [56] Applying this principle to the present case, the Minister asserts that if ECCO's interpretation were accepted, namely, that "authorisation" means approval by members or shareholders, then the provision that allows for any regulations or schedules adopted to regulate the actions of CMOs or licensing bodies would become entirely meaningless. The regulatory scheme would become unnecessary,

¹⁰ Cap. 1.02 of the Laws of Saint Christopher and Nevis

¹¹ [1964] 2 QB 7

and the Act's authorisation requirement would be deprived of any purpose whatsoever.

[57] Section 94(1) of the Act sets out an express statutory definition of a CMO. The definition is not open-ended. It requires that a CMO must be (1) a registered entity, and (2) authorised in accordance with the Act.

[58] The Minister submits that this statutory structure is deliberate. Parliament chose to condition a CMO's legal recognition, and therefore its ability to issue licences on behalf of rightsholders, on its compliance with registration and authorisation requirements. An entity that fails to meet this statutory definition cannot be treated as a CMO under the Act.

[59] The term "authorised" cannot be understood in isolation; it must be interpreted in harmony with the full scheme regulating CMOs. Section 94 (4) indicates that Part VII (Copyright Licensing) shall be read in accordance with any regulations or schedules adopted to regulate the actions of CMOs or licensing bodies. Section 92(a) also refers to regulations governing the licensing bodies or CMOs. Both 92(a) and 94(4) contemplate that the actions of CMOs would be regulated.

[60] The Minister further submits that the phrase "authorised in accordance with this Act" in section 94(1) is decisive. Parliament did not say:

- a) "authorised by its members":
- b) "authorised by copyright owners";
- c) "authorised by rightsholders"; or
- d) "licensed by the owner of the copyright or related rights".

[61] The Minister argues that had Parliament intended private authorisation it would have used the same language it consistently employed throughout the Act when referring to private authorisation only, that is, specific reference to authorisation by the rights holders. Instead, Parliament used language that mirrors general authorisation provisions: "authorised in accordance with this Act".

- [62] The Minister contends that when section 94(1) defines a CMO as an entity "authorised in accordance with this Act", the authorisation contemplated is one granted pursuant to a state-administered regulatory process established by its attendant regulations.
- [63] The Minister argues that the Regulations, which the Act explicitly directs the reader to apply when understanding section 94, confirm that authorisation is granted by the competent national authority. The Regulations require a CMO to provide certain information including proof that it is a registered legal entity as required by section 94(1) before authorisation is granted. The Minister asserts that this is consistent with the purpose of the Act which is to protect the rights of rights holders by ensuring that those who represent their interests are competent and legally constituted to discharge their duties. Section 94 and its surrounding provisions presuppose an institutional authorisation process, not internal member approval.
- [64] The Minister explains that this interpretation accords with international best practices for CMOs. As noted by the World Intellectual Property Organisation (WIPO), CMOs typically operate within regulatory frameworks where the CMO's authority is typically conveyed by its statute (if membership-based), by voluntary mandates, by representation agreements with other CMOs and/or by national law. The distinction between internal authority from members and external authorisation from the State is fundamental to the collective management system worldwide.
- [65] The Minister submits that when the Act is read as a whole, the only coherent meaning of "authorise" is authorisation by the competent authority designated under the regulatory scheme. Any other interpretation would be inconsistent with the statutory framework and the evident purpose of Parliament.
- [66] If ECCO's position were correct, namely, that no prohibition exists because the Act does not expressly prohibit operating without authorisation, the Minister posits that the statutory scheme on regulations would be rendered meaningless. Parliament would have created an authorisation requirement that any entity could simply ignore.

The authorisation process would be voluntary, compliance would be optional, and the entire regulatory framework would have no legal force.

- [67] The Minister is adamant that such an interpretation cannot be correct. It would attribute to Parliament an intention to create an elaborate but entirely toothless regulatory scheme, and the Minister strenuously asserts that the principle against interpreting statutes to produce absurd results applies with full force here.
- [68] The Minister alleges that ECCO's interpretation fails because it confuses private law arrangements with public rights and obligations. Member approval may empower a CMO internally as a matter of private corporate governance, but it cannot constitute statutory authorisation to operate a national licensing regime. The authorisation to operate a national copyright licensing regime is quintessentially a matter of public law, requiring the sanction of a public authority.
- [69] At trial (and reduced to writing in closing submissions as above), learned counsel for ECCO asserted that Regulation 4(7) conflicts with the Act because it permits rightsholders to license works individually even when rights have been assigned to a CMO. The Minister counters that Regulation 4(7) expressly limits an individual rightsholder's actions "subject to obligations that the individual has to a CMO", and therefore, does not override assignments made to CMOs.
- [70] The Minister points out that under section 7(1) of the Copyright Act, copyright comprises several distinct rights. ECCO's own membership contract:
- i. requires assignment of the public performance right (section 7(1)(c));
 - and
 - ii. the right of reproduction (section 7(1)(a))
- [71] However, members retain the remaining rights, including:
- i. adaptation rights (section 7(1)(f));
 - ii. distribution rights (section 7(1)(b))
 - iii. communication to the public (section 7(1)(e)), etc.

