



Neutral Citation Number [2014] EWHC 1690 (Ch)

Claim No: HC12 B 01510

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

The Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 4 June 2014

Before: Mr Richard Meade QC sitting as a Deputy Judge of the High Court

Between :

(1) BSI Enterprises Limited
(2) Cayman Music Limited

Claimants

- and -

Blue Mountain Music Limited

Defendant

Hugo Cuddigan (instructed by **Briffa Solicitors**) for the Claimants
Ian Mill QC and Tom Cleaver (instructed by **Russells Solicitors**) for the Defendant

Hearing dates: 13 and 14 May 2014

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Richard Meade 4 VI 14

Mr Richard Meade QC sitting as a Deputy Judge of the High Court:

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Introduction

1. In this action the Claimants seek declarations that the First Claimant is the owner and the Second Claimant the exclusive licensee of the copyrights in the music and lyrics for certain songs by the famous reggae musician Bob Marley (“the Works”). They also claim an account of sums mistakenly had and received by the Defendant from copyright collecting societies in respect of the Works. The latter claim is contingent on the success of the former, as I shall explain below.
2. The Works comprise 13 songs written by Bob Marley in the early 1970s. They include one of his most famous songs, “No Woman No Cry”.
3. It is common ground that whether the Claimants are entitled to the copyrights in the Works depends on the proper interpretation of an agreement of March 1992 between, on the one hand, Island Logic Limited, and, on the other hand, Cayman Music Inc. (“CMI”), a New York company (an entirely different entity from the Second Claimant), various other associated companies, and an individual called Danny Sims, of whom I shall say more shortly. I will refer to this agreement as the March 1992 Agreement.
4. It is also common ground between the parties now (although it was far from being so at the time) that at the date of the March 1992 Agreement the copyrights in the Works belonged to CMI. The Defendant asserts that the copyrights in the Works passed to Island Logic under the March 1992 Agreement, whereas the Claimants assert that the copyrights remained with CMI, from whom the First Claimant later acquired them. So my main task is to construe the March 1992 Agreement to determine who is right.
5. Having identified the central issue I now need to go back almost to the beginning of Bob Marley’s career and explain the sequence of events leading to the March 1992 Agreement and beyond.

6. The parties agreed a useful chronology which I annex to this judgment as Annex A.
7. The relevant events begin in 1968 when Bob Marley made a publishing agreement with Johnny Nash Music Limited (“the 1968 Agreement”).
8. Johnny Nash was a well known recording artist and partners in a record company called JAD with Danny Sims. Bob Marley was at some point (the precise date does not matter) signed as a recording artist to JAD, subject to an exclusive licence to CBS.
9. Matters changed in the early 1970s in two ways.
10. First, Bob Marley signed as a recording artist with Island Records in 1972, having met Chris Blackwell of Island (from whom I heard evidence, as I shall elaborate below). Island bought out CBS’s interest in the course of this. Island was and is a very well known and successful music business concern, with both recording and publishing interests. A number of Island group companies are involved in the history of this dispute, but the details of which company did what are not relevant on the whole so I shall refer to them collectively (including the Defendant) as “Island” save where necessary to be more specific.
11. Second, Bob Marley entered into a publishing agreement with Danny Sims’s publishing company, CMI, on 11 October 1973 (“the 1973 Agreement”).
12. Between 1973 and 1976 Bob Marley wrote the Works.
13. However, Bob Marley did not publicly describe himself as the author of the Works. He deliberately misattributed their authorship to various friends and associates. It is clear that his object in doing this was to gain control of the copyrights in the works and gain remuneration from them. This therefore benefited him, and it also benefited the persons to whom authorship was wrongly attributed because they received royalties from

various collecting societies. CMI was, obviously, damaged to the extent that it did not receive any royalties.

14. This arrangement by Bob Marley was referred to by the parties at trial as the Misattribution Ploy.
15. Bob Marley's purported justification for the Misattribution Ploy was that he had not been paid any publishing royalties under the 1968 or 1973 publishing agreements. I do not know whether or not this is true but it does appear clear from the evidence of Mr Blackwell that Bob Marley thought he had a genuine grievance. Whether that grievance justified the Misattribution Ploy is a completely different matter, of course.
16. Island, in the person of Mr Blackwell, was made aware of the Misattribution Ploy at the time it was being perpetrated (probably in 1974), by Bob Marley, who also explained the purported reason why he was doing it. Mr Blackwell sympathised with Bob Marley to the extent that he had not been paid, but was not privy to any discussions or arguments between Bob Marley and Danny Sims.
17. Island paid mechanical royalties to the misattributed authors.
18. Bob Marley died intestate on 11 May 1981.
19. In 1984, CMI brought a complaint in New York against Rita Marley (Bob Marley's widow) as administratrix of his estate ("the Estate"), and various other parties including Island Records, Inc. ("the New York Action"). The claim was for damages and recovery of money obtained by the defendants using the Misattribution Ploy. Island Records, Inc. was a relatively peripheral defendant in that no money was claimed from it, but it shared lawyers with the other main defendants.
20. The defendants to the New York Action denied the Misattribution Ploy. This denial was of course untrue. Because of the peripheral nature of its

involvement I do not think it is possible to say what Island's involvement in making it was, and Mr Blackwell did not recall.

