

IN THE SUPREME COURT OF JUDICATURE  
IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM CHANCERY DIVISION  
(Mr Justice Ferris)

Royal Courts of Justice  
Strand, London, WC2A 2LL

Tuesday 10th April, 2001

B e f o r e:

LORD JUSTICE WALLER  
LORD JUSTICE LAWS  
AND  
LORD JUSTICE JONATHAN PARKER

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MASQUERADE MUSIC LTD & ORS

Appellants

- v -

MR BRUCE SPRINGSTEEN

Respondent

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(Transcript of the Handed Down Judgment of  
Smith Bernal Reporting Limited, 190 Fleet Street  
London EC4A 2AG  
Tel No: 020 7421 4040, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

Mr Guy Tritton and Mr James Graham (instructed by Messrs Stephens Finers Innocent for the  
Appellants)  
Mr Nigel Davis QC and Mr Mark Vanhegan (instructed by Messrs HamlinS for the Respondent)

J U D G M E N T  
As Approved by the Court

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LORD JUSTICE JONATHAN PARKER :

*INTRODUCTION*

1. This appeal raises questions as to the approach of the court when invited to admit secondary evidence of the contents of a document and, if such evidence be admitted, as to the standard of proof to be applied in evaluating such evidence.
2. The appeal is brought by the first and second defendants in a copyright action, Masquerade Music Ltd and Mr Ron Winter (its owner and managing director), against an order made by Ferris J on 10 December 1998 following the trial of the action. Permission to appeal was granted by Aldous LJ on 16 February 1999.
3. The claimant in the action, Mr Bruce Springsteen, is a world-famous composer and performer of popular music. In the action, Mr Springsteen claims damages and injunctive relief against the appellants in relation to the manufacture, importation and supply by the appellants of compact discs containing recordings of performances made by him in the early 1970s of 19 songs which he had written and composed. Mr Springsteen alleges that the appellants thereby infringed his musical and literary copyrights in the songs and his copyrights in the sound recordings. The third defendant in the action, Sony Music Entertainment Inc (“Sony”), is joined in the action in its capacity as exclusive licensee of the sound recording copyrights, in succession to CBS Records (“CBS”), but has taken no part in the action and was not represented at the trial.
4. By their Re-Re-Amended Defence the appellants put Mr Springsteen to proof of his title to the copyrights and denied infringement, contending that they had neither actual knowledge nor reason to believe that the compact discs which they had imported were infringing copies.
5. The judge held that Mr Springsteen had established title to the musical and literary copyrights in all 19 songs, and to the copyrights in 14 of the sound recordings (the copyrights in the remaining 5 sound recordings being vested in Sony), and that the appellants did not know but had reason to believe that the compact discs which they had imported were infringing copies. Accordingly, by his order the judge granted injunctive relief against the appellants and directed an inquiry as to damages.
6. The judge’s finding that the copyrights in 5 sound recordings were vested in Sony was not a contentious finding since Sony’s attitude to the litigation has been supportive of Mr Springsteen; indeed, following the judgment Sony assigned the outstanding copyrights to Mr Springsteen.
7. Although the trial lasted some 8 court days, the issues raised on this appeal relate to one discrete aspect of the dispute, viz. to one link in Mr Springsteen’s pleaded chain of title in

relation both to the musical and literary copyrights and to the sound recording copyrights. In relation to each category of copyrights, Mr Springsteen pleads a long chain of title dating back to 1972. At the trial, the appellants did not advance any positive case by way of challenge to Mr Springsteen's title, still less did they contend that they were licensed to exploit the copyrights. Their challenge to Mr Springsteen's title was limited to requiring him to prove it.

8. The judge found that in 1972, as part of Mr Springsteen's pleaded chain of title, the musical and literary copyrights and the sound recording copyrights were assigned by partnerships in which a Mr Appel and a Mr Cretecos were equal partners to limited companies which they had caused to be incorporated to take over the respective partnership businesses. (At the trial the appellants had sought to show that the assignor of the musical and literary copyrights was not a partnership but was the trading name of Mr Cretecos alone – a fact which, if established, would have broken Mr Springsteen's chain of title in relation to those copyrights – but the judge found otherwise.)
9. It is common ground in this appeal (as it was before the judge) that section 36(3) of the Copyright Act 1956 required that, to be effective, any assignment of the copyrights from the partnerships to the limited companies had to be in writing and signed on behalf the partnerships; and that by requiring Mr Springsteen to prove his title the appellants placed on him the onus of proving that these requirements had been met.
10. The best way of discharging that onus would, of course, have been for Mr Springsteen to produce the written assignments at the trial. In the event, however, he did not do so. Rather, he led evidence that inquiries as to their whereabouts had proved fruitless and on that basis he invited the court to admit secondary evidence as to their existence and their terms in the form of oral evidence from a Mr Jules Kurz (a New York lawyer with experience of the popular music industry) who was instructed by Mr Appel and Mr Cretecos to effect the transfer of assets from the partnerships to the limited companies, and from Mr Appel himself. The appellants objected that secondary evidence of the contents of a written document is only admissible where the party seeking to rely on the document can satisfy the court (and I quote from paragraph 45 of the appellants' skeleton argument at the trial) "that all possible measures had been taken to find the relevant documents", and that Mr Springsteen had failed to discharge that burden. It was accordingly submitted on behalf of the appellants that secondary evidence of the assignments was not admissible. However, the judge concluded that such evidence was admissible, on the footing that it was enough that the respondent had shown that he was not in a position to produce the written assignments in court "without difficulty". He held (at p.212) that:

“... what has been done on behalf of Mr Springsteen was reasonably thorough, albeit falling short of what might be considered to be exhaustive”.

11. The judge accordingly went on to consider the secondary evidence, and on the basis of that evidence he held on the balance of probabilities that the copyrights had been effectively assigned from the partnerships to the companies: that is to say that the assignments had been in writing and signed on behalf of the respective partnerships.
12. The appellants' primary challenge in this appeal is directed to the admissibility of the secondary evidence. They repeat the submission made to the judge that secondary evidence of the contents of a document is inadmissible unless the party seeking to adduce such evidence first satisfies the court that he has made an exhaustive search for it, and they submit that the judge erred in law in applying a less rigorous test (namely, whether Mr Springsteen was in a position to produce the original assignments in court "without difficulty").
13. The appellants further contend that the judge was in error in finding that such search as had been made for the written assignments on behalf of Mr Springsteen was "reasonably thorough". The appellants characterise that finding as "perverse".
14. The appellants then go on to challenge the judge's finding, based on the secondary evidence, that the copyrights had been effectively assigned by the partnerships to the companies: that is to say that the assignments were made in writing and signed on behalf of the partnerships, in compliance with section 36(3) of the Copyright Act 1956. They also submit (a submission which was not made to the judge, and which is not to be found in their grounds of appeal) that in evaluating the secondary evidence the judge applied the wrong standard of proof, in that the appropriate standard is not the balance of probabilities but a standard more akin to a criminal standard.