[72] The Minister explains that Regulation 4(7) simply clarifies that retained rights or works not assigned to a CMO may be licensed directly by the rightsholder. This is entirely consistent with the Act. The Minister gives a practical example: a songwriter who assigns public performance rights may still exercise the right of adaptation by licensing a remix of their song in a different genre or language. Regulation 4(7) facilitates such exploitation, the Minister submits, and asserts that it does not encroach upon any rights assigned to a CMO.

[73] The Minister further explains that the statutory regime regulates the status and operation of CMOs as public-facing licensing bodies. It does not regulate or modify the terms of private assignments between rightsholders and CMOs. The Act distinguishes clearly between: (a) private arrangements, such as assignments, mandates, and licensing contracts; and (b) public authorisation, which determines whether a body may legally operate as a CMO.

Applicable principles of statutory interpretation - the purposive approach

[74] The Minister submits that ECCO's position is founded upon a fundamentally flawed approach to statutory interpretation. He advances that the modern approach to statutory interpretation requires courts to adopt a purposive construction that seeks to give effect to the true intent and purpose of legislation. This approach has been authoritatively endorsed by the highest courts in the United Kingdom,¹² and is applicable in the Caribbean by virtue of the common law heritage.

[75] The Minister submits that the Act, when read as a whole, clearly demonstrates Parliament's purpose to establish a comprehensive regulatory framework for CMOs, with authorisation by a competent authority being central to that framework.

Implied prohibition

[76] A critical issue in this case is whether a prohibition against operating without authorisation as stated in Regulation 4(6) is authorised by the Act even though the

¹² See *Shah v Barnet London Borough Council* [1983] 2 AC 309; see also *Pepper (Inspector of Taxes) v Hart* [1993] AC 593

Act does not expressly state such a prohibition. The Minister submits that such a prohibition is necessarily implied from section 94.

[77] The Minister contends that it is well established that a statutory prohibition need not be expressly stated in order to have legal effect. Where Parliament creates a statutory requirement or condition, a prohibition against acting contrary to that requirement may arise by necessary implication, even in the absence of express prohibitory language. In support of this argument, the Minister relies on the House of Lords case of **R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax**¹³ which authoritatively addressed the concept of “necessary implication” in statutory interpretation.

[78] Under that principle, an implication is necessary where it must logically flow from the statutory language.

Application to section 94

[79] Section 94(1) does not state in express terms that “no person shall operate as a collective management organisation without authorisation”. What section 94(1) does is define what a CMO is. It provides that a “collective management organisation” means “a registered non-profit legal entity that is authorised in accordance with this Act” to represent rightsholders.

[80] Applying the test in **Morgan Grenfell**, the Minister posits that the question is: Does the express language of section 94 show that the statute must have included the prohibition that no person or association of persons shall issue or grant copyright or related rights licences unless they are a registered non-profit legal entity and authorised in accordance with this Act? The Minister asserts that the answer follows from express language and logic and illustrates the point in this manner:

- a) Section 94(1) defines a CMO as a “a registered non-profit legal entity authorised in accordance with this Act”.

¹³ [2002] UKHL 21; [2003] 1 AC 563

- b) An entity that is not a registered non-profit legal entity nor authorised in accordance with the Act does not satisfy this definition.
- c) Therefore, an entity that is not a registered non-profit legal entity nor authorised in accordance with this Act is not a CMO within the meaning of the Act.
- d) It necessarily follows that such an entity cannot lawfully exercise the functions that the Act reserves to CMOs.

[81] The Minister argues that this is not a "reasonable implication" or what Parliament "would probably have included". It is what the express language of section 94, construed in its context, necessarily requires. The prohibition is a matter of "express language and logic".

[82] The Minister makes an analogy: a statute providing "only licensed persons may practice medicine" does not require an express prohibition on unlicensed practice. The prohibition is implicit in the definition. So too here, the Minister reasons: a statute defining CMOs as entities that must be "authorised in accordance with this Act" implicitly excludes unauthorised entities from exercising CMO functions.

The role of delegated legislation in giving effect to implied prohibitions

[83] The Minister submits that where an Act contains an implied prohibition, delegated legislation may make that prohibition explicit without exceeding the scope of the enabling power. He makes the point that the Regulations do not create a prohibition that Parliament did not intend; they articulate and give practical effect to a prohibition that was always inherent in the statutory scheme.

[84] Further, Section 94(4) provides that this Part of the Act shall be read in accordance with any regulations or schedules adopted to regulate the actions of collective management organisations or licensing bodies.

