



Case No: A3/2004/1995
A3/2004/2001

Neutral Citation Number: [2005] EWCA Civ 1300
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(MR JUSTICE LEWISON)
HC02C 01010

Royal Courts of Justice
Strand, London WC2

Friday, 04 November 2005

Before :
LORD JUSTICE CHADWICK
LORD JUSTICE LATHAM
and
LORD JUSTICE NEUBERGER

Between :
MARK TAYLOR
- and -
RIVE DROITE MUSIC LIMITED

Claimant/Respondent
Defendant/Appellant

Mr Andrew Sutcliffe QC & Mr Peter Ratcliffe (instructed by Davenport Lyons of 30 Old
Burlington Street, London W1S 3NL) for the Appellant
Mr Ian Mill QC and Miss Jane Mulcahy (instructed by Forbes Anderson of 16-18 Berners
Street, London W1T 3LN) for the Respondent

Judgment
(as Approved by the Court)

Lord Justice Chadwick :

1. This appeal and cross–appeal are from the order made on 15 July 2004 by Mr Justice Lewison in proceedings brought by Mr Mark Taylor, a record producer and songwriter, against Rive Droite Music Limited ("RDM"), a music production and publishing company. As the judge put it at paragraph 2 of his judgment [2004] EWHC 1605 (Ch): "The main focus of the dispute between the parties is whether Mr Taylor was entitled to stop working for RDM in the circumstances in which he did".

The underlying facts

2. The facts are fully set out by the judge in his lengthy and careful judgment. By way of introduction it is sufficient to extract and adopt passages from the following three paragraphs of that judgment:

"1. Mark Taylor is a talented music producer and song writer. He has produced songs for world famous artistes, including Cher, Enrique Iglesias, Rod Stewart, Lionel Richie, Tina Turner and a host of other household names . . . In 1995 he entered into two agreements with Rive Droite Music Ltd . . . The first, which was oral, was a producer's agreement. The second, which was written, was a publishing agreement. The publishing agreement was renewed twice, latterly in 1998. At the end of November 2000 Mr Taylor stopped working for RDM. Since then he has worked for Brian Rawling Productions Ltd . . . That is a company principally owned by Mr Brian Rawling, but in which Mr Taylor also has a shareholding.

...

8. XIII Bis is a group of French companies set up by M. Laurent Dreux–Leblanc. The group has subsidiaries in many parts of the world. Its core business is the publishing, production, recording and distribution of music. Its head office is in Paris, where M. Dreux–Leblanc lives; and its central administration is conducted from there. In 1992 M. Dreux–Leblanc decided that it would be a good idea to establish a presence in England. RDM was established for that purpose. Mr Brian Rawling was recruited to head up RDM in England; but he reported to M. Dreux–Leblanc in Paris. . . . In essence the idea was that RDM would establish a stable of song writers. Songs written for RDM would then be offered (or 'pitched') to other record labels and artistes. If they liked the songs, then RDM would produce the tracks;

in return for both a production fee and production and writers' royalties. . .

9. In early 1995 Mr Rawling came across Mr Taylor. Mr Taylor was very short of work at the time. But Mr Rawling was impressed; and decided to try to persuade M. Dreux–Leblanc to take him on. . . ."
3. By October 1995 Mr Taylor had reached agreement with RDM on the terms on which he would undertake production work. They also reached agreement on the terms of a publishing agreement. The terms of the publishing agreement were reduced to writing and signed on 1 December 1995. That agreement was for a term of two years. It was renewed (or replaced) by a second publishing agreement (in the same, or substantially the same, form) dated 1 December 1997.
4. By mid–1998 Mr Taylor and Mr Paul Barry - another songwriter engaged by RDM under a publishing agreement - had collaborated successfully on a number of songs, including the songs "All or Nothing", "Dove L'Amore", "Strong Enough" and "Runaway". Those four songs - recorded by the artiste "Cher" – were to be included in an album released in September 1998. At the same time Cher released a single "Believe" which had been produced by Mr Taylor. Both the album and the single achieved great success. By the end of October 1998 the single had reached the top of the charts in the United Kingdom - where it remained for the next seven weeks. As a result of the success of Cher's album (and, no doubt, the success of the single) Mr Taylor's reputation was established. Cher was impressed by his work and wanted him to write and produce further songs for her.
5. It was against that background of success that Mr Taylor and RDM entered into a third publishing agreement on or about 1 December 1998 - notwithstanding that the term of the second (1997) agreement still had one year to run. One of the principal issues in dispute before the judge was whether the term of the term of the third (1998) publishing agreement was two years (as Mr Taylor contended) or three years (as RDM contended).
6. On 6 November 2000 Mr Rawling gave notice terminating his employment with RDM with effect from 10 February 2001. On 28 November 2000 Mr Taylor sent a fax to M. Dreux–Leblanc "to clarify the situation regarding my publishing agreement dated 1st December 1998, which comes to an end this month". That assertion was refuted by M. Dreux–Leblanc in a lengthy reply faxed to Mr Taylor on 30 November 2000.
7. In early December 2000 Mr Taylor travelled to Miami with Mr Barry. While there they worked together on songs to be recorded by the artiste "Enrique Iglesias". On 6 December 2000 Mr Taylor sent a further fax to M. Dreux–Leblanc, giving notice of his intention to determine the production agreement with effect from 1 December 2000. Over the next month or so all the producers employed by RDM and most of the administrative staff left RDM. Most of them went to work for Mr Rawling at Brian Rawling Productions Limited ("BRP").

These proceedings

8. On 10 January 2001 RDM's solicitors sent Mr Taylor a letter before action. These proceedings were commenced some fifteen months later, on 18 April 2002, by the issue of a claim form by Mr Taylor. As originally served the particulars of claim sought a declaration that the term of the 1998 publishing agreement was two years, expiring on 30 November 2000, a declaration as to the basis on which RDM was required to account under that agreement (and under the two earlier publishing agreements) and accounts and inquiries. Subsequently, by amendment, there was added a claim for monies said to be due following an examination by the Royalty Compliance Organisation into RDM's records.
9. By its defence RDM put in issue the construction of the 1998 publishing agreement advanced on behalf of Mr Taylor and, in the alternative, sought (by way of counterclaim) rectification of the relevant clause so as to accord with its contention that the parties intended the term to be for three years. RDM sought damages (also by way of counterclaim) for alleged breaches of the production agreement - being failure to deliver certain projects ("the Projects") described in schedule 2 to the pleading (including, in particular, recordings by Enrique Iglesias); for infringement of copyright in that (it was said) Mr Taylor had authorised record companies to copy and issue to the public copies of his work on the Projects; and for unlawful interference with goods - being computer files relating to projects on which Mr Taylor had been engaged since the start of his relationship with RDM. By a subsequent amendment to its counterclaim (in the alternative to its primary claim that the term of the 1998 publishing agreement was three years) RDM sought damages for infringement of copyright in respect of two of the Iglesias songs ("Hero" and "Love to See You Cry") on the basis that Mr Taylor had acquired a writing interest in those songs by contributions which were adaptations of – or new compositions incorporating a substantial part of – compositions by Mr Barry.
10. The proceedings came before Mr Justice Lewison for trial in May and June 2004. He identified (at paragraph 5 of the judgment which he handed down on 6 July 2004) seven main issues which he needed to decide. Those were: (i) whether the 1998 publishing agreement was for a term of two years or three years (either on its true construction or following rectification); (ii) whether, under the terms of the production agreement, Mr Taylor was contractually obliged to work exclusively for RDM; (iii) what, if any, terms were to be implied into the production agreement; (iv) whether Mr Taylor diverted to BRP projects which should have come to RDM; (v) whether Mr Taylor had infringed RDM's copyright in the two Iglesias songs; (vi) whether RDM was in breach of the publishing agreement in failing to exploit a song "Follow Your Heart" written partly by Mr Taylor; and (vii) whether RDM had accounted to Mr Taylor on the correct basis.
11. The judge decided issues (i), (ii) and (vi) in favour of Mr Taylor; he decided issue (v) in favour of RDM ; he decided (in answer to issues (iii) and (iv)) that it was an implied term that, in respect of any project that Mr Taylor had agreed to carry out, he would not provide his services to anyone other than RDM (if RDM secured the project), that it was also an implied term that Mr Taylor would not do anything to prevent RDM from securing a project and that Mr Taylor was in breach of that implied term; and (in answer

to issue (vii)) that RDM had not accounted on the correct basis. He held, also, that files in relation to one project (the Hall & Oates project) were improperly deleted from Mr Taylor's computer and back-up copies were removed from RDM's premises so that to that extent (but to that extent only) RDM had made out its case for unlawful interference with goods. The judge's conclusions are reflected in the order which he made on 15 July 2004, following further argument.

The issues in this Court

12. RDM appeals (under reference 2004/1995) with the permission of the judge from paragraphs 1 and 2 of that order - which contain declarations that the 1998 publishing agreement was for a term of two years expiring on 30 November 2000 and that, accordingly, Mr Taylor was and is under no obligation to deliver to RDM any Composition (as defined in that agreement) written in whole or in part by him during the twelve months commencing on 1 December 2000. RDM appeals, also, from so much of paragraph 13 of that order as refused injunctive relief consequent upon the declaration of copyright infringement contained in paragraph 6 of the order. And it seeks permission to appeal from orders as to costs and interest (paragraphs 21, 22 and 8 of the Order) made under CPR Part 36.21.
13. Mr Taylor cross-appeals (under reference 2004/2001) with the permission of the judge from paragraph 5(ii)(b) of the order, from paragraphs 6, 9 and 10 (the declaration as to infringement of copyright and consequential orders for accounts, inquiries and damages), from paragraphs 16 to 18 (the judgment for unlawful interference with goods and consequential orders for an inquiry as to damages and delivery up) and from so much of paragraph 20 as limits the award of his costs of the action (incurred up to 2 March 2004) to 70%. He seeks permission to appeal from paragraphs 11 and 12 (the declaration as to the implied term not to do anything to prevent RDM from securing any project which he had agreed to undertake and damages for breach of that implied term in relation to work on Cher's "Living Proof" album).
14. In summary, therefore, there are five issues (other than costs) for determination in this Court: (i) whether, upon the true construction¹ of the 1998 publishing agreement, the term of Mr Taylor's engagement was two years or three; (ii) whether Mr Taylor infringed RDM's copyright in the versions of "Hero" (both literary and musical) and "Love to See You" (musical only) as they existed on 1 December 2000; (iii) whether RDM is entitled to an injunction to restrain further breaches of copyright; (iv) whether RDM made good its claim against him for interference with goods in relation to the Hall & Oates project; and (v) whether Mr Taylor was in breach of an implied term of the production agreement in relation to the "Living Proof" album. In relation to that final issue Mr Taylor was granted permission to appeal on the ground that the judge should not have found there to be an implied term (as that had not been advanced by RDM at trial) but was refused permission to appeal on the ground that the judge had been wrong to find, as a fact, that there had been a breach of that implied term. We heard the arguments on the latter ground on the basis that the appeal was before us.