21. It is not now clear how Danny Sims obtained knowledge or suspicion of the Misattribution Ploy so as to bring the New York Action, but in any event the claim was dismissed on 14 January 1988 on grounds of limitation following a trial in November 1987 (directed only to the limitation issue) in which a jury concluded that Danny Sims "had discovered the fraud prior to October 24 1982". I was told that New York had a limitation period of two years for such claims.
22. The other important aspect of the New York Action is that Rita Marley on behalf of the Estate brought a counterclaim to rescind the 1968 and 1973 publishing agreements. This counterclaim, if successful, would have had profound effects going well beyond the Works because it could have meant that all copyright in works written by Bob Marley from 1968 to 1976 would have reverted to the Estate, regardless of their attribution.
23. Mr Cuddigan, who argued the case for the Claimants before me, described the counterclaim as a "Hail Mary", i.e. a bold but desperate last-minute attempt to change the whole landscape of the dispute. I have no way of knowing whether that is accurate.
24. It is common ground that because the New York Action was dismissed for limitation reasons and not on the substantive merits there was a possibility that the Misattribution Ploy dispute would be revived in some other forum. How large that possibility was is something I consider below.
25. For reasons recounted in his witness statement, whose details are not directly relevant but included a desire to protect Bob Marley's creative legacy in partnership with the Estate, Chris Blackwell and Island decided to seek to acquire the rights in Bob Marley's works, including musical copyrights and publishing rights.

26. First and foremost, Island (in the form of Island Logic Inc.) did this by making an agreement with the Estate, on 27 April 1988 (“the 1988 Agreement”). The 1988 Agreement specifically listed the Works as being acquired by Island. I will return to its other provisions below.
27. There were many parties potentially interested in Bob Marley’s estate, and there were a variety of challenges to the 1988 Agreement. Following protracted litigation a further agreement was made on 10 September 1992 (“the September 1992 Agreement”) which confirmed the 1988 deal in modified form.
28. Between the 1988 Agreement and the September 1992 Agreement, Island became aware that Danny Sims was seeking to sell rights in various works by Bob Marley, including what had been obtained under the 1968 and 1973 publishing agreements. This was of particular interest to Island because combined with the 1988 Agreement (if and when ratified) it would give Island control of the great majority of Bob Marley’s creative output.
29. This led to the negotiation and conclusion of the March 1992 Agreement.
30. The March and September 1992 Agreements were undertaken by Island through Island Logic Limited.
31. I now move on to matters after the March 1992 Agreement. They are of no relevance to the interpretation of that agreement, but set the scene for the Claimants’ interests and this dispute.
32. In 2006, Lewison J (as he then was) gave judgment in an action, begun in 2002, brought by Aston “Family Man” Barrett claiming rights in six of the Works. One of the Defendants to that claim was a company in the Island group and Mr Blackwell gave evidence for the defence. In the course of it he said that those six compositions were not included in the March 1992 Agreement (a statement which he now says was wrong – see below).

33. This appears to have inspired the First Claimant to make a contract with CMI intended to buy the copyrights in the Works (as part of a larger collection), on the basis that if the copyrights were not included in the March 1992 Agreement they must still be with CMI. That agreement was made on 20 May 2008 (“the May 2008 Agreement”).
34. On 1 October 2011, the First Claimant granted an exclusive licence to the Second Claimant.
35. These proceedings began by way of a claim form of 13 April 2012.
36. Island received royalties in respect of the Works from various collecting societies for some time, although I was told payment has been frozen as a result of this dispute.

The Witnesses

37. The Claimants called oral evidence from Mr Mark St John and Mr David Simmons.
38. Mr St John is an independent consultant in the music business and gave evidence about the May 2008 Agreement in support of the Claimants’ argument that it included the Works. His evidence as to primary facts was not really challenged. He also gave evidence about the price paid by the First Claimant under the May 2008 Agreement (£250,000) which confirmed that the price was depressed by the obvious dispute over title. He was also challenged over which of two versions of the May 2008 Agreement was the correct one.
39. I thought Mr St John was entirely fair and honest and so far as it matters I accept his explanation of which version of the May 2008 Agreement was the right one (and Mr Mill QC who argued the Defendant’s case with Mr Cleaver did not dispute it in closing). However, apart from the rather obvious point that disputed assets command a lower price, I thought his evidence was essentially irrelevant.

40. Mr Simmons is an accountant by profession but now administers music publishing rights and in the past has provided help and consultancy to others doing so. He advised and assisted Danny Sims and CMI in the negotiation of the March 1992 Agreement.
41. Mr Simmons was also very fair in his oral evidence, although I think it emerged that his recollection of events is less good than had been reflected in his written statement. This did not matter all that much, however. Cross-examination revealed that his evidence about the price paid under the March 1992 Agreement was (I am sure unintentionally) a little inaccurate. I reject as irrelevant his subjective view of the meaning of the March 1992 Agreement.
42. Save as I have just mentioned, Mr Simmons' evidence tended to confirm aspects of the factual matrix, but there was little dispute as to them in any event.
43. The Claimants did not call any of their current principals to give evidence. This elicited a mild complaint from Mr Mill QC, given that Island had had to call Mr Blackwell. I do not think there is anything at all in the complaint, since I cannot see what relevant evidence they might have given.
44. By consent of the parties, I gave the Defendant permission to serve a late witness statement from Mr Hayes, formerly of Island, responding to Mr Simmons. There was only minimal challenge to this in cross-examination, and it consisted of an essentially semantic debate over paragraph 8 of his statement which I found to be of no assistance.
45. The Defendant's main witness was Mr Blackwell. He gave evidence spanning events from his first involvement with Bob Marley's music in the 1960s, through the circumstances surrounding the Misattribution Ploy, Bob Marley's death, the 1988 and 1992 Agreements, and his own evidence in the Aston Barrett litigation to which I have referred above.

46. Mr Cuddigan made clear that he did not criticise Mr Blackwell as a witness. This lessens my task in assessing his oral evidence but I must nonetheless record my views.
47. I found Mr Blackwell almost invariably to be clear, open and concise in his evidence where he remembered events. There were, unsurprisingly, matters which he no longer recalls and when that was the case he said so. Although he is the moving spirit behind Island, I formed the clear impression that he was not always aware, even at the time, of all the details of its affairs, contracts, and litigation. For example, he said he did not remember Island's involvement in the New York Action or the state of its pleadings there, but I think he probably was not aware of those matters at the time, or only tangentially, given that Island was very much a secondary defendant. Similarly, I doubt if he was aware of the fine detail of the 1988 and 1992 Agreements.
48. Mr Blackwell agreed that he was aware of the Misattribution Ploy at the time. He was perhaps a little slow in addressing the question of whether he knew that it involved deceiving Mr Sims (and this is the only respect in which I had any difficulty with his evidence) but he fairly said that he did not know what passed between Bob Marley and Mr Sims and his recollection of a complex situation is now less than perfect.
49. I turn to his evidence in this case about what he said in oral evidence in the claim by Aston Barrett. It will be recalled that he said there that he believed six of the Works were not included in the March 1992 Agreement, and his statement in this case was that he was wrong. In his statement for this case he pointed out that he had not been shown the March 1992 Agreement, and said that he was tired after a full day of cross examination. He said that it was possible that he thought the six compositions in question had been assigned to Island under the 1988 and September 1992 Agreements with the Estate.

