



Neutral Citation Number: [2005] EWHC 249 (CH)

Case No: HC04C02405

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 February 2005

Before :

THE HONOURABLE MR. JUSTICE HART

Between :

EXPERIENCE HENDRIX LLC
- and -
(1) PURPLE HAZE RECORDS LTD
(2) LAWRENCE MILLER

Claimant

Defendants

Mr Richard Arnold QC (instructed by **Messrs. Eversheds**) for the Claimant.

Mr Richard Miller QC and Miss Denise McFarland (instructed by Mr Clive Sutton) for the Defendants.

Hearing dates: 27, 28th January 2005

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.

.....
THE HONOURABLE MR. JUSTICE HART

Mr. Justice Hart :

1. This is the claimant's application for summary judgment under CPR 24.2 on its claim for infringement of performer's rights in performances given by the late Jimi Hendrix at the Konserthuset Stockholm Sweden on 9th January 1969 ("the Stockholm Performances"). Although there is no formal admission by the defendants on the pleadings that the Stockholm Performances took place, the proposition that the claimant will be unable to prove that they did is fanciful. They took the form of performances given in two sets by Jimi Hendrix performing together with Mitch Mitchell and Noel Redding as "The Jimi Hendrix Experience". A sound recording and/or film and sound recording of the Stockholm Performances was made by a Swedish broadcasting organisation.
2. At the time the only protection afforded by English law to performers against the unauthorised exploitation of their performances was achieved by the criminal sanctions provided for by the Performers' Protection Acts 1958-1963. Subject to a qualification which it is unnecessary to elaborate (see the decision of the Court of Appeal in *Rickless v. United Artists Corp* [1988] QB 40 and the illuminating discussion of that decision in Arnold, *Performers' Rights*, 3rd Edition at paras 1.64-1.84) a performer had no private law right or remedy in respect of such exploitation. Such a right (and accompanying remedy) was first expressly provided for by the provisions contained in Part II of the Copyright Designs and Patents Act 1988 which had a commencement date of 1st August 1989.
3. On 18th September 1970 Jimi Hendrix died intestate in London. The defence puts the claimant to strict proof of those facts. However, both the date of death and the fact of intestacy are in reality incontrovertible as matters of record.
4. By order of the Surrogate's Court of the County of New York, New York State made on 19 February 1971, Mr Kenneth D Hagood ("the New York Administrator"), was appointed as administrator *de bonis non* of the goods, chattels and credits ("the Estate") of Jimi Hendrix. On 23 January 1973 Mr Alan Leighton-Davis ("the English Administrator") was appointed as administrator of the estate of Jimi Hendrix pursuant to letters of administration granted by the High Court of Justice, Family Division, Principal Probate Registry by virtue of a power of attorney granted by the New York Administrator for this purpose. By an instrument made in New York County, New York State, USA and dated 30 March 1977 the New York Administrator distributed, transferred and set over to Mr James A. Hendrix ("Mr Hendrix"), father of Jimi Hendrix, all right, title and interest in the assets of the Estate. On 13 November 2000 with the consent and at the direction of the New York Administrator and Mr Hendrix, the English Administrator executed a Deed of Assignment and Assent which transferred to the Claimant, *inter alia* "all... the property comprised in [Jimi Hendrix's] estate now vested in or belonging to or under the control of [the English Administrator] as administrator thereof".
5. As already stated, the provisions of Part II of the 1988 Act came into effect on 1st August 1989. These conferred rights on a performer by requiring his consent to the exploitation of his performances (as more particularly set out in sections 181-184) and also on a person having recording rights in relation to recordings made without his consent or that of the performer (as set out in sections 185-188). In relation to the rights conferred on performers the following points should be noted:

i) The rights conferred are conferred retrospectively, s. 180(3) providing that:

“The rights conferred by this Part apply in relation to performances taking place before the commencement of this Part; but no act done before commencement, or in pursuance of arrangements made before commencement, shall be regarded as infringing those rights.”

ii) The rights only subsist in “qualifying performances”, an expression defined in s. 181 by reference to the provisions of s. 206.

iii) The rights were neither assignable nor transmissible save as provided in s. 192(2) to (5). Section 192(2) provided that:

“On the death of a person entitled to performer’s rights:

- (a) the rights pass to such person as he may by testamentary disposition specifically direct, and
- (b) if or to the extent that there is no such direction, the rights are exercisable by his personal representatives.”

iv) The content of the performer’s rights was defined by reference to the acts which infringe. Three categories of infringing acts were specified by, respectively, s. 182, 183 and 184. Section 182 dealt with infringement by the direct or indirect recording of a qualifying performance or the live broadcast of a qualifying performance without the consent of the performer. Section 183 dealt with the use of a recording by a person who knew or had reason to believe that the recording was made without such consent. Section 184 dealt with business dealings in “illicit recordings” where the dealer knew or had reason to believe that the recording was an illicit recording.

v) The rights are quite separate from copyright, section 180(4) providing that:

“The rights conferred by this Part are independent of:

- (a) any copyright in, or moral rights relating to, any work performed or any film or sound recording of, or broadcast or cable programme including, the performance, and
- (b) any other right or obligation arising otherwise than under this Part.”

6. These provisions were substantially amended and expanded by the Copyright and Related Rights Regulations 1996 (SI 1996/2967) (“the 1996 Regulations”) which were made in order to implement, inter alia, Council Directive No. 92/100/EEC of 19th November 1992. The commencement date of the 1996 Regulations was 1st December 1996. A new section 182 was substituted in similar terms to the old section 182 but restricting its ambit to direct recording of a qualifying performance, and direct recording of a broadcast. A new section 182A provided that a performer’s rights were infringed by a person who without his consent made a copy of a recording of a

qualifying performance, and labelled the resulting right “to authorise or prohibit the making of such copies” a “reproduction right”. A new section 182B provided that a performer’s rights were infringed by a person issuing to the public copies of a recording of a qualifying performance without the performer’s consent and labelled the resulting right as a “distribution right”. A new section 182C (with which this case is not concerned) conferred on the performer a “rental right” and a “lending right”; and a new section 182D made provision for a performer to be entitled to equitable remuneration from the owner of the copyright in a sound recording of a qualifying performance when it was played in public or broadcast.

7. A new section 191A declared the rights granted by section 182A, 182B and 182C to be “property rights”, and a new section 191B provided that a performer’s property rights were transmissible “by assignment, by testamentary disposition or by operation of law, as personal or moveable property”. Section 191(B)(3) provided that an assignment of property rights should not be effective unless in writing signed by or on behalf of the assignor.
8. The 1996 Regulations also contained the following provisions material to the arguments in this case:

“26.(1) Subject to anything in regulations 28 to 36 (special transitional provisions and savings), these regulations apply to copyright works made, and to performances given, before or after commencement.

(2) No act done before commencement shall be regarded as an infringement of any new right, or as giving rise to any right to remuneration arising by virtue of these Regulations.

Saving for certain existing agreements

27.(1) Except as otherwise expressly provided, nothing in these Regulations affects an agreement made before 19th November 1992.

(2) No act done in pursuance of any such agreement after commencement shall be regarded as an infringement of any new right.

Special provisions

New rights: exercise of rights in relation to performances

30.(1) Any new right conferred by these Regulations in relation to a qualifying performance is exercisable as from commencement by the performer or (if he has died) by the person who immediately before commencement was entitled by virtue of section 192(2) to exercise the rights conferred on the performer by Part II in relation to that performance.

(2) Any remuneration or damages received by a person's personal representatives by virtue of a right conferred on them by paragraph (1) shall devolve as part of that person's estate as if the right had subsisted and been vested in him immediately before his death.

New rights: effect of pre-commencement authorisation of copying

31. Where before commencement:

- (a) the owner or prospective owner of copyright in a literary, dramatic, musical or artistic work has authorised a person to make a copy of the work, or
- (b) the owner or prospective owner of performers' rights in a performance has authorised a person to make a copy of a recording of the performance,

any new right in relation to that copy shall vest on commencement in the person so authorised, subject to any agreement to the contrary."