Tarr v Tarr

[85] Further, the Minister argues that the prohibition contained in Regulation 4(6) does not offend the rule in **Tarr v Tarr** as submitted by ECCO. The Minister cites the

cases of **Boddington v British Transport Police**,¹⁴ **Taione and Others v Kingdom of Tonga**,¹⁵ and **Ng Enterprises Ltd v Urban Council**¹⁶ to illustrate that only absolute prohibitions are without the power to regulate. The Minister submits that this case is distinguishable from **Tarr v Tarr** as Regulation 4(6) does not impose an absolute prohibition. It does not prohibit a CMO from operating at all. It requires a CMO to comply with specific requirements to conduct its licensing activities.

Dormant legislation until activated by regulations

[86] The Minister points out that some statutory provisions cannot operate until the necessary regulatory machinery is created. Such provisions remain dormant, in the sense that they are in force but not in effective operation until the required regulations are enacted.

[87] This principle was considered in the case of **RM v Scottish Ministers**¹⁷ by Lord Reed who opined:

“It follows that the distinction which the Ministers have sought to draw between a provision being in force, in the sense that it has become law, on the one hand, and its being in effective operation, on the other hand, is in principle a valid distinction. In a commencement provision such as section 333(2) of the 2003 Act, in particular, the words 'in force' can only bear the former of those senses. That is because the effect of a provision which fixes a date when provisions 'shall come into force' is that those provisions will automatically come into force on the specified date. Nothing requires to be done in order for the provisions to come into force beyond passively awaiting the date fixed by the Act itself. If however the provisions being brought into force cannot be brought into effective operation without further action being taken—as is true, on any view of the matter, of the provisions to which section 333(2) applies—then the commencement provision must be referring only to the bringing of the provisions into force as law, and not to their being brought into effective operation.”

In the event, the Ministers' failure to exercise their power to make the necessary regulations under section 268(11) and (12) of the 2003 Act by 1 May 2006, or since that date, has had the result that, although sections 268–271 are

¹⁴ [1998] 2 All ER 203 at 217-218

¹⁵ [2005] 4 LRC 661 at 712

¹⁶ [1997] 1 LRC 192

¹⁷ [2012] All ER (D) 322 at paras. 32 and 43

technically in force, they have no more practical effect today than they had on the date, more than nine years ago, when the 2003 Act received Royal Assent.”

The position before the Regulations

- [88] Section 94 imposed a requirement of authorisation but did not outline the mechanism for obtaining it. The Act expressly contemplated that Regulations would be made to establish the process. Until the Regulations came into force, the authorisation requirement was incapable of being satisfied because no procedure existed by which a CMO could apply for or obtain authorisation.
- [89] The Minister makes it clear that prior to the Regulations coming into force, a CMO was not acting unlawfully by operating without authorisation. This is because the statutory requirement, whilst existing on the face of the Act, could not be complied with. A CMO could not obtain authorisation when no procedure existed for obtaining and granting it.
- [90] Accordingly, ECCO’s operation prior to the commencement of the Regulations was entirely lawful.

The position after the Regulations came into force

- [91] The Minister explains that once the Regulations came into effect, the position changed fundamentally. The Regulations provided: (a) the procedure for applying for authorisation; (b) the criteria for granting authorisation; (c) the conditions attached to authorisation; and (d) the consequences of operating without authorisation. The authorisation requirement became fully operative because the mechanism for compliance now existed.
- [92] Regulation 4(6), which prohibits operating without authorisation, did not create a new obligation. It gave practical effect to the statutory requirement in section 94. Once the machinery was in place, the underlying statutory requirement became enforceable.
- [93] The Minister asserts that ECCO therefore had no legal entitlement to continue operating without authorisation once the Regulations came into force. The fact that

ECCO lawfully operated before the Regulations did not confer any vested right to continue operating without authorisation after the regulatory scheme became operative. The system simply transitioned from a dormant statutory requirement to an active regulatory obligation.

[94] The Minister advances that the modern purposive approach to statutory interpretation requires that section 94 be read in light of Parliament's clear intention to establish a comprehensive regulatory framework for CMOs.

[95] The Minister therefore requests the court to find that Regulations 4(6) and 4(7) are valid exercises of delegated legislative power and dismiss ECCO's challenge accordingly with costs to be awarded to the Minister.

The statutory framework, case law and analysis

[96] The court must determine whether the impugned regulation falls within the statutory power conferred. In **Damian Kelsick v Kerstin Petty and the Attorney General of Saint Christopher and Nevis**,¹⁸ Ventose J, as he then was, cited Lord Neuburger in **R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)**¹⁹ where His Lordship stated:

"Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is ultra vires it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation."

