



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

9 April 2024

MEDIA RELEASE

IAN JAMES BURDEN AND OTHERS v ESR GROUP (NZ) LIMITED

(SC 96/2023)

Hearing in the Supreme Court Friday 26 April

CASE HISTORY SYNOPSIS

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court.

Background

In 2013 and 2014, ESR Group (NZ) Ltd (ESR) imported from Vietnam and sold furniture that breached the appellants' copyright. The key issue before the Supreme Court is whether ESR breached the appellants' distribution right under s 16(1)(b) of the Copyright Act 1994. Section 16(1)(b) grants the owner of the copyright an exclusive right to "issue copies of the work to the public". Section 9(1) of the Act defines this as "the act of putting into circulation copies *not previously put into circulation*".

ESR argues that it has not breached the appellants' distribution right. This is because the infringing furniture was already in circulation in Vietnam before ESR had imported it to New Zealand. This means the furniture was "previously put into circulation" under s 9 of the Act.

By contrast, the appellants argue that s 9 was intended to cover copies not previously put into circulation *in New Zealand* (as opposed to anywhere in the world). This means it is irrelevant that the furniture had already been available in Vietnam. The appellants also argue that it is relevant that the furniture had been circulated in Vietnam without the appellants' consent.

Courts below

On 29 July 2022, the High Court found in favour of the appellants. The Court found that s 9(1) meant "putting into circulation copies [in New Zealand] not previously put into circulation [in New Zealand by or with the consent of the owner]". As the furniture had been made in Vietnam and without the appellants' consent, the furniture had not previously been put into circulation. This meant that ESR was liable for breaching the appellants' distribution right.

On 31 July 2023, the Court of Appeal overturned the High Court's decision. The Court of Appeal found that the work *had* been previously circulated due to its availability in Vietnam.

The fact the appellants had not consented to the circulation in Vietnam was irrelevant. This meant ESR was not liable for breaching the appellants' distribution right.

This appeal

On 7 December 2023, the Supreme Court granted the appellants' application for leave to appeal against the Court of Appeal decision. The approved questions are:

- (a) Was the Court of Appeal correct to conclude, for the purposes of s 9(1) of the Copyright Act 1994, that a copyright holder's consent is not necessary for a work to be "in circulation"?
- (b) Was the Court of Appeal correct to conclude, for the purposes of s 9(1) of the Copyright Act 1994, that circulation outside of New Zealand could constitute "circulation"?

Viewing of hearing

This hearing of the appeal will be livestreamed. Details about access to the live-stream and the conditions of access will be posted on the [Courts of New Zealand website](#) shortly before the hearing. No recording is permitted.

The panel

The Hon Justice Kós	The Hon Justice Ellen France	The Hon Justice Glazebrook	The Hon Justice Williams	The Hon Justice O'Regan
------------------------	---------------------------------	-------------------------------	-----------------------------	----------------------------

Judges as seen from the public gallery

Counsel

- Ian James Burden, PGT Reclaimed (International) Ltd and Plantation Grown Timbers (Vietnam) Ltd (Appellants): *A H Brown KC, J Oliver-Hood and J R E Wach*
- ESR Group (NZ) Ltd (Respondent): *J G Miles KC and A J Pietras*

Sitting hours

Court will begin at 10:00am and conclude at 4:00pm with adjournments taken from 11:30am to 11:45am and from 1:00pm to 2:15pm. There is no afternoon adjournment.

Enquiries

Any enquiries about the hearing should be directed via email to supremecourt@justice.govt.nz. While attending the hearing, enquiries can also be directed to the Court Registry, which is located outside the main courtroom in the Supreme Court foyer.

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613

Court of Appeal decision: [\[2023\] NZCA 335](#) (31 July 2023)
Supreme Court leave decision: [\[2023\] NZSC 159](#) (7 December 2023)