### *THE FACTUAL BACKGROUND*

15. For a detailed account of the factual background to the dispute I can do no better than refer to the judgment of Ferris J (which is reported at [1999] EMLR 180), where the factual background is set out fully and clearly. Since, as already indicated, the issues raised on this appeal are limited to one link in Mr Springsteen's pleaded chain of title to the copyrights, it is unnecessary to burden this judgment with more than a brief summary of the material facts. In the summary which follows I have included facts which were disputed at the trial but in respect of which there is no appeal against the judge's findings.
16. In about 1971 Mr Springsteen, who was then about 21 years of age and who had been active as a singer and musician for some 7 years, was introduced to Mr Appel. Mr Appel was a songwriter who carried on his songwriting activities jointly with Mr Cretecos. In March 1972 it was agreed that Mr Appel and Mr Cretecos would promote Mr Springsteen's interests. For that purpose, Mr Appel and Mr Cretecos formed three partnerships; one (Laurel Canyon Management) to act as Mr Springsteen's manager, one (Sioux City Music Inc) to cover his

songwriting activities, and one (Laurel Canyon Productions) to cover his recording activities. From the start it was intended that the partnerships would in due course be succeeded by limited companies, and Mr Kurz was instructed to take the necessary steps to achieve that result. In the event the limited companies were not incorporated until some months later, due (it would appear) to shortage of funds to pay the fees involved. In the meantime, in March 1972 Mr Springsteen entered into a recording agreement with Laurel Canyon Productions, and in May 1972 he entered into a songwriter's agreement with Sioux City Music Inc and a management agreement with Laurel Canyon Management. In June 1972 a recording agreement was entered into between Laurel Canyon Productions (describing itself as Laurel Canyon Productions Inc) and CBS (a major record producer, which has since been taken over by Sony). Under the recording agreement, all master tapes were to be the property of CBS when delivered. The recording agreement was varied in August 1972 so as to cover also the master tapes of certain songs which had been recorded prior to the date of the agreement.

17. In June 1972 a company named Laurel Canyon Ltd was incorporated to take over the business of Laurel Canyon Productions (the sound recordings partnership). In October 1972 a company named Sioux City Music Ltd was incorporated to take over the business of Sioux City Music Inc (the songwriting partnership). Sioux City Music Ltd later changed its name to Laurel Canyon Music Ltd. In March 1973 a company named Laurel Canyon Management Ltd was incorporated to take over the business of Laurel Canyon Management (the management partnership). All three companies were incorporated in New York. The shares in each company were issued 50/50 to Mr Appel and Mr Cretecos, and they were appointed the first directors.
18. In his witness statement, Mr Kurz said that he would have drafted a short form of assignment of the copyrights from the songwriting partnership and the sound recording partnerships to the respective limited companies. In oral evidence, under cross-examination and in answer to a question from the judge, Mr Kurz said that in the case of each of those companies the minutes of the first meeting of directors would have been based on a standard form published by a supplier of corporate documents called Julius Blumberg; that in each case he would have filled in the standard form so as to contain a transfer of assets (including copyrights) from the partnership to the company; that in each case the minutes were signed by Mr Appel and Mr Cretecos; and that there were no written assignments of the copyrights apart from those minutes. The appellants accept that there were minutes of the first meetings of the directors of the respective companies and that such minutes were based on standard forms published by Julius Blumberg, but they do not admit that the minutes contained any assignments of the copyrights. Hence the issues raised on this appeal.
19. Returning to the chronology, Mr Springsteen made a number of recordings for CBS under the recording agreement. His first album was released in January 1973 and his second in November 1973. Neither was particularly successful. In late 1973 or early 1974 the business relationship between Mr Appel and Mr Cretecos came to an end, and Mr Appel bought Mr Cretecos' shares in the three companies for a modest consideration of US\$3000. The consideration was paid with money lent to Mr Appel by Mr Kurz, who held the shares as collateral until the loan was repaid about a year later. Thenceforth, Mr Appel was the sole beneficial owner of the three companies and he ran them as his own.

20. In August 1975 Mr Springsteen's third album was released. It was an immediate success and sold more than one million copies.
  
21. Shortly thereafter, disputes arose between Mr Springsteen and Mr Appel which led to litigation in the United States. Depositions were taken in that litigation, and Mr Cretecos swore an affidavit on behalf of Mr Springsteen. In the event the litigation never came to trial but was compromised in May 1977 by an agreement referred to as "the basic agreement". The parties to the basic agreement were Mr Springsteen, the three companies, and Mr Appel. The purpose of the basic agreement was to vest all copyrights in Mr Springsteen, and immediately following the signing of the basic agreement Mr Springsteen entered into a co-publishing agreement with Laurel Canyon Music Ltd, under which he assigned to Laurel Canyon Music Ltd a half share in certain of the musical and literary copyrights, including three copyrights which are the subject of the present action. In May 1983 Laurel Canyon Music Ltd reassigned to Mr Springsteen its half share in those three copyrights. Thus, subject only to the musical and literary copyrights the subject of this action having been effectively assigned by Sioux City Music Inc (the songwriting partnership) to Sioux City Music Ltd (which later changed its name to Laurel Canyon Music Ltd), Mr Springsteen is the legal and beneficial owner of those copyrights.
  
22. In April 1979 Mr Cretecos commenced proceedings against Mr Appel (amongst others), alleging (in effect) that Mr Appel had cheated him into selling his shareholdings in the three companies to Mr Appel at too low a price. It is of some significance in the context of this appeal that in those proceedings Mr Cretecos did not assert title to any of the copyrights, nor did he allege that any copyrights remained as assets of the former partnerships with Mr Appel; rather, his entire case against Mr Appel was founded on the premise that the copyrights were assets of the companies. This is an aspect to which I shall return later in this judgment.
  
23. So far as the sound recording copyrights are concerned, in 1977 Mr Springsteen entered into a new recording agreement with CBS, under which the copyright in all future recordings was to belong to him. However, the judge found that (contrary to the contentions put forward on behalf of Mr Springsteen) the agreement did not have the effect of assigning to Mr Springsteen those sound recording copyrights which had been vested in CBS immediately prior to the agreement (in the event, there were 5 such copyrights). He accordingly held that those 5 copyrights were vested in Sony, as successor to CBS. As to the remaining 14 sound recording copyrights, the judge held that they were owned legally and beneficially by Mr Springsteen. As I mentioned earlier, the outstanding 5 copyrights have since been assigned by Sony to Mr Springsteen.
  
24. Lastly, I should note that on 24 December 1991 the three companies were dissolved.

25. I must now refer to the judge's judgment in more detail.

26. Having set out the factual background, the judge turned first to Mr Springsteen's pleaded chain of title, and addressed the question: What was the general relationship of Mr Appel and Mr Cretecos in their dealings with Mr Springsteen? This question arose for decision because at trial the appellants had sought to establish that "Sioux City Music Inc" was not a partnership between Mr Appel and Mr Cretecos but was the trading name of Mr Cretecos alone. As I observed earlier, had this been established it would have broken Mr Springsteen's chain of title to the musical and literary copyrights. The judge expressed his finding on that question as follows (at p.205):

"This is a fundamental issue but it is one which I do not find it difficult to resolve. I have no doubt that Mr Appel and Mr Cretecos were, from the outset of their dealings with Mr Springsteen until their activities were taken over by one or other of the companies which they incorporated, equal partners in all their activities connected with Mr Springsteen."

27. There is no appeal against that finding.

28. After rejecting a contention advanced on behalf of the appellants that the songwriter's agreement of May 1972 was ineffective because there had been an earlier songwriter's agreement, the judge turned to the connected questions whether the musical and literary copyrights were effectively assigned by Sioux City Music Inc to Sioux City Music Ltd and whether the sound recording copyrights were effectively assigned by Laurel Canyon Productions to Laurel Canyon Ltd. For reasons already explained, the judge's resolution of those questions is central to the present appeal.

29. Turning first to the musical and literary copyrights, the judge began by setting out section 36(3) of the Copyright Act 1956, which provided as follows:

"No assignment of copyright (whether total or partial) shall have effect unless it is in writing signed by or on behalf of the assignor".