Express prohibition vs implied prohibition

[97] The main thrust of ECCO's case is that the Copyright Act contains no express provision empowering the Minister to prohibit a CMO from licensing copyright; such

¹⁸ SKBHCV2014/0119, delivered November 12, 2018, at para. 10

¹⁹ [2016] AC 1531 at para. 23

a restriction requires express authority from the Act and therefore, Regulation 4(6) is ultra vires the powers of the Minister.

[98] The Minister's case is that Regulation 4(6) is intra vires his power or authority which comes from section 94 of the Act. The Minister counters ECCO's position and asserts that a statutory prohibition need not be expressly stated in order to have legal effect. The Minister advances that although the Act does not expressly state that an organisation cannot operate without authorisation, such a prohibition arises by necessary implication.

[99] In submitting that a power to "regulate" does not ordinarily include a power to prohibit unless Parliament clearly says so, ECCO relies on the dicta of Lord Pearson in **Tarr v Tarr**,²⁰ who when dealing with the question of the meaning of the term "regulate" within the context of matrimonial orders, did a substantive review of the term "regulate" as applied in a number of authorities²¹ with regard to diverse types of legislation, suggesting that the interpretation of the term "regulate" is a matter of general application. Lord Pearson stated:

"There is authority in several different connections for the proposition that a power to regulate does not (unless the context so requires) include a power to prohibit. In *Municipal Corp'n of the City of Toronto v Virgo* ([1896] AC 88 at 93, 94) Lord Davey said:

'It appears to their Lordships that the real question is whether under a power to pass by-laws "for regulating and governing" hawkers, &c., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised. It was contended that the by-law was ultra vires ... No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. **But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern**

²⁰ [1972] 2 All ER 295 at 300 f - j, and 302 b

²¹ See *Attorney General for Ontario v Attorney General for the Dominion* [1896] AC 348 at 363 per Lord Watson; see also *Ward v Folkestone Waterworks Co* (1890) 24 QBD 334 at 338, 339 per Cave J; see also *Birmingham and Midland Motor Co Ltd v Worcestershire County Council* [1967] 1 All ER 544 at 550, [1967] 1 WLR 409 at 419, per Lord Denning

seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words ... through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.'

It was held that the by-law was ultra vires.

.....

In the Oxford English Dictionary under the word 'regulate' there is not given any meaning which could possibly include prohibition. Thus, the word 'regulating' in itself is not apt to include a power to prohibit. There is no evident reason why the draftsman should not have added the words 'or prohibiting' if he meant to include a power to prohibit." (*Emphasis added*)

- [100] In the opposing argument, on the concept of "necessary implication" in statutory interpretation, the Minister relies on the House of Lords case of **R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax**²² where Lord Hobhouse stated:

"It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. A necessary implication is not the same as a reasonable implication... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

- [101] I find the Minister's analysis in applying the test in **Morgan Grenfell** to section 94 of the Act to be compelling. The analogy of a statute providing "only licensed persons may practise medicine", illustrates the point clearly. In light of such a provision, there would be no need for an express provision prohibiting unlicensed persons from

²² [2002] UKHL 21; [2003] 1 AC 563; [2002] 3 All ER 1 at para. 45

practising medicine. By the express words of the statute, it is necessarily implicit and a matter of logic that unlicensed persons are excluded. Likewise, the definition of a CMO in section 94(1) as “a registered non-profit legal entity authorised in accordance with this Act” necessarily implies that an entity that is not a registered non-profit legal entity nor authorised in accordance with the Act does not fall within the definition of a CMO. A CMO not authorised in accordance with the Act is, by express language and logic, implicitly excluded. This is so without the express terms that no person shall operate as a CMO without authorisation.

[102] I accept the Minister’s submission that Regulation 4(6), in providing that a CMO shall not operate without authorisation, makes explicit what section 94(1) already implies. Applying section 94(4) of the Act, section 94(1) is to be read in accordance with Regulation 4(6). The Regulation gives effect to the necessarily implied requirement in section 94(1) that a CMO is an authorised entity.

[103] Further, the Minister distinguishes this case from **Tarr v Tarr** on the basis that Regulation 4(6) does not impose an absolute prohibition. In **Boddington v British Transport Police**,²³ the appellant argued that the power to make byelaws regulating the conduct of persons with respect to smoking in railway carriages did not include the power to post signs which prohibited smoking. Lord Irvine stated:

“... Whilst Mr. Boddington did not contend that the byelaw itself was unlawful, he did argue that, in the context of the primary legislation, the decision to post notices to prohibit, rather than regulate, smoking, was unlawful. He relied upon authorities to the effect that normally a power to regulate does not include a power to prohibit: *City of Toronto Municipal Corp v Virgo* [1896] AC 88 at 93 and *Tarr v Tarr* [1972] 2 All ER 295, [1973] AC 254 at 265 –268 per Lord Pearson.