- 9. Although it is not admitted in the pleadings, Mr Miller QC on behalf of the defendants did not seek to challenge the proposition that, if the Hendrix Estate ever had any performer's rights in respect of the Stockholm Performances, those rights are now vested in the claimant as a result of the deed of assignment executed by the English administrator on 13th November 2000.
- 10. It is not in issue that the first defendant has made and sold in this country copies of a recording of the Stockholm Performances. It is not suggested that in doing so it had the consent of the claimant or of the Estate. The claimant contends that the Stockholm Performances were qualifying performances and that the first defendant has infringed Jimi Hendrix's performer's rights under s. 182A and 182B. It further contends that the second defendant, as the allegedly controlling mind of the first defendant is also liable in respect of those infringing acts.
- 11. It was submitted on behalf of the defendants that the claimant's case depended on my accepting certain submissions of law on the true construction of the 1988 Act and the 1996 Regulations which did not properly lend themselves to summary determination and that, for that reason alone, I should decline to rule on them at this stage of the proceedings. As to that, I have concluded that the two main points relied on by the defendants ought to be decided before this action proceeds further. The correct answer to them does not depend on the establishment of any facts. It was further submitted that additional points on which the defendants rely can only be determined after a full investigation of the contemporary facts has been conducted. These additional points concern the true construction of an agreement called the Yameta Agreement which is discussed in more detail below. For reasons which appear below, I have concluded that investigation of the exact factual matrix of the Yameta Agreement is unnecessary for the purposes of deciding whether the defendants have a prospect of successfully invoking it as a defence to these proceedings.

Were the performances qualifying performances?

12. The first point taken by the defendants is that the performances were not qualifying performances. Section 181 provides that:

“a performance is a qualifying performance for the purpose of the provisions of this Part relating to performer’s rights if it is given by a qualifying individual (as defined in section 206) or takes place in a qualifying country (as so defined).”

Section 206 provides

“(1) In this Part-

“qualifying country means

(a) the United Kingdom

(b) another Member State of the European Economic Community, or

(c) to the extent that an Order under section 208 so provides, a country designated under that section as enjoying reciprocal protection;

“qualifying individual” means a citizen or subject of, or an individual resident in, a qualifying country....”

13. Sweden joined the EEC on 1st January 1995. Sweden was also designated by an Order in Council made under section 208 (The Performances (Reciprocal Protection) (Convention Countries) (No. 2) Order 1989 which came into force on 1st August 1989, and continued to be so designated in subsequent orders which replaced that order until (in 1999) the view seems to have been taken that it was unnecessary to designate EC members in that way.
14. It was submitted on behalf of the defendants that the relevant date at which the qualification requirements have to be satisfied is the date when the performance in question took place. In support of that submission Mr Miller QC drew my attention to the absence of any transitional provisions in the Orders made under section 208 (contrasting the position of comparable Orders made under section 159 of the 1988 Act in relation to copyright) or of any transitional provisions in the case of countries joining the EU after the commencement date of the 1996 Regulations. Unless the statute is construed as only applying to foreign performances given after the relevant foreign country has become a qualifying country, the effect of that country becoming a qualifying country will be retrospectively to render acts in the UK infringing acts except to the extent that they occurred before 1st August 1989 (the “springing interest” problem).
15. Mr Arnold QC submitted on behalf of the claimant that this approach was irreconcilable with the fact that the 1988 Act expressly provided (by section 180(3)) that it applied to performances taking place before 1st August 1989, and that

Regulation 26(1) similarly provided expressly that the 1996 Regulations applied to performances given before 1st December 1996. Unless retrospective effect was given also to the definition of qualifying country, those provisions were meaningless. It was clear, he submitted, that such retrospectivity applied in relation to the qualifying country identified in section 206(1)(a), namely the United Kingdom: to place a different construction on section 206(1)(b) was unwarranted by the language used, and would involve discrimination on grounds of nationality contrary to Article 12 EC. In connection with the latter submission he referred me to Case C-360/00 *Land Hessen v. G Ricardi & Co.* [2003] EMLR 13. In further support of this submission Mr Arnold also referred me to Article 14.6 of the Agreement on Trade – related Aspects of Intellectual Property Rights (“TRIPS”) dated 15th December 1993 providing that Article 18 of the Berne Convention (1971), should mutatis mutandis apply to performers’ rights, to Article 18 itself, and to the decision of the ECJ in *Schieving-Nijstad VOF v. Groeneveld* [2002] FSR 22 (in support of the proposition that EC Member States should apply national rules not merely so far as possible in conformity with the applicable EC legislation but also as far as possible in conformity with TRIPS). He submitted that the springing interest problem was simply a consequence, admittedly unsatisfactory, of the way in which the Act was drafted.