30. The judge then addressed the question of the admissibility of the secondary evidence tendered by Mr Springsteen as to the existence of assignments of copyright which complied with that statutory provision. The judge addressed that question in the following passage from his judgment (pp.210-212):

“The problem which Mr Springsteen faces is that, although he asserts that there was a written assignment which satisfied section 36(3), he is unable to produce the original or any copy of such an assignment. On his behalf Mr Davis has submitted that I should accept secondary evidence of the suggested assignment and find that such an assignment was indeed executed.

Mr Tritton submitted that I ought not to accept that the terms of the assignment can be proved in this way. He did not go so far as to say that an assignment of this kind could never be proved by secondary evidence, but he said that the party seeking to adduce secondary evidence must first establish that the missing document has been diligently searched for. The more important the document, the more diligent must be the search. The alleged assignment is a document of commercial importance to Mr Springsteen’s chain of title. Mr Tritton argued that the search for it has not been sufficiently diligent.

Mr Tritton cited a number of authorities, some of them of considerable antiquity. I think that the court adopted a more strict approach a hundred or more years ago than that which it adopts today and I consider that no real guidance as to the modern practice is to be obtained from cases decided in the last century. The point has arisen, in one context or another, in the last 30 years and I prefer to concentrate my attention on the more recent cases. I was referred by one party or the other to *Garton v. Hunter* [1969] 2 QB 37; *R. v. Nowaz* [1976] 3 All ER 5; *R. v. Wayte* (1983) 76 Cr. App. Rep. 110; and *R. v. Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277 at 307-308. I take as a guiding principle the following passage from the judgment of Beldam J in *R. v. Wayte*, at 116-7:

“There are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible. Moreover, it is now well established that any application of the best evidence rule is confined to cases in which it can be shown that the party has the original and could produce it but does not. Lord Denning made observations on this topic in the case of *Garton v. Hunter* .... At p.44 he said: “That old rule has gone by the board long ago .... Nowadays we do not confine ourselves to the best evidence.”

More recently, in a criminal case the Divisional Court adopted the same approach to the copy of a video tape of street disturbances which was admitted in evidence by the Brentford Justices. In *Kajala v. Noble* (1982) 75 Cr. App. Rep. 149 Ackner LJ, in giving the judgment of the



court, said at p.152: “The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one’s hands, one must produce it; nowadays we do not confine ourselves to the best evidence. The goodness or badness of it goes only to weight, and not admissibility.”

This was followed in the *Osman* case, where the Divisional Court made ... two other observations which are of relevance. First the court said that while it would be “more than happy to say goodbye to the best evidence rule” and “the little loved best evidence rule has been dying for some time the recent authorities suggest that it is not quite dead”.

Secondly, the Divisional Court, applying the passage from the judgment of Beldam J in *R. v. Wayte* which I have cited above, went on to consider what was meant by a party having a document available in his hands. It said:

“We would say that it means a party who has the original of the document with him in court, or could have it in court without any difficulty.”

In the present case I accept – indeed it was not disputed – that Mr Springsteen does not have the original assignment (if there was one) or any copy of it. He was not himself party to any such assignment and there is no reason to suppose that he ever did have it or a copy of it. If he was to produce the document he would have to obtain it through a third party. The evidence was that he has, through his representatives, made inquiry of Mr Kurz, who said he was responsible for preparing the document, and of Mr Appel who was one of the assignors and a director of and ultimately sole shareholder in the assignee company. Neither of these persons was able to produce the original or any copy of the assignment, although both of them were positive that an assignment had been made. Mr Appel has also made inquiries of Mr Marc Elliot, the author of a book about Mr Springsteen to whom Mr Appel had supplied a number of documents (many of them published in the book) concerning Mr Springsteen and his dealings with Mr Appel and Mr Cretecos. Mr Elliot was unable to assist.

Mr Tritton submitted that these inquiries were not enough and that other inquiries could and should have been made. The evidence which I shall

come to in a moment showed that the assignment, if there was one, must have been recorded in the minute books of [Sioux City Music Ltd]. No corporate books of [Sioux City Music Ltd] have been produced and Mr Tritton submitted that no proper search for them had been made. A study of the lengthy deposition of Mr Cretecos in the proceedings brought by him against Mr Appel in 1979 indicates that Mr Marks, the attorney then acting for Mr Appel, had copies of the relevant minutes in 1979. Mr Tritton complained that no sufficient inquiry had been made of Mr Marks to see if he still has such copies. Mr Tritton also pointed out that there was no evidence that Mr Parcher, the New York attorney who has acted for Mr Springsteen since 1976, had been asked whether he had copies of them, although it is likely, Mr Tritton suggested, that he received copies of them during the course of the 1976 proceedings between Mr Appel and Mr Springsteen.

If the principle were that a party seeking to adduce secondary oral evidence of the existence and contents of a document must first show that he has searched exhaustively for the original or an authentic copy of the document, Mr Springsteen would not, I think, come within it. But I take the principle to be that which emerges from the passages in the authorities which I have quoted. In particular the question is whether Mr Springsteen has such a document or could produce it in court without difficulty. I have no doubt that the answer to both parts of that question is in the negative.

I do not think it is necessary, in connection with the admissibility of secondary evidence, to consider whether more might have been done by way of searching for the document. That would, of course, be a relevant matter if it were suggested that the party seeking to adduce the secondary evidence had refrained from a more extensive search for better evidence for fear of what he might find. I did not understand such a suggestion to be made in this case. In any event I would find that what has been done on behalf of Mr Springsteen was reasonably thorough, albeit falling short of what might be considered to be exhaustive.

I proceed, therefore, to evaluate the secondary evidence of the existence and contents of an assignment of musical copyrights from [Sioux City Music Inc] to Sioux City Music Ltd.”

31. The judge then proceeded to review the secondary evidence adduced by Mr Springsteen to the effect that the musical and literary copyrights had been assigned to Sioux City Music Ltd. At the foot of p.214 of the judgment the judge said:

“The real question which I have to consider is whether I am satisfied, on the balance of probabilities, that the transaction was carried through in the way which Mr Kurz described.”

32. The judge went on to record that he had not found Mr Kurz to be an altogether satisfactory witness. He then proceeded to consider the credibility of the evidence of Mr Appel and to address the competing submissions of Mr Tritton and Mr Davis as to the findings which he should make. At the foot of p.217 of the judgment the judge said this:

“I have set out the relevant evidence and the points which were made on each side in some detail because I have found this much the most difficult part of the case to decide. In the end I have concluded that the probability is that there were assignments of the kind that Mr Kurz deposed to. The criticisms of his testimony and the points derived from the documentation are not, in my view, of sufficient force to cause me to reject that evidence. There was no directly contradictory evidence and I must bear in mind that what was under consideration was a series of transactions which took place more than 25 years ago between partnerships which were, tacitly at least, then thought to have come to an end and companies which appear to have had no commercial purpose since 1983 when [Laurel Canyon Music Ltd] assigned to Mr Springsteen its half share in the musical copyrights which were subject to the co-publishing agreement.

There are two other factors which are, I think, of some relevance. First, if it was the belief of Mr Cretecos that he had a personal interest in Mr Springsteen’s copyrights after the incorporation of the companies, it is somewhat surprising that no mention was made of this fact when he sued Mr Appel in 1979. Secondly, if it were the case that some musical copyrights remained vested in Mr Appel and Mr Cretecos as partners after the companies were incorporated, this fact would be destructive of Mr Springsteen’s chain of title but it would not establish any title on which the defendants could rely. The argument is therefore an unattractive one in the hands of the present defendants and I do not regret finding myself able to reject it.”