In my judgment, whilst ordinarily the word 'regulate' may be used to indicate something less than total prohibition, the meaning to be attributed to it in any statute must depend on the particular statutory context. Authorities relating to other statutes are of limited assistance.”

²³ [1998] 2 All ER 203 at 217-218

[104] In **Taione and Others v Kingdom of Tonga**,²⁴ Webster CJ, explaining the meaning of 'regulate', indicated:

“ ‘Regulate’ means to control or adjust by rule (Chambers); and to control, govern or direct by rule or regulations, to subject to guidance or restrictions, to bring or reduce to order, and to correct by control (Oxford); and so has a very wide meaning (although that does not include an absolute prohibition: see *Toronto v Virgo* [1896] AC 88, *Ontario v Canada* [1896] AC 348 and *Tarr v Tarr* [1972] 2 All ER 295 at 302(HL)).”

[105] In the Privy Council decision in **Ng Enterprises Ltd v Urban Council**,²⁵ Lord Slynn stated:

“Their Lordships accept that as a general rule a power to regulate an activity *prima facie* does not give the donee the power to prohibit the activity totally. Prohibition of an activity in part, in a particular case or in a particular way, may, however, as the cases show, be needed for effective regulation. The extent to which such partial prohibition is permissible depends on the terms of the power to regulate and on the context in which the power is to be operated.”

[106] I accept the Minister’s submission that this case is distinguishable from **Tarr v Tarr** and that Regulation 4(6) does not impose an absolute prohibition. It does not prohibit a CMO like ECCO from operating at all. It requires a CMO to comply with specific requirements to conduct its licensing activities. Regulation 4(6) does not absolutely prohibit operation by a CMO. It requires compliance with statutory prerequisites. It is therefore a valid regulatory measure.

[107] I have considered ECCO’s comparison with other statutes that include express prohibitions. However, I also note the opinion of the House of Lords in **Boddington v British Transport Police** that the meaning to be attributed to the word “regulate” in a statute must depend on the particular statutory context, and that authorities relating to other statutes are of limited assistance.

²⁴ [2005] 4 LRC 661 at 712 h - i

²⁵ [1997] 1 LRC 192 at 199 d - e

Meaning of “authorised in accordance with this Act”

[108] For ease of reference, I repeat section 94(1) of the Copyright Act. It provides:

In this Part,

*“collective management organisation” means a registered non-profit legal entity that is **authorised in accordance with this Act**, to represent its members comprising authors and other right holders, both national and foreign, as well as to collect and distribute rights revenue related to the exploitation of the copyright and related rights licensed to the collective management organisation;*

[109] ECCO interprets the highlighted words as referring to the requirement for an assignment in compliance with section 21(1) of the Act. This attaches the meaning of “authorised” to approval by members represented by a CMO.

[110] In support of its contention, ECCO refers to the dicta of Viscount Simon in **Withers (H.M. Inspector of Taxes) v Nerthersole**,²⁶ a case concerning the nature of an assignment for the purpose of income tax legislation in the United Kingdom and the Copyright Act, 1911 as follows:

“The Copyright Act, 1911 makes it perfectly clear that the ownership of copyright can be transferred by assignment either wholly or partially and “either for the whole term of the copyright or for any part thereof” (s.5 (2)). So far as the property is assigned, the assignee becomes the owner instead of the assignor.”

[111] Lord Uthwatt further noted in the same case:²⁷

“A partial assignment can only mean an assignment of some of the rights included in the copyright. The effect of a partial assignment of copyright for a period less than the whole term is not to create any new right, but only to divide the existing right. In the result, there are two separate owners each with a distinct property.”

[112] ECCO further illustrates its point by the dicta of Quilliam J in the Supreme Court of New Zealand in the case of **J. Albert & Sons PTY and others v Fletcher Construction Co. Ltd**,²⁸ where the defendant, who had imported a tape on which

²⁶ [1948] 1 All ER 400 at 402 G

²⁷ Ibid at 404 H

²⁸ [1976] RPC 615 at 619 - 620

was recorded various musical works for the purpose of transmitting the works to subscribers and had been duly authorised by the Australasian Performing Rights Assn. Ltd to transmit musical works but had not been authorised or licensed by the plaintiffs to make or import the tape. His Lordship stated:

“It is necessary for a proper understanding of the question raised here to observe the way in which the Copyright Act, 1962 creates and protects the various rights which can arise.”

- [113] Quilliam J went further to explain the difference between rights under the Copyright Act in respect of a single work that may exist simultaneously with each other and the provisions related to assignments and continued:

“The result is that an author of a work may assign virtually all his rights in all countries or he may assign some only of his rights or he may assign rights of a certain kind in one country to a particular person and rights of the same kind in another country to another person, and so on. The combination of ways in which he may assign his rights is almost endless. Similarly a person holding a right from an author may himself make further assignments. In these ways there may be a multiplicity of rights all stemming from the original work but all different and all capable of separate assignment....Each of the several rights arising under the Act becomes the subject of a separate copyright.”