50. Mr Cuddigan pointed out in cross-examination that Mr Blackwell was not in fact at the end of a day's cross-examination in the 2006 trial when he made the relevant statements; rather, it was quite soon after the short adjournment. I do not think this point of detail matters. Mr Blackwell was over half way through his second day of cross examination. My own observation was that he tired quite quickly (albeit that I must allow for the fact that the 2006 trial is eight years ago). I have no doubt that he was tired at the relevant point in the 2006 trial, and that his recollection of being tired is an honest one.
51. Aside from that, I also accept Mr Blackwell's evidence that he may have mistakenly had in mind the agreements with the Estate, an explanation which draws added force from the fact he was not shown the March 1992 Agreement and anyway does not and did not have a mastery of its detail. I was also left with the firm impression that the scope of the 1992 Agreement was very peripheral to the Aston Barrett litigation.
52. More fundamentally, I cannot see that it matters at all even if Mr Blackwell was "wrong" in what he said about the March 1992 Agreement on an earlier occasion. The agreement means what it means.
53. There was also some cross-examination directed to Mr Blackwell's statements in the Aston Barrett litigation about having to pay more under the 1992 Agreement had the six Works in fact been included. Mr Blackwell said this was wrong as well, but the nature of the criticism was never clear to me and anyway as will appear below Mr Cuddigan withdrew any reliance on arguments based on cost of the collations of compositions in the various agreements. I do not think Mr Blackwell was open to any criticism on this front; I do not think he understood what the criticism being put to him was.

The Issues

54. Issue 1. The main issue is whether the copyrights in the Works were transferred to Island under the March 1992 Agreement, it now being

common ground that they belonged to CMI at the time (although such was not agreed at the time, of course).

55. Issue 2. If the copyrights were not so transferred to Island under the March 1992 Agreement then I understand it to be common ground, and I would find, that they were transferred to the First Claimant in 2008. I need say no more about this contingent issue.
56. Issue 3. On the assumption that the First Claimant owns the copyrights, the Claimants claim in restitution for the payment to them of the monies received by Island from collecting societies by way of royalties.
57. Issue 4. Island asserts that it had an implied licence to do as it did, arising from the Claimants' failure to notify Island of any claim, by analogy with *Fisher v. Brooker* [2006] EWHC 3239 (Ch), [2007] FSR 12.
58. The Claimants accept that no specific notice was given to Island of any claim prior to the Claim Form (there was a suggestion on day 1 of the trial of reliance on some pre-action correspondence but Mr Cuddigan abandoned it on day 2). But the Claimants say that Island was on notice as a result of its contemporaneous knowledge of the Misattribution Ploy in the 1970s and 1980s. I will deal with this under Issue 3.

Issue 1 – Were the copyrights in the Works transferred to Island under the March 1992 Agreement?

59. The March 1992 Agreement is subject to New York law but neither side has led evidence of New York law so I will assume it to be the same as English law and apply that.
60. There was no dispute about the principles of interpretation of contracts under English law; both sides referred me to the well known line of cases which includes *ICS v. West Bromwich Building Society* [1998] 1 WLR 896. I refer in particular to the following passage from the speech of Lord Hoffmann in *ICS* as identifying the correct approach (at pp. 912-913):

‘(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191, 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

61. In addition, each side referred me to *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.
62. Mr Cuddigan referred me to paragraph 28 where Lord Clarke referred to the process of interpretation as being "an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences."
63. Mr Mill for his part referred me to paragraph 21, where Lord Clarke referred to the exercise as being "essentially one unitary exercise" with "regard to all the relevant circumstances", saying also that "If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".
64. I did not understand these different citations from the same judgment to suggest any disagreement between the parties as to the relevant principles; they seem entirely consistent to me.
65. Mr Mill also referred me to *Chitty on Contracts*, 31st Ed., 12-043. His purpose in doing so was to emphasise that the intention of the parties is to

be determined objectively and that the meaning of a written agreement to be determined from the document itself (having due regard to the factual matrix).

66. These are basic propositions from which Mr Cuddigan did not (and realistically could not) dissent, but I think Mr Mill was right to refer me to the passage because, as I will explain below, I think a central fallacy in Mr Cuddigan's argument was to seek to identify the parties' intention and agreement from the surrounding circumstances and then to make the language of the document yield to them at all costs, rather than seek to find the intention and agreement in the document.

Factual Matrix

67. I turn to the factual matrix, which I remind myself must be matters in the contemplation of both parties. This included the following:
- a. The 1968 and 1973 Agreements.
 - b. The Misattribution Ploy (which was known as a fact to Island and strongly suspected by Mr Sims).
 - c. The New York Action, including in particular (i) that CMI had alleged the Misattribution Ploy but that its claim had been dismissed for limitation reasons, and (ii) the counterclaim, which was extant.
 - d. That it was possible the Misattribution Ploy would be complained of again in other future litigation because it had not been dismissed on the merits. As a result, ownership of (allegedly) misattributed works was unclear to some degree.
 - e. That there were likely to be works created by Bob Marley during the currency of the 1973 Agreement which had not been specifically identified ("lost works").

