



Neutral Citation Number: [2008] EWCA Civ 287

Case No: A2/2007/0157

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY
MR JUSTICE BLACKBURNE
HC05CO1374

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2008

Before :

LORD JUSTICE MUMMERY
MR JUSTICE DAVID RICHARDS
and
SIR PAUL KENNEDY

Between :

(1) GARY BROOKER
(2) ONWARD MUSIC LIMITED
- and -
MATTHEW FISHER

Appellants

Respondent

MR JOHN BALDWIN QC and MS JESSIE BOWHILL (instructed by Harbottle & Lewis
LLP) for the Appellants
MR IAIN PURVIS QC and MR HUGO CUDDIGAN (instructed by Jens Hills & Co) for
the Respondent

Hearing dates : 3rd & 4th October 2007

Judgment

LORD JUSTICE MUMMERY:

Introductory summary

1. “A Whiter Shade of Pale” is placed high in lists of the greatest songs of all time. Procol Harum’s record in May 1967 was an instant smash hit. Sales ran into millions. The musically literate judge, who tried this case, knew it. He held that the song had achieved cult status. There are over 770 versions of it. The introductory bars are used as mobile phone ring tones. The melody would even strike a chord with an unworldly judge in its echoes of JS Bach, *Wachet Auf* and the second movement of his Keyboard Concerto No 5 in F Minor.
2. Who wrote the music? Who owns the copyright? These are the questions in the case. Since it first entered the charts 40 years ago “A Whiter Shade of Pale” has been exploited on the basis that Gary Brooker wrote the music and that the publishing and record company, to which he sold the rights, and its successor possessed and controlled the copyright. The registrations with the societies responsible for the collection of copyright royalties for performing rights and mechanical recording rights and the payments and distributions of royalties and fees have been made on the same shared and uncontested understanding.
3. On 31 May 2005 Matthew Fisher, who was a member of Procol Harum between 1967 and 1969, started this case against Gary Brooker and Onward Music Limited (the defendants). He claimed that he composed a significant part of the music, as recorded by the band in May 1967. A letter of 19 March 2004 from his solicitor to Gary Brooker’s manager, Chris Cooke, mentioning a “writer’s share” was followed a year later by his first clear assertion of a legal claim in the letter sent by his present solicitors to Gary Brooker on 14 April 2005. In the 38 years after the issue of the record Matthew Fisher played no part and had no say in the exploitation of the copyright in the music. He neither claimed nor received payment of any royalties earned from it. In the action he did not claim damages or an account of profits from the defendants for infringement of copyright by unauthorised use of the music before the commencement of the action. He confined his claim to declarations of the court as to his contribution to the music on the 1967 record, his joint interest in the copyright and the size of his copyright share. At the trial questions also arose about an implied licence for past exploitation by the defendants and the need to obtain his prior consent for exploitation after 31 May 2005. He made an unsuccessful application for an injunction.
4. The claims largely succeeded in the court below. The defendants appeal from an order of 20 December 2006 in which, after a six day trial, Blackburne J made a series of declarations to the effect that (1) Matthew Fisher is the co-author of the music of “A Whiter Shade of Pale”, as recorded by Procol Harum and released as a single on 12 May 1967 (the Work); (2) he is a joint owner of the musical copyright in the Work, his share being assessed at 40% ; and (3) the licence of the defendants to exploit the Work was revoked on 31 May 2005 (i.e. 38 years after the initial release of the record.) Although declaration (3) was not claimed in the action, an agreement was apparently reached between counsel after judgment that a declaration should be included in the order to reflect the judge’s decision on the points of implied licence and revocation.

5. The judge ordered an enquiry as to damages in relation to the exploitation and licensing of the Work subsequent to 31 May 2005. He dismissed a restitutionary claim for past royalties on the ground of implied licence. He refused to grant an injunction against the defendants restraining future exploitation on the ground of absence of a threat to infringe his copyright. No cross appeal has been brought against the dismissal of the restitutionary claim and of the injunction application. The judge ordered the defendants to pay 90% of the costs of the action.
6. The judge gave two reasons for granting permission to appeal: (a) the unusual nature of the claim (i.e. one brought nearly four decades following the events giving rise to the claim and without having made a claim in the intervening period to be acknowledged as a joint author, which the judge thought was “quite extraordinary”); and (b) the insistence of the defeated defendants that the decision would have a widespread and dire effect on the way that the music industry has operated in the past.

Issues in appeal

7. There are four main issues in the appeal. The first two are by far the most important to the parties and generally.
8. First, excessive and inexcusable delay. The defendants failed on their equitable defences of acquiescence, laches, delay and proprietary estoppel, and in their related contentions that the passage of time had made a fair trial impossible and ought to disqualify Matthew Fisher from any discretionary declaratory or equitable relief.
9. Secondly, implied assignment of the copyright in the Work as an arrangement. This issue centred on the point that the music, as performed and recorded by Procol Harum in May 1967, was an authorised arrangement of music previously composed by Gary Brooker on his own, recorded by him on a demonstration tape (a demo) and assigned by him to Essex Music Limited (Essex Music, the predecessor in title of the defendant Onward Music Limited) on 7 March 1967. This happened before Matthew Fisher could have made any contribution to the composition of the Work. Matthew Fisher does not claim any rights in music composed before he joined Procol Harum. His claim is to a joint interest in the copyright in the Work as an arrangement of the music previously composed by Gary Brooker. The arrangement was improvised during the course of the band’s rehearsals for the record released on 12 May 1967.
10. The judge held that the pre-existence of Gary Brooker’s music on the demo tape did not provide the defendants with a defence to Matthew Fisher’s claim that his subsequent contribution resulted in a jointly owned arrangement of Gary Brooker’s original music. The judge held that the arrangement was a separate copyright work, in which Matthew Fisher had a joint interest with the defendants. His share was assessed at 40%. Blackburne J rejected the contention that Matthew Fisher had made an assignment, express or implied, of his joint interest in the copyright in the arrangement to Essex Music. Instead, he held that the defendants had an implied licence to exploit Matthew Fisher’s interest in the copyright in the arrangement until the licence was terminated by him with effect from 31 May 2005.
11. Thirdly, the Recording Contract. This issue arises on the construction of a Recording Contract dated 16 May 1967 made between the members of Procol Harum and Essex

Music. The judge held that the Recording Contract was irrelevant to Matthew Fisher's copyright claim.

12. Fourthly, unfairness. This issue is directed to the alleged unfair consequences of the judge's order. The judge held that no unfairness grounds existed for denying the declarations claimed.

Outline facts

13. Gary Brooker was composing music in the mid-1960s. He was introduced to his future collaborator, Keith Reid, by a mutual friend, Gary Stevens, in about the middle of 1966. Keith Reid wrote the words for their songs. Gary Brooker wrote the music.
14. In early 1967 they decided, in conjunction with Gary Stevens as project adviser, to form a band to play their songs. On 28 January 1967 they placed an advertisement in the "Melody Maker" magazine - "lead guitar, organist, bass wanted for new project." On 25 February 1967 Matthew Fisher placed an advertisement in "Melody Maker"- "Hammond Organist, harmony vocals, seeks pro. group."
15. Procol Harum (the band's choice of name, inspired by the pedigree of a friend's cat) was formed. Gary Brooker was lead singer and pianist; Dave Knights, bass player; Ray Royer, guitarist; and Matthew Fisher, organist. A session drummer, Bill Eyden, was used for the recording sessions. A Management Agreement was made between the band and New Breed Management Limited (New Breed). It had no bearing on the copyright position.
16. Earlier in 1967 Gary Brooker had composed the music of "A Whiter Shade of Pale" around lyrics written by Keith Reid. From this point on I shall use the same definitions as were used by Blackburne J in his excellent judgment. The combined words written by Keith Reid and the music originally composed by Gary Brooker for "A Whiter Shade of Pale" will be called "the Song." This is to distinguish the Song from the arrangement of it performed by the band on the record, which Mr Fisher claims included his unacknowledged contribution to the arrangement of the music. The arrangement of the Song on the record will be called "the Work." This dispute is about the authorship of the Work, the ownership of the copyright in it and the exploitation of the copyright and entitlement to royalties earned after 31 May 2005.
17. Gary Brooker made a demo tape of the Song with his vocals and piano accompaniment. Keith Reid took the demo tape to David Platz of Essex Music, who considered it to be a "certain hit."
18. On 7 March 1967 Gary Brooker and Keith Reid executed a written assignment of the copyright in the Song (and another song) to Essex Music Limited (Essex Music) in return for 50% of the publishing royalties and fees received from sheet music, and of mechanical royalties, synchronisation fees, performance fees and broadcasting fees. The rights acquired by Essex Music in the Song and in the sound recording of the Work were subsequently vested with effect from December 1991 in Onward Music Limited (Onward Music), the second defendant. Onward Music also owns the rights in the master recording, as released in May 1967, and the rights under the New Breed Agreement.

19. Registrations were duly made with the Performing Right Society (PRS) on 17 March 1967 and, at about the same time, with the Mechanical Copyright Protection Society (MCPS). The registrations did not mention Matthew Fisher.
20. It is not disputed that the Song and the copyright in its words and music came into existence and were assigned to Essex Music before Matthew Fisher participated as a Hammond organist in the band's performances. After he joined the band there were rehearsals of performances of the Song. In the course of the rehearsals improvised changes were made to the Song: the words were shortened from 4 verses to 2 and the instrumental sections were all played by Matthew Fisher on the Hammond organ, instead of alternately on organ and piano. The single issued on 12 May 1967 was a recording of a performance by the band in a recording studio made several weeks earlier. On 16 May 1967 a Recording Contract was made between Essex Music, New Breed and the members of Procol Harum.
21. In August 1969 Matthew Fisher left Procol Harum. The band's partnership was dissolved on the basis that Matthew Fisher should no longer be legally responsible for the debts incurred by the band (about \$60,000). He released generally his entitlement to record royalties in relation to various works, but the release did not cover his entitlement to a share of the copyright or to publishing royalties in his compositions. He did not notify Gary Brooker or Essex Music of any claim to an interest in the copyright in the Work or to royalties earned by the exploitation of it.
22. The essence of Mr Fisher's claim, which was first made in clear terms to Gary Brooker in a solicitor's letter in April 2005, is that he became a joint author of the Work and joint owner of the copyright in it by composing the distinctive 8 bar melody of the organ solo, including the variation during its second repetition. The judge agreed with the description of the organ solo as "significant and as hugely famous." He found that Matthew Fisher's organ solo is

"11.a distinctive and significant contribution to the overall composition and, quite obviously, the product of skill and labour on the part of the person who created it."