33. The judge then went on to address the question whether the sound recording copyrights were effectively assigned by Laurel Canyon Productions to Laurel Canyon Ltd. At p.218 he said this:

“I expressed the preceding issue in terms of an assignment from [Sioux City Music Inc] to [Sioux City Music Ltd] in the hope that this would

assist in the achievement of clarity. But, as will already have become apparent, the relevant evidence was the same in respect of assignments from each of the three partnerships to the relevant successor corporations. For the reasons which I have already given, I find that there were assignments of the assets of [Laurel Canyon Productions] to Laurel Canyon Ltd and of the assets of [Laurel Canyon Management] to [Laurel Canyon Management Ltd].”

34. Basing himself on those findings, the judge went on to conclude that Mr Springsteen had established that the musical and literary copyrights and the sound recording copyrights had been effectively assigned to Laurel Canyon Music Ltd and Laurel Canyon Ltd respectively.
35. As noted earlier, the appellants accept there were written minutes of the first meetings of the directors of the two companies (Sioux City Music Ltd and Laurel Canyon Ltd), whilst not admitting that such minutes contained effective assignments of the copyrights; equally, Mr Springsteen does not rely on any written assignments apart from those minutes. This is not a case, therefore, in which there is an issue as to the *existence* of the documents relied on; it is accepted that minutes existed. Rather the issue in this case is as to the *contents* of those minutes, viz. whether they constituted assignments of the copyrights which complied with section 36(3) of the 1956 Act: that is to say (a) whether they contained appropriate words of assignment, and (b) whether they were signed by or on behalf of the partnerships. It is against the judge’s findings on that issue that this appeal is directed.

#### THE ARGUMENTS ON THIS APPEAL

36. As to the *admissibility* of secondary evidence of the contents of a document, Mr Tritton (who appears with Mr James Graham for the appellants) submits firstly that the judge erred in law in adopting as the appropriate test of admissibility whether Mr Springsteen could produce written assignments in court “without difficulty” (p.212). He submits that the test is a stricter one and that it was for the respondent to satisfy the court that it was not reasonably possible for him to produce the assignments. The “without difficulty” (or, if it be different, “without *any* difficulty”) test propounded by the Divisional Court in *Osman* represents, as he submits, a material and unwarranted departure from the nineteenth-century authorities to which the judge referred in his judgment, and which are summarised and explained in a number of authoritative textbooks to which Mr Tritton referred us. Mr Tritton submits that those authorities (none of which has been overruled) establish the rule, which continues in force today, that a party who seeks to adduce secondary evidence of the contents of a document must first satisfy the court that the document has been destroyed or is lost, or that for some other reason it is in practice impossible to produce it. Mr Tritton relies in particular on the citation by Cohen LJ in *Barber v. Rowe* [1949] 2 All ER 1050, at 1051H, of the following passage from the judgment of Lord Cozens-Hardy MR in *Read v. Price* [1909] 2 KB 724, at 730:

“You may prove the existence of the writing by the ordinary law of evidence, and when the writing is lost, and the proof of the loss is satisfactory to the court, you may give secondary evidence of the contents of the lost document, just as in cases where writing is required under the Statute of Frauds you can always prove the existence of the writing by parole evidence, if proof is given of the loss of the written document.”

37. Mr Tritton further submits that in order to prove that a document is lost the party seeking to rely on it must satisfy the court, on the balance of probabilities, that the document cannot be found. At one stage in his submissions Mr Tritton formulated the appropriate test of admissibility as being that of satisfying the court, on the balance of probabilities, that it was impossible to produce the document. Later, however, he formulated the test in less absolute terms, viz. that it was not reasonably possible to produce the document; and he accepted that it would be for the judge in each case to decide, on the evidence before him, whether the test had been met on the facts of that particular case.
38. In support of his submissions, Mr Tritton cited a number of authorities, including *R. v. Nowaz* [1976] 1 WLR 830 CA. In that case an issue arose whether the prosecution could adduce secondary evidence of the contents of a passport application in circumstances where the person holding the original application refused to produce it and could not be compelled to do so. James LJ, delivering the judgment of the court, referred to the dearth of authority on that issue in criminal cases, and continued (at p.832D):

“There are cases, which we have not found it necessary to consider in detail, which involved the civil law and evidence admissible in civil proceedings which clearly show that in circumstances such as these where a document is not produced because it cannot be produced – because the person in whose custody it is cannot be compelled to produce it – then the secondary evidence is admissible.

A general statement of the law can best be summarised, we think, in a passage to which our attention was invited in Professor Cross’ book on *Evidence*, 4th ed. (1974), p.524, under the heading “Stranger’s lawful refusal to produce document”, which reads:

“When the original of a document is in the possession of a stranger to the litigation, the proper course for the party desiring to prove the contents of the document is to serve the stranger with a subpoena duces tecum. The stranger may, however, be able to establish a claim to privilege in respect of the document when secondary evidence of its contents becomes admissible.”

Relating that to criminal proceedings, the subpoena duces tecum referred to is the equivalent of a witness summons requiring the attendance of a witness and production by the witness of the documents. That was complied with in this case we are told. The passage goes on:

“The governing principle is the same as that which covers the next two exceptions ...” I interpolate, those are the exceptions of a lost document and production of the original document being impossible. Returning to the text: “... it is impossible to compel production of the document, and it will apply in cases in which the person in possession of the original is beyond the jurisdiction of the court; ...”

39. Mr Tritton submits that this passage is illustrative of a modern day application of the principles established by the nineteenth-century authorities, and is authority for a higher test of admissibility based on the practical impossibility of producing the original document. He submits that it is implicit in the decision in *R. v. Nowaz* that the Court of Appeal was accepting the rule that even if the document is not readily available secondary evidence of its contents cannot be adduced unless the case falls within the exceptions identified in the textbooks, one of which is that the original document cannot be found after “due search” (see, for example, Cross & Tapper on Evidence 8th edn. p.755). The objective of the rule, Mr Tritton submits, is to reduce the risk of a party giving false evidence of the contents of the document.
40. Mr Tritton submits that the cases of *R. v. Wayte* and *Osman*, on which the judge relied, are distinguishable from the instant case in that they were both criminal cases concerning the admissibility of photocopies as evidence of the contents of the originals: they were not concerned with the admissibility of parole evidence of such contents. He stresses that Lloyd LJ’s observation that the court would be “more than happy to say goodbye to the best evidence rule” was made in the context of its having served a useful purpose in the days of parchment and quill pens. In contrast, he submits, the danger of allowing parole evidence of the contents of documents has not diminished over time.
41. As to Lord Denning’s dictum in *Garton v. Hunter* [1969] 2 QB 37, 44 (cited by Beldam J in *R. v. Wayte*, in the passage quoted by the judge in the instant case), Mr Tritton submits that *Garton v. Hunter* was not concerned with the admissibility of secondary evidence of the contents of documents; rather, it was concerned with evidence as to the rateable value of a caravan site. Moreover, none of the earlier cases on which Mr Tritton relies were cited to the Court of Appeal in that case.
42. Mr Tritton also referred us to *Batjac Productions Inc v. Simitar Entertainment (UK) Ltd* [1996] FSR 139, 145, where Harman J said that the relevant test seemed to be:

“... that secondary evidence of the contents of a document can only be adduced if the party seeking to give that secondary evidence has made reasonable efforts to procure the documents.”