16. I am unable to accept the submissions made on behalf of the defendants on this short point of construction. Mr Miller QC was constrained to concede that a performance given in the UK prior to 1st August 1989 was a qualifying performance for the purposes of Part II of the Act. I cannot see how it is possible to take a different view in relation to the countries identified by the description in section 206(1)(b) (i.e. Member States of the EEC) or to draw a distinction either between countries which were members as at 1st August 1989 and those who joined after 1st August 1989 and before 1st December 1996, or between the latter and those who joined after 1st December 1996, or between the last mentioned category and countries who may hereafter join. Subject to the theoretical possibility of impugning the validity of Orders made under section 208, the same applies in relation to countries which are, without more, designated under section 206(1)(c). The springing interest problem is simply a consequence of the way in which the Act has been drafted. It is not a problem which calls to be solved in the present case. Whatever the solution may be to it (if there is one), it is not to be found by interpolating an artificial temporal restriction into the definition of a qualifying country. In fact, a partial solution to the problem may exist in s. 191J which provides a defence to an action for infringement with a defence to a damages claim if at the time of the infringement he did not know and had no reason to believe that the rights subsisted in the recording to which the action relates. It is only a partial solution because the section is unclear as to the extent to which a remedy by way of account of profits might nonetheless subsist.
17. Accordingly, the Stockholm Performances were, in my judgment, qualifying performances.

Who was the performer?

18. The next point taken on behalf of the defendants was that the relevant performance, or performances, was or were not by Jimi Hendrix alone but by Jimi Hendrix performing together with Mitch Mitchell and Noel Redding. If the correct analysis of what happened was that the performance(s) were by the three of them acting together as a

group, then (so the argument ran) the Act bestows only a single right on the three of them jointly.

19. Mr Miller QC submitted that the ordinary meaning of the word performance was apt to refer to a single event participated in by more than one person, and relied also on the statutory definition of “performance” in section 180(1) which requires it to be, inter alia, “a live performance given by one or more individuals”. Accordingly, he submitted, if the Stockholm Performances were properly to be seen as performances by the group, as opposed to being performances by Jimi Hendrix alone, the performers’ rights were co-owned by the Estate, Mitch Mitchell and Noel Redding (or their respective estates or assigns) and the present action was not properly constituted. He also relied on the provision in section 191A(4), which was introduced by the 1996 Regulations, which reads as follows:

“(4) Where a performer’s property rights (or any aspect of them) is owned by more than one person jointly, references in this Part to the rights owner are to all the owners, so that, in particular, any requirement of the licence of the rights owner requires the licence of all of them.”

20. Section 191I(1) provides that:

“an infringement of a performer’s property rights is actionable by the rights owner.”

Moreover CPR 19.3 provides:

“(1) Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise.”

21. In my judgment the proposition that an individual who participates in a group performance does not enjoy, in his own individual right, performer’s rights under the 1988 Act, either as originally enacted or as amended, is not sustainable. Section 180(2) does indeed contemplate that a performance may be given by one or more individuals, but the Act proceeds on the basis that each individual performer has the rights conferred by the Act provided that the performance is a qualifying performance or he is a qualifying individual. As Mr Arnold pointed out, the construction urged by the defendants raises insuperable difficulties when considering whether a group performance (some members of the group being qualified individuals and others not and the performance not taking place in a qualifying country) is or is not a qualifying performance.
22. Section 191A(4), far from being inconsistent with, in my judgment supports the claimant’s construction. It is directed to the case where there is joint ownership of rights in a single performer’s performances, a situation made possible by the possibility of transmissibility introduced by the 1996 Regulations. The possibility existed under the original provisions in relation to testamentary dispositions although the statutory solution was somewhat different: see the now repealed section 192(3).

Neither of the provisions points to a performer's rights in a performance given by more than one individual as only being capable of existing as a jointly owned right.