Blackburne J's judgment: overview

23. The judgment contains a full and careful statement of the issues, a detailed summary of the evidence, clear findings of fact and a summary of the relevant law. Blackburne J reached firm conclusions on the following points.
24. On the issue of authorship, he held that Matthew Fisher's contribution to composition, including the organ solo, entitled him to claim joint authorship of the Work and to a joint interest in the copyright. He said

"42. Reviewing the evidence as a whole, it is abundantly clear to me that Mr Fisher's instrumental introduction (i.e. the organ solo as heard in the first eight bars of the Work and as repeated) is sufficiently different from what Mr Brooker had composed on the piano to qualify in law, and by a wide margin, as an original contribution to the Work. The result in law is that Mr Fisher qualifies to be regarded as a joint author of the Work and,

subject to the points to which I shall next turn, to share in the ownership of the musical copyright in it.”

25. On the issue of an implied assignment of the copyright in the arrangement, he held that Matthew Fisher’s copyright interest in the Work was not defeated by the existence of the prior copyright in the Song, which vested successively in Gary Brooker, Essex Music and Onward Music. In particular, his claim was not defeated by an express or implied assignment to Essex Music of the copyright in the Work as an arrangement of the Song authorised by Essex Music.
26. As for the Recording Contract, he held that the terms of the Recording Contract did not affect Matthew Fisher’s interest in the Work. It was simply irrelevant to his rights.
27. Contrary to the defendants’ contentions he held that it was possible to have a fair trial of the case, even though many years had passed since the events of 1967 when the Work was composed.
28. The judge dealt with the defences based on acquiescence, laches, delay and proprietary estoppel together. He examined 5 particular aspects of the evidence highlighted by Mr Andrew Sutcliffe QC, who was the defendants’ leading counsel at the trial: (i) the failure of Matthew Fisher to assert his claim before the record was released in May 1967; (ii) his decision in early summer 1967 not to pursue his claim, but to remain with Procol Harum and to benefit from membership of the band; (iii) the circumstances in which he left Procol Harum in August 1969; (iv) Gary Brooker’s efforts in promoting Procol Harum’s repertoire, including the Work, and in keeping it in the public eye for nearly 40 years; and (v) Matthew Fisher’s long delay in asserting his claims.
29. The judge concluded that the delay defences did not defeat Matthew Fisher’s copyright claim. It will be necessary to consider in more detail below the law and the facts relating to the delay defences in the context of the judge’s reasons for granting the three declarations as to co-authorship, joint ownership and revocation of implied licence.
30. Delay did not, the judge held, disentitle Matthew Fisher to the discretionary declaratory relief about his co-authorship of the Work and to a joint interest in the copyright in it and revocation of implied licence. The declarations would put beyond doubt his property copyright interest in the Work, which still had many years to run. This would enable him to vindicate and enforce his rights in the future. The judge held, however, that it was premature to grant the application for injunctive relief, as there was no evidence of an intention on the part of the defendants to exploit the Work in defiance of Matthew Fisher’s interest in it.
31. No restitutionary right based on unjust enrichment was, the judge held, established against the defendants in respect of a share of the royalties received by them prior to the letters before action, in particular a claim to a share of the monies received by the defendants as registered owners with the two collecting societies in the 6 years before the issue of the proceedings. Matthew Fisher’s right to share in the royalties only arose from the issue of the claim on 31 May 2005. The judge pointed out that

“Mr Fisher sat back and permitted the two societies to account to the defendants for royalties in respect of the musical copyright in the Work for nearly 40 years.”

32. He may have been unaware of his legal rights, but the collecting societies had no knowledge of his claims. They had no option but to account to the defendants in the way that they did. As for the defendants, they “had no reason to think that they were not entitled to the payments they received.” The judge held that Matthew Fisher “must be taken to have gratuitously licensed the exploitation of his copyright” and the implied licence continued until it was revoked, which came about in the case of Gary Brooker when he was sent a letter before action in April 2005 and, in the case of Onward Music, when it was notified of the claim in May 2005. It is agreed that the revocation of the implied licence did not operate as a revocation of the 1967 Agreement between Gary Brooker and Essex Music and the copyright assignments made in it. Matthew Fisher was not a party to that agreement or to the express assignments made by it. The revocation did, however, terminate the implied licence of the defendants’ exploitation of the Work. This meant that, after termination, unless the defendants obtained the prior consent of Matthew Fisher to the exploitation of the Work by third parties, they were liable for infringement of copyright and to an injunction against infringing it. It was, however, made clear to this court by Mr Ian Purvis QC, who appeared for Matthew Fisher, that he had no wish to interfere with the continued collection of royalties by the PRS or the MCPS, though he did wish to be paid his proper writer’s share of the royalties in future.
33. As to the quantum of Matthew Fisher’s copyright interest in the Work, the judge held that this should be reflected by according him a 40% share in the musical copyright. He had claimed a 50% interest against which the defendants had not advanced a positive case. Recognising that the question was ultimately a highly subjective one, the judge held that, although Matthew Fisher’s contribution to the overall work was a substantial one, it was not as substantial as that of Gary Brooker.

Basic copyright points

34. It is worth noting and explaining a few basic copyright law points at this stage. They may help dispel a degree of confusion that has crept into the discussions of some aspects of this extremely unusual case.
- (1) The case is essentially about title to copyright with an eye to control of the copyright in the future. This is unusual. Most copyright cases are about claims for compensation for past infringements of copyright and for injunctions preventing repetitions of infringements. The claim here is for declarations of rights in relation to a copyright that will not expire until much later this century. The declaratory nature of the relief sought and granted explains why the claims are not statute barred under the Limitation Acts of 1939 and 1980. It is common ground that the provisions of the Limitation Acts do not bar the declaratory relief claimed by Matthew Fisher. It is also common ground that, although the Copyright, Designs and Patents Act 1988 (the 1988 Act), like its predecessor the Copyright Act 1956, is silent on the question, the equitable defences of acquiescence, laches, delay and proprietary estoppel are potentially available to the defendants as grounds entitling

the court to refuse to grant relief. It is clear that the declarations sought are not simply to establish the existence of Matthew Fisher's attribution and property rights. The declarations are the foundation for enforcement by the more drastic equitable remedy of an injunction restraining the defendants' future unauthorised exploitation of the Work, save on agreed terms.

- (2) It is accepted by Matthew Fisher that the exploitation of the copyright in the Work in the period 1967 to 2005 did not infringe his copyright, as the defendants exploited the Work with his consent. There was an implied licence. He knew about the defendants' activities, but made no objection to them. Copyright is not infringed if the act restricted by the copyright is done with the licence of the copyright owner: section 16 (2) of the 1988 Act reproducing similar provisions in the Copyright Act 1956, which were in force for part of the relevant period. The licence may be in writing. It may be oral. It can be implied from conduct. It may be for a consideration or gratuitous, exclusive or non-exclusive, revocable or irrevocable, of limited duration and ambit or for the full term of copyright and embrace the entirety of its statutory scope.
- (3) Copyright subsists as "a property right": section 1(1) of the 1988 Act. In an action for infringement all such relief by way of damages, injunctions, accounts or otherwise is available to the claimant as is available in respect of the infringement of any other property right: section 96(2) of the 1988 Act. Although the damages may be assessed by reference to the royalties which the copyright owner would have obtained under a hypothetical contractual licence, the copyright and damages awarded for infringement are distinct from royalties and fees earned by exploitation of the copyright under contractual licence terms. In general, there is no statutory right to the payment of royalties. Royalties are usually the consideration payable under a contract made between the copyright owner and the person who wishes to exploit one or more of the rights comprised in the copyright in a work.
- (4) These distinctions between property rights and contractual rights are particularly relevant in this case, as the legal and practical consequences of the three declarations granted by the judge have not been explored by the judge or by the parties as fully as they could have been: for example, the purpose of the declaration of a joint interest in the copyright and of revocation of the implied licence in relation to Matthew Fisher's future control, by means of an injunction, over its exploitation by the defendants.
- (5) Copyright law distinguishes between different descriptions of work in which copyright subsists: between, for example, a musical work and a sound recording of a musical work: section 1(1), 3(1) and 5(1) of the 1988 Act. Both works are distinct from each other and also from performers' property rights in a performance of a musical work, which may itself be recorded: see Part II of the 1988 Act. This case is about title to the Work as a musical work. It is not about title to the Song, to

the sound recordings of the Work, or to the rights of Procol Harum in their performances of the Work.