43. Finally, so far as the admissibility of secondary evidence is concerned, Mr Tritton submits that the best evidence rule, as recognised and explained in the textbooks and in the authorities, is important and works no injustice. If the party seeking to rely on a document is genuinely unable to produce it, justice requires that secondary evidence of its contents be admitted. On the other hand, if the party seeking to rely on the document could have produced it but has simply failed to do so, justice requires that the court should decline to admit secondary evidence of its contents.
44. Turning to the question of the adequacy of the search carried out on Mr Springsteen’s behalf, Mr Tritton submits that the evidence adduced at trial established that hardly any effort had been made to obtain the original minutes of the first meetings of directors of Sioux City Music Ltd and Laurel Canyon Ltd.
45. In the first place, he points out, no evidence was adduced of any search for the corporate books of the two companies. Nor was there any evidence that inquiry had been made of Mr Parcher, who was Mr Springsteen’s trial lawyer in the 1970s. Mr Parcher was due to be called as a witness at the trial but in the event he had to return to New York before he could be called and his evidence was accordingly adduced under the Civil Evidence Act. In this connection, Mr Tritton refers to the deposition of Mr Appel made in November 1976 in the litigation between him and Mr Springsteen. In taking this deposition, Mr Parcher (for Mr Springsteen) asked Mr Appel to provide him with the documents relating to the assignments from the partnerships to the companies, to which Mr Appel replied: “Okay”.
46. So far as Mr Appel is concerned, no mention was made in his witness statement of his having undertaken any search for the assignments, but in cross-examination he said that he had asked Mr Elliot (who had written an unauthorised biography of Mr Springsteen with Mr Appel’s assistance, for which purpose Mr Appel had provided him with a quantity of documents relating to Mr Springsteen’s business affairs) whether he had the assignments, but Mr Elliot was unable to assist. Mr Tritton points out that it is unclear on the evidence what attempts Mr Elliot made to find the assignments.
47. Lastly on this aspect, Mr Tritton submits that despite clear evidence that in 1979 Mr Marks (formerly Mr Appel’s attorney) had the original minutes in his possession, there is no evidence of any inquiry being made of Mr Marks as to whether he still had them or whether he knew where they could be found.

48. As against that, the only cogent evidence as to what may have happened to the original minutes was that of Mr Kurz, who said (in paragraph 30 of his witness statement):

“My normal procedure would have been to include such an assignment in the corporate books as part of the minutes of the first meeting of directors and I believe I would have done so in this case. I no longer have copies of these documents which were destroyed along with all the documents I had relating to Springsteen when I moved my offices to White Plains, New York, a few years ago.”

49. Mr Tritton stresses the importance of the assignments (if they exist) to Mr Springsteen. He submits that since they constitute documents forming part of his title to the copyrights, one would have expected him to have at least acquired and retained copies of them.
50. So far as the admissibility of secondary evidence is concerned, therefore, Mr Tritton submits (in summary) that Mr Springsteen did very little in the way of searching for the minutes, and that such search as was made on his behalf was very far from being exhaustive and cannot even be described as “reasonably thorough”. He accordingly submits that the judge was wrong to admit secondary evidence of the contents of the minutes.
51. Turning to the question of the *evaluation* of the secondary evidence, on the assumption that (contrary to his primary submissions) the judge was right to admit it, Mr Tritton submits in the first place that the appropriate standard of proof is not the balance of probabilities but a standard which is more akin to the criminal standard. He submits, by analogy with the standard of proof applicable in a rectification claim, “convincing proof” is required (see, e.g., *Joscelyne v. Nissen* [1970] 2 QB 86). In support of this submission, Mr Tritton cites *Harris v. Knight* (1890) 15 PD 170 (a case of a lost Will). Lindley LJ began his judgment in that case by saying:

“A person who propounds for probate an alleged will, and who is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubt on those points”.

52. Mr Tritton also relies in this connection on the New South Wales case of *Maks v. Maks* (1986) 6 NSWLR 34. In that case the plaintiff alleged that the defendant had agreed in writing to hold the house in which they had both been living on trust, as to a half share, for the plaintiff. The plaintiff sought to adduce oral evidence of the contents of the written agreement. In the course of his judgment, McLelland J said this (at p.36E):



“I am of opinion that where the original writing is not produced and secondary evidence is relied on, there must be clear and convincing proof not only of the existence, but also of the relevant contents, of the writing, of the same order as the proof required to establish an entitlement to the rectification of a written instrument ....., the two classes of case being to my mind in relevant respects analogous.”

53. Mr Tritton also reminded us of the much-cited passage from the speech of Lord Nicholls in *Re H (Minors)* [1996] AC 563, approving the approach of Morris LJ in *Hornal v. Neuberger* [1957] 1 QB 247. In *Hornal v. Neuberger Productions Ltd* Morris LJ said (at p.266):

“The phrase “balance of probabilities” is often employed as a convenient phrase to express the basis upon which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics. .... Though no court and no jury would give less careful attention to issues lacking in gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. This view was denoted by Denning LJ when in his judgment in *Bater v. Bater* he spoke of a “degree of probability which is commensurate with the occasion” and of “a degree of probability which is proportionate to the subject-matter”.”

54. Turning to the secondary evidence, Mr Tritton submits that the overwhelming inference from such evidence is that the minutes did not contain assignments of the copyrights. He relies on the letters from CBS referred to by the judge in the passage from his judgment quoted earlier, and to what he characterised as the confusion which existed in the minds of Mr Appel, Mr Springsteen and Mr Kurz and in the contemporary documentation between the partnerships and the companies. He also relies on the fact that the “basic agreement” makes no express reference to any assignments from the partnerships to the companies. He submits that it is inconceivable that if such assignments had existed they would not have been expressly mentioned.
55. Mr Tritton submits that Mr Kurz’s evidence was wholly unreliable and that the judge should not have accepted it.
56. Mr Nigel Davis QC (who appears with Mr Mark Vanhegan for Mr Springsteen) submits that, so far as the *admissibility* of the secondary evidence is concerned, the judge applied the right test and reached the right conclusion. He accepts that a party seeking to adduce secondary evidence of the contents of a document must provide the court with a reasonable explanation

why he is not in a position to produce the original document before the court will admit the secondary evidence, but he submits that that is as far as it goes, and that what is a reasonable explanation is a matter for the court having regard to all the circumstances of the particular case. He submits that in any event, whatever the extent of the so-called “best evidence rule” in the nineteenth century, judicial attitudes in relation to the admissibility of evidence have changed substantially over time – and particularly so following the coming into force of the Civil Evidence Act 1995, which abolished the rule against the admission of hearsay evidence in civil proceedings. The modern authorities, he submits, do not depart from the earlier authorities, rather they simply illustrate the modern attitude towards evidential matters.