¹ There is no appeal from the judge's refusal (if he were wrong as to construction) to order rectification of the agreement.

15. As I have said, RDM seeks permission to appeal from paragraphs 21 and 22 of the order made on 15 July 2004 - by which it was ordered to pay indemnity costs from 3 March 2004 and interest on those costs at a rate of 10% over Bank of England base rate - and from paragraph 8 of the order - by which it was ordered to pay interest at that same rate from 3 March 2004 on the damages for failure to exploit the composition "Follow Your Heart". It is clear that those orders were made on the basis that CPR 36.21 was engaged. The parties agreed that we should not hear argument on that application - or on any appeal to follow if permission were granted - until after we had decided the substantive issues raised by the appeal and cross-appeal; and we have not done so.

The 1998 publishing agreement

16. The publishing agreement dated 1 December 1998 is made between Mr Taylor ("the Writer") and RDM ("the Publisher"). It provides for the assignment by the Writer to the Publisher, in consideration for payment of royalties and fees by the Publisher to the Writer, of all copyright in the words and music of "the Compositions" (as defined in clause 3). Clause 4 defines "the Term". It provides for a period of twenty five years ("the Retention Period") following expiry of the term during which copyright shall remain in the Publisher. Clause 6 requires the Publisher to use all reasonable endeavours to exploit the compositions. Clause 10 provides the basis upon which royalties are to be calculated and paid by the Publisher. Royalties are payable subject to the recoupment of advances already paid by the Publisher to the Writer. Clause 11 provides for the payment of advances on account of fees and royalties. By clause 12 the Writer undertakes a minimum commitment - that is to say, the delivery of a minimum number of new compositions throughout the term. Clause 14 requires the Publisher to prepare and provide to the Writer statements of receipts.

17. "Compositions" are defined by clause 3(a) of the agreement:

"In this Agreement the term 'the Compositions' shall mean those compositions listed in Schedule A hereof and all musical compositions and/or lyrics and/or original arrangements of musical works (whether or not such musical works so arranged are in the public domain) which may prior to the date hereof have been written, composed or created in whole or in part by the Writer (whether under his own name or any other name) and not been assigned by the Writer to any third party, and/or any Compositions heretofore assigned to any third party the rights in which shall revert to the Writer at any time during the Term hereof, and/or any compositions which are during the Term hereof written, composed or created in whole or in part by the Writer including the title, words and music thereof."

18. Clauses 4 (Term, Retention and Collection Period), 11 (Advances) and 12 (Writer's Minimum Commitment) are central to the first issue for decision on this appeal: was the term of Mr Taylor's engagement two years or three? It is necessary to set out substantial parts of those clauses:

"4(a) (i) The Term of this Agreement shall (subject to Clause 12(b) hereof) be for a period 2 (two) years from the date hereof,

(ii) In the event that all advances paid to the Writer hereunder have not been fully recouped (as hereinafter defined) at the expiry of the Term, then the Term shall be extended for the shorter of either 1 (one) year or to the end of the accounting period² in which recoupment occurs.

(iii) For the purposes of this Agreement the expression 'Recoupment' shall mean the accounting date at which, based on information reasonably available to the Publisher . . . the share of earnings accountable to the Writer hereunder shall be sufficient to recoup all advance payments made to the Writer hereunder.

(b) Immediately following the expiry of the Term hereof (as may be extended), the Publisher shall continue to exercise the rights granted hereunder in respect of the Compositions for a further period of 25 (twenty five) years ('the Retention Period'). For the sake of clarity, the Publisher shall not be entitled to any rights in any musical works composed by the Writer after the expiry of the Term hereof. At the end of the Retention Period all right and interest in the Compositions shall, save as provided in Clause 4(c) hereof, revert to the Writer without further formality.

(c) Upon the expiry of the Retention Period, the Publisher shall have a further period of 2 (two) years in which to collect any and all income earned during the Term and/or the Retention Period but unpaid at the expiry of the Retention Period.

...

11. The Publisher agrees to pay to the Writer during the Term hereof the following advance payments on account of and recoupable from fees and royalties payable to the Writer pursuant to the Agreement:–

(a) £25,000 (twenty five thousand pounds sterling) during the first 12 (twelve) month period of this Agreement payable in 4 (four) equal quarterly instalments, the first such instalment being paid upon signature hereof and the subsequent instalments being paid on 1st of March 1999, 1st of June 1999, 1st September 1999;

² In that context, "accounting period" means the period ending on "the accounting date" – 30 June or 31 December (as the case may be) – for which accounts are to be prepared under clause 14(a).

(b) £25,000 (twenty five thousand pounds sterling) during the second 12 (twelve) month period of this Agreement payable in 4 (four) equal quarterly instalments, the first such instalment being paid on 1 December 1999 or such later date as may be occasioned by the extension of the first 12 (twelve) month period of this Agreement and the three subsequent instalments being paid at three-monthly intervals thereafter;

(c) £25,000 (twenty five thousand pounds sterling) during the third 12 (twelve) month period of this Agreement payable in 4 (four) equal quarterly instalments, the first such instalment being paid on 1st December 2000 or such later date as may be occasioned by the extension of the first and/or the second 12 (twelve) month period of this Agreement and the three subsequent instalments being paid at three-monthly intervals thereafter.

...

12 (a) The Writer hereby undertakes to deliver to the Publisher in each 12 (twelve) month period of the Term a minimum of an aggregate of 10 (ten) new Compositions by the Writer of a quality commercially acceptable to the Publisher ('the Minimum Commitment') and the Publisher undertakes to act reasonably and in good faith in assessing such acceptability. . . .

(b) In the event that the Writer fails to fulfil the Writer's Minimum Commitment for any 12 (twelve) month period as aforesaid at least 60 (sixty) days prior to the expiration of the relevant 12 (twelve) month period then without prejudice to any other rights of the Publisher the said 12 (twelve) month period of the Agreement shall be automatically extended without further notice or payment from the Publisher until 60 (sixty) days following fulfilment of the Writer's Minimum Commitment for the said 12 (twelve) month period (and the Term hereof shall be deemed extended accordingly) provided that no one period of extension shall exceed 2 (two) years SAVE THAT, notwithstanding any failure to fulfil the Minimum Commitment, no extension shall be applied in the event that all advances actually paid to the Writer hereunder shall have been recouped . . . "

19. At first sight, there is an apparent tension between the definition of the Term (two years) in clause 4(a)(i) of the 1998 publishing agreement and the provision, in clause 11(c), for the payment of advances "during the Term hereof" in respect of "the third . . . twelve month period of this Agreement". It is that apparent tension which has given rise to the dispute which is the subject of the first issue on this appeal - two years or three.

The 1995 and 1997 publishing agreements

20. As I have said, the 1998 publishing agreement was executed at a time when the term of the 1997 publishing agreement (dated 1 December 1997) had not expired. The 1997 agreement followed an earlier agreement (the 1995 agreement - dated 1 December 1995). Clause 20 of the 1998 agreement provides that royalties payable under either of the two earlier agreements shall be retained by the Publisher until all advances paid under those agreements have been recouped. It is plain, therefore, that the terms of the earlier agreements are part of "the background knowledge which would reasonably have been available to the parties in the situation in which they were" at the time of the 1998 agreement - to adopt the expression used by Lord Hoffmann in the first of the principles which he summarised in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912g–913e.
21. The form of each of the two earlier agreements was the same. Each was for a term of two years (subject to clause 12(b)). Further the form of the two earlier agreements was the same as that of the 1998 agreement, with one significant difference. In each of the earlier agreements the words "Intentionally deleted" appeared in clause 11(c) - in place of the text set out in that clause in the 1998 agreement. The inference is obvious. The three agreements are derived from a common source which did include the text of clause 11(c) as it appears in the 1998 agreement. When preparing the 1995 agreement from that source – and when preparing the 1997 agreement (which may, itself, have been prepared either by reproducing the 1995 agreement or from the original source) the draftsman took the decision to delete the text of clause 11(c). But when preparing the 1998 agreement the draftsman took the decision (for whatever reason) to include the text of clause 11(c).
22. There are, of course, differences in the amounts of the advances to be paid under the earlier agreements and the 1998 agreement. Under both the earlier agreements advances of £10,000 are to be paid (by semi-annual instalments) in each of the first twelve month period and the second twelve month period. In the absence of clause 11(c) there is no third twelve month period in which an advance is to be paid. But in other respects the form and structure of the three agreements are the same. In particular, each contains clause 4(a)(i) (the Term), clause 4(a)(ii) (extending the Term until advances have been recouped), clause 12(a) (Writer's Minimum Commitment) and clause 12(b) (automatic extension of each twelve month period - and deemed extension of the Term - if the minimum commitment is not fulfilled).

The first issue: two years or three

The judge's view

23. The judge addressed the question "two years or three" at paragraphs 209 to 233 of his judgment. He began by reminding himself of the familiar observations of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* (*ibid*), which he described as the "modern starting point for the consideration of the interpretation of a contract". He recorded (at paragraph 210 of his judgment) that both counsel were in agreement that "in considering the meaning and effect of the 1998 agreement it was legitimate to look at the 1995 and 1997 agreements"; but he found no assistance in those earlier agreements. He accepted (at paragraph 213) that if clause 4(a)(i) of the 1998 agreement were read alone, there was no difficulty in understanding what it means: "It clearly states that the term of the agreement is two years". Equally, if clause 11 were read alone, there was no difficulty in understanding what that clause meant: "It clearly says that there will be three twelve month periods in the agreement". He posed the question: "Are these clauses inconsistent, or can they be reconciled?" And, in that context, he reminded himself of the need - emphasised by Mr Justice Steyn in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 1 All ER 81, 89 - "to reconcile seemingly inconsistent provisions if that result can conscientiously and fairly be achieved". At paragraph 217 of his judgment he identified as his first task: "to see whether the two clauses can be sensibly read together". He reached the conclusion, at paragraph 221 of his judgment, that that could be done. That led him - necessarily, as it seems to me - to the further conclusion that the Term of the agreement was the period of two years for which clause 4(a)(i) provided.