- (6) Copyright law also distinguishes between an original work, in which copyright may subsist, and an original adaptation or version of that work, in which a separate copyright may also subsist. There can be copyright in an original work created by A and a separate copyright in an adaptation or version of A's work created by B. Obvious examples are translations of literary and dramatic works and arrangements or transcriptions of musical works. In cases of contested title the different copyright works and the separate copyrights in them must be clearly distinguished from one another. Thus, in this case the copyright in the music of the Song was originally vested in Gary Brooker, as the creator of it, then assigned by him to Essex Music before the Work was improvised and later assigned to Onward Music. The Work, to which Matthew Fisher made creative contributions during the rehearsals of the band's performances, is a copy of a substantial part of the music of the Song. If made without the express or implied consent of Essex Music, it would have been an infringement of Essex Music's copyright in the music of the Song. It could at the same time, whether it was authorised or not, itself be a copyright arrangement of the Song.
- (7) As explained above, the consequence of express or implied consent by the copyright owner is that there is no infringement of the copyright. Thus, as Matthew Fisher consented to the 1967 recording of the Work in which he participated, there was no infringement of his copyright in the Work in the making or exploitation of the record by the defendants. At the very least Essex Music had Matthew Fisher's implied consent to make the sound recording of the Work and to publish and issue the record of the sound recording that included the Work as performed by the band.
- (8) By virtue of improvised changes made to the music of the Song during the course of the rehearsals, an arrangement of Gary Brooker's music of the Song was created and a separate copyright in the arrangement came into being. The key question on title to the Work is who, in the circumstances of the arrangement of the music of the Song, became entitled to exploit the copyright in it. Was it the maker(s) of the arrangement? Or was it the owner of the copyright in the underlying Song with whose consent the arrangement was made? The resolution of this issue requires a careful examination of all the circumstances in which improvised changes were made to the music of the Song during the band's rehearsals in 1967.

Issues: discussion and conclusions

A. Delay

35. Matthew Fisher's extreme delay in making his claim and in bringing the proceedings is the most striking feature of the case. The delay provided the defendants with various legal arguments grounds for objecting to the court granting him any relief.

(1) Impossibility of a fair trial

36. The main objection was that, with the passing of nearly 40 years since the composition of the Work, it was no longer possible to have a fair trial on the contested question of joint composition of the Work. After discussing this submission in detail in the light of the evidence that he had heard, the judge rejected it. Mr John Baldwin QC, who now appears for the defendants, submitted that the judge failed to have proper or sufficient regard to a number of matters that should have led him to hold that it was impossible to have a fair trial of the case. In short, it was unfair that the defendants should be called upon, at this remote distance of time from the relevant events, to answer a claim brought by a person guilty of excessive and inexcusable delay.
37. Mr Baldwin forcefully submitted that, on the all-important question of reliable evidence about the circumstances in which the Work was created, the defendants were seriously prejudiced by delay in notifying the claim. This gave rise to obvious difficulties in adducing evidence to rebut the claim. He cited **Barrett v. Universal-Island Records Ltd** [2006] EMLR 567 at 629 paragraph 205. By the time the claim was notified vital evidence in rebuttal was no longer available. Gary Brooker's demo tape of the Song delivered to Essex Music in March 1967 has been lost or destroyed. Key witnesses have died: David Platz of Essex Music, who heard the recording of the song made by Gary Brooker in March 1967, died in 1994; Guy Stevens could, if the claim had been made earlier, have given evidence about the rehearsals in 1967, but he died in 1981; Denny Cordell, the producer of the 1967 recording of the band performing the Work, died in 1995. As for the members of the band, Ray Royer could not be located and Dave Knights had no recollection of what happened in rehearsals in 1967. The recollection of Gary Brooker and Keith Reid, who gave evidence, had dimmed over time.
38. The lapse of time and the evidential problems flowing from it meant that it was impossible for the judge to make safe findings of fact in 2007 about what had happened in the rehearsal and creative processes in 1967. It was patently unfair to allow a claimant to bring a claim after such a long delay. The judge should have declined to make any findings of fact in his favour.
39. Mr Baldwin's submission might have stood a better chance of success had it been made before the trial, for example on an application to strike out the proceedings as an abuse of the process of the court. Such an application could have been made along the lines similar to those that were made pre-CPR under the inherent jurisdiction of the court to dismiss proceedings for want of prosecution on the grounds of inordinate and inexcusable delay, substantial risk that it would not be possible to have a fair trial and the likelihood of serious prejudice to the defendant (see **Birkett v. James** [1978] AC 297).
40. I agree with the judge that, quite apart from the grounds for disallowing a claim or denying relief on the ground of delay, the court, in appropriate circumstances, has power to dismiss proceedings where the passage of time makes it impossible to have a fair trial of the case. In extreme cases it could be an abuse of process for the proceedings to be brought at all. Mr Purvis did not dispute the jurisdiction, but submitted that this was not such a case.

41. The submission that a fair trial was impossible was made after the judge had heard all the evidence. He identified the key issue of fact affected by the delay as who composed the distinctive eight bar melody of the organ solo, including the variation during its second repetition. On that issue there were only two contenders: Matthew Fisher and Gary Brooker. He regarded both as honest witnesses, who could well recall the roles that each had played in the process of composition of the Work and the distinctive organ solo. The other possible witnesses, who were no longer available, would not have been in a position to add much nor could the demo tape, which had disappeared, possibly even having been destroyed.
42. The judge held that the clear burden of Gary Brooker's evidence was that Matthew Fisher had composed the precise melodic line which featured in the organ solo. Gary Brooker did not claim to have written the same notes. His point was rather that the form taken by the melodic line was circumscribed by, and effectively dictated by, a descending base line in the Song that he had composed before Matthew Fisher had become involved and that its character was inspired by the Bach-like flavour of the Song's original piano accompaniment.
43. Although the submission that no fair trial was possible was at the forefront of the appeal, it is an aspect of the judgment below with which this court should be very reluctant to disagree with the experienced trial judge in the absence of an error of principle or a plainly wrong result. See **Re Grayan Services** [1995] Ch 241 at 254. Blackburne J was in the best position, having heard the evidence with a full appreciation of the factual and legal issues and having weighed in the balance all the considerations relevant to a fair trial, to assess the overall situation and to decide whether a fair trial of the issues was possible. Indeed, the judge has himself demonstrated that it was possible to have a fair trial by making clear findings of fact despite the passage of time. In my judgment, Mr Baldwin has not come anywhere near to showing that the defendants were denied the right to a fair trial of the issues as a result of the long delay in making the claim and in bringing the proceedings.
44. Further, he has not shown that there are any grounds for disturbing the judge's findings of fact on the composition of the Work in 1967 and on Matthew Fisher's contribution to it. In my view, the judge was entitled to find on the evidence before him that Matthew Fisher was the co-author of the Work.

(2) Equitable defences

Acquiescence, laches, delay and estoppel: general

45. This collection of equitable defences is based on the excessive period of delay by Matthew Fisher in asserting his claims to a joint interest in the Work and on the fact that the defendants have controlled its exploitation without objection for nearly four decades. These defences are at the heart of the appeal. As the judge rejected these defences, the facts and the law need to be considered in more detail than would normally be necessary in a judgment in this court.
46. The substantive nature of the relief claimed is relevant to the defences. The claim is not only for a declaration of co-authorship but also for declarations as to (i) a joint interest in the copyright, which would require the defendants to obtain Matthew Fisher's consent to their continued exploitation of the Work and (ii) revocation, as

from 31 May 2005, of the defendants' implied licence to exploit the work since 1967. An application to the trial judge for a final injunction was founded on the latter two declarations. Although the immediate relief claimed took the form of declarations of title, the ultimate relief desired was the equitable remedy of a final injunction restraining, and thereby exercising control over, the future exploitation of the copyright in the Work, save on agreed terms. The defendants' response was that the claim was barred by acquiescence, laches, delay and estoppel.

47. The submissions included arguments about the pleadings on this aspect of the case. The defendants pleaded generally (paragraph 22(3) of the re-re-amended defence) that, if Matthew Fisher had an interest in the Work (which was denied), he had, by his acquiescence in its exploitation, impliedly represented that he did not object to such exploitation and did not expect to receive any royalties from it and that the defendants had changed their positions in reliance on the representations by dealing with their respective interests in the copyright as their own and by exploiting it on that basis. This seems to me to be an adequate pleading of the delay defences, including proprietary estoppel. It could have been pleaded more fully, but I do not think that anyone reading it fairly and reasonably could have been left in any doubt as to the basis of this resistance to the claims.
48. By amendment four additional particulars were pleaded (paragraph 22(3A) to (3E)). First, the fact that Gary Brooker and the remaining members of the band released Matthew Fisher from certain debts incurred by the band in exchange for which he gave up his right to receive record royalties, to which release they would not have consented, had they known that he claimed to be entitled to a share of a writer's royalties generated by exploitation of the work. Secondly, the large amount of time, hard work and effort and cost invested by Gary Brooker and Keith Reid in promoting the band's repertoire over the years in the belief that they were solely entitled to the fruits of its success and were solely entitled to represent themselves as the writers of it. Thirdly, the very fact that he had waited almost 40 years before bringing the claim was unfairly prejudicial to the defendants, having regard to the likely conflict of oral evidence about the relevant events and the death of potential witnesses in the intervening period. Fourthly, Onward Music and its predecessors had allowed numerous cover versions of the Work to be released and it would be very burdensome to identify which cover versions made use of the material contributed by Matthew Fisher. It would be unconscionable now to permit him to assert any interest in the copyright and /or to withdraw his consent to the exploitation by the defendants. The plea that the claim was barred by laches was repeated.
49. The pleading of this point continued into paragraph 22A (8) of the re-re-amended defence, in which it is pleaded that Matthew Fisher was estopped from asserting any right to the copyright in the arrangement. Had he asserted it before 12 May 1967, Essex Music could have released the record of it in a different arrangement without his organ part and that opportunity was lost by reason of his silence. It was also pleaded that, had he asserted it any time after 12 May 1967, he would have been excluded from the band and would have ceased to benefit from his association with Gary Brooker. He had deliberately chosen to continue to benefit from that association rather than making a claim. When faced with a choice in 1967 of suing or leaving the band he had elected to stay with the band and thereafter continued to benefit from his association with it rather than bringing proceedings. It would, it is alleged, be

unconscionable to permit him to go back on his decision not to claim a share in the publishing income from exploitation.