- [114] Quilliam J continued in the final paragraph on page 620:

“It thus becomes a matter of precision to determine which person is for the moment the owner in which country of which particular aspect of the copyright in a certain work. It seems clear, however, that the legislation is designed to set up the means by which such a question may be answered, and moreover to protect the right of the owner of that aspect of copyright. It is also apparent that each of the rights conferred and protected by the Act is a matter of economic value to its owner.”

- [115] Therefore, ECCO submits that the Copyright Act does in fact specify the circumstances in which one can determine whether a CMO is authorised to act on behalf of its members and as such falls within the definition set out in section 94(1) of the Act, as the Act sets up the means by which the copyright owner can be determined.

- [116] ECCO argues that the construction placed by the Minister must fail for the following reasons: (1) The court should not imply a substantive provision in a definition

section; (2) Section 94(1) does not specify that the CMO must be authorised by the Minister to represent its members, but says they must be authorised in accordance with the Act to represent its members. ECCO submits that this means that the CMOs must have (i) assignments which comply with the requirements of section 21(1) of the Copyright Act, thereby giving it the right to license the works of its members and enforce the rights of its members in infringement actions; or (ii) exclusive licences or non-exclusive licences as set out in section 33 and 34 of the Copyright Act. (3) Even if the Minister's assertion that "authorised in accordance with this Act" means authorised by the Minister were to be entertained, this creates an ambiguity or doubt in that the expression is capable of two different constructions which (i) contravenes the requirement that restriction on rights must be imposed by clear authority of law and/or (ii) it creates doubt in relation to a provision framed as a definition which should be construed restrictively and confined to the proper function of a definition.

[117] Respectfully, I do not accept ECCO's interpretation. I understand ECCO to be arguing that "authorised" means having the proper legal standing to act, which comes from having valid contracts or assignments with its members, the artistes, and not a government permit.

[118] To my mind, the words "to represent its members" onwards are descriptive of the functions of a CMO under the Act. These words set out or explain, by definition, what a CMO is empowered to do.

[119] Part VII of the Act deals with copyright licensing and comprises sections 92 to 112. Section 94(4) directs that this Part of the Act be read with any regulations adopted to regulate the actions of CMOs. Section 149 empowers the Minister generally to make regulations to give effect to the provisions of the Act and in particular, in section 149(b), to prescribe anything that is necessary for the purpose of giving effect to the Act.

[120] "Authorised in accordance with this Act" contemplates an authorisation process which a CMO must comply with in order to qualify as a CMO. Therefore, I agree with the Minister's submission that when the Act is read as a whole, the only coherent

meaning of “authorise” is authorisation by the competent authority designated under the regulatory scheme.

- [121] I do not find favour with ECCO’s submission to the effect that if one entertains the Minister’s interpretation, it will create a situation of ambiguity. This is for the simple reason that if, on the other hand, one accepts ECCO’s interpretation, it will create a situation of absurdity. It cannot be that authorisation under section 94(1) is placed in the hands of a CMO’s members. The statutory scheme contemplates a public law authorisation process administered by a competent authority, not private approval by members. Section 94(1) does not, and cannot, confer any authority in a CMO’s members to make regulations as correctly given to the Minister under section 149. Therefore, a situation of absurdity would arise because authorisation by members would render the regulatory scheme under the Act senseless.

The applicable principles of statutory interpretation

- [122] Given the intent and purpose of the relevant parts of the Copyright Act, I am of the view that this court should adopt the more modern approach to statutory interpretation in this case – the purposive approach.
- [123] In **Shah v Barnet London Borough Council**,²⁹ Lord Scarman emphasised that purposive interpretation may only be adopted where judges “can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament’s purpose or policy.”
- [124] Similarly, in **Pepper (Inspector of Taxes) v Hart**,³⁰ Lord Griffiths stated:
- “The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