24. The judge reached the conclusion that the two clauses were not inconsistent because (as he said) he preferred (on this point) the arguments advanced by Mr Mill QC on behalf of Mr Taylor to those advanced by Mr Sutcliffe QC on behalf of RDM. The judge set out those arguments at some length (at paragraphs 217 to 220 of his judgment). In the circumstances that they form the substance of his own reasoning and have, in effect, been rehearsed in the submissions made to this Court, it is convenient that I do the same:

"217. . . . In opening Mr Mill submitted that clause 4(a)(ii) of the agreement provided that there would be a third year of the agreement in the event that Mr Taylor's advances had not been fully recouped by RDM by the end of the second year (or a subsequent accounting period). Clause 11(c) must therefore be interpreted as confined to the situation in which the Term of the agreement is extended by the operation of clause 4(a)(ii). This may involve reading clause 11(c) as if it dealt with the third year of the agreement 'should it occur'. In that way clause 11(c) can be read conformably with clause 4(a)(i); and there is no inconsistency.

218. Mr Sutcliffe disputed that submission on the following main grounds. First, clause 4(a)(ii) provides for the extension of the Term in the event that all advances

paid to Mr Taylor have not been fully recouped at the expiry of the Term. If Mr Taylor is unrecouped, the Term is extended for the *shorter* of one year or to the end of the accounting period in which recoupment occurs. This means that there is no automatic one year extension. The accounting periods were the six month periods ending on 31 December and 30 June in each year. Mr Taylor might become fully recouped in the accounting period immediately following the end of the Term (i.e. by the following 31 December). Thus, if the fixed Term were taken to be 2 years ending on 30 November 2000, and if Mr Taylor became fully recouped in the accounting period ending on 31 December 2000, the Term would expire on 31 December 2000, only a month after the date on which the Term would otherwise have expired. If Mr Taylor became fully recouped in the following accounting period, the Term would end on 30 June 2001. If Mr Taylor never became recouped, the Term would be extended for the full year; that is to 30 November 2001. The same position would apply if Mr Taylor became recouped in the third accounting period. Although that accounting period would not in fact end until 31 December 2001, the long-stop date would kick in, and the Term would come to an end on 30 November 2001. Second, clause 11(c) speaks of 'the third 12 × month period of the Agreement'. It does not envisage that 12 month period being shortened by earlier recoupment. Third, it makes no commercial sense for RDM to be paying Mr Taylor a further advance of £25,000 in circumstances where the Term has only been extended by virtue of clause 4(a)(ii) because he is unrecouped. The only purpose of extending the Term for a further period is to enable RDM to recoup advances already paid. By clause 11(c), RDM would be required to pay Mr Taylor a further sum of £25,000. This further payment reduces the possibility of recoupment within the extension period. Fourth, the 1995 and 1997 agreements contain clause 4(a)(ii) in identical terms but no clause 11(c). It is hard to see why clause 11(c) should have been absent from those agreements but came to be included in the 1998 agreement, especially in circumstances where the annual advance payable under the 1998 agreement was two and a half times higher than that payable under the two previous agreements. Lastly, Mr Mills construction inevitably involves reading an apparently unqualified obligation to pay the advance during the third twelve month period as being qualified by some phrase as 'if it should occur'.

219. In his impressive reply, Mr Mill gave detailed answers to Mr Sutcliffe's objections. Mr Mill accepted that, contrary to his opening submission, on analysis clause 4(a)(ii) did not provide for an automatic extension of one year. Depending on the date of recoupment, the extension could be for one month (to 31 December 2000), seven months (to 30 June 2001) or one year (to 30 November 2001). However, he fastened on the opening words of clause 11:

‘The Publisher agrees to pay to the Writer *during the Term hereof* the following advance payments on account of and recoupable from fees and royalties payable to the Writer *pursuant to the Agreement*’
(emphasis added)

220. Thus Mr Mill submitted that if the extension of the term came to an end on, say, 30 June 2001, RDM's obligation to pay advances would cease on that date, because the obligation was only an obligation to pay ‘during the Term hereof’. This dealt with Mr Sutcliffe's first two objections. It also obviated the need to read any words into clause 11(c) (again, contrary to his opening submission). Next he submitted that there was a plain commercial purpose in the clause, whether looked at from the point of view of the writer (Mr Taylor) or the publisher (RDM). From Mr Taylor's perspective, an extension of the term would continue the period during which he would be exclusively tied to RDM. He could not therefore sell his compositions elsewhere. He would need an income to live on during the extension, and clause 11(c) provided the machinery for this. From RDM's perspective, the combination of clauses 1 and 4(b) gave the publisher the right to exploit the writer's works created during the Term for a period of 25 years after the Term ended. The obligation to pay advances was an obligation to pay on account of royalties etc. payable ‘pursuant to the Agreement’. There was every reason to suppose that during the period of 25 years following the termination of the Term the publisher would recoup advances out of royalties. In addition, he submitted that the minimum commitment applied during the extension so that the publisher would have the benefit of the writer's delivered compositions during the extension. I do not agree with this last point. The minimum commitment is an obligation to deliver 10 compositions during each twelve month period of the term. If the term were to be extended for the full period of one year, then I can see that the minimum commitment would apply. But if the term were to be extended for a shorter period (say, to 30 June 2001), then I do not see how the minimum commitment clause could be apportioned or rewritten so as to oblige the writer to deliver, say, five compositions in a six month period. Mr Mill's fall-back position on this point was

that in practice, since the writer has nowhere else to go during the extension period (because he is exclusively tied to the publisher) he would in practice deliver compositions for the publisher to exploit. I think the point can also be made that the copyright in any composition written or created during the extension period would automatically be assigned to the publisher under clause 1. . . . In answer to Mr Sutcliffe's fourth objection Mr Mill submitted that although a comparison between the 1998 agreement and the 1995 and 1997 agreements was legally permissible, it was unhelpful. Just because the two earlier agreements were workable without clause 11(c), it did not follow that the 1998 agreement was unworkable with the inclusion of clause 11(c)."

25. The judge's conclusion is expressed, succinctly, at paragraph 221 of his judgment:

"I confess that although Mr Sutcliffe persuaded me that Mr Mill's original formulation was a very improbable reading of the agreement, Mr Mill has persuaded me that his revised formulation is a permissible reading, given the extreme reluctance of the court to hold that clauses in a contract are truly inconsistent, with the consequence that one of them must be rejected or rewritten. In my judgment the two clauses can be conscientiously and fairly read together."

26. The judge then went on to consider what the position would be if he were wrong - that is to say, if on a true analysis the two clauses were indeed inconsistent. He had no doubt about the principle to be applied: effect should be given to that part [of the agreement] which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected" - *Walker v Giles* (1848) 6 C.B. 662, 702, *per* Chief Justice Wilde. But, as the judge observed, if there was an inconsistency between clause 4(a)(i) and clause 11(c), the problem was to decide which of those clauses was best calculated to give effect to the real intentions of the parties. As to that, he accepted the submission made by Mr Mill, which he expressed in these terms (at paragraph 231 of his judgment):

"Where the court is confronted with two conflicting terms in an agreement, both dealing with duration, but one doing so directly, and the other indirectly, the court should infer that the clause dealing with duration directly represents the 'real intention' of the parties. The conventional structure of an agreement such as this one is that duration is referred to in a separate clause; and that is where the reasonable person with the background knowledge of the parties would look to discover the duration of the agreement."

On that basis - had he thought the two clauses mutually inconsistent - the judge would have rejected clause 11(c) of the 1998 publishing agreement.

Are clauses 4(a)(i) and 11(c) of the 1998 publishing agreement mutually inconsistent?

27. The judge was plainly correct to ask himself, first, whether the two clauses could sensibly be read together. The court must start from the premise that the parties intended that effect should be given to each of the clauses in their agreement; so that "to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent" - *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co. Ltd* [1989] 2 HKLR 639ž 645G–H. And, as Lord Goff of Chieveley pointed out, in delivering the advice of the Privy Council in that case:

"In point of fact, this is likely to occur only where there has been some defect of draftsmanship. . . . But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction."

28. In my view, this is one of those rare cases in which the court is forced to conclude that there has been some defect of draftsmanship. The clauses cannot sensibly be read together.

29. It is important to keep in mind that the definition of the Term in clause 4(a)(i) of the agreement – as a fixed period of years - is expressly made "subject to Clause 12(b) hereof". Clause 12(b) provides for automatic extension of any "12 (twelve) month period of the Agreement" if and in the event that the Writer fails to fulfil his Minimum Commitment (defined in clause 12(a)) for that period. The extension is until 60 days "following the fulfilment of the Writer's Minimum Commitment" for that period, subject to the limitation that "no one period of extension shall exceed two years". The expression "12 (twelve) month period" - where it appears in clauses 11 and 12 of the agreement – must be read with that in mind. The expression does not mean a period of twelve months certain. It means a period which will last for at least twelve months, but which may last for longer than twelve months (subject to a limit of three years) if it takes the Writer longer than twelve months to fulfil his Minimum Commitment.

30. The effect of the definition in clause 4(a)(i), read with clause 12(b), is that the duration of the Term is elastic. It is equal to the aggregate of a number of "12 (twelve) month periods" each of which may continue for more than twelve months. If and in the event that any "12 (twelve) month period" is "automatically extended" under clause 12(b), "the Term hereof shall be deemed extended accordingly".

31. The definition of "the Term" is important. It determines (amongst other matters): (i) the period during which compositions written, composed or created by the Writer fall within the definition "Compositions" for the purposes of clauses 1 and 3 of the agreement (and so are compositions the copyright in which is assigned to the Publisher); (ii) the commencement of "the Retention Period" for the purposes of clause 4(b) (and so the

period for which copyright in the Compositions remains vested in the Publisher); (iii) the period during which the Publisher is to pay advances to the Writer under clause 11; and (iv) the period during which the Writer is required to deliver new Compositions in accordance with the Minimum Commitment undertaken in clause 12(a). In each of those contexts "the Term" has the "elastic" meaning given by clause 4(a)(i) read with clause 12(b). It is not - or, at least, not necessarily - a fixed number of years.