50. On the basis of the pleadings Mr Baldwin repeated the overall submission unsuccessfully made by Mr Sutcliffe at the trial that the assertion of a joint interest in the copyright in the Work and the claim for declaratory relief were barred by the equitable doctrines of acquiescence, laches, delay and estoppel. A concise account of the various equitable delay defences, which fall outside the scope of the express provisions of the Limitation Acts, but are expressly saved by statute (see section 36(2) Limitation Act 1980,) is to be found in Halsbury's Laws Vol 16(2) (4th Edition–Reissue) at paragraphs 909-918. One striking feature of the account is how the various defences overlap and shade into one another as particular manifestations of a broader principle of justice that the conduct of a party to an action may make it inequitable for him to succeed in it. For example, in **Habib Bank Ltd v. Habib Bank AG** [1981] 1 WLR 1265 this combination of defences was pleaded in a passing off action objecting to the use of a name which the defendants had been using without objection for many years. A permanent injunction was claimed. The trial judge rejected the claim on various grounds including acquiescence, laches and estoppel which were dealt with compositely. In a passage quoted with approval by the Court of Appeal at 1287D Whitford J said

“Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.”

51. Oliver LJ, with whom Stephenson LJ expressly agreed on this point, favoured a broad approach to the problem of inequitable or unconscionable conduct by long delay, rather than one turning on historical distinctions between the assertion of equitable rights and the enforcement rights by equitable means: see p 1284H-1285F and 1287F.
52. I deal first with closely linked equitable defences of acquiescence, laches and delay, which do not have the same requirement as proprietary estoppel for proof of detrimental reliance by the defendants.
53. It has been said time and time again that mere delay is not a defence. Mr Baldwin submitted that this was not a case of mere delay in making a claim and seeking relief from the court. It is a case of an extreme, inexcusable period of delay in which there is present a sufficient element of acquiescence to give rise to a defence to a claim for declarations, on which the claim for a permanent injunction was based. A defence of acquiescence is available where a person is aware that his rights are being breached and is in a position to complain about the breach, but does not protest or do anything about it. He stands by. The longer he does nothing, the stronger the evidence that he has assented to what has been done or to what is still being done. His failure to protest or to do anything leads the other party, who might have stopped doing what he was doing if he had received an earlier objection, to believe that there is no objection to what he has done, or, where the inactivity of the claimant goes on for a long time, to continuing to do what he has been doing. There comes a point at which the court can hold that it is too late to assist the claimant's enforcement of his rights, because it

is unreasonable and unjust for him to complain about their infringement. The longer the time that passes before the claimant takes action, the stronger the evidence of acquiescence in the continuing activities of the defendants and the greater the difficulty in turning the clock back to the time when the claimant first had an opportunity to protest and seek redress for the infringement of his rights. This aspect of acquiescence is of particular relevance to Matthew Fisher's claim that, although he accepts that for nearly 40 years the defendants had an implied licence to exploit the Work, this was revoked by him as from 31 May 2005.

54. Mr Baldwin relied on laches as well as acquiescence, submitting that the circumstances of the delay were such that Matthew Fisher should be treated as both having acquiesced in the defendants' activities and having waived his claim to his interest in the copyright in circumstances in which it would be inequitable and practically unjust to give him any remedy. He cited Sir Barnes Peacock in **Lindsay Petroleum v. Hurd** (1874) LR 5 PC 221 at 239-240

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because a party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy .”

55. Laches looks to undue delay, to any change of position by the defendants resulting from the delay and to the unreasonableness and injustice of stopping the defendants from carrying on doing what they have been doing for very many years. The concept of unconscionability, which, as I shall explain, underpins the doctrine of proprietary estoppel, also appears in formulations of the defences of laches and acquiescence. The change of position aspect of acquiescence and laches is less stringent than the requirement of detrimental reliance in cases of proprietary estoppel. Undue delay by the claimant and the defendant's intervening activities over a long period may suffice to make it unjust to disturb the situation, especially if it is impossible to return the defendants to their original position without some injustice to them.
56. Mr Baldwin turned to the application of the principles of unconscionable delay and change of position to the facts of this case. Although Matthew Fisher was aware in 1967 that he might have a copyright interest in the Work, he made a positive decision not to pursue it, as he did not want to fall out with Keith Reid and other members of the band. He made a deliberate choice to stay with the band and be a pop star. When he left the band two years later in 1969 and was released from his liability for the substantial debts of the band he chose not to raise a claim. The evidence of Gary

Brooker and Keith Reid was that they would not have released him on the terms that they did, had they been made aware of the claim now made by him.

57. 38 years followed during which he refrained from notifying a claim, even though there were occasions, such as interviews, when he openly discussed his claimed contribution to the Work. He had even received counsel's advice (Mr Cakebread wrote two opinions) between 1989 and 1991 that he had an arguable case, but he had not followed it up with notification of a claim, let alone by the institution of proceedings.
58. The combination of all of these factors, it was submitted, was sufficient to bar Matthew Fisher's claims to a joint interest in the copyright and to exercise control over future exploitation of it.

Proprietary estoppel: general

59. The related defence of proprietary estoppel was also invoked by the defendants at trial as a substantive answer to the claim for declarations. The estoppel in this case is based on passive acquiescence in activities openly continued, without request for recompense or recognition, over a very long period, rather than on positive encouragement of expenditure of money or effort by a particular representation by word or conduct or on a gratuitous promise giving rise to an expectation in a situation akin to contract. If established, which Blackburne J held it was not, this doctrine can produce more far-reaching effects than acquiescence or laches would on the proprietary interest in the copyright and on its enforcement against the defendants. In an appropriate case the doctrine can operate not only as a shield of defence: it can even be used as a cause of action for the positive acquisition of proprietary rights.
60. The principles set out by Oliver J in **Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd** [1982] QB 133 at 151 have been cited to and accepted as correct by this court, for example, by Walker LJ in **Gillett v. Holt** [2001] Ch 210 at 232D-E and by Jonathan Parker LJ in **Beckingham v. Hodgins** [2003] EMLR 18 at paragraph 36. Indeed, there was no serious disagreement between leading counsel about the relevant principles. It is true that proprietary estoppel has been mainly applied to the assertion of claims to the occupation and beneficial ownership of interests in land. It was not contended, however, that other forms of property, such as intellectual property, fall outside the scope of its application. The real dispute here was not about the principles, but about their application to the particular facts of this case.
61. Mr Baldwin understandably fixed on Matthew Fisher's silently standing by and looking on the defendants' investment in the exploitation of the Work and their dealings in it for 38 years, coupled with his decisions over the decades not to take the opportunities that he had for asserting and notifying his claim (e.g. before the record was released in May 1967, his decision in 1967 not to pursue his claim, but to remain with and benefit from membership of Procol Harum, the circumstances in which he left the band on agreed terms in August 1969, the decision to take no action after taking counsel's opinion in 1989). Mr Baldwin contrasted Matthew Fisher's decisions not to notify a claim with the defendants' ongoing activities in the intervening period on the basis that the Work was theirs to exploit.

62. The doctrine of proprietary estoppel is rooted in the conduct of the owner in relation to his property which either is, or would be, unconscionable or inequitable by reason of the detrimental reliance of another on the conduct of the property owner. Yet another judicial statement at this level of decision about the range of circumstances in which the doctrine can be applied is unnecessary. The cases cited explain the principles with sufficient clarity for later courts to identify the kind of case to which they could apply. This case is prima facie within the familiar territory of proprietary estoppel. Matthew Fisher claims title to property in the form of a joint interest in the copyright in the Work. He claims the legal right to enforce his copyright interest in the future free of any implied licence. The defendants, to whom he notified his claim and against whom he claims his interest in the copyright, submit that his standing by, looking on and not objecting to their investment in the exploitation of the Work led them to act in the belief that they had obtained all the copyright. In such circumstances it would be unconscionable for the legal owner to assert and enforce his property rights. He is estopped from either enforcing his rights or terminating the defendants' existing rights by revocation of the implied licence.
63. Much of the argument below and in this court concentrated on the requirement of detrimental reliance in cases of proprietary estoppel. There must be some substantial detriment suffered in consequence of reliance in order to make the owner's subsequent assertion and enforcement of his legal rights in his property unconscionable. The detriment usually involves the expenditure of money on the property with the encouragement or acquiescence of the legal owner, but it need not take that form and the detriment need not even be quantifiable in financial terms: see Halsbury's Laws (4th edition re-issue) Vol 16 (2) at paragraph 1091 and Snell's Principles of Equity (31st edition) at paragraph 10-19, where it is stated that detriment is not a "narrow or technical concept." The detriment may take the form of a course of action which a person would not have taken but for the other's conduct and which would turn out to be detrimental, if the other party asserted his legal rights to the property. There is "a broad enquiry" as to whether the repudiation of the expectation is unconscionable.
64. Where the doctrine applies it gives rise to an equity which the court may fashion to suit the justice of the case: see **Jennings v. Rice** [2002] EWCA Civ 159; [2003] 1 FCR at paragraphs 36 and 56. The means of satisfying the equity range from awards of compensation, through a licence, which affects use of the property, becoming irrevocable to, in the most extreme cases, an order for the transfer of the property by the legal owner to the victim of his unconscionable conduct.
65. In holding that the proprietary estoppel defence failed the judge correctly stressed the need to demonstrate detriment. In holding that, without substantial detriment, no question of unconscionability sufficient to support an estoppel could arise, he considered separately and rejected a number of detailed points made in support of it.
- (1) As for the suggestion that Matthew Fisher should have asserted his claim before Essex Music released the record, he held that there was no evidence that he did anything to encourage Essex Music to believe that he would not be asserting his copyright interest or that he had indicated in any way that he was foregoing his rights. He had kept silent and failed to assert his rights. It was not clear that Essex

Music had suffered detriment. The work was very successful and benefited all concerned, save Matthew Fisher.