- f. That Island was in the process of acquiring the Estate's interest in Bob Marley's creative output.
 - g. That this was being done by means of the 1988 Agreement, which remained under challenge, and although those challenges appeared to be slowly approaching a resolution, it was uncertain what form any final agreement would take.
 - h. The general terms of the 1988 Agreement. Mr Cuddigan relies on two particular elements of it, (i) that the Works were specifically listed, and (ii) that the New York claim by CMI was acknowledged as a piece of actual or potential litigation. I doubt if these details were in the active contemplation of the parties to the March 1992 Agreement, objectively speaking, not least because CMI was not a party to the 1988 Agreement, but I do not think it would make much if any difference if they had been.
 - i. That Island was desirous of obtaining as many as possible of the rights in Bob Marley's creative output.
 - j. That the Works were registered at the US Copyright Office as written by the misattributed authors, and Island had been paying royalties accordingly.
68. I should add a little more about points c and d in case it matters how likely it was thought to be that the Misattribution Ploy would be sued over again, and because the contrast between the Misattribution Ploy claim and the counterclaim in the New York proceedings has been debated before me and is relevant to Mr Cuddigan's argument.
69. I find that the likelihood of the Misattribution Ploy being litigated again was low, but perceived as being just about possible. It must be recalled that by March 1992 it was at least ten years since Mr Sims became aware of the

possibility that the Ploy had been perpetrated. It was eight years since the New York Action had been begun, and four years since it had been dismissed. There was no sign of Mr Sims having threatened any other litigation.

70. This view is supported by Mr Hayes' evidence as to Island's view (paragraph 7 of his statement, which was not challenged) although of course I accept that this is evidence of subjective belief and CMI may have seen things somewhat differently.
71. The counterclaim was different because it was an extant piece of litigation, whatever its perceived merits.
72. I should also mention point i – Island's desire to obtain as much of the Marley catalogue as possible. The mere fact that a party desires something has to be treated with care as part of the factual matrix, and one must not assume that the deal which was ultimately made satisfied that party's desire. Here, there is more to it. Island was seeking to put together a collection of a strictly limited class of rights which it hoped would be as complete as possible, and CMI was in a nearly unique position to profit from satisfying that desire. So it made sense for Island to buy everything CMI could offer in the way of Marley compositions, and for CMI to sell the same. It would have made much less sense for Island to buy only part of what CMI had or might have: from Island's perspective its catalogue would be unnecessarily incomplete, and from CMI's perspective the residue would be unlikely to be as valuable to anyone else.
73. Finally, I should mention that one of the Works is, as I have said above "No Woman No Cry". It was part of the factual matrix that this was a very well known song and one of Bob Marley's most famous recordings, as well as very commercially successful. The specific importance of No Woman No Cry faded a little during the trial because it initially formed the centre piece of an argument, later abandoned by Mr Cuddigan, about the relative

financial value of it. Nonetheless it stood as a sort of epitome of the Misattribution Ploy songs.

Terms of the March 1992 Agreement

74. I turn to the March 1992 Agreement. It is of imposing length. Mr Cuddigan made much of the fact that it was carefully negotiated with expert input (which is true), in support of an argument, which I will address below, that it is unlikely that they did not deal with the Works and misattribution generally, if misattributed works were intended to be included. For the moment I will simply say that although the agreement is lengthy and was worked on hard at the time, it is in some respects rather scrappy. I have in mind in particular the uneven treatment of the terms “Composition” and “Catalogue” (although in the end little was made of that untidiness in oral argument).
75. As to the specific terms, I take from Mr Cuddigan’s skeleton argument, with limited additions and deletions, the following checklist of potentially relevant parts of the agreement:

Clause 1.1: which defines “Acquired Assets” to include (i) “Compositions” and (ii) “Songwriter Agreements”.

Clause 1.8: which defines “Composition” and “Catalogue”. This is the key clause as it the one on which the Defendant relies as giving it the Works.

Clause 1.9: which defines “encumbrance” to include claims or any other encumbrance or contingency of any nature whatsoever affecting any of the Acquired Assets.

Clause 1.20: which defines “restriction” as agreements restricting CMI’s rights to exploit the Works, but not including non-exclusive agreements such as songwriter agreements.

Clause 1.22: which defines “Songwriter Agreements” to include all music publishing rights granted to CMI pursuant to its “songwriter contracts... whereby [CMI] is entitled to... rights to one or more Compositions”. This became important in the course of the trial as I will explain below.

Clause 2.1: Transfers the Acquired Assets.

Clause 3.1: the purchase price paid to CMI for all the assets being acquired was \$1,250,000.

Clause 5.4: in this clause, CMI provides a warranty as to title to “the Acquired Assets”, itself defined as including the Compositions. The purposes of Schedules 8A and 8B are described; the former is a list of declared encumbrances; the latter lists those compositions in respect of which no representations as to title are made by CMI.

Clause 5.13: litigation and claims. This clause expressly refers to the counterclaim by the Estate in the New York claim. To the extent that the counterclaim results in the loss of any “Acquired Assets”, that is deemed not to be a breach.

Clause 11.4: in the context of a condition to the obligations of the buyer, Island, this clause requires that no action, suit or proceeding shall have been commenced against CMI or against Island Logic or any of its affiliates, which seeks to restrain or change the transactions contemplated by the agreement.

Schedule 2: this is the list of Compositions provided by CMI, and is referred to in clause 1.8. None of the Works appears on it.

Schedule 8A: CMI discloses a lists of encumbrances that CMI says relate to the “Acquired Assets”. It refers to the counterclaim by the

Estate in New York (listed in Schedule 12) as an encumbrance. It also lists certain other musical works as being subject to claims from SBK, Ackee and Number 11 Music Publishing.

Schedule 8B: provides a list of Compositions in relation to which CMI makes no warranty as to title. Schedule 8B concludes with the following statement:

“There are no restrictions other than as set forth in Schedule 12 herein on [CMI’s] right to sell the Acquired Assets.”

It should be noted that all the musical works listed in Schedules 8A and 8B also appear in Schedule 2.