32. That "elastic" meaning has effect for the purposes of clause 11 of the agreement. The Publisher agrees to pay to the Writer "during the Term hereof" advances on account of fees and royalties. Clause 11(a) requires payment of £25,000 "during the first 12 (twelve) month period". During that period the quarterly instalments are to be paid on fixed dates (1 December 1998, 1 March, 1 June and 1 September 1999). But the "the first 12 (twelve) month period" has the extended meaning to which I have already referred. It is a period which may continue beyond 30 November 1999. This is made clear by clause 11(b). Under that clause an advance of £25,000 is payable "during the second 12 (twelve) month period of this Agreement" by four equal quarterly instalments, the first such instalment being paid on 1st December 1999 "or on such later date as may be occasioned by the extension of the first 12 (twelve) month period of this Agreement" and the three subsequent instalments being paid at three-monthly intervals thereafter. So, if the first "12 (twelve) month period" is automatically extended beyond 30 November 1999 by the operation of clause 12(b), the second "12 (twelve) month period" does not start on 1 December 1999: it does not start until the first period has come to an end. The pattern is repeated in clause 11(c). The first quarterly instalment of the third advance of £25,000 is payable on 1 December 2000 "or such later date as may be occasioned by the extension of the first and/or the second 12 (twelve) month period of this Agreement". And, again, the three subsequent instalments are to be paid at three-month intervals thereafter. But, because "the Term" has the "elastic" meaning to which I have referred, payments made during the first, second or third "12 (twelve) month periods" will all be made "during the Term hereof".
33. The premise which underlies the structure of the agreement - if it is to have effect in the way that I have described - is that the number of "12 (twelve) month periods" corresponds to the number of years in the clause 4(a)(i) definition. So, to state the obvious, if the clause 4(a)(i) definition provides that "the Term of this Agreement shall (subject to Clause 12(b) hereof) be for a period of 'N' years from the date hereof", the scheme of the agreement requires that there be 'N' "12 (twelve) month periods". The scheme does not work as intended if there are 'N+1' periods.
34. That, of course, is the problem in the present case. The parties have made an agreement which purports to define the Term by reference to three periods (clause 11) and two years (clause 4(a)(i)). The solution proposed by Mr Taylor and adopted by the judge is to treat the third period as if it were not brought into the definition of the Term in clause 4(a)(i) - that is to say, as if it were not a "12 (twelve) month period" for the purposes of clause 12(b) - but, rather, as an extension of the Term within clause 4(a)(ii). It is said, in effect, that clause 11(c) is intended to provide for the payment of an additional advance of £25,000 in the event that all advances paid to the Writer during the first two periods have not been fully recouped within those first two periods.

35. Leaving aside the obvious uncommerciality of an arrangement which provides for the payment of a further advance in circumstances where the existing advances have not been recouped, the solution proposed by Mr Taylor presents difficulties which are, to my mind, incapable of being overcome by any process of reasoned construction.
36. First, the effect of clause 4(a)(ii) is to extend the Term beyond the date at which it would otherwise come to an end. The judge, in the passage to which I have referred, appears to have taken the view that the date on which the Term would come to an end (but for the extension for which clause 4(a)(ii) provides) was 30 November 2000. But that is to ignore the deemed extension of the term, under clause 12(b), in the event that either of the first two "12 (twelve) month periods" is automatically extended by reason of the Writer's failure to fulfil his Minimum Commitment for that period. The true position (on any view) is that the Term might come to an end on, or at any time during the period of four years following, 30 November 2000. And the effect of that is that the extension for which clause 4(a)(ii) provides – "either 1 (one) year or to the end of the accounting period in which recoupment occurs" – may be for any period of up to one year. It is to that period (of unpredictable length) that the provisions of clauses 11(c), 12(a) and 12(b) have to be applied.
37. Second, what amount is to be paid under clause 11(c) in the event of a "recoupment" extension into a third period under clause 4(a)(ii)? It is said that the obligation to pay advances under clause 11 comes to an end at the end of the period of extension (whenever that may be). But the obligation under clause 11(c) is to pay £25,000 during the third period. It is not an obligation to pay an amount reduced *pro-rata* if the third period is less than a year. Nor is it an obligation to pay £6,250 on the first day of the extended period and a further £6,250 on the first day of each succeeding three monthly period, if that day happens to fall within the extended period of recoupment.
38. Third, to what extent (if at all) does the Minimum Commitment apply during the extended period of recoupment? The judge thought that the commitment would apply if the period was extended for the full period of one year, but not otherwise. But that approach, as it seems to me, overlooks the fact that it will not be known, at the start of the period of recoupment, when that period will end. The duration of the period (subject to the maximum of one year) depends on the recoupment actually made within it. So, on the judge's view, neither the Writer nor the Publisher will know, during the period, whether the Minimum Commitment applies.
39. Fourth, if the Minimum Commitment does apply, is the extended period of recoupment itself extended under clause 12(b)? If the period of recoupment is treated as a "third 12 (twelve) month period" for the purposes of clause 11(c) and is a "12 (twelve) month period" for the purposes of clause 12(a) – as the judge accepted it could be if it lasted for the full year permitted by clause 4(a)(ii) – then (at first sight, at least) it will be "automatically extended" (for up to a further two years) by the provisions of clause 12(b) if the Writer fails to fulfil the Minimum Commitment for that period. The judge did not address that point; and counsel for Mr Taylor could provide no answer during argument in this Court.

40. The judge was right to refer to the "extreme reluctance" of the court to hold that clauses in a contract are truly inconsistent. And he was right to have in mind the observation of Lord Goff of Chieveley, when delivering the opinion of the Privy Council in the *Yien Yieh Commercial Bank* case, that "the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction". But it is not the duty of the court to seek to reconcile seemingly inconsistent provisions by giving to the contract a construction that the parties could not have intended. The question, in each case, is whether the provisions can sensibly be read together; whether a reconciliation of the provisions can conscientiously and fairly be achieved. In my view the judge ought to have accepted, in the present case, that that question had to be answered in the negative.

Which of the two clauses should prevail?

41. For the reasons which I have set out, I am driven to the conclusion that it is not possible to reconcile clause 11(c) - which can only be given effect on the basis that the Term comprises (or is defined by reference to) three "12 (twelve) month periods" - with clause 4(a)(i) - which defines the term (subject to clause 12(b)) as a period of two years. It seems to me impossible to avoid the conclusion that there has been a mistake in draftsmanship.

42. It is, I think, easier to accept that conclusion in the circumstances that the 1998 agreement follows earlier agreements which are in substantially the same form. The circumstances point strongly to the conclusion that the 1998 agreement and the earlier agreements derive from a common source. The process of adaptation from other documents lends itself more readily to sloppy and careless draftsmanship than the process of drafting as a coherent whole - as Lord Goff recognised in the *Yien Yieh Commercial Bank* case.

43. Further, it is clear that the mistake in draftsmanship was either (A) to include clause 11(c) without making an appropriate alteration to clause 4(a)(i) or (B) to retain clause 4(a)(i) in the form in which it was in the 1995 and 1997 agreements without appreciating that clause 11(c) should be omitted or deleted (as it had been in the earlier agreements). The question, of course, is which of those two mistakes should be attributed to the parties.

44. There was some evidence as to the manner in which the 1998 agreement was prepared. The judge set that out at paragraph 147 of his judgment:

"Preparation of the written agreement . M. Dreux–Leblanc says that he prepared the new written agreement in November 1998, using a previous RDM agreement as his precedent. He changed clause 11 to reflect the new dates for payment of the quarterly advances. He added a new clause 11(c) (which had been marked 'intentionally deleted' in the previous agreement) to deal with the payment of advances in the third year of the term. He added a new clause 20, which referred to Mr Taylor's previous agreements. However, he says that he forgot to

change clause 4 which retained its description of the term of the agreement as '2 (two) years'."

45. The judge accepted, I think, that RDM (through M. Dreux–Leblanc) wanted a three year agreement. At the least, that was M. Dreux–Leblanc's evidence and the judge did not reject it: what he found (in addressing the claim for rectification) was that M. Dreux–Leblanc did not make that clear to Mr Taylor in the course of any discussion. Nor did the judge reject M. Dreux–Leblanc's account of the drafting process. But, of course, Mr Taylor had no part in that process. The judge found (at paragraph 173 of his judgment) that Mr Taylor would not have agreed to a three year term if the matter had been discussed. He also found (at paragraph 177) - although "not without some hesitation" - that Mr Taylor did not read the 1998 agreement before he signed it.
46. It is, I think, plain that Mr Taylor can be in no better position *vis à vis* the 1998 agreement than he would have been if he had read the agreement with the knowledge (which was plainly available to him) that it differed from the 1995 and 1997 agreements in the significant respect to which I have already referred; that is to say that, in place of the words "intentionally deleted" which had appeared against clause 11(c) in the earlier agreements, there was now text which made it clear that an advance was to be paid during the "third 12 (twelve) month period". With that knowledge he should have concluded - or, more accurately, a reasonable person looking at the matter objectively would have concluded - that clause 11(c) had been omitted from the earlier agreements because it was not required (and was not apposite) in agreements which extended only over two "12 (twelve) month periods"; but that it had been included in the 1998 agreement with the intention that the term of that agreement should extend over three periods.
47. For those reasons I would hold that the judge was wrong to take the view that he did on this point. In accepting, at paragraph 231 of his judgment, the submission on behalf of Mr Taylor that - "The conventional structure of an agreement such as this one is that duration is referred to in a separate clause; and that is where the reasonable person with the background knowledge of the parties would look to discover the duration of the agreement" - he gave insufficient weight (i) to the importance of the successive "12 (twelve) month periods" in relation to the Term - that is to say, he failed to give weight to the need to read clause 4(a)(i) with clause 12(b) - and (ii) to the significance of the words "intentionally deleted" in the earlier agreements and of the change that had been made by including the text of clause 11(c) in the 1998 agreement. I would have allowed the appeal on the first issue.

The second issue: infringement of copyright

48. The circumstances in which this issue arose are set out at paragraphs 235 to 239 and 251 of the judgment. In summary the position was this. Mr Barry went out to Miami in July and October 2000 to write songs with Enrique Iglesias. The products of those sessions included "Hero" and "Love to See You Cry". But, by the end of November 2000 the songs were unfinished. Mr Barry returned to England. In late November 2000 Mr Iglesias telephoned Mr Taylor to ask him to come out to Miami to work on the songs. The judge accepted that that was Mr Taylor's first involvement with that project. Mr Taylor and Mr Barry flew to Miami on 3 December 2000 and stayed there for about a week. They worked with Mr Iglesias on the songs in a studio in Miami. Mr Taylor made a number of contributions, both to the music and to the lyrics. After his return from Miami, Mr Taylor continued to work on the songs. In consequence he was given a writing credit (described by the judge as "modest") on each song when the songs were subsequently released to the public.

49. It was accepted that what Mr Taylor did in relation to both the musical work and the literary work in "Hero" and to the musical work in "Love to See You Cry" gave rise to a new joint work in each. RDM's primary claim, of course, was that the work done by Mr Taylor in and after December 2000 was done at a time when the 1998 publishing agreement remained in force; so that the copyright in musical compositions and lyrics composed or created in whole or in part by Mr Taylor fell within that agreement and vested in RDM by virtue of the assignment in clause 1. On that basis Mr Taylor was in breach of the 1998 publishing agreement - and infringed RDM's copyright - when, in April 2001, he purported to assign his interest in those songs to Metrophonic Music Limited. But, having held that the 1998 publishing agreement determined on 30 December 2000, the judge rejected that as a basis for RDM's claim in respect of infringement of copyright.