- (2) As for the point that, after the release, he decided to stay with the band, the judge was unable to see how the defendants could rely on that as giving rise to the pleaded estoppel. No detriment had been suffered by them as a result of the failure to make the claim at that time.
 - (3) As for the circumstances in which Matthew Fisher left the band in August 1969, the judge was not persuaded that, if the claim had been made at the parting of the ways between him and the other band members, the situation would have been significantly different.
 - (4) As for the promotion of the Procol Harum repertoire by Gary Brooker over many years, the judge said that Gary Brooker had accepted in cross examination that the fact that he had been named as sole composer of the Work made no difference to the extent to which he had performed the Work over the years.
 - (5) Finally, noting that delay in itself was no defence, the judge rejected a clutch of other factors relied on by Mr Sutcliffe as relevant when considering the justice of the claim: the fact that, if the claim had been asserted in 1967, he might have been required to assign his interest to Essex Music on the same terms as applied between Gary Brooker and Keith Reid and the fact that it hardly seemed fair to Gary Brooker to deprive him of a portion of his publishing income which he had reasonably regarded as his own for nearly 40 years.
66. The judge added that, even if he had thought that the defendants had made out any of their estoppel pleas, he would have had to consider how best to give effect to the equity thereby established. He said that
- “ On the facts of this case, where it is difficult to discern any or any appreciable detriment, it would in my judgment be a wholly extravagant and unjust result to deprive Mr Fisher for the remainder of his life and 70 years thereafter of his interest in the Work’s musical copyright on the basis of the estoppels that have been pleaded, the more so when for almost 40 years the defendants have enjoyed the fruits of that copyright interest without the need to account for any part of them to Mr Fisher.”
67. Initially, I inclined to the view that the judge ought to have taken a broader view of the requirement of detriment and found that this was a case to which the defence of proprietary estoppel ought to be applied. I have, however, concluded that this court would not be entitled to interfere with his decision on this point. There was no error in the judge’s statement of the principles of proprietary estoppel or in his application of them to the detailed factual points raised by the defendants. I would prefer to rest my decision to allow this appeal on the ground that, by virtue of Matthew Fisher’s acquiescence and laches, the judge ought not to have granted all of the three declarations that he did. I should therefore say more about the declarations.

The declarations

68. The judge dealt with the claim for declarations by stating that he did not accept the submission that the grant of declaratory relief was subject to the same considerations that come into play when the court is asked to grant equitable remedies, though he accepted that whether in a given case a declaration should be granted is a matter for the court's discretion. I agree. I will return to this topic later.
69. The point at which I part company with the judge is in his approach to the different declarations. He said in relation to the declarations of authorship and joint ownership-
- “85. That said, I can see no reason why I should not grant the declaration that Mr Fisher seeks which is that he is a co-author of the Work and a joint owner of the musical copyright in the Work. Not only will such a declaration serve to put beyond doubt what his interest is in the musical copyright and thus enable the two collecting societies to adjust their records and account for the royalties accordingly, but it will also serve to indicate what Mr Fisher's rights are in case he should enforce them against third parties either here or abroad. Relevant to this is that Mr Fisher's interest in the musical copyright is a property right. It has many years to run. The fact that for whatever reason he has not sought to establish that interest before now does not mean that, by declining a declaration, the court should make it difficult for him to vindicate and enforce that interest, so long as it lasts, in the future.”
70. In this passage the judge made clear his understanding that the granting of the declaration as to the property right of joint ownership would enable Matthew Fisher to enforce his interest in the Work. As a property right copyright is usually enforced and controlled by means of a final injunction or by the threat of an injunction. Unless a licence is granted on agreed terms the copyright owner is normally entitled to a final injunction restraining infringement of his rights.
71. As for the declaration that the implied licence for the defendants to exploit the Work was revoked on 31 May 2005, this was not in Matthew Fisher's claim form. It was included in the court order by agreement between counsel. It reflects the reasons given by the judge for refusing, even though he held that the implied licence had been revoked, to grant an injunction to restrain infringements of copyright directly carried out or authorised by the defendants in the future. Such acts of infringement were distinct from exploitation, within the scope of the authorised arrangements with the two collecting societies, which he did not seek to restrain. This declaration also reflects the judge's reasons for dismissing the restitutionary claim for six years royalties.
72. The judge declined to grant an injunction solely on the ground that it was premature to grant it. He said that he did not detect

“88. ... any intention on the defendants’ part to continue to exploit the musical copyright in the Work in defiance of any interest in it which Mr Fisher is able to establish. “

73. The restitutionary claim was for payment to him by the defendants of his share of the monies paid out to them by the collecting societies in the six years before the issue of the proceedings. Matthew Fisher contended that the defendants had received a greater share of the royalties than they should have done, as a result of him not being registered as owner of the Work with either society when, by virtue of his interest in the Work, he should have been. The registration was on the mistaken basis that Gary Brooker alone was the author of the music in the Work. The defendants had been unjustly enriched at his expense and should now be made to disgorge the amount that they had unjustly received.
74. Although the judge rejected the claim and there has been no appeal against that, his reasons are relevant to the discretion to grant the third declaration. The judge concluded that, by sitting back and permitting the two societies to account to the defendants for royalties in respect of the musical copyright in the Work for nearly 40 years,

“94. ... he must be taken to have gratuitously licensed the exploitation of his copyright. That implied licence must have continued at least until 19 March 2004 when, through his then solicitors, his claim was first indicated to Mr Brooker. Even then it was scarcely clear from the letter that he was revoking the licence. In my judgment any revocation of the implied licence only came about, at the earliest, when his present solicitors sent their letter before action to Mr Brooker. That was in April 2005. It was only in May 2005 that his solicitors notified the second defendant of any claim.

95. Given those circumstances there is, in my judgment, no injustice to Mr Fisher in the fact that the defendants have received all of the royalties prior to receiving the letters before action. The claim was issued on 31 May 2005. In my judgment, any right by Mr Fisher to share in the royalties only arose from that time.”

75. Turning now to consider separately each of the declarations granted, the judge was right, in my view, to grant the declaration that Matthew Fisher was the co-author of the music of the Work, as recorded on the record released in May 1967. That was a fact that the judge was entitled to find was established on the evidence before him.
76. Further, the defendants have not demonstrated that acquiescence and laches have made it unconscionable or inequitable for Matthew Fisher to require a change for the future in the attribution of authorship in order to reflect the correct position of joint authorship. There was no pleading or evidence from the defendants that the past attribution of the Work to Gary Brooker alone was such that Gary Brooker would, if the attribution were corrected for the future, suffer damage to his reputation or substantial professional embarrassment in consequence of Matthew Fisher asserting his right to attribution.

77. At one point in the argument I was concerned that this declaration of joint authorship would not serve any useful purpose, unless it was also coupled with the other declarations as to a joint interest in the copyright in the work and as to the revocation of the implied licence. I am, however, satisfied that, even if left standing as the only declaration, it would have some practical benefit to Matthew Fisher and would not be unfair or unjust to Gary Brooker. As Mr Purvis QC pointed out the declaration is potentially valuable in relation to his client's moral rights under the 1988 Act, in particular the right to the attribution of authorship of a work.
78. The judge thought that, on granting a declaration of co-authorship, it followed that there should also be granted a declaration of joint ownership of the copyright. I would agree that, in normal circumstances, co-authorship of a work entails initial co-ownership of the copyright in it. But, as the judge's analysis in refusing an injunction and in refusing the restitutionary claim shows, the declaration of Matthew Fisher's assertion of a joint interest in the copyright and his ability to enforce that interest by revoking an implied licence to exploit had a quite different impact on the defendants than the factual declaration of co-authorship.
79. There is, in my view, a substantial distinction to be drawn between the right to attribution of authorship and the right to title and to the control of exploitation in the future. It does not appear that the practical significance of the very different effects of the three declarations was explained to the judge or even to this court in the skeleton arguments or the oral submissions. I confess that the full implications of the different declarations did not become clear to me until writing this judgment. The case was presented primarily on the basis that Matthew Fisher was not entitled to any relief, either because a fair trial of his claims was impossible or because he was prevented by his dilatory conduct and acquiescence from claiming any relief. If that was wrong, then it seems to have been assumed that all three declarations were appropriate.
80. The distinction between attribution of joint authorship of the Work and continued exploitation of the Work is crucial to the relief which the court should grant. As for the first declaration, as already stated, I cannot see why it would be unconscionable for Matthew Fisher now to assert that the record on co-authorship should be put straight for the future.

Discussion and conclusion on joint interest and revocation of licence declarations

81. As for the other two declarations, by virtue of a joint interest in the copyright and the termination of the implied licence as from 31 May 2005, Matthew Fisher would acquire a share in and a degree of control over the defendants' investment in their exploitation of the copyright during the previous 38 years, which he had never previously asserted or enforced. The effects go far beyond recognition of his joint authorship. The declaration as to co-ownership and the associated declaration as to revocation of the implied licence would create a situation in which I would hold that the doctrines of acquiescence and laches apply and affect the discretion of the court in deciding whether or not to grant declaratory or injunctive relief.
82. In my judgment, it was unconscionable conduct on the part of Matthew Fisher to wait for 38 years, with knowledge and without reasonable excuse, while the defendants exploited the Work before notifying his claim to co-ownership of the copyright in the Work. What followed was an assertion of his right to enforce his joint interest in the

copyright by terminating the defendants' licence to continue exploitation of the Work. By insisting that they now needed to obtain his prior consent for exploitation in the future, he was able to apply for a final injunction against them, as they did not have his consent following the revocation of the implied licence. The injunction application was only refused because there was no evidence of an intention by the defendants to disregard his rights. He is also pressing for a re-allocation of the royalties collected via the PRS and the MCPS, which is contrary to the allocation in which he has acquiesced since 1967.

