

**APPEAL**

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honourable Mr. Justice Harrington (the "Motions Judge") dated January 7, 2011, and amended on January 13, 2011, by which the plaintiff's motion for summary judgment was allowed (T514-10).

**THE APPELLANT ASKS that:**

1. The order of the Motions Judge be set aside and an order be granted dismissing the plaintiff's motion for summary judgment.

**THE GROUNDS FOR THE APPEAL are as follows:**

1. The Motions Judge erred in law by granting the Plaintiff's motion for judgment when there existed genuine issues for trial and a conflict in the evidence on material issues which could only be resolved fairly and judiciously by the Trial Judge.
2. The Motions Judge erred in law in identifying the material facts required to support the Plaintiff's claim of infringement.
3. The Motions Judge, in his reasons for decision, erred in failing to demonstrate that he engaged in a thorough and carefully reasoned assessment of the complex and important issues of infringement of the copyright in the Aga Khan's Farmans and Talikas and the MP3 audio bookmark.
4. The Motions Judge erred in arriving at categorical conclusions with respect to the consent issues without supporting evidence, despite evidence to the contrary and without regard to the evidence presented by the defendants/appellants.
5. In arriving at his conclusions, the Motions Judge erred in not giving thorough and careful consideration to the evidence and submissions proffered by the defendants/appellants.

6. The Motions Judge erred in law by failing to draw an adverse inference against the Plaintiff as a result of the Plaintiff's failure to provide evidence on important contested facts.
7. The Motions Judge erred in law by holding that there is conflicting evidence on file on the issue of forgery, and then proceeded to make findings of fact despite conflicting evidence.
8. The Motions Judge erred by holding that the credibility issues in the motions as pleaded before him are not germane.
9. The Motions Judge erred in misapprehending the evidence, failing to direct his mind to the evidence, and failing to consider relevant evidence before him.
10. The Motions Judge erred in law by accepting into evidence the Affidavits of Shafik Sachedina ("Sachedina") and Aziz Bhaloo ("Bhaloo") when the said affidavits contained statements of facts which were not within the personal knowledge of the deponents, and despite the fact that their evidence was materially contradicted by Mohamed Tajdin (who was not cross-examined) and the defendant Nagib Tajdin's ("Tajdin") evidence.
11. The Motions Judge erred in drawing inferences without necessary facts on the record, and/or on contested facts.
12. The Motions Judge erred by holding that the Aga Khan has never given the defendants permission to publish "any Farman, much less the *Golden Edition*" and erred in finding that the Aga Khan "tried the religious route, without success" to stop the defendants' activities based on contested evidence, and in light of his holding that expert evidence would be needed to understand the ceremonial issues in determining whether or not he had given his authorization in 1992.
13. The Motions Judge erred in that he failed to consider evidence that would establish:

- (a) that the Aga Khan gave His consent and blessing to the publication of present and future Farmans in Montreal in August 1992;
- (b) that the Aga Khan knew in mid 90s of the activities complained of and that He never mentioned to Bhaloo that He was displeased with Tajdin publishing the Farmans;
- (c) that the Aga Khan had said of the institutions that they “posses real autonomy, which do not depend on the intervention, nor the thinking, nor the support of the Imam.”
- (d) that it is the desire of some of the institutional leaders from the Aga Khan’s office who are seeking to prevent the defendants from publishing the Farmans;
- (e) that the Aga Khan has not revoked the direct consent He gave in 1992 regarding the publication of the Farmans.
- (f) that none of the public pronouncements made by the Aga Khan during delivering Farmans, Talikas, as well as the Ismaili Constitution, suggests or indicates that the activities complained of are not desired by Him;
- (g) that the only evidence that purports to be from the Aga Khan concerning the activities complained of are forged;
- (h) that the defendants were not seeking to dictate to the Aga Khan, but are pointing to evidence that establishes that the Aga Khan’s official pronouncements as set out in the Ismaili Constitution and all of his public Farmans support the defendants’ activities;
- (i) that the defendants have abided by what was expected of them, and that they are not in breach of the Ismaili Constitution or any Farman;