50. The alternative basis for the claim in respect of infringement of copyright was pleaded at paragraphs 75A to 75D of the re-amended counterclaim. Put shortly, it was said that Mr Taylor's contributions in December 2000 were adaptations of - alternatively new compositions incorporating a substantial part of - Mr Barry's existing compositions of the two Iglesias songs; that, when Mr Taylor made his contributions, the copyright in Mr Barry's compositions had already vested in RDM pursuant to an exclusive songwriting agreement made between Mr Barry and RDM; and that Mr Taylor's adaptations (or new compositions) and the subsequent exploitation of the finished work constituted an infringement of RDM's existing copyright.

51. In the context of the claim for infringement - as put on that alternative basis - the first question for the judge was whether the copyright in the two Iglesias songs "Hero" and "Love to See You Cry", in the versions in which they existed on 1 December 2000 - had vested in RDM under the terms of Mr Barry's exclusive song writing agreement - which was in the same terms as the 1998 publishing agreement (so far as material). He held that it had done so (paragraph 250 of his judgment). It followed that work done by Mr Taylor on the songs after 1 December 2000 (and the subsequent exploitation of the finished songs) was an infringement of RDM's copyright unless there was a defence upon which

Mr Taylor could rely. It was said on behalf of Mr Taylor that RDM had given consent - through Mr Rawling, who (at the time) was still employed by RDM - to the work which Mr Taylor was doing. The judge accepted that Mr Rawling knew of the purpose of Mr Taylor's visit to Miami and that he was held out by RDM as having the ostensible authority of a director; but there was no evidence that he had given consent and (having regard to the terms of a letter written by M Dreux–Leblanc to Mr Taylor on 30 November 2000, just before he set off for Miami) no basis upon which to imply consent on behalf of RDM. So the defence failed. The judge held that RDM's claim in respect of infringement of copyright in the two Iglesias songs, as they existed on 1 December 2000 - was entitled to succeed.

52. Mr Taylor's primary submission on his cross–appeal is that the judge was wrong to hold that copyright in the two Iglesias songs – in the versions in which they existed on 1 December 2000 – had vested in RDM under the terms of Mr Barry's exclusive song writing agreement. In short, the argument was advanced that copyright did not vest in RDM until the completed composition had been delivered to RDM. The judge rejected that submission. At paragraphs 248 and 249 of his judgment he said this:

"248 In my judgment each version of a song, if it is a musical and/or literary work, is a composition within the meaning of the agreement. The copyright owner is essentially given negative rights; that is to say the right to prevent anyone else from infringing copyright. . . . To reach a construction that makes the assignment of copyright dependent on the writer's subjective opinion of when a song is 'complete' or 'finished' creates acute commercial uncertainty as to what rights the publisher has. Equally, to conclude that no copyright is assigned until the writer delivers the song, means that the writer can delay assigning copyright simply by delaying delivery of a song. It is true that by so doing he might be in breach of the minimum commitment, but that is not a complete answer. . . . Moreover it would be productive of potential commercial conflict if the publisher was entitled only to copyright in the finished song, but copyright in preliminary versions remained with the writer.

249. It may be objected that if copyright in the draft of an unfinished song vests in the publisher as soon as it has been fixed, then the writer will infringe the publisher's copyright if he carries on working on the song. However, there would, in my judgment, be implied under the publishing agreement a licence for the writer to continue working on the song for the purposes of the agreement. Such an implication would, in my judgment, be necessary to give business efficacy to the agreement and/or is so obvious that it goes without saying. . . . "

53. Had the 1998 publishing agreement remained in force after 1 December 2000 - so that copyright in Mr Taylor's work on the two Iglesias songs vested in RDM under that agreement - it would be of little importance whether the judge was correct to hold that

copyright in the songs, as they existed on 1 December 2000, had already vested in RDM under Mr Barry's publishing agreement. But the other members of this Court differ from the view that I take on that first issue; and so it is necessary to address the question whether the judge was correct to hold as he did in answer to the second issue. In any event the point was argued before this Court at some length and – on a strict analysis - it is a distinct point and the subject of a cross–appeal.

54. In the circumstances that I have the misfortune to differ from the view of the other members of the Court on that second issue also, I can do so shortly. In my view the judge was correct for the reasons which he gave. The relevant question - which the judge identified - was whether unfinished work could, nevertheless, be a 'Composition' within the meaning given to that term by clause 3 of Mr Barry's publishing agreement. Clause 3 must be read in conjunction with clause 1. When read together it is, I think, clear that the phrase "any compositions which are during the Term hereof written, composed or created in whole or in part by the Writer" is intended to encompass all original musical and literary work of the Writer in which copyright subsists. And, as the judge pointed out at paragraph 247 of his judgment, copyright can subsist in an unfinished version of work (whether musical or literary). All that is required is that the work is an original work. There is no reason why the meaning given to 'Composition' by clause 3 of the agreement should be cut down by clause 12; which, as the judge observed, is intended to impose an obligation (as to minimum commitment) which is independent of the assignment of copyright. I would have dismissed the cross–appeal on the second issue.

The third issue: should there be an injunction

55. The relief sought by way of counterclaim included an injunction restraining Mr Taylor "from infringing [RDM's] copyright in the Disputed Songs. . .". In that context "the Disputed Songs" are those set out in schedule 4 to the re–re–amended defence and counterclaim. They include eight songs said to have been composed before 30 November 2000 (the undisputed term) and two songs composed thereafter (the disputed term). Of the eight songs composed during the undisputed term, five were recorded by Enrique Iglesias (including "Hero" and "Love to See You Cry") and three were recorded by Cher.
56. The judge addressed the question whether he should grant an injunction in the terms sought, or at all, at an adjourned hearing and in the light of the judgment in which he had determined issue (i) in favour of Mr Taylor. It follows, therefore, that he approached this question on the basis (i) that the 1998 publishing agreement had determined on 30 November 2000 and (ii) that the only infringement of copyright which had been established against Mr Taylor was infringement of the copyright in the versions of "Hero" (both literary and musical) and "Love to See You Cry" (musical only) as they existed on 1 December 2000. He held that there was no evidence that there was any threat of primary infringement of copyright in those works by Mr Taylor. But Mr Taylor was the joint author of both those works in the form in which they were released to the public, so that there was secondary infringement which gave rise to a claim for damages or an account of profits.

57. The judge then went on to consider the submission advanced on behalf of RDM that, because its property right in the versions of the works as they had existed on 1 December 2000 was still being infringed by the sales to the public of the two works (in the completed versions), it was entitled to an injunction to restrain continuing infringement. He said this (at paragraphs 26 to 28 of the further judgments delivered on 15 July 2004):

"26. The question really, as it seems to me, is whether it is Mr Taylor who is continuing any activity in infringing copyright. As I have said, he was the joint author of both of those works. In fact even though the joint authorship was itself an infringement of copyright, he has assigned his copyright interest to Metrophonic, and consequently is in no position to do anything about the publication of those two works.

27. It seems to me also that I must take into account the realities of an injunction in exercise of the equitable jurisdiction to grant or withhold an injunction under what used to be Lord Cairns' Act, and is now section 51 of the Supreme Court Act 1981, for this seems to me to be a case in which the principal purpose of the grant of an injunction against Mr Taylor will be the use by RDM of that order to better its negotiating position vis-à-vis the record companies in order to require record companies to change the credits on the information provided to the public on the sleeve of the CD. There is no real question of actually stopping the released versions of the works in question.

28. That, in my view, is not what the equitable jurisdiction is designed to achieve. As a matter of discretion therefore I decline to order the grant of an injunction."

58. On this appeal RDM challenges the judge's conclusion that, having assigned his copyright interest in the two songs to Metrophonic, Mr Taylor is no longer in a position to restrain publication of the compositions. It is said that there are provisions in the agreement made between Mr Taylor and Metrophonic on 11 April 2001 - in particular, at clauses 6(h) and 6(i) of that agreement - which give Mr Taylor power to withhold consent in circumstances which would enable him to exercise control in the future.

59. The judge was not asked to consider those provisions. But, in my view the answer to the challenge to the judge's conclusion that Mr Taylor is no longer in a position to restrain publication of the two compositions is found in paragraph 24 of the skeleton argument lodged on his behalf as respondent to RDM's appeal. Put shortly, the matters in respect of which Mr Taylor's consent is required under the agreement of 11 April 2001 are matters to which the consent of RDM (in its capacity as assignee of Mr Barry's copyright interest as writer of the songs) would also be required in any event. So, to the extent that exploitation of the songs could be prevented by an injunction restraining Mr Taylor from giving consent under clauses 6(h) and 6(i) of the agreement of 11 April 2001, the injunction would achieve nothing that cannot already be achieved by RDM withholding its own consent. If RDM really does wish to prevent exploitation of the songs in the

limited circumstances in which Mr Taylor's consent is required under his agreement with Metrophonic, it can do so. It does not need an injunction.

60. The true position - as the judge recognised – is that RDM does not wish to prevent exploitation of the two songs. It is not in its interests to do so. What it wants is for the songs to be published in circumstances that it (rather than Metrophonic) is given credit as publisher on the sleeve. RDM seeks an injunction against Mr Taylor not in order to stop publication but in the expectation that that injunction will enable it to put pressure on Metrophonic in negotiations as to publishing credits. It is to be noted that, in its oral and written submissions, RDM does not suggest that that is an inaccurate or unfair assessment of the position.
61. RDM seeks to rely, also, on clauses 6(e) and 10(3) of the agreement of 11 April 2001. Clause 6(e) provides that all Mr Taylor's rights in and to the compositions revert to him on the expiration of the "Rights Period" - a period which, as defined, will expire on 30 July 2016 or on earlier termination under the provisions of clause 16(1) of the agreement. But there is no reason to think that the rights will, in fact, revert to Mr Taylor during the next ten years; and no reason to cover that possibility by a prospective injunction at this stage. Nor does clause 10(3) of the agreement of 11 April 2001 assist RDM. If Mr Taylor (in his capacity as a producer or recording artist) were to enter into a recording or other agreement with a third party (in the circumstances permitted by that clause) that would not, of itself, authorise or enable him to authorise infringement of copyright in either of the two compositions. The consent of the copyright owners (RDM, Metrophonic and Mr Iglesias' publishers) would still be required before he could perform obligations under such an agreement in relation to those compositions.
62. It is accepted that, in deciding whether or not to grant an injunction to restrain infringement of copyright, the judge was entitled to exercise a discretion. Having held that the 1998 publishing agreement had determined on 30 November 2000, he decided to refuse an injunction. He did so on the ground that an injunction would serve no proper purpose. I am not persuaded that he was wrong to take that view. I would dismiss the appeal on the third issue.