57. As to the evidence of attempts made on Mr Springsteen’s behalf to discover the whereabouts of the assignments, Mr Davis submits that the judge was fully entitled to find on that evidence that Mr Springsteen had given a reasonable explanation of his inability to produce the original minutes, and on that basis to admit secondary evidence of their contents. He points out that at no stage has it been suggested by or on behalf of the appellants that the attempts were other than entirely genuine. He also points out that Mr Springsteen was not himself a party to the assignments and would not necessarily have concerned himself with what was in effect an internal reorganisation of the affairs of Mr Appel and Mr Cretecos.
58. Mr Davis relies strongly on the evidence of Mr Kurz that documents in his possession relating to Mr Springsteen’s affairs were destroyed when he moved offices some years ago. Mr Davis also points to the fact that inquiries were also made of Mr Appel, who was the owner of the companies until they were dissolved; and that Mr Appel in turn inquired of Mr Elliot. As to Mr Parcher, Mr Davis reminds us that he was and is Mr Springsteen’s US attorney, and that had the assignments been in his possession (or, for that matter, had they once been but were no longer in his possession) they would have been disclosable by Mr Springsteen in the present action. As to Mr Marks, Mr Davis submits that it is no more likely that he would have retained copies of the assignments than Mr Parcher. Further, the evidence indicated that whatever documents Mr Marks may have had were handed over (with Mr Appel’s permission) to Mr Elliot.
59. Mr Davis further submits that it is necessary to put this evidence in context. He reminds us that the assignments (if they existed) were made in 1972 (some 26 years before the trial); that by the time of the trial all litigation between Mr Springsteen, Mr Appel and Mr Cretecos had long since come to an end; that the companies were dissolved on 24 December 1991; that from 1972 onwards Mr Springsteen, Mr Appel and CBS all proceeded on the basis that the copyrights were vested in the companies and subsequently (i.e. from 1977 onwards, following the “basic agreement”) in Mr Springsteen; and that in the litigation between Mr Cretecos and Mr Appel in 1979 Mr Cretecos’ case was that the copyrights were vested in the companies, from which he had wrongly been ousted by Mr Appel.
60. Turning to the *evaluation* of the secondary evidence, on the basis that it was properly admitted, Mr Davis submits firstly that the correct standard of proof is the balance of probabilities. He fully accepts the statements of principle made by Lord Nicholls in *Re H (minors)*: indeed, he

prays those statements in aid as demonstrating that the appellants' contention for a higher standard of proof is misconceived.

61. As to the judge's findings on the secondary evidence, Mr Davis reminds us that since this aspect of the appeal is an appeal purely on fact, the appellants must satisfy us that the judge, who had the advantage of seeing and hearing the witnesses, was clearly wrong in the findings which he made. He points out that this is not a case in which it can be said that, in making his findings, the judge overlooked any aspect of the evidence: on the contrary, it is apparent from the judgment that the judge weighed all the evidence, both oral and documentary, with very great care before making his findings. Mr Davis draws attention to the unfavourable comments which the judge made about the evidence of Mr Kurz as demonstrating that the judge subjected his evidence to a close and critical examination before concluding that he should accept it.
62. Mr Davis points out that it was never put to Mr Kurz that he was lying. He submits that it was pre-eminently a matter for the judge whether to accept or to reject Mr Kurz's evidence that assignments were made, and that there is no basis on which the judge's acceptance of Mr Kurz's evidence can be challenged in this court.
63. Mr Davis also relies on what he calls the inherent probabilities of the matter. In particular, he points out that it was intended by all parties from the outset that the partnerships would turn themselves into limited companies; that Mr Kurz was instructed to complete the necessary formalities; that limited companies were duly incorporated; and that thereafter all concerned proceeded on the basis that the partnerships were at an end and that the assets of the partnerships had vested in the companies. Mr Davis further submits that had there been no effective assignments of the copyrights it is surprising that the omission did not come to light in 1974 (when Mr Appel and Mr Cretecos split up) or in 1976 (in the course of the litigation between them) or in 1977 (when the "basic agreement" was concluded and when the sound recording copyrights were licensed by Mr Springsteen to CBS). In the circumstances, submits Mr Davis, it is inherently probable that the minutes of the first meetings of directors of Sioux City Music Ltd and Laurel Canyon Ltd contained assignments of the copyrights. Nor, he submits, is there any reason to doubt Mr Kurz's evidence that the minutes were signed by Mr Appel and Mr Cretecos as the first directors of those companies.

## *CONCLUSIONS*

64. I turn first to the question of the admissibility of secondary evidence of the contents of a document, and to the existence and scope of the so-called "best evidence rule".

65. Even in its heyday, the best evidence rule was not an absolute rule; its application depended on the particular circumstances of each case, as the following passages from the judgments of Lord Hardwicke LC in three eighteenth-century cases demonstrate.

66. First, in *Saltern v. Melhuish* (1754) Amb. 246, Lord Hardwicke said this:

“There are several grounds by which evidence, even parole, may be given of the contents of a deed. It is ground sufficient to show that the deed is in the hands of the opposite party, and that he had notice to produce it, and does not. Another ground is, to give reasonable account of the deed being lost or destroyed. Rule of law is, that the best evidence must be given *which the nature of the case will permit.*” (My emphasis.)

67. See also *Omychand v. Burke* (1744) 1 Atk. 21, where he said (at p.49):

“.... judges and sages of the law have laid it down that there is but one general rule of evidence, *the best that the nature of the case will permit.*” (My emphasis.)

68. In *Whitfield v. Fausset* (1750) 1 Ves Sen 387, at 388, Lord Hardwicke said:

“I was in some doubt; for there ought to be some proof that the deed was lost; some foundation laid first: but ordered [it] to be read, yet subject to be conclusive or not. The plaintiff having ordered a search to be made had found a draft of the deed, but not the deed itself; the reading of which was next objected to, because there was not sufficient evidence that the deed was lost. The rule is that the best evidence must be used that can be had, first the original; if that cannot be had, *you may be let in to prove it any way, and by any circumstances the nature of the case will admit.* This extends not only to deeds, but to records; ..... But for this the law requires a proper foundation to be laid; and two things are necessary. First, to prove that such a deed once existed..... The next step is to shew some ground that the deed is lost; or being in his adversary’s hands, cannot be come at. What I go upon is, that there is sufficient evidence to trace this into the hands of the defendant, who is the purchaser of the estate..... This, then, is a strong foundation to let the plaintiff in to read the draft.....” (My emphasis.)

69. To the same effect is a dictum of Lord Kenyon CJ in another eighteenth-century case, *Read v. Brookman* (1789) 3 Term Rep. 151, where he said:

“There is not doubt but that on the trial of a cause, depending on the fact of existence of such a deed, every proper suspicion will be entertained. A mere excuse hatched for the purpose will not be considered a sufficient apology for not producing the deed, nor indeed any excuse *but such as the urgency and justice of the case will warrant.*” (My emphasis.)

70. In *Brewster v. Sewell* (1830) 3 B & Ald 296, the plaintiff in a libel action sought to give secondary evidence of the contents of an insurance policy. The policy had been superseded by a later policy and the plaintiff’s evidence was that he had searched for the original policy but was unable to find it. The court held that the plaintiff had sufficiently explained his inability to produce the original policy and admitted the secondary evidence of its contents. In his judgment in that case, Holroyd J identified the mischief at which the best evidence rule was directed, as follows (at p.302):

“Now the reason why the law required the original document to be produced, is this, that other evidence is not so satisfactory, where the original document is in possession of the party, and where it is his power to produce it or get it produced, provided he gives notice. In either of these cases, if he does not produce it, or take the necessary steps to obtain its production, but resorts to other evidence, the fair presumption is, that the original document would not answer his purpose, and that it would differ from the secondary evidence which he gives with respect to the instrument itself. The law, in such a case, requires the original itself to be produced. .... It seems to me therefore, that this being a useless instrument, where the particular terms of the instrument are immaterial, the party cannot be presumed to have any improper purpose in resorting to secondary evidence.”

71. Holroyd J’s references to “fair presumption” and “improper purpose” seem to me to do no more than reflect the inevitable suspicion with which the court will view a party who seeks to rely on secondary evidence where primary evidence is available. The “fair presumption” in such circumstances will be that the primary evidence will not support his case, and accordingly that he is proffering secondary evidence for an improper purpose. But, as it seems to me, that is not so much a rule of law as a fact of life.