Schedule 12: Identifies the New York Counterclaim and goes on to say that “There are no other claims threatened or pending against Seller with regard to the Acquired Assets”.

76. In meeting Mr Cuddigan’s arguments, Mr Mill also drew my attention to clauses 1.1(e) and 1.2 dealing with the definition of “Accounts Receivable”.
77. As I have said above, clause 1.8 is the key clause by operation of which, together with clauses 1.1 and 2.1, Island says it acquired the Works. I do not lose sight of the fact that I must construe the agreement as a whole, but given the central nature of clause 1.8 to the argument, I think it is useful to set it out in full:

“1.8 ‘Composition’ and ‘Catalogue.’ The term ‘Catalogue’ shall mean all presently-existing musical compositions, or portions thereof, including cues, domestic or foreign, whether originally claimed or registered as a musical composition or as a part of a dramatic-musical work, consisting of lyrics and/or music whether or not registered in the United States Copyright Office or elsewhere, whether published or unpublished, written recorded by Robert N. Marley, Winston Peter McIntosh and/or Neville Livingstone, and/or certain

musical compositions written or composed by Alfonso Pyfrom and/or Jimmy Norman (which were recorded by any of Robert N. Marley, Winston Peter McIntosh and/or Neville Livingstone), under their own names or under any pseudonyms, individually or as part of any collaboration between or among any of them or others (individually a 'Composition' and collectively the 'Compositions') and all right, title and interest in and to such Compositions, including all copyrights and renewals and extensions of copyrights thereto in all jurisdictions throughout the Universe, to the extent such compositions, copyrights, renewals and extensions are owned, controlled or administered, in whole or in part, by any member of Seller or by Seller's Music Publishing Business as of the Closing Date, or from which any member of Seller or Seller's Music Publishing Business receives income, including, but not by way of limitation, the Catalogue listed on Schedule 2 attached hereto. In furtherance of the foregoing, and not by way of limitation, the Compositions also include all musical compositions owned by Seller which were recorded by Robert N Marley (whether alone or in combination with any other artists)."

The parties' contentions

78. For the Claimants, Mr Cuddigan argues that clause 1.8 includes the compositions in Schedule 2 and by way of "sweep up" unknown songs written or recorded by Bob Marley and owned by CMI but not appearing in Schedule 2. It is by reference to sweeping up unknown songs that Mr Cuddigan seeks to avoid what would obviously be the very difficult position of arguing that clause 1.8 is in fact limited to the compositions in Schedule 2. He contends that songs the subject of the Misattribution Ploy were not included in clause 1.8 and invites me to decide that the parties so agreed.
79. For the Defendant, Mr Mill argues that clause 1.8 includes the compositions in Schedule 2 and any other songs in fact written or recorded by Bob Marley and in fact owned by CMI, whether or not known or unknown, and whether their attribution was accurate or inaccurate.

80. Mr Cuddigan advanced 6 main points in support of his approach. The numbering of them changed a little during the trial owing to one of the points being split into two and the pragmatic abandonment of a point based on price which I will mention below. In closing, Mr Cuddigan provided a helpful checklist whose numbering I will use below.
81. Mr Cuddigan's point 1 was referred to as the "elephant in the conference room" and asks rhetorically why No Woman No Cry (as the epitome of the Works, and the most famous and valuable of them) is not mentioned in the March 1992 Agreement.
82. Point 2 relies on the fact that it was common ground that there was still a dispute about the songs including songs which had been the subject of the Misattribution Ploy (and hence the Works), but that there was no language in the March 1992 Agreement to resolve the dispute. This point of course relied on the possibility of CMI reintroducing the matters the subject of the New York Action in some forum with a more generous limitation period, or the matter occurring in some other context where the time which had passed was not a problem.
83. Under point 2, Mr Cuddigan also argued that the factual matrix indicated a deliberate choice to avoid the issue (whereas by contrast, he argues, the New York counterclaim is expressly referenced in Schedule 12).
84. Under point 3 the Claimant asserts that the March 1992 Agreement did not resolve the issue of accrued royalties, it being unlikely, it is said, that the parties intended to resolve ownership of the Works by their assignment to Island, while not addressing past royalties. This bears a little explanation: in the period running up to 1992, royalties had been paid to the Estate for exploitation of the works which, if CMI owned the works, should have gone to it.
85. Under point 4 the Claimant asserts that under the warranty provisions of the March 1992 Agreement there was a natural "home" for the Works in Schedule 8A or 8B, being compositions for which no, or only a restricted

warranty would be given. Yet, the Claimants say, the Works are not there (which is correct) and this is said to indicate that they were not conveyed.

86. In relation to point 5, under the heading “other conflicts” the Claimants argue that had the Works been conveyed by the March 1992 Agreement there would have been additional “Encumbrances” and “Restrictions” under the agreement. As I understood it the “Encumbrance” would have been the New York litigation and/or the underlying dispute to which it related, and the “Restrictions” would have included the songwriter agreements with the misattributed authors of the Works. Their absence is said to indicate that the Works were not conveyed.
87. Point 6 is headed “overarching approach to ownership”. It is said for the Claimants that the parties to the March 1992 Agreement agreed, for the purposes of the agreement only, that the Works as songs the subject of the Misattribution Ploy were not owned by CMI. This was a very subtle argument: it was to the general effect not that the parties agreed that the Works were not actually owned by CMI (which would have obviously adverse implications for the Claimants’ case now) but that the parties adopted a special meaning and scope for ownership in the context of the agreement only.
88. It is essentially by a combination of points one, two and six that the Claimants address the meaning of clause 1.8. Mr Cuddigan argued that rolled into the word “owned” was a meaning incorporating a decision not to address misattributed works at all, and to adopt the special notion of ownership for the purposes of agreement alone, i.e. that for that purpose only CMI did not own the Works.
89. In brief summary, Mr Mill’s responses were as follows:
90. On point 1, he argued that the Works and No Woman No Cry are not omitted but instead deliberately included by the general language of clause 1.8. He agrees that if clause 1.8 had covered Schedule 2 works with a “sweep up” which did not in its terms extend to the Works then he would

be in difficulty, but says that the sweep up is broad and adequate for his argument.