The fourth issue: interference with goods

63. The pleaded allegation, at paragraph 84 of the re-re-amended defence and counterclaim, was that, in or about late December 2000 (shortly after Mr Taylor had given notice that he no longer intended to provide his services to RDM as a producer), he copied files onto his portable computer and then deleted those files from RDM's computers. The judge held that RDM had established its claim under this head to the limited extent that files relating to the Hall & Oates project were improperly deleted from Mr Taylor's computer and back up copies wrongfully removed from its premises. By paragraph 16 of his order of 15 July 2004 he gave judgment for RDM on its claim for wrongful interference with goods to the extent that the claim "related to the computer files containing parts of [Mr Taylor's] productions of recordings by Hall & Oates which were deleted by [Mr Taylor] in or about November 2000"; and he ordered an inquiry as to the damage suffered by RDM as a consequence of such interference. It is from that paragraph of the order (and

the consequential orders in paragraphs 17 and 18) that Mr Taylor appeals under this head.

64. The judge's findings of fact in relation to this issue are set out at paragraphs 324 to 328 of his judgment. He accepted that it was standard practice within RDM that, once a project was finished, files relating to that project would be deleted from the computer; but that copies of those files (backed-up onto a CD) would be kept at the premises. He recorded that Mr Taylor had accepted that he had deleted files from his computer. Mr Taylor's case was that he had done so in accordance with the standard practice. But, as the judge found (accepting Mr Taylor's evidence on this point), "the Hall & Oates project which he [Mr Taylor] had been working on shortly before he left RDM, had not yet been accepted although the tracks had been delivered, and 'there was potential for that to have needed some tweaks'". So, as the judge held, "that project was not, therefore, a finished project and the files relating to it ought not to have been deleted from the computer".

65. There was nothing to suggest that copies of the deleted material had not been backed up onto a CD in accordance with the standard practice. Indeed, it would have been very surprising if the deleted material had not been backed up. The question was: what had happened to the back-up copies. The judge was not satisfied that "no materials relating to the Hall & Oates project were left at Home Park House"; but Mr Taylor accepted that there were back up copies of the Hall & Oates material at BRP's premises. It was on that basis that the judge concluded "that files [relating to the Hall & Oates project] were improperly deleted from Mr Taylor's computer and that back up copies were wrongfully removed from Home Park House". But he made no finding as to what was left at Home Park House; and no finding that it was Mr Taylor who had removed copies to BRP's premises. He did not think that it was necessary to do so. Further, as it seems to me, he did not have the evidential material on which to do so. He said this, at paragraph 331 of his judgment:

"Any deletion of files and wrongful removal of back-ups was carried out as part of a common design to which Mr Taylor was a party. Thus he is liable jointly for any tort committed as part of that common design."

66. It is said on behalf of Mr Taylor – correctly, in my view – that it was no part of the pleaded case that he had come to meet at trial that back-up copies of Hall & Oates material had been removed from RDM's premises; or that, if so, those back-up copies had been removed by him; or that those copies had been removed "as part of a common design to which [he] was a party". Accordingly, it is said, the judge should not have held that he was liable for the tort of unlawful interference with RDM's goods in so far as that interference consisted of the wrongful removal of back-up copies from RDM's premises at Home Park House to BRP's premises. The only unlawful interference with RDM's goods for which Mr Taylor could properly be held liable was the deletion of files from the computer at a time when, on a strict view, the Hall & Oates project had not been finished. And that wrong should be marked only by an award of nominal damages.

67. In my view there is force in those submissions. An allegation that Mr Taylor removed back-up copies belonging to RDM from Home Park House - *a fortiori* , an allegation that

he was party to a common design to deprive RDM of its property - carries a strong implication of dishonesty. It is a much more serious allegation than that made in the pleaded case - which, on analysis, is no more than an allegation of misapplication of the standard practice relating to the deletion of files on the completion of a project. If RDM intended to advance a case that Mr Taylor had behaved dishonestly in relation to the Hall & Oates material, that case should have been pleaded in unequivocal terms and put to Mr Taylor so that he could answer it. Absent that, the judge should not have made the finding that he did.

68. It follows that I would allow Mr Taylor's appeal on this issue to the extent that I have indicated. I would vary paragraph 16 of the judge's order by setting aside the direction for an inquiry; I would substitute for paragraph 17 an order that Mr Taylor pay nominal damages in respect of his wrong in deleting files otherwise than in accordance with standard practice; and I would set aside paragraph 18.

The fifth issue: breach of the production agreement

69. The judge held that Mr Taylor was in breach of an implied term of the production agreement in relation to the "Living Proof" album. In relation to that issue Mr Taylor was granted permission to appeal on the ground that the judge should not have found there to be an implied term (as that had not been advanced by RDM at trial); but was refused permission to appeal on the ground that the judge had been wrong to find, as a fact, that there had been a breach of that implied term. We heard the arguments on the latter ground on the basis that the appeal was before us.
70. The "Living Proof" album was recorded by the artiste Cher. As I have said, an earlier album which she had recorded, and a single "Believe", produced by Mr Taylor while he was working for RDM, had achieved great success. It is not in dispute that Cher wanted Mr Taylor to produce her new album. RDM had been sent a producer contract (which it signed) under which it agreed to provide the services of Mr Taylor and Mr Rawling for her. Cher had come to England in November 2000 with that project in mind; but she returned to the United States unexpectedly without work having been commenced.
71. In the event the recording was made at a time when Mr Taylor had left RDM and was working with BRP. The circumstances are set out by the judge at paragraphs 278 to 281 of his judgment:

"278. On 17 January 2001 Warner Music UK Ltd (Cher's record label) wrote to Messrs Rawling and Taylor. They said that they understood that they would 'shortly commence' production of three tracks by the artiste Cher. On 13 February 2001 they wrote to RDM asking for confirmation that RDM were exclusively entitled to the production services of Messrs Rawling and Taylor. They said that:

'if you are unable to furnish these services or if you do not confirm to us immediately that you are able to contract with

us on this basis we will proceed to contract with Brian [Rawling] and Mark Taylor directly.'

279. On 15 February 2001 \ Mr Rawling wrote to M. Dreux-Leblanc. Under the heading 'Cher' he said:

'The album still has not been started or agreed to. Last conversation was she was in LA resting and this album will be started as and when she feels good about it.

I will be involved with Mark TAYLOR in the production of the album. (Unless WARNERS tell me something else.)'

280. On 20 February 2001 RDM replied to Warners confirming its ability to enter into an agreement, and asserting that the tracks in question were produced in RDM's studios by its employees or sub-producers. This fax seems not to have reached its addressee, because on 28 February Warners wrote to say that as they had had no reply to their letter of 13 February they were proceeding to contract directly with Mr Rawlings and Mr Taylor. RDM replied on the same day. They referred to the draft agreements, prepared in the name of RDM and asserted that Warners were bound to deal with RDM. On 2 March Warners asked the pointed question:

'Is [your] company still able to deliver the services of Messrs Rawling and Taylor?'

281. Warners had sent copies of its correspondence with RDM to Mr Negus-Fancey, the lawyer acting for Mr Rawling. On 6 March he said that RDM had no authority to contract on his behalf. He continued:

'In addition, contrary to RDM's assertions, the three commissioned tracks have not been and will not be produced at RDM's studios. Cher's vocals are scheduled to be recorded in the States and the producers are recording and mixing the tracks at alternative studios.'

72. The judge held that, by the end of November 2000, Mr Taylor had agreed to produce the Cher tracks for RDM and had already begun to do so. He recorded that it was accepted on behalf of Mr Taylor, in argument before him, that he should not undertake a project otherwise than for RDM if (i) RDM had obtained the project and (ii) Mr Taylor had agreed with RDM that he would undertake the project on RDM's behalf. But Mr Taylor did not accept that he was bound to decline to undertake any project, otherwise than for RDM, which RDM had failed to obtain.

73. The judge found that the second of the two conditions to which I have just referred was satisfied. As he put it, at paragraph 283 of his judgment: "the Cher project was plainly a project for which Mr Taylor had been nominated as the producer by RDM (and had

agreed to undertake the work)". But that left the other condition unsatisfied: RDM did not obtain the project. The judge went on to say this:

"This is the strength of Mr Mill's submission that Mr Taylor's obligation to carry out production for RDM was conditional on RDM winning the project. But where a contract is conditional, it is commonplace to imply a term that neither party will prevent fulfilment of the condition. Thus Mr Sutcliffe [for RDM] submits that the true position is that Mr Taylor and Mr Rawling planned to do everything they could to ensure that the Cher project became one of BRP's first projects. Neither of them had any intention whatever of allowing Warner to put the project through RDM. There was not even a remote possibility of RDM being able to secure Warner's agreement to making a contract with RDM in relation to the Cher project. Mr Taylor was part of BRP. His true position was that he would only do the project through BRP. Accordingly the cause of RDM's inability to secure the Cher project was Mr Taylor's own wrongdoing. It was not any independent action of Warner or any failure on the part of RDM. Mr Taylor is not, therefore, entitled to rely on his own wrong in asserting that the condition has not been fulfilled."

74. It was that reasoning which led the judge to conclude, at paragraph 286 of his judgment, that "Mr Taylor was in breach of contract in providing his producer services to BRP on "Living Proof" in respect of those tracks that would otherwise have been produced by him for RDM". The judge said this:

"I consider that if Mr Taylor had indicated that he would provide his producer services through RDM there would have been a high probability that RDM would have secured a contract from Warners for his services. I assess that probability at 75 per cent."

That conclusion is reflected in paragraphs 11 and 12 of the order of 15 July 2004.

75. It is clear from the terms in which paragraph 11 of that order is expressed that the judge held that Mr Taylor was in breach of an obligation to be implied into the producer agreement into which he had entered in October 1995. It will be in mind that he had given notice, on 6 December 2000, terminating that agreement with effect from 1 December 2001. It is pertinent, also, to have in mind that the judge had rejected the submission that, while Mr Taylor was engaged under the producer agreement with RDM, he was not precluded from undertaking work for anyone else. The steps in the judge's reasoning can, I think, fairly be summarised as follows: (i) Mr Taylor's obligation to produce the Cher tracks for RDM was, of course, conditional on RDM obtaining the project from Warners; (ii) if, but only if, that condition were satisfied Mr Taylor would be in breach of that obligation if he undertook to produce the Cher tracks for BRP; (iii) it was an implied term of the producer contract that Mr Taylor would do nothing to prevent

RDM obtaining the project from Warners - that is to say, he would do nothing to prevent the condition precedent to his obligation to produce the Cher tracks for RDM from being fulfilled; (iv) the fact that his conduct in relation to the Cher tracks was calculated to prevent RDM from obtaining the project from Warners. The fourth step in that reasoning rests, I think, on two elements: first, Mr Taylor delayed work on the tracks in November 2000 - so avoiding the need for Warners to award the project to RDM at that stage - and, second, that, by the time Warners were ready to proceed in January 2001, he had let it be known that he was ready to produce the tracks for BRP.