83. I agree that delay on its own is insufficient to raise a defence and to prevent a person from enforcing his legal claim to property. Whether the delay in notifying and pursuing a claim to a property interest is unconscionable and inhibits the granting of equitable remedies for the enforcement of a legal right depends on the conduct of the parties, judged objectively as regards the length of the delay, the reasons for it, the knowledge of the parties, the consequences of the conduct, the difficulty of going back and restoring parties to their original positions and all other circumstances relevant to acquiescence and laches.
84. As for proprietary estoppel I agree with the judge on the need to establish that detriment has been suffered and that, for the reasons given by him, he was unable to find the detriment required to support that defence. One possible argument for detriment was simply that the defendants had made an investment in the exploitation of the Work for nearly 40 years, but the difficulty with this is that the judge found as a fact that the defendants would have made the same investment of effort and expenditure on the exploitation of the Work anyway.
85. On this aspect of the case, however, the judge ought to have held that the defences of acquiescence and laches operated to disentitle Matthew Fisher from the exercise of the court's discretion to grant the second and third declarations. There is no requirement of detrimental reliance for the application of acquiescence and laches.
86. The judge ought also, in my judgment, to have differentiated between nature and effect of the declaration of co-authorship and the declaration of joint interest and of termination of the implied licence. The latter would allow the copyright interest to be enforced by injunction in the future in a way in which it had never been enforced in the past. The copyright position is that the defendants and their predecessors have invested in the exploitation of the Work for nearly 4 decades without challenge. They dealt with it as if they were the owners, which they were reputed to be, and which, save for the interest claimed by Matthew Fisher in the arrangement of the underlying music, they in fact still are. The fact that Gary Brooker may have benefited by not having to split the writer's share with Matthew Fisher is not, in my view, a satisfactory answer to the asserted right of Matthew Fisher to use a copyright interest to terminate the defendants' continued exploitation as from 31 May 2005 and to obtain an injunction to restrain future exploitation without his consent.
87. Mr Purvis submitted that the delay in making the claim had prejudiced his client. The defendants had enjoyed "a bonus" or "adventitious windfall", as they had been able to keep all the royalties without accounting to Matthew Fisher. He said that any detriment they had suffered was outweighed by the benefits of him not claiming sooner. He should not be punished for the delay. In my judgment, the question is not what benefits the defendants have received as a result of Matthew Fisher's decision

not to notify a claim, which he could have made earlier but did not. As I have attempted to explain, the issue is whether, faced with the facts of Matthew Fisher's excessive and inexcusable delay with knowledge of the defendants' continuing exploitation of the Work on the basis that they owned all the copyright in it, he has acquiesced in the indefinite continuation of this state of affairs. If, as I think, that is so, then it is unconscionable for him, with a view to enforcing his property right by final injunction, to assert a joint share in the copyright and to terminate the implied licence, under which he accepts the defendants have acted for very many years. The fact that he has limited his formal claim for relief to declarations of right does not avoid the effects of his acquiescence and laches, because the declarations (2) and (3) are plainly sought with a view to enforcing, by equitable remedies if necessary, his declared interest in the copyright against them, if they continue to exploit it without his express consent. If they are not sought in order to control the exploitation of the copyright by injunction or the threat of injunction, then no useful purpose would be served in granting them.

88. The revocation of the implied licence would require the defendants to cease exploitation in the future unless they can obtain the consent of Matthew Fisher. If permitted to revoke the licence of the defendants and decide whether or not to licence future use, he could dictate his terms and put the defendants in a weaker bargaining position than they would have been in, had he made his claim in, say, 1967 or 1969. After the passage of nearly 40 years and the activities in the intervening years it is impossible to return the defendants to the bargaining position they would have been in vis-à-vis Matthew Fisher had he protested at the time when the defendants were concluding agreements for the acquisition of rights and their exploitation of the Work.
89. I would allow the appeal against the grant of the second and third declarations. Matthew Fisher's acquiescence and laches prevent him from asserting the joint copyright interest sought in the second declaration and from revoking the implied licence mentioned in the third declaration with the object of using these declarations as the basis for a final injunction or the threat of an injunction.
90. If the implied licence has not been effectively revoked, there neither has been nor will there be in the future any infringement of copyright by the defendants for which damages could be recovered. Nor would there be any declared basis on which to require alteration of the entitlement to the royalties collected by the copyright societies.

(3) Discretionary relief

91. It was argued that declaratory relief was a discretionary remedy and that the length of the delay should have led the judge to decline to grant any of the declarations sought by Mr Fisher.
92. In my judgment, there was no error in the judge's treatment of mere delay as a reason for refusing to grant declarations. There is a possible argument that declaration is an equitable remedy, but the principles governing the discretion to grant or withhold declarations are not the same as the principles governing such equitable remedies as final injunctions. Thus, delay on its own is not a reason for refusing a declaration as to co-authorship. As for the other declarations, the point does not arise, as the appeal succeeds on the acquiescence and laches point, the declarations being sought for use

as the basis of a final injunction or threat of an injunction in order to control the exploitation of the copyright in the Work.

B. Arrangement/implied assignment

93. This was labelled by the judge and counsel as the arrangement point, though it should perhaps be called the implied assignment point. The dispute is about title to the arrangement and whether it was vested in Essex Music by virtue of an implied equitable assignment of the copyright. As I shall explain, the point is closely linked to the proprietary estoppel and acquiescence point and its effect on the assertion of title and the enforcement of rights. I have differed from the judge as to the application of an estoppel allowing the defendants' continued exploitation of the Work, as distinct from his receiving future credit for his joint authorship.
94. The essence of the defendants' argument on implied equitable assignment of the copyright can be shortly stated. By virtue of the 1967 assignment by Gary Brooker and Keith Reid Essex Music became the owners of the copyright in the Song before Matthew Fisher made any creative contribution to the musical arrangement. As copyright owners, Essex Music had the exclusive right to control the making of copies of the Song in any material form, including the making of adaptations and arrangements: sections 2(5) (a) and (f) of the Copyright Act 1956, the provision in force at that time. The Work was an arrangement of the earlier original musical work composed for the Song by Gary Brooker alone. The Work was improvised during the rehearsals for the recording for Essex Music of the band's performance of the Song. It was accepted by Mr Purvis that the Work was made with the licence of Essex Music. The issue is whether the licence was subject to conditions relating to the ownership of the copyright in the resulting arrangement. Mr Baldwin submitted that Essex Music, as the owner of the copyright in the Song, had the right to dictate the terms on which the arrangement of it was made by Matthew Fisher and Gary Brooker in the form of the Work and the terms on which it was exploited.
95. The pleadings explain how this aspect of the defence was put. It is alleged (paragraph 22A(7)) that making of the arrangement of the Song, to which Matthew Fisher contributed for the purposes of the recording, required the licence of the copyright owner, which was impliedly given, though there was no agreement that he should participate in any royalties or income from the arrangement. It was also pleaded that the licence was given on the "express or implied condition that all royalties and other income derived from the exploitation of the arrangement would be paid to the owner of the copyright in the Song and that the Claimant would not assert any copyright in the Song or in any version of it." It was pleaded that the condition was to be implied from the fact that, if Matthew Fisher had asked Gary Brooker and Keith Reid for a copyright share in the summer of 1967, they would have refused his request. It was also to be inferred from the conduct of the parties for nearly 40 years thereafter during which time he never claimed or asserted any right to share in the copyright in any version or any right to share in the income from its exploitation.
96. The real question, Mr Baldwin submitted, was therefore the basis on which Essex Music consented to the members of the band making an arrangement of their copyright Song. The arrangement of the music of the Song was made for the purpose of performing it at the recording session. Essex Music made a master recording of the performance of the Work so that it could manufacture and sell records. Mr Baldwin

said that, having regard to the relevant factual matrix, consent was given by Essex on the basis that all the copyrights in the Work, including those that might belong to Matthew Fisher (or, for that matter, to Gary Brooker) should vest in Essex Music. In that way no copyright claim could be made against Essex Music by the members of the band in respect of the exploitation of the copyright in the Work or in the sound recording of it. Nor, in the absence of an agreement, could any publishing royalties be claimed by Matthew Fisher from Essex Music.

97. The factual matrix was the commercial fact that Essex was a record and publishing company. Its business was to exploit the copyrights in works owned by it, for example, by making and releasing records of performances of those works by the band, who received royalties in return. This was the practice followed by Essex Music and the band in respect of every other song which was released. This Work was no different from any of the others. For example, on 12 July 1967 Matthew Fisher made an assignment of copyright in another work to Essex Music. Along with Gary Brooker he was party to an assignment to Essex Music on 28 May 1968 of the copyright in another work.
98. The judge held, correctly in my view, that there was a separate copyright in the Work as an arrangement of which the group were joint authors. He went on to reject the contention that the consent of Essex Music, as owner of the underlying copyright in the music of the Song, was subject to an implied term that the copyright in the arrangement vested in Essex Music free of any claim by members of the group to a share of the copyright and the royalties earned by it.
99. The judge arrived at this conclusion because he held that it was impossible, on the evidence, to say that there was any kind of express agreement between Matthew Fisher and Essex Music that he would not claim any copyright interest in the Work or that Essex's licence was given on that basis. Nor were there any grounds justifying the implication of such a term in Essex's licence on the basis pleaded.
100. I agree with the judge that there was no express agreement that Essex Music's licence to make an arrangement was given on the condition that he would not claim any copyright interest in the Work. As for the implication of an assignment of the copyright to Essex Music it is unnecessary to express a view, although I appreciate the commercial sense in the points made by Mr Baldwin. In view of the conclusion that I have reached on the acquiescence point the defendants' position is covered by an irrevocable implied licence for the defendants to exploit the arrangement rather than by implied assignment of the copyright in it.
101. These are the circumstances. The copyright in the Song was assigned outright to Essex Music. An arrangement of it was improvised during the course of rehearsals for a recording by Essex Music, which invested in the exploitation of the Work and the recording of it. Implied copyright licences by all the parties, including Mathew Fisher, were necessary as a matter of business efficacy. They were necessary in order to avoid a situation in which the copyright in the Song was infringed by the band in making an arrangement without the licence of Essex Music. They were also necessary to avoid a situation in which the separate copyright in their improvised arrangement was infringed by Essex Music in making the recording of it. If any member of the band retained the copyright interest in his contribution and did not grant any licence to Essex Music, the result would be split rights, which would impede the exploitation of

the Work and recordings of it in the interests of all concerned. Just one member of the band could prevent the Work, which had been created to be exploited by the Essex Music, from being exploited by them or their successors.