91. On point 2, he disputed that there was a decision, either in fact or in the terms of the agreement, not to address the misattributed songs including the Works. He said that the New York claim was defunct while the counterclaim still existed and this accounted for the latter and not the former being reflected in the March 1992 Agreement.
92. On point 3, he argued that outstanding royalties would indeed pass to Island along with the copyrights in the works by virtue of clauses 1.2 (Accounts Receivable) or 1.22 (which passed to Island the benefit of the 1973 publishing agreement). So, he said, there was no inconsistency.
93. On point 4 he argued that one cannot necessarily infer from the warranties that a seller gives as to what is sold, the full or exact scope of what is in fact sold, and that there might have been a range of reasons for not mentioning the Works in the warranties or Schedules defining them.
94. On point 5 he argued that there would neither be additional Restrictions nor an additional Encumbrance within the meaning of the March 1992 Agreement were his argument on the transfer of the Works to be correct. He said that nothing proposed by Mr Cuddigan would amount to a contractual Restriction preventing exploitation of the Works (in particular the songwriter agreements would not have been thought or expected to be exclusive and there is no evidence that they were), and that the New York claim did not constitute an Encumbrance either.
95. On point 6 he submitted that it added nothing to the earlier points.

Assessment

96. I have no hesitation in rejecting Mr Cuddigan's arguments, tenacious and imaginative though they were. I shall deal with points 1, 2 and 6 together since they are related and are the ones which go to the whole structure of

the Agreement. Points 3, 4 and 5 raise specific points of construction which I can deal with separately. I do not lose sight of the fact that I must assess the agreement as a whole, but I have to deal with the points in some order for the purposes of analysis.

97. What points 1, 2 and 6 have in common is that they assert an agreement between CMI and Island either not to address songs the subject of the Misattribution Ploy, or to treat them as not belonging to CMI even if they did in fact so belong, but only for the purposes of the March 1992 Agreement. But such an agreement is simply nowhere to be found in the language used. That is why I said in dealing with the law that Mr Mill was right to direct my attention to the basic principles in *Chitty*. My task is not to divine what I think from the circumstances the parties are most likely to have agreed and then bend the language to that; it is to interpret the language they chose.
98. For similar reasons, I think Mr Cuddigan's approach is circular. It begins by asserting that the March 1992 Agreement did not cater for No Woman No Cry or the Works generally. But that is the very thing I have to decide. The agreement does not name No Woman No Cry, but that is a different matter. Looking to the language it seems to me very firmly that No Woman No Cry was catered for by means of the general terms in clause 1.8 including in Compositions all that CMI owned that was written or recorded by Bob Marley.
99. In any event, I reject the factual premise of the underlying argument since I think it would have made no sense for the parties to agree not to include songs the subject of the Misattribution Ploy. Island wanted to buy everything it could and CMI's best opportunity to maximise its potential claim over the Misattribution Ploy was with Island. It would have made absolutely no commercial sense for the Works to be in a position of uncertainty with Island having an unnecessarily incomplete catalogue of uncertain scope and CMI retaining the rump of an old claim. For the

parties to agree to leave out the Works without saying so in terms and so maximise future uncertainty seems to me to be little short of ridiculous.

100. Further, the Claimants' arguments as to why the parties might have decided not to address the New York claim were very speculative. For example it was suggested that Mr Sims might still have been smarting from the dismissal of the claim in 1988, but there was no evidence of that at all and it seems very improbable to me.
101. In my view the fact that the New York counterclaim is mentioned while the claim is not is easily accounted for by the fact that the former was still in existence while the latter was not. As a matter of practical reality, I think it is quite understandable that the combined effect of the 1988 dismissal of the claim in New York, the fact that the estate was registered as the owner of the copyrights in the Works, and the 1988 Agreement was that the parties treated the Works and compositions in the same category as belonging to the Estate and therefore in all likelihood about to be transferred to Island once the 1988 Agreement was implemented, so that all that was needed out of an abundance of caution was the very general sweep up of clause 1.8.
102. I would also reject the Claimants' argument on the basis that its ultimate conclusion fits so very poorly with the language of clause 1.8. It will be recalled that the Claimants accept that clause 1.8 includes a sweep up, but say that the effect of it is only to cover "lost" songs. There is nothing at all in the language of clause 1.8 to support this approach in my view. On the contrary clause 1.8 is conspicuously sweeping and general, seeking to catch all compositions written or performed by Bob Marley almost to the point of redundant repetition (I have in mind the last sentence in particular).
103. On point 3 I strongly prefer Island's arguments. If there were accrued royalties then on a natural and sensible reading of clauses 1.2 and/or 1.22 they were also assigned to Island. I return to clause 1.22 below.

104. Point 4 is the one area where I think the Claimants' arguments are somewhat realistic. It would, it seems to me, have been natural for the Works to be acknowledged and included in one of the categories (Schedule 8A or 8B) where CMI's warranties were limited or excluded. However, I think the fact that they were not may also be explained as a result of the parties assuming that such compositions were already in all likelihood in the hands of the Estate (see above). I also think that Mr Mill has a point that the scope of a warranty cannot be used without more to infer exactly what was transferred. Finally, I think that this is a point of very modest weight compared with the other factors at play, and really while it is consistent with the end point of Mr Cuddigan's arguments, it does not drive one in that direction.
105. On point 5 I again prefer Island's arguments. I do not see why a claim which CMI had made against others would be regarded as an Encumbrance on the Acquired Assets – the claim is in the wrong direction. The New York counterclaim is quite different because it was a claim against CMI and so it is addressed in the March 1992 Agreement. I cannot see how songwriter agreements with the misattributed authors would be Restrictions either, since there is no evidence or reason to believe they were exclusive. Non-exclusive songwriter agreements were specifically excluded from the scope of Restrictions.
106. I therefore find for Island on the main issue. The Claimants do not own the copyrights in the Works.
107. There are two matters I should tidy up.
108. First, I must deal with clause 1.22. This has a part to play in the main argument as I have said above. In addition, it was advanced as a separate and free-standing defence because Mr Mill argued that it conveyed to Island the benefit of the 1973 publishing agreement, including "all music publishing rights" pursuant to it. Since on the Claimants' argument the Works were necessarily caught by the 1973 publishing agreement that

would, Mr Mill said, give Island the publishing rights in the Works even if the Claimants were right and CMI kept the copyrights.