76. The first ground upon which Mr Taylor seeks to challenge the judge's conclusion that he was in breach of the producer agreement is that the implied term upon which the judge relied - which I have described as step (iii) in the judge's reasoning - formed no part of RDM's pleaded case and was not the subject of submission or argument in the court below. That contention, as it seems to me, is supported by the way in which the implied terms of the producer agreement were pleaded at paragraph 77 of the re-re-amended defence and counterclaim. But, for my part, I prefer to put my decision on the second ground upon which Mr Taylor relies - that the judge was wrong to hold that it was his conduct which prevented RDM from obtaining the project.

77. The judge accepted the evidence of Mr Turbitt (another producer engaged by RDM) that:

"Brian Rawling, Mark Taylor, Graham Stack and I agreed between us that work on the Cher and Enrique Iglesias projects should be delayed as far as possible until we started the new business. However, work on these and other projects was started before we left RDM."

He held, at paragraph 207 of his judgment, that:

"Mr Taylor was advised to and did delay work on projects (and in particular the Cher project), with a view to ensuring that the projects would go to the new company."

78. This Court must accept those findings of fact - so far as they go. But they do not lead to the conclusion that any delay on the part of Mr Taylor led to the postponement of the project from November 2000 to February 2001. The reason for that postponement is set out by the judge at paragraph 268 of his judgment:

"Cher arrived in England on 16 November. She had been supplied by Mr Dickins with a CD containing possible songs for inclusion on the new album, and she was already beginning to learn them. She planned to stay in England until the new album was finished. Shortly after her arrival Mr Dickins played her another RDM song, written by Paul Barry, Steve Torch and Mr Taylor, called 'Love is a Lonely Place Without You'. The US presidential election had just taken place, and Cher had been an active campaigner for the defeated candidate, Al Gore. Her disappointment with the result, coupled with difficulties

with her London accommodation, caused her to cut her visit short."

Thereafter, there is nothing to suggest that the position was not as set out in Mr Rawling's letter of 15 February 2001. He wrote:

"The album still has not been started or agreed to. Last conversation was she was in LA resting and this album will be started as and when she feels good about it."

79. The true position, as it seems to me on consideration of the judge's findings as a whole, is that the opportunity to obtain the project by agreement with Warners in November was lost to RDM when, for reasons unconnected with any desire by Mr Rawling or Mr Taylor to delay, Cher decided to return to the United States. The opportunity did not arise again until Warners wrote to RDM on 13 February 2001 asking for confirmation that RDM was entitled to the production services of Mr Rawling and Mr Taylor. By that date the production agreement of October 1995, under which Mr Taylor was obliged to provide production services on behalf of RDM, had come to an end. Whatever the judge might have suspected, there was no evidence to support a conclusion that Mr Taylor had been responsible for the lack of progress between November 2000 and February 2001.
80. For my part, therefore, I would hold that the fourth step in the judge's reasoning was not made out. I would grant Mr Taylor the permission to appeal that he requires on this issue and I would allow that appeal.

Conclusion

81. For the reasons which I have set out I would have allowed RDM's appeal on the first issue (duration of the 1998 publishing agreement) and dismissed Mr Taylor's appeal on the second issue (infringement of copyright). But the other members of the Court take a different view. I would dismiss RDM's appeal on the third issue (injunction). I would allow Mr Taylor's appeal on the fourth issue (interference with goods) to the extent indicated; and I would allow his appeal on the fifth issue.
82. As I have said, we have not heard argument on RDM's application for permission to appeal from paragraphs 21 and 22 of the order made on 15 July 2004 (indemnity costs) or from paragraph 8 of that order. The parties will wish to give further consideration to those paragraphs in the light of the judgments which we are now handing down.

Lord Justice Latham :

83. I have had the opportunity to consider the detailed judgments of both Chadwick LJ and Neuberger LJ. I agree with the reasoning of, and the result proposed by, Chadwick LJ in relation to what he has described as the third, fourth and fifth

issues. As to the first and second issues, subject to what I say below, I prefer the reasoning of Neuberger LJ, and therefore agree with the orders that he proposes.

84. As to the first issue, I have the same concerns as Chadwick LJ about whether the provisions of Clause 4(a)(i) and Clause 11(c) can ultimately be reconciled. The reasoning applied by both the trial judge and Neuberger LJ in order to demonstrate the possibility of reconciliation seems to me to have some of the characteristics of Procrustes' bed. And I do not consider that it would be the most secure foundation on which to determine the length of the contractual term.
85. I am, however, quite satisfied that Clause 4(a)(i) should prevail over Clause 11(c). There is no doubt, as Chadwick LJ's judgment makes clear, that the 1998 agreement was like the earlier agreements, based upon what could be described as a proforma agreement in standard form prepared by RDM. As the judge found, the form of the agreement was determined by the M. Dreux–Leblanc. Although he did not make any express finding to this effect, he rehearsed without adverse comment M. Dreux–Leblanc's evidence to the effect that he had retained Clause 11(c) which had been "intentionally deleted" in the previous agreements deliberately, but had failed to amend Clause 4. He found that Mr Taylor had not only played no part in drafting the agreement, but had not even read it before he signed it.
86. It seems to me in these circumstances, as Neuberger LJ has more fully set out in his judgment, that the determination of the term of the contract should properly be governed by the clause expressly identifying that term. The fact that there is a contrary indication in a clause dealing with the mechanics of payment which eschews the word "term" and talks of "periods" should not, in my judgment, entitle the maker of the agreement to argue that the clause expressly dealing with the term does not mean what it says.
87. As to the second issue, I confess to having had more difficulty. There is force in the argument clearly set out in paragraph 54 above, by Chadwick LJ, that the breadth of the expressions in Clause 3 is apt to cover all original work in which copyright is capable of subsisting. I also see the force of the judge's concerns in paragraph 248 of his judgment as to the difficulty of identifying the moment at which copyright is to vest if it is some different time from the moment the copyright comes into existence. Those are undoubtedly powerful arguments for the construction contended for by RDM.
88. But it seems to me that this construction fails to give adequate recognition to the fact that the agreement is not drafted by reference to the existence of copyright in any work of Mr Barry, but by reference to "compositions", as set out in Clause 3(a). In itself the word "composition" is protean. In the context with which we are concerned it could be a one line tune, a full musical score, or a full musical score with lyrics. The problem is therefore to determine what meaning is intended in the context of the other clauses in the agreement.

89. Neuberger LJ has set out the other clauses which provide the context in which this question has to be determined. And most of them provide no assistance in that they are consistent with either the arguments of RDM or Mr Taylor. But there are two in particular which would appear to support Mr Taylor's argument. Clause (1)(d)(ii) granting to RDM "The sole and exclusive right to make alterations to the Compositions at the discretion of [RDM]" is difficult to reconcile with the idea that the moment a work is capable of being subject to copyright, it should vest in RDM. The judge effectively acknowledged this by implying a term into the agreement as he set out in paragraph 249 of his judgment. Whilst that is obviously a possible solution, were other material to make it plain that "composition" was to be so construed, it is more consistent with the view that "composition" for the purposes of the agreement means a completed work. This is certainly how the word "composition" is used in Clause 12.

90. I recognise the practical difficulties inherent in concluding that it is only a completed work which qualifies as a composition for the purposes of Clause 3(a), because of the inherent uncertainty in determining when any such work can properly have been described as complete. And I do not think that the solution is to confine assignments to those works which have been delivered, pursuant to Clause 12 of the agreement. That would be to re-write the contract, because the contract expressly does not provide for assignment on delivery which would have been a simple mechanism if that was the result intended. But in reality, the same practical problem arises if copyright is assigned the moment it comes into existence. Only the composer knows when that moment occurs. And it would, to my mind, be offensive if, without some express words to this effect, any original musical or literary idea of a composer was, under this form of agreement, to be ipso facto assigned irrespective of whether that is developed by the composer into a completed work or not. Accordingly I agree with Neuberger LJ's formulation of the meaning to be given to the word "composition" in this agreement.

Lord Justice Neuberger

91. RDM's appeal and Mr Taylor's cross-appeal raise various points arising out of a judgment given by Lewison J following a nineteen day trial. He had to determine a large number of disputes of fact and law, only a few of which come before us. Those disputes arose out of the relationship between the parties, which, for the period with which this appeal is directly concerned, was governed by a written contract dated 1 December 1998 ("the 1998 Agreement"). In his judgment, Chadwick LJ has set out the relevant facts and issues, and it is unnecessary to repeat them.

The first issue: the duration of the 1998 Agreement

Introductory

92. The first issue which has to be resolved is whether the duration of the 1998 Agreement was two years from 1 December 1998, as the Judge held and as is submitted on behalf of Mr. Taylor, or whether, as is submitted on behalf of RDM, the term was three years from 1 December 1998.
93. That issue turns on the proper interpretation of the 1998 Agreement, and in particular on the effect of clauses 4, 11 and 12. There is no doubt that, at least on the face of it, there is a conflict between the express stipulation in clause 4(a)(i) that "The Term of this Agreement shall be for a period of 2 (two) years from the date hereof", and clause 11(c) which clearly envisages a "third 12 (twelve) month period of this Agreement".
94. Where, as here, a contract has two provisions which, on the face of it, appear to be inconsistent or contradictory, one must normally first determine whether, on closer analysis, the contract can be properly interpreted so as to reconcile the two provisions. If that is not possible, one has then to go on to decide which of the two inconsistent provisions should prevail. In the absence of a claim for rectification (and no such claim is advanced on this appeal), each of these exercises involves interpreting the contract, and therefore must be carried out by reference to the words used in the provisions concerned, the other provisions of the contract, business common sense, and the admissible circumstances in which the contract was executed.
95. In the present case, it is common ground that, if it is possible to reconcile clause 4(a)(i) and clause 11(c), then the term of the 1998 Agreement was two years and not three years. The view that the provisions could be reconciled is the primary basis on which the Judge reached his conclusion, and the primary basis upon which Mr. Ian Mill QC, on behalf of Mr. Taylor, advances his case before us. For RDM, Mr. Andrew Sutcliffe QC contends, as he did before the Judge, that the two provisions cannot be reconciled: in other words, he does not suggest that the two provisions could be reconciled in such a way as to lead to the conclusion that the term of the 1998 Agreement was three years.
96. Rather unusually, I am of the view that it is sensible to go straight to the second question, and consider which of the two provisions should prevail, making the assumption, favourable to RDM, that they cannot be reconciled. I have two reasons for taking this somewhat heterodox course, and they are both based on the fact that the argument as to whether or not the two provisions can be reconciled is detailed and intricate. First, if a detailed analysis of those arguments can be avoided, so much the better. Secondly, and more importantly, it seems to me that in concentrating on the detailed and intricate analysis of clauses 4, 11 and 12 required in order to decide whether they can be reconciled, there is a danger of losing proper perspective, and perhaps failing to see the wood for the trees, when it comes to what, at least to me, is the rather easier and simpler exercise of deciding which of the two provisions should prevail on the assumption that they are irreconcilable.