23. Having reached that conclusion I prefer to express no view on the question whether one co-owner of a performer's rights (or performers' rights) may sue in respect of them without joining his co-owners to the action. A respectable body of authority in the analogous field of copyright allowed such an action by a co-owner, and it would be surprising if CPR 19.3 had altered this. On the other hand section 191I, read with section 191(A)(4), appears to contemplate all the owners being parties to the infringement suit at least where the co-ownership is "joint". I do not decide this point.

Are there other potential flaws in the claimant's title to the rights?

24. The remaining arguments on behalf of the defendants are that they have a more than fanciful prospect of persuading the court at trial of one or more of the following propositions:

i) that Jimi Hendrix had in his lifetime either assigned, or agreed to assign, his performer's rights in the Stockholm Performances in such a way as to have prevented the Estate from having been the person entitled to exercise them either under the old section 192(2)(b) or under Regulation 30(1) of the 1996 Regulations ("the assignment argument");

ii) that Jimi Hendrix had in his lifetime authorised a person to make a copy of a recording of the performance so that the reproduction rights and distribution rights vested on 1st December 1996 not in the Estate but in that person ("the Regulation 31 argument");

iii) that the acts of the defendants were done pursuant to an agreement made before 19th November 1992 and therefore cannot be infringing acts ("the Regulation 27 argument");

iv) that the defendants have the benefit of a licence granted by Jimi Hendrix ("the licence argument").

I should add that if the Regulation 27 argument is a sufficiently good one to enable the defendants to avoid a summary judgment, I cannot myself see why it cannot be argued with equal force that the acts have been done "in pursuance of arrangements made before [1st August 1989]" and thus non-infringing by virtue of section 180(3) of the 1988 Act. I do not, however, recall this particular argument as having been made.

The Yameta Agreement

25. Each of these arguments requires a consideration of an agreement made between a Bahamian company Yameta Company Limited ("Yameta") and Jimi Hendrix dated 1st December 1966 ("the Yameta Agreement") in which Yameta was described as "the Manager" and Jimi Hendrix as "the Performer" and which was governed by Bahamian law.

26. The material provisions of the Yameta Agreement were as follows:

“1. THE Performer HEREBY APPOINTS the Manager to render and the Manager agrees to render its services or the services of its employees or servants to use its best endeavours in the promotion and furtherance of the career and interest of the Performer and in the procurement of suitable employment for the Performer in every branch medium and form of the entertainment industry and the Performer agrees to render to the Manager his exclusive services in respect of all activities of the Performer throughout the world in every branch medium and form of the entertainment industry including without prejudice to the generality of the foregoing vaudeville music hall burlesque cinematograph films legitimate theatre television (both live and tele-recording) broadcasting (both live and recorded) and personal appearances of every medium and sort at hotels restaurants clubs schools colleges night clubs one night stands and in all and every other manner in every way connected with the entertainment industry including without prejudice to the generality of anything hereinbefore provided the making of commercial gramophone records and other sound recordings including those for use in synchronisation with cinematograph films or radio or television performances or recordings or tele-recordings as the case may be the writing and publishing of music and lyrics (hereinafter referred to as “the entertainment industry”) for the period of four years (hereinafter called “the period”) from the date hereof subject as hereinafter provided

2. As compensation for the services herein agreed to be rendered the Performer agrees to pay to the Manager a sum equal to 40% of all gross payments made to the Performer excluding gross payments made in respect of recording royalties or publishing under the control of the Manager in respect of the entertainment industry during the period of any extension thereof agreed by the parties hereto.

3. THE Manager may appoint a theatrical agent to act as agent for the Performer and the Manager shall pay such agent as remuneration for such agents service 10% of such of the gross earnings of the Performer received in respect of such engagements as such agent may procure for the Performer and such payment shall be made out of the 40% of such gross earnings which the Manager shall be entitled to and shall be paid hereunder. PROVIDED ALWAYS that the Manager may with the prior consent of the Performer agree to pay an agent more than 10% of the gross income of the Performer received in respect of engagements procured by such agent in which case the excess of such 10% shall be borne by the Performer out of the Performer’s gross income.

4. THE Performer HEREBY WARRANTS:

...

(c) that the Performer will transmit to the Manager all enquiries or offers of employment in any way affecting the Performer in the entertainment industry as herein defined and the Manager agrees to deal with such enquiries or offers in the best interest of the Performer and not to prejudice in any way the Performer's prospects of employment and advancement in the entertainment industry.