109. This point was unconventionally argued in that Mr Mill initially (but wrongly) accepted that it was not pleaded and later corrected himself to say that it was (which Mr Cuddigan then accepted). Despite this unusual turn of events I think I have all the materials which I need to decide the point and I consider that Island is clearly correct about it. It would have made commercial sense for this valuable Marley-related asset of CMI to be included in the overall sale to Island, and it fits with the natural meaning of the language.
110. Second, I think it is right very briefly to record my views about the Claimants' arguments based on price. Mr Cuddigan very sensibly dropped the point following the evidence but it suffused the opening skeleton argument for the Claimants, and parts of the written and oral evidence. So understanding the materials in the case may be assisted if I explain the issue.
111. The point made was in several parts. First, it was said that one could infer from the 1988 Agreement what the value of No Woman No Cry was. Second, it was said that one could then compare that with the total price paid under the March 1992 Agreement. Third, it was said that since the former greatly exceeded the latter, it must be assumed that No Woman No Cry was not included in the scope of the March 1992 Agreement.
112. The evidence was against this argument. First, the 1988 Agreement included many other matters on top of the compositions conveyed – for example the rights to use Bob Marley's name and likeness – so as to make it impossible to attribute a value to No Woman No Cry. Second, the March 1992 Agreement took the value of compositions as part of the negotiating background, but no more than that. The overall amount paid was simply haggled over; it was not a calculation. Third, both the 1988 and March 1992 Agreements had to reflect the uncertainty over ownership of No

Woman No Cry and the Works generally and it cannot be assumed (and is probably not true) that the uncertainty applied to each side equally.

113. In any event and leaving the evidence aside, it is perfectly possible that the Estate struck a good bargain and CMI struck a poor one.

Issue 3 – The Claimants’ restitutionary claim

114. This issue does not arise because of my finding on issue 1. For reasons which will appear shortly I decline to decide aspects of it. In my view I should nonetheless make factual findings in case my decision on issue 1 is overturned on appeal.
115. For the purposes of this part of my judgment I must assume that my decision on issue 1 is wrong.
116. The Claimants assert that a claim in restitution lies in circumstances such as the present where royalties properly owing by X (the copyright collecting body) to C have been paid to D instead. They rely by analogy on *Fisher v. Brooker*.
117. In *Fisher v. Brooker* the claim failed because the claimant had stood by for many years without objection while the defendant received royalties from the collecting societies. See paragraphs 90 to 95 of the judgment of Blackburn J and in particular paragraphs 93 to 94. Mr Cuddigan argued that the facts of the present case are distinguishable and that the Claimants (and CMI before them) did not stand idly by, by reason of the initial assertion of CMI in the New York proceedings.
118. It was implicit in this approach by the present Claimants that had there not been prolonged non-assertion of his rights, Mr Fisher would have succeeded. Island’s opening skeleton for trial rather followed this line, by emphasising what it said was a close factual analogy between the present case and *Fisher v. Brooker*. However, in his oral submissions Mr Mill

challenged whether, even if there had not been a long period of inaction, the Claimants would have had a claim in restitution.

119. Mr Mill was undoubtedly entitled to argue this on the pleadings, and I think he is right to say that Blackburn J in *Fisher v. Brooker* did not find that there was a good claim in restitution but for Mr Fisher's inaction. At the start of paragraph 94 Blackburn J said that he had not been shown any authority supporting the existence of a claim, before going on, as I see it, to say that had there potentially been one it would have failed for lack of any overall injustice to Mr Fisher because of his inaction (see paragraph 95).
120. However, although Mr Mill was entitled to take the point, the consequence of the way the trial unfolded was that the argument on the law was not as complete as it might have been. This, taken with the other matters I am coming to, makes me reluctant to make any finding on the law.
121. Mr Mill for his part relied on Prof Burrows' *Restatement of the English Law of Unjust Enrichment* (1st Ed.). At 8(2)(f) of Part 2 (rephrasing for the present situation and omitting irrelevant material) this provides for a possible claim by C against D where X pays D instead of C, if X was under a legal obligation to pay C but instead paid D, and the payment to D discharged X's obligation to C. That would not assist the present Claimants, since the payment by the collecting societies to Island would not prevent the Claimants making a claim against the societies for either copyright infringement or breach of the societies' obligations to its members (were the Claimants members).
122. In addition, Mr Mill argued that none of the categories of the Restatement defining when enrichment is unjust applied to the present case.
123. Mr Cuddigan responded by arguing that the Restatement is not intended to be absolutely complete but only to identify where claims for unjust enrichment have already been recognised in English law, and by pointing out that this is a developing area of law. In my view he is right about both,

but this only serves to reinforce my view that I should be slow to reach a decision on the limited arguments presented to me.