72. In the same case, Best J said (at p.303):

“It is very difficult to lay down any general rule as to the degree of diligence necessary to be used in searching for an original document, to entitle the party to give secondary evidence of its contents. That must depend, in a great measure, upon the circumstances of each particular case.”

73. As I read them, the judgments in *Brewster v. Sewell*, whilst fully consistent with the rule stated by Lord Hardwicke, exemplify an increasingly fact-based and flexible application of that rule, in which the court’s inquiry as to what has become of the original document is directed at establishing not so much that the best available evidence is before the court as that the party seeking to rely on secondary evidence of the contents of the document *genuinely* does not have the original document available to him: in other words, that no improper purpose is involved and that there are no grounds for viewing the secondary evidence with suspicion.

74. This more flexible approach is also reflected in the following passage from the judgment of Pollock CB in *Gathercole v. Miall* (1846) 15 M & W 319, at 329:

“Now it seems to me, that the evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much, according to the nature of the paper itself, the custody it is in, and, indeed, all the surrounding circumstances of the particular matter before the court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would be likely to take care of, and which might, I think, be considered as lost, so as not to be produced before a court and jury, when, after search, in the first instance, at the place where it was likely to be found, it is not discovered there, and we cannot suggest any one place where it is more likely to be than another.”

75. In the same case, Alderson B referred to the “improper motive” basis for the rule, saying (at p.335):

“I think *the search should be such as should induce the judge to come to the conclusion*, that the Court afterwards, on revising his opinion, to come to the same conclusion, *that there is no reason to suppose that the omission to produce the document itself arose from any desire of keeping it back*, and that there has been no reasonable opportunity of producing it which has been neglected. Now, the question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course of argument, of the back of a letter. It is quite clear a very

slender search would be sufficient to shew that a document of that description had been lost. If we were speaking of an envelope, in which a letter had been received, and a person said: "I have searched for it among my papers, I cannot find it", surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes that it has been taken away by someone, that seems to me to be amply sufficient. .... I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? *As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had bona fide endeavoured to produce the document itself.*" (My emphasis.)

76. In *R. v. The inhabitants of Saffron Hill* (1852) 1 E & B 93 Erle J echoed the dictum of Best J in *Brewster v. Sewell* quoted above, saying (at p.98):

"It is difficult to lay down any definite rule of law as to what constitutes a search for a document sufficient to warrant the admission of secondary evidence of its contents. In *Phillipps on Evidence* it is said:

"Cases must very much depend upon their particular circumstances, especially on the importance of the instrument, or the usage or practice which may exist respecting the custody of such documents."

In the present case it is enough to say that the facts stated in the case are not sufficient to shew that the Court below was wrong."

77. In my judgment the authorities to which I have referred establish that by the mid-nineteenth century, if not earlier, the so-called "best evidence rule" was recognised by the courts as no more than a rule of practice to the effect that the court would attach no weight to secondary evidence of the contents of a document unless the party seeking to adduce such evidence had first accounted to the satisfaction of the court for the non-production of the document itself. But even if that conclusion be open to doubt, there can in my judgment be no room for doubt that as the law stands today, some 150 years later, that is the position.
78. As Balcombe LJ said in *Ventouris v. Mountain (No 2)* [1992] 1 WLR 887, at 899, with reference to section 6 of the Civil Evidence Act 1968 (which related to the admissibility of hearsay statements):

“The modern tendency in civil proceedings is to admit all relevant evidence, and the judge should be trusted to give only proper weight to evidence which is not the best evidence.”

79. True it is that Lord Denning’s dictum to the same effect in *Garton v. Hunter* [1969] 2 QB 37 at 44 - viz. that the “goodness or badness [of the secondary evidence] goes only to weight, not to admissibility” – was made in an entirely different context, but it was cited by Ackner LJ in *Kajala v. Noble* [1982] Cr App. R. 159 (a decision of the Divisional Court) in the context of a question as to the admissibility of secondary evidence of the contents of a document. As Ackner LJ said, in a passage from his judgment cited by the judge in the instant case:

“The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one’s hands, one must produce it.”

80. For my part, I would not even recognise the continuing existence of that “remaining instance” of the application of “the old rule”. In my judgment, the “obligation” of a party who has a document to produce the original in evidence is founded not on any rule of law but is simply a reflection of the fact that a party to whom a document is available will by reason of that very fact be unable to account to the satisfaction of the court for his non-production of it when inviting the court to admit secondary evidence of its contents, with the practical consequence that the court will attach no weight to the secondary evidence.
81. I turn next to *R. v. Governor of Pentonville Prison ex parte Osman* (above). In *Osman* the applicant applied to the Divisional Court for habeas corpus, challenging his committal to prison to await his return to Hong Kong to face charges of conspiracy. One of the points taken on the applicant’s behalf before the magistrate was that the documents exhibited to the depositions and affidavits on which respondent relied were copies, and that under the best evidence rule such copies were inadmissible in evidence. The point having been taken, the respondent did his best to produce the originals of such exhibits as he could find, and to explain the unavailability of the others. In the Divisional Court it was submitted on the applicant’s behalf that the respondent’s efforts in that respect had been incomplete and inadequate. In response, it was submitted by Mr Nicholls QC on behalf of the respondent firstly that the best evidence rule no longer existed; secondly that if it existed it had been complied with; and thirdly that in any event section 11(1)(b) of the Fugitive Offenders Act 1967 provided a statutory exception to it. Addressing Mr Nicholls’ submissions, Lloyd LJ said this (at pp.308 – 309):



“As to his first submission, this court would be more than happy to say goodbye to the best evidence rule. We accept that it served an important purpose in the days of parchment and quill pens. But since the invention of carbon paper and, still more, the photocopier and the telefacsimile machine, that purpose has largely gone. Where there is an allegation of forgery the court will obviously attach little, if any, weight to anything other than the original; so also if the copy produced in court is illegible. But to maintain a general exclusionary rule for these limited purposes is, in our view, hardly justifiable. So we would, if we could, be happy to accept Mr Nicholls’ first submission.

But although the little loved best evidence rule has been dying for some time, the recent authorities suggest that it is still not quite dead.”

82. Then, after referring to *Kajala v. Noble* and *R. v. Wayte*, Lloyd LJ continued (at p. 308F):

“What is meant by a party having a document available in his hands? We would say that it means that a party who has the original of the document with him in court, or could have it in court without any difficulty. In such a case, if he refuses to produce the original and can give no reasonable explanation, the court would infer the worst. The copy should be excluded. If, in taking that view, we are cutting down still further what remains of the best evidence rule, we are content. On the facts the magistrate was entitled to hold that the prosecution had given a reasonable explanation for the absence of such originals as they failed to produce.

But if we are wrong about that, there remains the third of Mr Nicholls’ arguments. Section 11 .... is dealing with procedure and method rather than substance. Since the rule against hearsay is a substantive rule of evidence, it must therefore be applied, as it was in this case, by the magistrate. But the best evidence rule is not a rule of substance. It has become a rule of practice or procedure, like the rule against a witness refreshing his memory by reference to a previous statement, unless it was fresh in his mind when he made it.”

83. It is, I think, important to place the “without any difficulty” test in context. In *Osman*, as in the instant case, there was no allegation of bad faith or impropriety against the respondent. As Lloyd LJ observed, where forgery is alleged the court will attach little, if any, weight to secondary evidence of the contents of the document. In my judgment, *Osman* confirms that the question of the admissibility of secondary evidence of the contents of a document is a question for the judge, weighing all the evidence.