- (j) that the only condition placed by the defendants was that the communication from the Aga Khan be authentic.
14. The Motions Judge erred in interpreting the Ismaili Constitution, the Farmans, and the 1992 Mehmani ceremony. The appellant respectfully states that that type of interpretive analysis should only be done in the context of a full factual record, possibly including appropriate expert evidence.
15. The Motions Judge erred in deciding a significant question of law involving the interpretation of the Ismaili Constitution, the Farmans, and the 1992 Mehmani ceremony when authorization was given regarding the publication of the Farman books, in the context of summary motion rules, and on contradictory evidence.
16. With respect to the issue of express consent, the Motions Judge concluded at paragraph 45:  
As mentioned earlier we are in the realm of civil law, not religion. No expert evidence has been filed as to the significance of ceremonial gestures. Given the ordinary meaning of the words used in the exchange between His Highness the Aga Khan and Mr. Alibhay, I simply cannot find that the Aga Khan gave his consent to Mr. Tajdin's endeavours.
17. The respected judge also found that the Aga Khan said to Alibhay, "continue doing what you are doing" and then proceeded to speculating as to what the Aga Khan might have meant by the words spoken without any evidence on the record.
18. The Motions Judge allowed the motion for summary judgment although the question of "authorization" is both legally and factually complex. It is best described in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at paragraph 38: "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement

must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage"; see *The New Shorter Oxford English Dictionary (1993)*, vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference... These are determinations best left to a trial judge to weigh in the context of all of the evidence." [Emphasis added].

19. The Motions Judge erred in law by drawing an adverse inference against the defendants for the defendants' failure to file the transcript of the discovery held on October 15, 2010. The issues concerning the discoveries held on October 15, 2010, were contested, and the parties were prohibited from filing further evidence of the discoveries for the motions for summary judgment and were given leave to bring a motion before Prothonotary Tabib for determination of whether any evidence from the discoveries to be filed for the motions.
20. The Motions Judge exceeded his authority and erred in law when he misinterpreted his limited role as a motions judge and expanded his authority to becoming a trial judge and proceeded to weigh evidence, assess credibility, draw inferences on disputed facts, so as to make a determination as a trial judge as opposed to a motions judge.
21. The Motions Judge erred in relying on hearsay evidence to come to his conclusions. Entirely the whole evidence of the plaintiff was based on hearsay evidence - the two letters attached to Sachedina's affidavit purported to have been signed by Aga Khan dated January 16, 2010, and February 18, 2010; the Affirmation attached as an exhibit to the affidavits of Daniel Gleason and Jennifer Coleman; the affidavit evidence of Sachedina and Bhaloo (when saying that the plaintiff did not authorize or approve of the publications) is based on hearsay evidence. The Motions Judge erred in not drawing an adverse inference when the plaintiff did not provide direct evidence, and further erred when he admitted and relied on hearsay evidence in coming to his conclusions without any evidence of the necessity and reliability of such hearsay to be admitted as evidence. The hearsay evidence was contested by the defendants and their expert's

reports filed in response to the motion for summary judgment.

22. The Motions Judge erred in finding that Sachedina's evidence was credible. Sachedina's evidence was self serving devoid of specific facts and particulars, and one not capable of being admitted as it is entirely based on hearsay evidence, and in any event, a self serving affidavit without specific facts and particulars cannot create a triable issue. Furthermore, his evidence was contradicted by Tajdin and Mohamed Tajdin, and the Motions Judge preferred Sachedina's hearsay evidence and rejected contrary evidence to support his findings of facts.
23. The Motions Judge also erred in relying on Bhaloo's affidavit when his evidence was based on double hearsay, and although he was a very senior leader for Canada during the relevant period, he did not give evidence that the Aga Khan desired the activities undertaken by the defendants to cease although he, as a senior leader, was the organizer of the Mehmani ceremony when Alibhay was given the authorization by the Aga Khan, and despite his multiple meetings with the Aga Khan during the years when Defendants were publishing Farmans in his jurisdiction. Notably, Bhaloo failed to produce a video recording made by them regarding the *Mehmani* of 1992 when Alibhay presented the first Farman book to the Aga Khan.
24. The Motions Judge erred in holding that the onus is on the defendants to prove consent contrary to the holding made by the Federal Court of Appeal in *Positive Attitude Safety System Inc. v. Albian Sands Energy Inc.*, 2005 CarswellNat 3575.
25. The motions judge erred in analysing the issue of latches when he made findings of fact based on contested facts.
26. The Motions Judge erred in making findings of fact and drawing inferences on contested facts (e.g. paragraphs 12, 14, 15, 17, 18, 19, 20, 23, 24, 41, 42, 43, 44, 46, 52, 54, 56), which is not within the domain of a judge hearing a motion for summary judgment.

27. The Motions Judge erred in finding that the experts reports are contradictory. The plaintiff's expert's opinion did not conflict with the defendants' expert's opinion, as he was not retained to consider and he did not consider if the purported signatures were in fact signed by the Aga Khan. He further admitted on cross-examination that despite asking for authentic signatures of the Aga Khan and original documents purportedly signed by the Aga Khan (Affirmation), the plaintiff's lawyer failed to deliver them to his own expert for inspection.
  
28. The Motions Judge also inappropriately makes a finding of fact when he states that, "That letter elicited a very strong reaction.." In effect, the Motions Judge made findings of fact in the face of expert evidence that that letter was not signed by the Aga Khan that the letters and Affirmation were not signed by the Aga Khan. It is an error of law for a judge hearing a motion for summary judgment proceeding to make findings of fact on conflicting evidence.
  