124. Mr Cuddigan also drew my attention to Goff & Jones' *The Law of Unjust Enrichment* (8th Ed.). At 6-52ff under the heading "Interceptive Subtractions" the authors refer to the C/D/X situation. At 6-56 they suggest that cases of this kind can be explained and justified if the payment by X to D is effective without more to discharge X's liability to C (which is not the present case), or "less clearly" where the law affords C a right to elect to treat the payment by X to D as an act discharging X's debt to C. No authority is cited for the second, "less clear" situation. Mr Cuddigan sought to bring the Claimants within this second situation by saying that his clients would undertake to the Court not to pursue the collecting societies if successful against Island.
125. I very much doubt if this is the kind of election the authors had in mind, and Mr Mill submitted that it was not. He also pointed out that in 6-57 the authors identify that in cases of "interceptive subtraction" it is normally the fact that C is unaware of the diversion to D that justifies restitution, and such does not apply here where it is obvious that the Claimants were fully aware of what was going on from before the May 2008 Agreement under which they claim to have derived their rights.
126. My view is that the Claimants' claim in restitution, if it exists at all, is right at the fringes of a developing part of the law and I do not think it would be right or useful to make a decision about the boundaries of such a claim on the basis of the somewhat incomplete argument I have received, in circumstances where I have already dismissed the Claimants' claim on conventional grounds.
127. However, I believe I should express my view of the facts. There are two things to say here.
128. First, I reject the Claimants' argument that Island's enrichment is unjust based on the original assertion of CMI's claim in New York. That claim

was dismissed in 1988, and by 2008 when the First Claimant claims to have acquired the copyrights in the Works (which for present purposes I assume it did), the original assertion was ancient history. Island had been collecting royalties without objection for many years.

129. Second, even on the assumption that I am wrong about the interpretation of the March 1992 Agreement, I believe that Island had grounds for a reasonable, even if mistaken, belief that it had acquired both ends of the dispute over works the subject of the Misattribution Ploy, and had expended significant amounts of money to do so.

Issue 4 – Licence?

130. Given my findings of fact above, it seems to me that there is no material distinction between the present case and *Fisher v. Brooker*, on the assumption which I must still apply, that I am wrong about ownership of copyright in the Works. In each case there was a long delay on the part of the copyright owner in asserting its rights, during which time it was aware that the copyright collecting societies were paying royalties to the defendant.
131. Therefore, consistently with the decision of Blackburn J in *Fisher v. Brooker*, I would hold that Island had a gratuitous licence to exploit the Works, which was terminated only with the issue of the Claim Form (or alternatively its service – I do not need to decide which).
132. Mr Cuddigan sought to persuade me that, if I reached this point in the analysis and had rejected any factual distinction from *Fisher v. Brooker*, I should depart from it on the basis that Blackburn J was wrong. Mr Cuddigan's argument was that Blackburn J had misunderstood the nature of the infringing acts and the nature of what collecting societies do; he said that it was irrelevant for Blackburn J to have considered that the defendant had a licence when the acts of exploitation which, in the absence of a licence, would infringe were by the collecting societies in authorising

reproduction, and the licensees from the collecting societies in carrying out reproduction of the Works.

133. I would be extremely slow to conclude that Blackburn J, a full-time Chancery Judge with much greater experience than I, was wrong, let alone that he was clearly wrong so that I should depart from his reasoning. But in any event, I consider that he was right and that Mr Cuddigan's criticisms are misplaced. I read paragraph 94 of the judgment in *Fisher v. Brooker* as being to the effect that the defendant Mr Brooker had a gratuitous licence to exploit *A Whiter Shade of Pale* in the way that he had been doing all along. That exploitation involved authorising the acts of the collecting societies, who in turn authorised the commercial organisations which reproduced the song. Absent the licence, all the persons in the chain of exploitation would have infringed. In other words, it was a gratuitous licence with the implied right to sublicense.

Conclusions

134. I therefore conclude that:

- a. The Claimants have no rights in the Works because the copyrights in the Works passed to Island (specifically Island Logic Ltd) under the March 1992 Agreement.
- b. Accordingly, the Claim fails.
- c. It is not appropriate to decide the Claimants' claim in restitution but I make the relevant factual findings above.
- d. Had the Claimants had rights in the copyrights in the Works as they allege, Island would have had a licence down to the date of the Claim Form.

ANNEX A TO THE JUDGMENT

IN THE HIGH COURT OF JUSTICE

Claim no. HC12B01510

CHANCERY DIVISION

INTELLECTUAL PROPERTY

BETWEEN:

(1) BSI ENTERPRISES LIMITED

(2) CAYMAN MUSIC LIMITED

Claimants

and

BLUE MOUNTAIN MUSIC LIMITED

Defendant

AGREED CHRONOLOGY

Date	Event/Document	Bundle Ref
14 June 1968	Publishing Agreement between Johnny Nash Music Inc and Bob Marley	4.1/3/121
11 Oct 1973	Publishing Agreement between CMI and Bob Marley	1/2/13
11 Oct 1973 to 11 Oct 1976	Works in issue composed by Bob Marley	
11 May 1981	Bob Marley dies intestate	
15 October 1984	Complaint in New York Action issued by CMI v Rita Marley (as administratrix of the Estate of Bob Marley), BMML and Island Records Inc & Ors	4.1/1/95
14 January 1988	Judgment dismissing New York Action on limitation grounds	4.1/2A/120.1
27 April 1988	Conditional Agreement between Mutual Security Merchant Bank and Trust Co Ltd (as administrator of the Estate of Bob Marley) and Island Logic Inc	4.1/4/131

20 March 1992	Asset Purchase Agreement between Island Logic Ltd and Cayman Music Inc & Ors	4.1/5/185
	Ancillary Agreement between Vanguard Films and Cayman Music Inc	4.1/5/431
10 September 1992	Sale agreement between Mutual Security Merchant Bank and Trust Co Ltd (as administrator of the Estate of Bob Marley) and Island Logic Ltd & Ors	4.2/6/484
15 May 2006	Judgment in the matter of Aston Barrett and Universal-Island Records Ltd & Ors	6/19/1420
20 May 2008	Agreement between BSI Enterprises Ltd and Cayman Music Inc & Ors	4.2/12/676
1 October 2011	Licence between BSI Enterprises Ltd and Cayman Music Ltd	4.3/16/844
13 April 2012	Claim Form Issued	1/1/1
20 July 2012	Amended Claim Form Issued	1/1/1