²⁹ [1983] 2 AC 309 at 348; [1983] 1 All ER 226 at 238

³⁰ [1993] AC 593 at 617 [1993] 1 All ER 42 at 50

- [125] It is clear from a reading of the Act that Parliament intended to create a regulated system for CMOs in which authorisation by a competent authority is fundamental. Regulation 4(6) seeks to ensure that anyone issuing copyright licences is properly authorised to do so.
- [126] Regulation 4(6) provides that a CMO shall not operate without authorisation. I agree with the Minister's submission that this does not add to the Act; it makes explicit what section 94 already implies. By defining a CMO as an entity that "is authorised in accordance with this Act," Parliament necessarily implied that an entity that is not authorised is not a CMO and may not operate as one.
- [127] I have considered ECCO's submission that section 94 of the Act is a definition section without any substantive provision granting the Minister power to enact the authorisation process through a regulation. However, the section quoted by ECCO from Benion shows that substantive provision will not be incorporated in a definition **as a general rule**. In this case, section 94(1) provides the definition of a CMO. The regulation making power of the Minister is contained in section 149. Further, section 94(4) provides that the part of the Act dealing with copyright licensing shall be read with the regulations. When read as a whole, in this particular instance, a substantive provision is contained in the definition. Therefore, ECCO's submission is defeated.
- [128] Consistent with the purpose of the Act to protect the rights of rightsholders by ensuring that CMOs who represent their interests do so in conformity with the stipulated requirements, Regulation 4(6) is therefore necessary to give effect to the statutory framework adopted to regulate the actions of CMOs or licensing bodies as permitted by section 149 of the Act. It is well within the scope of the Minister's power to make regulations for the purpose of implementing the authorisation scheme established by section 94. Therefore, I rule that Regulation 4(6) is not ultra vires the powers of the Minister under the Copyright Act.

Legitimate expectation

[129] ECCO seeks a declaration that the failure to impose a transitional provision with respect to Regulation 4(6) is a breach of its legitimate expectation that such a provision would be included.

[130] In **Elvis Daniel and others v Public Service Commission and Attorney General**,³¹ at paragraphs 31, 32, 35 and 36 of the judgment, Baptiste JA summarised the law in relation to legitimate expectation. His Lordship stated:

“[31] ...The doctrine of legitimate expectation was developed by the courts as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectation as it prohibits the arbitrary use of power by public authorities:

[32] Broadly, the principle of legitimate expectation is based on the proposition that when a public body states that it will do something, a person who has reasonably relied on that statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts: ... To found a claim based on the principle, the statement in question must be “clear, unambiguous and devoid of relevant qualification”.
...

[35] In **Attorney General of Hong Kong v Ng Yuen Shiu**, ([1983] AC 629 at 636) Lord Fraser stated that the concept of legitimate expectation is capable of including expectations created by something that falls short of enforceable legal rights, provided they have some reasonable basis. Likewise in **CCSU v Minister for Civil Service**, ([1985] 1 AC 374 at 401) Lord Fraser said:

“But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the court will protect his expectation by judicial review as a matter of public law.”

[36] ... It is trite law that for a legitimate expectation to arise there has to be a clear, unambiguous and unqualified representation.”

[131] A lawful promise or practice may induce a legitimate expectation of a substantive benefit. Such a legitimate expectation may be held to have been unlawfully

³¹ SVGHCVAP2016/0007, delivered January 19, 2019

breached, should a decision maker make a change in policy which fails to provide for transitional arrangements for persons who have been acting in reliance of that previous promise or practice.³²

[132] The need for transitional arrangements in the context of intellectual property is highlighted in the English Court of Appeal decision of **Bentley 1962 Ltd and another v Bentley Motors Ltd**³³ where Arnold LJ stated:

"57 In devising appropriate transitional provisions, a fundamental guiding principle that has often been applied by the UK Parliament is that of continuity of the law. The concept of continuity of the law is not easy to define with precision, but in broad terms it refers to the idea that the law should continue to apply in as seamless a manner as possible after a change in the law. ...

58 Another fundamental guiding principle that has often been applied by the UK Parliament in making such policy choices is that of legitimate expectations. The legislature recognises that both right owners and users of intellectual property rights have legitimate expectations about the way in which changes to the law affecting their rights should be implemented. These expectations often revolve around the question of retrospectivity. Right owners expect that they will not be deprived of existing rights, while users expect that existing non-infringing uses will not be turned into infringements. Such expectations are not necessarily all-or-nothing ones, however. Thus right owners may be prepared to accept limitations on existing rights, at least in the future, particularly if such limitations are imposed, say, as part of the price for an extension of the term of their rights. Similarly, users may be prepared to accept certain activities being turned into infringements if they are given time to sell off existing stocks and to transfer their businesses to new areas of activity.

59 The question of legitimate expectations is, of course, tied up with that of fundamental rights. It is well established that intellectual property rights are "possessions" within the meaning of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as being protected by article 17(2) of the Charter of Fundamental Rights of the European Union. If a new law reduces the scope and/or duration of an intellectual property right, then right owners may argue that they have been deprived of their possessions."