....

7. THE Performer will make full and complete disclosure to the Manager of all contracts and professional engagements of every nature during the period or any agreed extension thereof and the Manager will keep full and accurate accounts and records of the Performer's professional engagements and remuneration and all dealings on behalf of the Performer.

...

9. The Performer shall be entitled to four consecutive weeks vacation in addition to the public holidays in the United Kingdom in each year at a time to be approved by the Manager.

10. The Performer shall give such rehearsals of performances as the Manager shall think fit and shall at all times hold himself in readiness to rehearse and shall provide himself with suitable music and instruments to enable himself to rehearse or perform on any engagement and shall at all times dress in a befitting manner and shall conduct himself soberly and shall not do any act matter or thing which may damage his reputation or image.

11. IF the Performer

- (i) shall be convicted of any criminal offence
- (ii) shall be in breach of any of the terms or conditions of this agreement
- (iii) shall fail other than by reason of sickness to honour any contract or agreement made by the Manager of any agent appointed approved or authorised by the Manager

THEN the Manager shall be entitled to determine this Agreement forthwith upon notice in writing determining the

same sent to the Performer PROVIDED THAT prior to the service of any such notice or termination under Clause (8) hereof the Manager will notify Michael Jeffrey of such intention and if Michael Jeffrey notifies the Manager within ten days of receiving such notification he is willing to take an assignment of this agreement from the Manager for a nominal consideration of ten shillings the Manager will procure such assignment shall be granted forthwith and the Performer hereby agrees that upon such assignment he and the Performer will continue to perform and observe all the covenants and agreements on his part to be performed and observed under the terms of this Agreement as if the said Michael Jeffrey had been a party to this Agreement as Manager.

...

13. THE benefit of this agreement shall be assignable by the Manager only in accordance with the provisions of Clause 11 hereof and shall not nor shall any right hereunder be assignable by the Performer.

...”

27. There is considerable dispute between the parties as to the background to the Yameta Agreement and as to the role played by various personalities involved in Jimi Hendrix’s professional life at this period. A bare matter of weeks prior to the conclusion of the Yameta Agreement Jimi Hendrix had entered into a 6-year management agreement dated 11th October 1966 with one Bryan Chandler. The Yameta Agreement envisaged the possibility of its benefits and burdens being assigned to Michael Jeffrey. A letter dated 5th June 1967 from Mr Jeffrey to Yameta authorised Yameta to split the commission owed to Mr Jeffrey between himself and Mr Chandler. All this lends support to the belief that at this period the reality was that Jimi Hendrix was being co-managed by Mr Chandler and Mr Jeffrey, Yameta simply being a corporate vehicle for Mr Jeffrey’s interest. Yameta itself, however, was (so far as the evidence before me goes) owned by another Bahamian company of which a Mr Hillman claims to have been both legal and beneficial owner. Mr Hillman was a Bahamian lawyer. None of this is capable of being resolved on this application for summary judgment.
28. There is also a dispute as to whether or not the Yameta Agreement was still subsisting as at the date of the Stockholm Performances. The claimant has been able to produce a document dated 11th November 1968 apparently made between Yameta, Jeffrey and Chandler in which all Yameta’s interests in various artists including Jimi Hendrix, were terminated and/or assigned to Jeffrey and Chandler. An agreement between Jimi Hendrix and Yameta, presumably being the Yameta Agreement, was referred to as an “employment agreement” and expressly treated as terminated as from 31st December 1967.
29. That agreement appears to bear Mr Hillman’s signature on behalf of Yameta. Without expressly denying the signature, Mr Hillman in his evidence on this

application has disputed the authenticity of this agreement. Although unimpressed by the quality of the evidence relied upon, I cannot resolve this issue on this application.

30. The first defendant contends that it is entitled to rely on the Yameta Agreement by virtue of a resolution of the board of Yameta passed at a meeting held on 5th December 1975 which purports to record that:

“It was resolved that the benefit of outstanding Contracts with Jimi Hendrix (now deceased) and Michael Frank Jeffrey (now deceased) be assigned to Mr. J.A. Hillman in consideration of Mr. Hillman indemnifying the Company in respect thereof.”