102. In other words, the making of the arrangement of the Song during the course of the rehearsals would have been an infringement of the copyright in the Song vested in Essex Music. But the band were performing the music for the purposes of making the recording for Essex Music. It is therefore necessary to imply a licence by Essex Music.
103. Similarly, a licence to Essex Music by all those who were making the arrangement is necessarily implied. Without it the record by Essex Music would be an infringement of the composers' copyright in the arrangement. But the composers of the arrangement are members of the band performing the music for the purposes of making the record for Essex Music. There is no difficulty in implying the licence.
104. The judge recognised and Mr Purvis accepted that the defendants exploited the Work with the implied licence of Matthew Fisher, which was not subject to any term or condition as to payment of royalties. But the declaration stated it had been revoked as from 31 May 2005. It was assumed to be a revocable licence. The conclusion on the estoppel point, however, is that Matthew Fisher is barred by his conduct from revoking the implied licence to the defendants to exploit the Work for the term of copyright. As the implied licence is irrevocable it continues. There is no question either of a contractual liability to pay royalties, as no such agreement was ever made, or of a statutory liability to pay damages or an account of profits for infringement of copyright, as the licence precludes infringement.
105. In future record and publishing companies might be well advised to obtain assignments in writing from performers to cover arrangements of music that may have improvised and so created new copyright works during rehearsal or recording sessions that are not covered by earlier formal agreements. It is in everybody's interest that there is certainty about the ownership of the rights necessary for the exploitation of the copyright in the interests of all concerned.

C. Recording Contract

106. On 16 May 1967 a Recording Contract was entered into between Procol Harum (of which Gary Brooker and Matthew Fisher were members) and Essex Music and New Breed (referred to in the Recording Contract as "the Company"). It was for a term of 1 year with 4 options to renew. Procol Harum agreed to record performances for the Company and to grant to the Company rights in records embodying their performances.
107. Mr Baldwin accepted that the Recording Contract did not have the effect of (a) assigning any copyright interest that Matthew Fisher may have in the Work to Essex Music; or (b) denying to him, if he is otherwise entitled, any share in the royalty income from the exploitation by third parties of reproductions of the Work.
108. In my judgment, those concessions are correct. The judge rightly held that the terms of the Recording Contract are irrelevant to Matthew Fisher's claim to be joint owner of the copyright in the Work. It does not bear on and is not concerned with ownership

of rights in the underlying copyright in the Work, which was performed by the band in the recording. It relates to the rights of the Company to make and exploit records of the group's performances. Its terms are irrelevant to the ownership, as between the creators of the Work, of the underlying copyright in it, being the Work as reproduced in the recordings made under the Recording Contract.

109. In a Supplementary skeleton argument Mr Baldwin, who did not appear in the court below, relied on clause 3(e) of the Recording Contract to make a different point, namely that Matthew Fisher was prevented from revoking the implied licence or asserting any copyright interest in relation to the making and selling by Essex Music or its successors in title of records of performances of the band made under the recording contract, including the performance in May 1967 which resulted in the Work and which is the subject of Matthew Fisher's claim. He contended that Essex Music and Onward Music, as successors in title, are entitled to incorporate on records and exploit records of arrangements in which the band members may have a copyright interest and being records made pursuant to the Recording Contract.
110. This point does not relate to the ownership of the copyright in the Work. It relates to the making of recordings of the Work and their exploitation. The judge's understanding of the position was that Matthew Fisher was not entitled to dispute, and was not seeking to dispute, the right of Onward Music to exploit the recordings made under the Recording Contract. Mr Baldwin said that that was not a correct understanding of the position, as under the terms of the declaration in the order the licence under the Recording Contract was revoked and that Matthew Fisher was seeking to extract a share of the mechanical royalties every time Essex Music or its successors made a record reproducing the 1967 master recording of the Work and similarly for public performances of that recording. Mr Baldwin said that the correct position was that the judge was wrong to declare that the licence to make the recording of the Work was revoked.
111. In view of the conclusions that I have reached on the other points, in particular that Matthew Fisher is, as a result of acquiescence and laches, not entitled to revoke the defendants' implied licence to exploit the Work by recording it or otherwise, it is unnecessary to say more on this point.

D. Other unfair consequences of order

112. Other points were put to the judge as to why the court should not grant any relief. One point was that, as a result of not having raised his claim between April 1967 and the release of the record on 12 May 1967, Matthew Fisher is better off, as the defendants lost the opportunity to re-record a performance by Procol Harum without using his contribution to the music. Another point was that, as a result of the judgment giving Matthew Fisher a 40% share of the copyright, there will be an unfair division of the writer's share of royalties Gary Brooker will have a lesser share than Matthew Fisher. His 60% share is halved to 30%, because he agreed with Essex Music to receive only half of his share of the publishing royalties.
113. In view of my conclusion on the acquiescence/laches point no useful purpose would be served by a decision on these points.

Result

114. The judge was entitled to find that Matthew Fisher made a creative contribution to the Work and he was right to grant a declaration as to his co-authorship. I would dismiss the appeal against the grant of this declaration.
115. I would, however, allow the appeal against the grant of declaration (2) of joint ownership of the musical copyright in the Work and declaration (3) of the revocation on 31 May 2005 of the defendants' implied licence from Matthew Fisher to exploit the Work. In summary, my reason for allowing the appeal against declarations (2) and (3) is that Matthew Fisher's conduct makes it unjust that he should succeed in his claims to a joint interest in the Work or to have revoked the implied licence for the defendants to exploit it. The judge should have taken a broader approach to the application of the delay defences. In particular:

(1) Matthew Fisher is guilty of excessive and inexcusable delay in asserting his claim to title to a joint interest in the Work. He silently stood by and acquiesced in the defendants' commercial exploitation of the Work for 38 years. His acquiescence led the defendants to act for a very long period on the basis that the entire copyright in the Work was theirs. They controlled the commercial exploitation of the Work without any reference or reward to him.

(2) His acquiescence has made it unconscionable and inequitable for him to seek to exercise control over the commercial exploitation of the copyright in the Work. The combination of a declaration of a joint interest and a declaration of revocation of the implied consent would enable him to control future commercial exploitation by means of a final injunction against the defendants. For this reason declarations (2) and (3) should be set aside.

(3) If the implied licence has become irrevocable by acquiescence Matthew Fisher cannot claim damages for infringement of copyright, or any share of the monies collected by the copyright collecting societies, or obtain any contractual right for payment of royalties in the future as the price for granting an express licence for the exploitation of the copyright in the Work. For these reasons the order for an inquiry as to damages since 31 May 2005 should be set aside.

MR JUSTICE DAVID RICHARDS:

116. On all aspects of this appeal, except for the defences of estoppel, acquiescence and laches based on Mr Fisher's delay in bringing his proceedings, I agree with the judgment of Mummery LJ. For the reasons which he gives, I agree that the appeal does not succeed on the grounds of impossibility of a fair trial, implied assignment of the copyright in the Work as an arrangement, the terms of the recording contract or certain points said to be unfair consequences of the orders made by the judge.
117. As regards the defences resulting from delay, I agree with Mummery LJ that a defence of estoppel was rightly rejected by the judge. Detriment is established as an essential element in any estoppel relevant to this case, as the parties agreed both before the judge and on appeal, and no detriment to the appellants is established. I agree also with Mummery LJ that any claim by Mr Fisher to any equitable relief, in this case an injunction, is barred by laches. However, I am unable to agree with him

that the appeal should in part be allowed, as regards the declaration of Mr Fisher's entitlement to a share in the copyright and to an inquiry as to damages for infringement subsequent to 31 May 2005, on the grounds of acquiescence and laches.