³² See *R (Patel) v General Medical Council* [2013] EWCA Civ 327

³³ [2021] Bus LR 736 at paras. 57 – 59

- [133] The regulations came into force on 6th December 2024. At trial, the Minister conceded that even if ECCO had been in a state of readiness to apply for a certificate of authorisation, the certificate would not have been granted on the same day. Certification would not have been instantaneous.
- [134] Evidently, there was no avenue for ECCO to apply for a certificate of authorisation before the regulations came into force. By his letter of 10th December 2024, the Minister advised ECCO of the authorisation procedure.
- [135] The Minister contends that in this case, a transitional period, a type of transitional provision, was not needed for the following reasons: (1) ECCO had notice of the regulatory framework coming into place to regulate ECCO in particular, as ECCO was the only CMO involved in the making of the regulations (ECCO is the only registered CMO in the Federation), so that the regulations were being made to regulate ECCO; and (2) ECCO knew that it would not be able to continue issuing licences without authorisation.
- [136] In the absence of a certificate of authorisation, the issuing of a licence from 6th December 2024 rendered ECCO's conduct in so doing unlawful. ECCO could not lawfully issue a copyright licence at least from 6th December 2024. However, notwithstanding ECCO's hypothetical scenario of being in a state of readiness to apply for an authorisation certificate, the evidence reveals that even in light of the Minister's offer of 10th December 2024 to expedite the process, ECCO submitted its application for authorisation on 18th June 2025. Clearly, ECCO was not in a position to apply for a certificate of authorisation on 6th December 2024. In fact, ECCO was liable to be struck off the Register of Companies for failure to file annual returns and incidental fees for the years 2023 and 2024. Such returns are due and payable annually on or before 30th April. I note here that ECCO also failed to file annual returns for 2025 by the due date.
- [137] It appears that ECCO instituted a self-regulated transitional period, notably in excess of six months of the date the regulations came into force. Further, it is evident

that ECCO, in breach of the regulations, issued at least one licence on 22nd May, 2025.

[138] ECCO was involved in the process of regulating CMOs for over two years before the regulations came into force. Its involvement included consultations and meetings with stakeholders, and approval of the regulations. The evidence shows that ECCO never requested, suggested or made mention of the need for a transitional period during any stage of the extensive consultation process.

[139] Even if a certificate of authorisation (had ECCO been ready to apply for one) would not have been issued on 6th December 2024, there was nothing to “force” ECCO’s breach of Regulation 4(6) on that day or a few days after, given ECCO’s own copyright licensing process in respect of applicants. The Registrar of Intellectual Property in her sworn evidence averred that the information and documents required for authorisation under the Regulations are standard documents that any properly functioning CMO should have readily available.

[140] In the circumstances of this case, where there was “no clear, unambiguous and unqualified representation” that a transitional grace period would be granted, ECCO’s considerable involvement in the process of bringing the regulations to the Federation, with no mention of the need for a transitional provision, it is my considered view that ECCO had no legitimate expectation that such a provision would be included. The Minister’s acknowledgement that authorisation could not be issued instantaneously on the day the Regulations commenced, does not, without more, create a legitimate expectation of a transitional period. Therefore, ECCO is not entitled to a declaration that the failure to include such a provision is in breach of its legitimate expectation.

Conclusion

[141] Regulation 4(6) is a valid exercise of the Minister’s regulatory authority. It gives effect to the statutory requirement in section 94 of the Copyright Act that only authorised entities may operate as CMOs. It is consistent with the Act’s purpose.

ECCO is not entitled to a declaration that Regulation 4(6) is ultra vires the Copyright Act.

- [142] ECCO has also failed to establish any breach of legitimate expectation. Given ECCO's prolonged involvement in the consultation process, its failure to regularise its affairs in a timely manner, and the absence of any representation promising transitional relief, the Minister's implementation of the Regulations was lawful.

Costs

- [143] The court will not generally make a costs order against an applicant for an administrative order unless the court considers that the applicant acted unreasonably in making the application or in the conduct of the application.³⁴ I am of the view that this case warrants an exception to the rule. ECCO's failure to file annual returns resulted in its inability to satisfy the requirements to obtain a certificate of authorisation when the Regulations came into force. In the face of the Minister's offer to expedite the authorisation process, ECCO took no immediate steps to regularise itself but fell into further delinquency by failing to file annual returns for the year 2025 by the 30th April deadline. To compound the situation, ECCO, having been notified of the requirements for authorisation, in deliberate contravention of the Regulations, continued issuing licences without having obtained a certificate. Finally, after filing its annual returns and paying all outstanding fees and penalties in May 2025, ECCO applied for a certificate of authorisation on 18th June 2025 in an apparent self-imposed transitional period of over six months from the Regulations becoming operational. Over two years of involvement in the process, given ample opportunity, ECCO failed to raise any of the issues raised in the claim.
- [144] ECCO has not come to this court with clean hands and its conduct must be addressed by an appropriate costs order.

³⁴ Civil Procedure Rules 2023, Rule 56.11(6)

Order

[145] Based on the foregoing, it is ordered as follows:

- 1) The claimant's fixed date claim in judicial review is dismissed in its entirety.
- 2) The claimant shall pay costs to the defendant in the sum of \$10,000.00.

Tamara Gill
High Court Judge

By the Court

Registrar