29. The Motions Judge stated at paragraph 59 of his reasons "First of all, the defendants admit that the real Aga Khan showed up. That is proof positive that he authorized the current lawsuit and that if he had ever given his consent, which he had not, by instituting the lawsuit he withdrew it." But there was no evidence before the Motions Judge on this point at all by either party to support this finding. Neither was there any evidence to support an inference that the Aga Khan had authorised the current lawsuit. The Motions Judge speculated on this issue without any evidence on the record, which is an error of law, as it is an error of law for a motions judge to go beyond the record to make findings of fact, or making inferences (or speculating) without any evidence on the record.
  
30. The Motions held that, "They say that if the Aga Khan is not pleased with what they are doing, all he has to do is amend the Ismaili Constitution, or simply issue a Farman, as a new Farman has the effect of overriding the Ismaili Constitution. However, it is not up to the defendants to dictate to the Aga Khan. He tried the religious route, without success." The Motions Judge erred by misapprehending the defendants' evidence that none of the official pronouncements made by the Aga Khan, including the Constitution, Farmans or Talikas, indicated that the

activities complained of were not desired by Him, and the only evidence that purports to be from the Aga Khan concerning these activities is forged, or from Sachedina which can best be described as a self-serving affidavit.

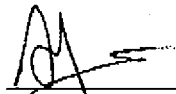
31. The Motions Judge misapprehended the evidence when he held at para. 12, "...in their devotion to him all he has to do is say the word and they will cease and desist. However they have placed so many conditions on this word that this lawsuit was taken in frustration." The only condition placed by the defendants is that the communication from the Aga Khan be authentic. There is no evidence of any other condition whatsoever. The defendants have provided expert's reports to say that the letters purportedly signed by the Aga Khan are forged. The Motions Judge made findings of fact, an error committed because the Motions Judge usurped the function of the trial judge.
32. The Motions Judge erred in failing to take into account evidence that in at least one other court case, employees and officers of the Aga Khan have committed fraud on the Dublin High Court hearing, and in not determining that the defendants' allegations of fraud have a precedent and ought to be taken seriously. In the Case of *Charlston v. H.H. The Aga Khan's Stud's Society Civile*, Dublin High Court, Case No. 11998.. No. 9515p, Justice Declan Budd said that his Court was defrauded by the defendant's officers: "Compounding and aggravating this deception of the Court by deleting relevant passages from the Coulton memo which included excisions which altered the meaning and excluded obviously significant and relevant passages from the memo."
33. The conflicting and/or the missing evidence in respect of authorization and/or consent, the interpretation of the Ismaili Constitution, the interpretation of Farmans and the issue of relationship are all complex matters and presented genuine issues for trial. Furthermore, if the Aga Khan had given his authorization in 1992, then the issues to be determined is whether the forged letters and this litigation have revoked the authorization, and if so what is the effect of a revocation after the publication undertaken before revocation. The law of Detrimental



Reliance will have to be determined and applied to the circumstances, all of which are complex issues and suited for a trial based on viva voce evidence.

34. The Court in *Canadian Imperial Bank of Commerce v. F-1 Holdings & Investments Inc.*, 2007 CarswellOnt 8012, (O.S.C.J. Div. Ct.) at para. 6, held: "The standard of review on a motion for summary judgment does not require an analysis of whether a palpable and overriding error has been made by the judge hearing the motion. It is strictly one of correctness." The appellant submits that errors of law made by the motions judge justifies intervention by an appellate court.
35. Such other grounds as the evidence may disclose, counsel may advise, or this Honourable Court may permit.

February 7, 2011



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Afnaz I. Jiwa  
37 Sandiford Dr.  
Suite 205  
Stouffville, ON  
L4A 7X5

Tel: (905) 640-3831  
Fax: (905) 640-7533

[jiwalaw@yahoo.ca](mailto:jiwalaw@yahoo.ca)

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**FEDERAL COURT**

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**BETWEEN:**

~~NAGIB FAJDI, ALNAZ JIWA, JOHN DOE and DOE CO:  
and all other persons or entities unknown to the plaintiff  
who are reproducing, publishing, promoting and/or  
authorizing the reproduction and promotion of the  
Infringing Materials~~

Appellants  
(Defendants)

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent  
(Plaintiff)

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**NOTICE OF APPEAL**

by the Appellant (defendant) Alnaz Jiwa

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Alnaz I. Jiwa  
37 Sandiford Drive  
Unit 205  
Stouffville, ON  
L4A 7X5

Tel: (905) 640-3831  
Fax: (905) 640-7533  
jiwalaw@yahoo.ca