118. As Mummery LJ has noted, copyright subsists as a property right. It exists independently of any right of action, although like any incorporeal property it is ultimately dependant on resort to the courts for protection. It endures for 70 years after the death of the author. In the case of Mr Fisher and the defendants copyright in the Work may well last for another 100 years or so. Although the Work was composed almost 41 years ago, the copyright has existed for a third or less of its total life, although as counsel for Mr Fisher observed at the trial the bulk of the earnings are likely already to have been made from it. All past earnings have been paid to the defendants. Mr Fisher does not seek to claim any part of those earnings, save since April 2005, or to establish any past infringement of his rights. His claim is almost entirely to establish his property right for the future.
119. There is no statutory limitation period applicable to claims to copyright. This may be contrasted with claims to land, where 12 years' adverse possession will not only bar an action to recover the land but will also extinguish the claimant's title: sections 15(1) and 17 of the Limitation Act 1980.
120. Mr Fisher is unable to establish any past infringement because, by reason of his failure to make any claim coupled with his knowledge of the exploitation of the Work by the defendants as if the copyright belonged entirely to them, he is presumed by operation of law to have granted them a gratuitous licence. Such a presumed licence is prima facie revocable on reasonable notice.
121. A copyright owner is entitled by statute to claim damages for infringement. Before Blackburne J, counsel for Mr Fisher made clear that his claim would be for sums representing his share of the royalties earned since June 2005 and in the future from licensing the Work, i.e. 40 per cent. It was not his wish to stop the exploitation of the Work.
122. If the appellants had established detriment to them resulting from Mr Fisher's failure to make any claim for 38 years, his claim would have been completely barred by estoppel. The estoppel would not only bar equitable remedies, it would in effect extinguish Mr Fisher's interest in the copyright and therefore bar all remedies. It is a curious feature of this unusual case that even after a delay of 38 years, the appellants were unable to establish any resulting detriment to them.
123. Like Mummery LJ, I consider that the facts of this case, including the excessive delay on Mr Fisher's part, his knowledge from the start that he may well be entitled to a share in the copyright in the Work and the exploitation by the appellants of the copyright over that period, are sufficient to establish a defence of laches. For 40 years they have controlled the exploitation of the Work outside those activities under the control of the collecting societies and he should not now be able to interfere with their control.
124. Laches is a defence or bar to a claim for equitable remedies: see Snell's Equity (31st ed) paras 5-16 and 5-19 and Chitty on Contracts (20th ed) Vol 1 paras 28-134 to 28-138 (both citing, amongst other authorities, *Lindsay Petroleum Co v Hurd* (1874) LR

PC 221). An injunction is an equitable remedy, although now with a statutory basis, and it does not matter whether the injunction is sought in aid of an equitable or a legal right: *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265.

125. I agree with Mummery LJ that the grant of a declaration is not an equitable remedy for the purpose of the application of equitable bars, but I also agree with him that if the sole purpose of a declaration were as a prelude or springboard to a claim for an injunction which would be barred by laches, the court should decline to grant the declaration on the grounds that it would serve no useful purpose.
126. If, therefore, Mr Fisher were claiming an injunction to restrain exploitation of the Work without his consent, as he did at the end of the trial although not at the start, I would hold that his claim to the injunction was barred by laches. If, without claiming an injunction, he sought a declaration solely as the means of then applying for an injunction, I would refuse the declaration.
127. The purpose of Mr Fisher's claim for a declaration as to ownership of the copyright in the Work is not solely, or even principally, as a basis for an injunction against the appellants. The practical effect of the declaration as to joint ownership of the copyright in the Work is, it is submitted by Mr Purvis QC for Mr Fisher, that the collecting societies will recognise his share of the copyright and will *for the future* pay to him his share of the royalties resulting from exploitation licensed by the societies. This does not require any injunction against the appellants.
128. So far as concerns such exploitation as remains within the control of the appellants, Mr Fisher sought an injunction at trial to restrain future infringements but this was refused by the judge, although not on the grounds of laches, and there is no appeal. As I have said, I consider that laches would be a bar to any such injunction. But Mr Fisher still has a statutory remedy in damages, to which laches could not be a bar. The declaration is useful, if not strictly essential, to found claims for damages in the event of future infringements.
129. In my view, therefore, laches does not provide a basis for allowing the appeal against the declaration of Mr Fisher's rights as a joint owner of the copyright in the Work.
130. If the appeal against that declaration is to be allowed, it must in my view be on the basis that he has lost any substantive right to the copyright. Either his share in the copyright has been extinguished or, as comes to the same thing in practical terms, he is not entitled to revoke the gratuitous licence which he is presumed by law to have granted to the appellants and is not entitled to assert an interest which would be binding on the collecting societies. In either event, he could not complain of infringement and would therefore have no claim in damages, nor would he be entitled to any payment of future royalties from the collecting societies. Even if his interest in the copyright had not strictly speaking been extinguished, the declaration should not be permitted to stand because it serves no useful purpose.
131. As will be clear from what I have already said, laches is not available because it is only a bar to equitable remedies. The appellants' claim must therefore be based on some form of waiver or acquiescence.

132. Acquiescence or waiver can take many forms. Many are irrelevant to the facts of this case. There has been no express waiver. There has been no consideration for a waiver, such as would give even an implied waiver contractual force. There has been no election between inconsistent rights.
133. The acquiescence or waiver must be one which can be inferred from Mr Fisher's long years of inactivity coupled with his knowledge of his possible rights and the appellants' reasonable assumption that the copyright belonged to them. But there is no consideration provided by the appellants and no detriment to them.
134. Acquiescence is described as follows in Halsbury's Laws of England Vol 16(2) para 909:

“The term ‘acquiescence’ is, however, properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable. The estoppel rests upon the circumstances that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title; a mere statement that he intends to do something, for example to abandon his right, is not enough. Furthermore, equitable estoppel is not applied in favour of a volunteer.”

Much of this passage is based on the judgment of the Court of Appeal in *De Bussche v Alt* (1878) 8 ChD 286. It can be seen that estoppel and acquiescence are treated as closely related.

135. Indeed, estoppel by acquiescence was one of a number of types of estoppel discussed in many of the cases leading up to and including *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133. It is treated as synonymous with proprietary estoppel in the well-known passage in the judgment of Oliver J at p 151-152 to which Mummery LJ has referred:

“Furthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* L.R. 1 H.L.129 principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he

has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

The essential element, as made clear in subsequent decisions of this court and as accepted by the parties, is detriment.

136. Acquiescence without detriment is, in my view, insufficient on established principles to extinguish a claimant’s property or rights for the future. Acquiescence in the defendant’s acts will preclude the claimant from proceeding in respect of those acts but will not prevent him from asserting his proprietary rights for the future. The implied gratuitous licence treated as arising in cases such as the present can be viewed as equivalent to acquiescence. The licence is revocable unless the defendant has acted to his detriment such that revocation would be unconscionable. The effect otherwise would be to treat acquiescence without detriment as having the same effect as estoppel, which does require detriment, in terminating the claimant’s proprietary rights.
137. The appellants relied on the decision in *Cluett Peabody & Co Inc v McIntyre Hogg Marsh & Co Ltd* [1958] RPC 355 and in particular the following passage in the judgment of Upjohn J at 354-355:

“Nevertheless, while falling short of estoppel, in my judgment the behaviour of the Plaintiffs, coupled with the very long delay, really amounted to an acknowledgement by them of the Defendants’ right to continue the use of their (the Defendants’) marks, and to a waiver of the Plaintiff’s right to sue for infringement by such continued user. I accept the Defendants’ submission that really the course of conduct between the parties showed a mutual policy of restraint to one another, or, putting it more colloquially, a mutual agreement to live and let live.”

In that case, each party had to the knowledge of the other been infringing the other’s trademarks over a considerable period. There had been discussions over the years between the parties and the effect of a letter written on behalf of the plaintiff was that anyone “might reasonably think that the Defendants were being told inferentially that no complaint was being made of the Defendants’ then present user of their trademark (device and words) on shirts, nor was any complaint made for twenty-nine years thereafter”. It was the course of dealing between the parties, including this letter, to which Upjohn J referred when he spoke of “a mutual agreement to live and let live”. There has been no similar course of dealing or mutual agreement in the present case. Upjohn J’s reference to estoppel was to “an estoppel in the strict common law sense”, which could not exist because the defendants knew all the relevant facts and did not act in reliance on any representation by the plaintiff. The facts of the case would probably support an estoppel as now understood.

138. In *Beckingham v Hodgins* [2003] EWCA Civ 143, [2003] EMLR 18, the court was concerned with a period of nine years in which the claimant made no claim to copyright in a song, although aware that he might be entitled to do so and having told

the first defendant at an early stage that he had decided not to make a claim. It was common ground that during that period there existed an implied gratuitous licence for the first defendant to exploit the copyright in the song. The claimant asserted that the licence was revoked when after nine years he gave notice of a claim and the first defendant submitted that he was estopped from doing so. Affirming the decision at first instance, the Court of Appeal held that the first defendant had suffered no detriment that made it unconscionable for the claimant to revoke the licence for the future, and a defence of estoppel therefore failed. At para 34, Jonathan Parker LJ (with whom Ward and Laws LJ agreed) agreed with the judge that the claimant's statement of intention to make a claim after nine years "was sufficient (absent an estoppel) to revoke the implied licence". As that makes clear, nothing less than estoppel could terminate the right to revoke the implied licence. While it may be said that acquiescence falling short of estoppel was not argued (although it was argued that detriment was not essential to estoppel), the statement is in my view correct.

139. There is a clear conflict in this case between the policy of discouraging stale claims, which underpins both the Limitation Act and the equitable defences, and the protection of property rights. While the former would justify the imposition of a limitation period for claims to assert an entitlement to copyright, it has not been enacted. In a case where the claimant has not agreed by deed or agreed (whether expressly or implicitly) for consideration to give up his property right, it must on existing principles be unconscionable for the claimant to assert his entitlement before he is deprived for the future of that right. Where the defendant cannot show any detriment resulting from the delay, it is not on existing principles unconscionable for the claimant to assert his right for the future. In my judgment this is justifiable: a property right should not in effect be extinguished without either consideration or detriment, although delay amounting to laches may properly be a bar to equitable remedies such as an injunction. Nor do I consider the result to be unjust. Where the defendants retain all past earnings and have suffered no detriment from Mr Fisher's delay, there is in my view no injustice if his interest in the copyright is now established for the future.
140. I would therefore dismiss the appeal against the second declaration, as to joint ownership of the copyright, as well as the first declaration, as to authorship. The third declaration, to the effect that Mr Fisher has revoked the implied licence, is not essential but it may be of assistance in clarifying the position and I would accordingly dismiss the appeal against it. I would also dismiss the appeal against the order for an enquiry as to damages for infringement subsequent to 31 May 2006.

SIR PAUL KENNEDY:

141. I agree with Lord Justice Mummery that this appeal should be allowed to the extent that he has indicated for the reasons he has given.

Judgment Approved by the court for handing down
(subject to editorial corrections)

Brooker Onward Music v Fisher