Yameta was subsequently struck off the Bahamian register of companies and was dissolved. A subsequent attempt to restore it to the register failed. By a licence dated 21st October 2003 made between Mr Hillman and the first defendant, which recited Mr Hillman’s belief as to his entitlement to enter into the licence, Mr Hillman licensed the first defendant to manufacture publish and distribute sound recordings of the Stockholm Performances “for the unexpired period of the Licensor’s copyrights”.

31. The case presented on behalf of the defendants was, in essence, that by the Yameta Agreement, Jimi Hendrix had so committed himself to Yameta that Yameta had become entitled either in law or in equity to all rights appertaining to performances by Jimi Hendrix. Such rights would have included all copyrights in original works produced by Jimi Hendrix during the currency of the Yameta Agreement and extended to rights, such as performer’s rights, which were not known to the law at the date of the Yameta Agreement. This result was said to obtain either from the fact that the Yameta Agreement was on its true construction a contract of employment (with the result that such copyrights were owned by Yameta by virtue of section 4(4) of the Copyright Act 1956 and that copyrights in recordings commissioned by Yameta were owned by Yameta by virtue of section 12(4) of the 1956 Act), or that a term should be implied in the Yameta Agreement which precluded Jimi Hendrix (or his estate) from doing any act which would frustrate Yameta in the exercise of its function under the Yameta Agreement of achieving the fullest possible commercial exploitation of Jimi Hendrix’s services rendered during its currency.
32. In my judgment there is a very short answer to this way of putting the defendants’ case. True it is that by the Yameta Agreement Jimi Hendrix in a sense delivered himself “body and soul” to Yameta for its duration. But the purpose of his so subjecting himself was to enable, and entitle, Yameta to fulfil its contractual role and duty of promoting and furthering his “career and interest”, and for that purpose of finding suitable employment for him. What Yameta got from this agreement was not the intellectual property rights which were generated by Jimi Hendrix but, by Clause 2, 40% of “all gross payments made to the Performer excluding gross payments made in respect of recording royalties or publishing under the control of the Manager in respect of the entertainment industry”. The agreement was no doubt wide enough to allow Yameta to require Jimi Hendrix to enter into, for example, recording contracts, and wide enough to allow Yameta to enter into such contracts on his behalf. What it plainly did not do is entitle Yameta to sell his services to third parties and pocket 100% of the proceeds for itself. A construction of the agreement which permitted that would be quite incompatible with the express provision for Yameta’s compensation to

come from gross payments made to Jimi Hendrix. Yameta's role under the agreement was plainly that of agent for and manager of Jimi Hendrix and not as his employer.

33. Clause 12 of the agreement was relied on by Mr Miller QC as in some way supporting his contrary argument. However, clause 12 appears to me to be wholly consistent with what I regard as the only possible construction of the agreement. It tells one that, even after the termination of the agreement, Jimi Hendrix is to continue to be liable to pay the 40% commission on "the gross income of the Performer in respect of any engagement in the entertainment industry entered into by the Performer during the currency of this agreement". How that is compatible with the assertion that the agreement somehow entitles Yameta to claim 100% of the benefit of a notional and proleptic assignment of performer's rights completely escapes me. It only works if Jimi Hendrix is entitled to income in respect of the engagement and is obliged to pay Yameta a commission out of that income.
34. For these reasons in my judgment none of the arguments listed in paragraph 23 above has any prospect of succeeding at trial. The assignment argument fails because the Yameta Agreement on its true construction contains no assignment of, or agreement to assign, the relevant rights, and it is unnecessary to give the agreement business efficacy to imply a term to that effect. It is unnecessary therefore for me to consider the effect of clause 13 of the Yameta Agreement, although as at present advised it appears to me to place a fundamental obstacle in the defendants' way: see *Linden Garden Trust Ltd v. Linesta Sludge Disposals Ltd* [1994] 1 AC 85. The Regulation 31 argument fails because the Yameta Agreement did not authorise Yameta to make a copy (for its own as opposed to Jimi Hendrix's benefit) of the Stockholm Performances. I find it unnecessary to decide for this purpose the interesting questions which were argued before me, first, as to whether the reproduction right was a "new right" for Regulation 31 purposes as opposed simply to a right "corresponding" to the original section 183 right (see the definition in Regulation 25(3)), and, secondly, as to whether the copies referred to in Regulation 31 are restricted to copies made before commencement. The Regulation 27 argument fails because the defendants acts were not done pursuant to the Yameta Agreement: nothing in that agreement authorised it to exploit for its own sole benefit the fruits of engagements which it had procured for Jimi Hendrix. The licence argument similarly fails. Doubtless it was open to Yameta to give a relevant consent to a third party which would have subsequently precluded an action for infringement against the third party. But such consent would have been given on Jimi Hendrix's behalf. Nothing in the Yameta Agreement entitled it to grant such a consent to itself.
35. Accordingly, the first defendant has, in my judgment, no realistic prospect of successfully defending this action and I can see no other reason why it ought to go to trial.
36. The case against the second defendant raises questions of a quite different kind. The particulars of claim allege against him that he:

"indirectly owns and controls the First Defendant and takes all decisions of any consequence on its behalf. The Second Defendant personally arranged for the making and issuing to the public of the Infringing Discs. In the alternative, if the

Second Defendant did not do the said acts personally, he took the decision that they should be done by others.”

That pleading was verified by a statement of belief as to its truth made by a Mr Houston Reed Wasson, an in-house lawyer of the claimant. The Amended Defence condescends no further than not to admit:

“the alleged facts and actions on the part of the Second Defendant which the Claimant relies upon as giving rise to allegations of joint liability.”

37. Evidence in support of the allegation for the purposes of the summary judgment application was given by Patrick John Gardiner a solicitor employed by the claimant’s solicitors, Eversheds. He states his belief that the second defendant is the controlling mind of the first defendant, and exhibits a number of letters from the first defendant all of which are signed by the second defendant on its behalf. The second defendant does not deal with the allegation in his witness statement dated 20th January 2005, although he does there refer to the first defendant as “my company”. That is entirely consistent with the exhibited letters (amongst them letters to President Bush, Lord Goldsmith and Sir John Stevens) where the second defendant writes in the first person as if he were the first defendant.
38. The circumstances in which a director or member of a company may be held liable with the company as a joint tortfeasor have been identified in a number of authorities of which the most recent is the decision of the Court of Appeal (Brown, Chadwick and Tuckey LJJ) in *MCA Records Inc. v. Charly Records* [2002] EMLR 1. In that case Chadwick LJ, after noting that there was a balance to be struck in each case and echoing earlier judicial statements as to the elusive nature of the question, held:

“49 First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company—that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company—for example by voting at general meetings and by exercising the powers to appoint directors. Aldous L.J. suggested, in *Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2)* [2000] 1 Lloyd’s Rep. 218 at 235—in a passage to which I have referred—that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word “never” in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its

constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort, as Aldous L.J. recognised at paragraphs 16 and 17 of his judgment in the *Pakistan National Shipping* case.

50 Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control. As I have said, it seems to me that this is the point made by Aldous J. (as he then was) in *PGL Research Ltd v. Ardon International Ltd* [1993] F.S.R. 197.

51 Third, the question whether the individual is liable with the company as a joint tortfeasor—at least in the field of intellectual property—is to be determined under principles identified in *CBS Songs Ltd v. Amstrad Consumer Electronics plc* [1988] A.C. 1013 and *Unilever plc v. Gillette (U.K.) Ltd* [1989] R.P.C. 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v. Amstrad* at page 1058E to which I have already referred, the individual “intends and procures and shares a common design that the infringement takes place”.

52 Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does “intend, procure and share a common design” that the infringement should take place may be liable as a joint tortfeasor. As Mustill L.J. pointed out in *Unilever v. Gillette*, procurement may lead to a common design and so give rise to liability under both heads. ”

39. The plea in paragraph 10 of the Particulars of Claim, if proved, is in my judgment sufficient to support a finding of personal liability under these principles. The second

sentence in particular fits Chadwick LJ's second proposition. The second defendant's decision simply to put the claimant to proof of the allegation and to decline the opportunity presented by this application to controvert it by evidence permits, if it does not compel, the inference that the allegation is true despite the absence of any direct evidence in its support. There is nothing before me to suggest that the second defendant's stance at trial will be different.

40. Accordingly the claimant is entitled to summary judgment against both defendants.