84. Further, there is in my judgment a parallel to be drawn between the gradual erosion and eventual abolition of the hearsay rule in civil proceedings and the decline of the best evidence rule. To my mind, the abolition of the hearsay rule in civil proceedings effected by the Civil Evidence Act 1995 is as clear a reflection as one could find of the modern tendency to admit all relevant evidence, identified by Balcombe LJ in *Ventouris v. Mountain (No 2)* (above). As the Law Commission said in paragraph 1.5 of its Report in which it recommended the abolition of the rule (1993/216):

“... recent developments in the law and practice of civil litigation point to a new approach, where the main emphasis is upon ensuring that, so far as possible and subject to considerations of reliability and weight, all relevant evidence is capable of being adduced. Another part of this new approach is that litigation is conducted in a more open climate, with more emphasis upon identifying and refining the issues in advance, which in turn gives parties less opportunity to take tactical advantage of technical points at the trial stage.”

85. In my judgment, the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence on the ground that it is worthless. At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between those two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight should be attached to the secondary evidence. Thus, the “admissibility” of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking into account all the circumstances of the particular case.

86. Nor, in my judgment, is Mr Tritton assisted by the 1976 decision in *R v. Nowaz* (above). The court in that case did not find it necessary for the purposes of its decision to consider the best evidence rule in any detail, and in my judgment the mere fact that it was content to take the statement of the rule from a well-known text book takes the matter no further.

87. In the instant case, the judge was in my judgment fully justified in his decision to admit secondary evidence of the assignments. I accept Mr Tritton’s submission that further steps could have been taken on behalf of Mr Springsteen to locate the company minute books, but,

for reasons already explained, there was no obligation on the respondent to make an exhaustive search, or indeed any search at all. The only requirement was for him to provide a reasonable explanation for his non-production of the minutes, in the sense that unless he did so the court would almost certainly decline to admit the secondary evidence. Given that there was no allegation by the appellants of impropriety or bad faith against Mr Springsteen or his advisers, and that there was nothing in the evidence to suggest that such attempts as were made on Mr Springsteen's behalf to find the assignments were other than wholly genuine attempts, the judge was entitled to take as the appropriate yardstick the "without any difficulty" test adopted by the Divisional Court in *Osman*. As the judge said (at p.212):

"I do not think it necessary, in connection with the admissibility of secondary evidence, to consider whether more might have been done by way of searching for the document. That would, of course, be a relevant matter if it were suggested that the party seeking to adduce the secondary evidence had refrained from a more extensive search for better evidence for fear of what he might find. I did not understand such a suggestion to be made in this case."

88. I turn, therefore, to the appellants' challenges to the judge's evaluation of the secondary evidence.
89. In the first place, I reject Mr Tritton's submission that the appropriate standard of proof is a higher standard than the balance of probabilities. I fully accept that the assignments were important documents in that they formed part of Mr Springsteen's chain of title, and in that respect are to be contrasted with, for example, the envelope referred to by Alderson B in *Gathercole v. Miall* (above); but, as explained by Lord Nicholls in *Re H (Minors)* (above), that does not alter the standard of proof any more than the need for "convincing proof" in rectification claims alters the standard of proof applicable to such claims. In *Re H (Minors)* Lord Nicholls said this (at p.586D):

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event, was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. .... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungood-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it".

This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris LJ in *Hornal v. Neuberger Products Ltd* [1957] 1 WQB 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters."

90. In my judgment, those observations apply in the instant case.

91. Nor, in my judgment, can Mr Tritton derive any assistance from *Harris v. Knight* (above). As noted earlier, that was a case of a lost Will, and it is inevitable that in such cases the court should require cogent evidence to establish its contents. As Lindley LJ said (at p.179):

"... it is obvious that any laxity or want of vigilance on the part of the Court in a case of this kind would encourage the fabrication of wills, and lead to perjury, which it would be extremely difficult to detect."

92. I accordingly conclude that the judge was right to evaluate the evidence on the basis that the standard of proof is the balance of probabilities.

93. I turn, finally, to the question whether the judge was right to conclude that, on the balance of probabilities, assignments in due form were made. I can deal with this aspect quite shortly. I agree with Mr Davis that the inference is overwhelming that the copyrights were effectively assigned from the partnerships to the limited companies. Thus, it was from the outset the intention of Mr Appel and Mr Cretecos (as Mr Tritton accepts) that the partnerships should be succeeded by limited companies; Mr Kurz, a lawyer with experience of the popular music industry, was instructed to ensure that the necessary formalities were completed to achieve that result; limited companies were duly incorporated which *de facto* carried on the businesses of

the former partnerships; thenceforth, all concerned (including Mr Cretecos) proceeded on the basis that all the assets of the former partnerships were vested in the companies and that the partnerships were at an end; and when the basic agreement was signed in 1977 no suggestion was made that any assets (let alone the copyrights, which represented the core of the entire operation) remained outstanding in the former partnerships.

94. As to Mr Kurz's evidence of his use of the Julius Blumberg standard form of minutes of a first meeting of directors of a newly incorporated company, it is instructive to examine the standard form itself (a specimen of this form was produced by Mr Springsteen at the trial and is included in the documentation before us).
95. The standard form makes specific provision for the inclusion of details of a "proposal" for the transfer of assets to the company. Thus, the standard form recitals record the presentation of a written proposal, details of which are to be filled in. The recitals continue:

"The proposal was taken up for consideration and the following resolution was on motion unanimously adopted."

96. The terms of the resolution are then set out *in extenso*, including a number of preliminary paragraphs beginning "Whereas....". The operative parts of the resolution read as follows;

"NOW THEREFORE, IT IS RESOLVED that the said offer, as set forth in said proposal, be and the same is hereby approved and accepted, and that in accordance with the terms thereof, this corporation, shall as full payment for said property issue to said offeror (s) or nominee (s) fully paid and non-assessable shares of this corporation, and it is

FURTHER RESOLVED, that upon the delivery to this corporation of said assets and the execution and delivery of such proper instruments as may be necessary to transfer and convey the same to this corporation, the officers of this corporation are authorized and directed to execute and deliver the certificate or certificates for such shares as are required to be issued and delivered on acceptance of said offer in accordance with the foregoing."

97. Mr Tritton accepted that there is no requirement that an assignment of copyright take any particular form, provided it is in writing and signed by or on behalf of the assignor, and that a general reference to all the assets of the former partnerships would suffice to assign the copyrights.

98. In these circumstances the overwhelming probability must be that in the case of each partnership Mr Kurz duly carried out his instructions and adapted the standard form of minutes so as to effect an assignment of the copyrights. Equally, the overwhelming probability must be that, as Mr Kurz testified, the minutes would have been signed by Mr Appel and Mr Cretecos as the first directors. To conclude otherwise would in effect be to find Mr Kurz guilty of negligence, and the evidence simply does not justify such an inference.

99. As to the reliability of Mr Kurz's evidence, that was pre-eminently a matter for the judge, who (as noted earlier) subjected it to close and critical analysis before concluding that he should accept it.

100. I accordingly find myself unable to discern any ground on which the judge's finding of fact that the copyrights were assigned can be challenged in this court. The judge reviewed the evidence with scrupulous care, and in my judgment his findings cannot be faulted.

101. For those reasons, I would dismiss this appeal.

LORD JUSTICE LAWS:

102. I agree.

LORD JUSTICE WALLER:

103. I also agree.