97. Accordingly, I propose to address first the question of whether clause 4(a)(i) or 11(c) should prevail on the assumption that they are irreconcilable. If (as in fact I do) I conclude that clause 4(a)(i) should prevail, so that the term of the 1998 Agreement is two years, it would then be strictly unnecessary to consider the logically anterior question of whether the two provisions can in fact be reconciled by a holistic interpretation of the 1998 Agreement. However, as I have had to consider that question when reading the powerful analysis in the judgment of Chadwick LJ, and as I have reached a different conclusion from him on that point as well, I think that I should express a view on it (albeit that one of my two reasons for going first to the issue of which of the two provisions should prevail is thereby dissipated).

If irreconcilable, which of the two clauses prevails?

98. With that slightly lugubrious introduction, I turn to the question of whether, on the assumption that the two provisions are irreconcilable, clause 4(a)(i) should prevail, so that the term of the 1998 Agreement would have been two years, or clause 11(c) should prevail, with the result that the term would have been three years.

99. One is here concerned with the interpretation of a bilateral contract. Interpretation, in that context, involves identifying the intention of the two contracting parties by reference to the words they have used in the contract concerned, taking into account, of course, the surrounding circumstances. Confining myself, for the moment, to the document itself, I consider that it is pretty clear that it is clause 4(a)(i) which must prevail, so that the duration of the 1998 Agreement is two years. I reach this conclusion essentially for three reasons, which may be said, at least to some extent, to involve putting the same point in rather different ways.

100. First, if the term is indeed two years, then clause 4(a)(i) is given its literal and natural effect, and clause 11(c) merely has no effect: it is redundant. On the other hand, if the term is three years, while clause 11(c) is given its natural effect, it is not merely a matter of clause 4(a)(i) being redundant. It is effectively being contradicted, or being given a meaning which it simply does not have: one is concluding that a contract, which the parties have expressly agreed in clear terms will last only two years, is to last three years. If one has to choose between a construction which results in one contractual provision being redundant or irrelevant, and a construction which results in another contractual provision being rewritten or contradicted, it seems to me that it is the latter of those two alternatives which flies more flagrantly in the face of the expressed intention of the parties.

101. Secondly, the issue between the parties in the present case is the duration of the 1998 Agreement. There is no doubt that clause 4(a)(i) is expressly, and indeed solely concerned with that very issue, and it is expressed in unequivocal terms: the duration is to be two years. On the other hand, clause 11(c) is not concerned

with the duration of the 1998 Agreement, but with advance payments of royalties. Of course, it contains a clear implicit assumption that the term will have a third twelve months, and will therefore be for a term of three years. However, although obvious and clear, it is nonetheless an assumption, and not an express and unequivocal statement as to duration.

102. Thirdly, clause 4(a)(i) is a central and substantive provision, whereas clause 11(c), although of obvious commercial importance, is ultimately only concerned with machinery. Clause 4(a)(i) is solely concerned with defining the basic duration of the 1998 Agreement – "basic" because it is capable of extension under clause 4(a)(ii) and under clause 12(b). The duration of a contract is one of its fundamental and essential provisions conceptually, legally and commercially. Clause 11(c) is a provision for payment in respect of one year on account of royalties, the calculation, apportionment and payment of which are dealt with in other provisions of the 1998 Agreement. Although obviously such a provision is of commercial importance to the parties, it has no such fundamental or essential significance.

103. It has not been suggested that any assistance can be obtained on this point from any of the other provisions of the 1998 Agreement. Although Mr Mill contends that business common sense militates in favour of a shorter term, I am unpersuaded by his point that Mr Taylor would not have agreed a longer term than the two years he had contracted for under the 1995 and 1997 Agreements ("the two earlier Agreements"), because he had become more successful by 1998. All sorts of factors could have been in play between the parties when they negotiated the term of the 1998 Agreement. For all one knows, it could have been Mr Taylor who, in the light of the royalty terms or because of RDM's reputation and performance under the two earlier Agreements, would have wanted the longer term.

104. I turn to consider whether there was anything else in the surrounding circumstances which should be taken into account when carrying out the interpretation exercise. In this connection, I have no doubt that one must take into account the fact that the parties had entered into the two earlier Agreements (which are indeed actually referred to in clause 20 of the 1998 Agreement, as Chadwick LJ has pointed out). Accordingly, the provisions of the two earlier Agreements can, indeed should, be taken into account when construing the 1998 Agreement, and, for present purposes, when seeking to resolve the question of whether the parties intended that the term of the 1998 Agreement was to be two years or three years.

105. Having said that, I am of the view that, when properly analysed, the provisions of the two earlier Agreements do not take one any further insofar as this question is concerned. As Chadwick LJ has explained, clause 4(a)(i) of the two earlier Agreements was, in each case, in identical terms to clause 4(a)(i) of the 1998 Agreement, but clause 11 was in somewhat different terms in relation to dates and quantum in sub-clauses (a) and (b) and, more importantly, clause 11(c)

of the two earlier Agreements simply had the words "Intentionally deleted" against it.

106. I can draw no helpful conclusion, or even any helpful inference, from those facts so far as the determination of the present issue is concerned. If, which was obviously possible in principle, the terms of the 1998 Agreement must have been negotiated between the parties expressly by reference to one or both of the earlier Agreements, then I can see the force of the argument that this renders it more likely that the parties must have intended the 1998 Agreement to be for a term of three years. This would be on the basis that it is more likely that they failed to change the two years in clause 4(a)(i) in the two earlier Agreements to three years in the 1998 Agreement, than it is that they mistakenly inserted provisions for royalties in advance in clause 11(c), when the two earlier Agreements had the words "Intentionally deleted" against that sub-clause.

107. However, it is equally as likely that the 1998 Agreement was drafted between the parties expressly by reference to RDM's standard form upon which the two earlier Agreements were clearly based. In this connection, I should say it is clear and must have been known to Mr Taylor that RDM had a standard form on which all three Agreements were based. First, we have seen a number of agreements between RDM and other Artists which are in effectively the identical form to the 1998 Agreement and the earlier Agreements; secondly, there were various provisions of the three Agreements which are redolent of their being in a standard form; thirdly, the very fact that clause 11(c) in the two earlier Agreements was described as "Intentionally deleted", rather than there being no clause 11(c) at all, underscores the point. If the 1998 Agreement was drafted by reference to the standard form with its Clause 11(c), it seems to me at least as likely that clause 11(c) was unintentionally not deleted, and filled in mechanically and without thought – the amounts and dates therein following those in sub-clause (a) and (b) – as it is that there was a mistake in the insertion of the period in the clear and simple 4(a)(i).

108. In fact, it appears that M. Dreux–Leblanc of RDM used the earlier Agreements as the basis for drafting the 1998 Agreement, but Mr Taylor was wholly unaware of this: he merely signed the draft of the 1998 Agreement prepared by M. Dreux–Leblanc without discussing, or, apparently, even reading it. It is, in my view, questionable whether, when considering the interpretation of a document (as opposed to a claim for rectification), one can take into account the actual basis upon which it was drafted, any more than one can take into account the drafting negotiations.

109. However, assuming, in RDM's favour, that one can take into account such a matter, it seems to me that it does not assist RDM in the present case. The fact that the drafting of the 1998 Agreement was based on the two earlier Agreements was a fact known only to RDM, through M. Dreux Leblanc, and it was not known to Mr Taylor. In my opinion, it must be wrong, as a matter of principle, when construing a document, to take into account a fact known only to one of the two

contracting parties at the time the agreement was made. I accept, of course, that, having not read the 1998 Agreement before he signed it, Mr Taylor can be in no better position than if he had conscientiously read it, but that takes matters no further forward here. If he had read the draft agreement proffered by M. Dreux–Leblanc, it would not have been apparent that it had been drafted by reference to the two earlier Agreements: as I have said, it could equally well have been the case that it was drafted with reference to RDM's standard form.

110. In these circumstances, I am of the view that, even making the assumption favourable to RDM that the 1998 Agreement contains two inconsistent provisions in relation to its duration, on its proper interpretation clause 4(a)(i) should prevail and therefore the term was two years. If I had not differed from Chadwick LJ on the logically anterior question of whether the two clauses can in fact be reconciled, I would not have considered it necessary to consider that question. However, I will deal with that issue, albeit as shortly as possible.

Can the two clauses be reconciled?

111. The only conceivable way in which clauses 4(a)(i) and 11(c) of the 1998 Agreement can be reconciled is on the basis, adopted by the Judge and supported by Mr. Mill, namely that clause 11(c) is concerned with, and can only apply to, a period of extension contemplated by clause 4(a)(ii), namely what may be called a "recoupment period". Mr Sutcliffe powerfully argues that there are a number of problems with that interpretation, and it is to those that I now turn.

112. First, clause 11 provides for payment "during the Term", and Mr. Sutcliffe suggests that that cannot include a recoupment period. I do not agree. It seems to me clear that, in a number of places in the 1998 Agreement, the expression "the Term" is clearly used in a way which is not merely limited to the two years (on this hypothesis) identified in clause 4(a)(i), but also any recoupment period. Indeed, Mr. Sutcliffe realistically accepts that the references to "the Term" in clause 4(b) and in clause 4(c) is to the two years as extended by any recoupment period. Accordingly, I see no difficulty in that connection.

113. Secondly, clause 11(c) refers to £25,000 being paid "during the third 12 (twelve) month period of this Agreement": Yet, as Mr. Mill accepts, a recoupment period, while it may well last as long as a year, could well be either one month or seven months (in light of the reference to "the end of the accounting period" in clause 4(a)(ii) and the implied definition of accounting period in clause 14(a) of the 1998 Agreement). That is clearly a fair point, but, at least to my mind, it is not sufficient to justify the conclusion that clause 11(c) cannot be referring to the recoupment period. It is a far from illegitimate construction of clause 4(a)(ii) to treat that period as a one year extension subject to prior determination after one month or seven months. Further, it is clear that the "first" and "second" twelve month periods in clauses 11(a) and (b) may in fact be more (possibly much more) than twelve months: see the other provision for extension in clause 12(b). That suggests that the parties did not have in mind that the reference to twelve month

periods in clause 11 was intended to carry with it a strict requirement that the duration of each of those periods was to be precisely a year.

114. The third point made by Mr Sutcliffe is that, if the recoupment period is only for one month or seven months, the provisions for prepayment in clause 11(c) are unsatisfactory or worse. Although I accept that the provisions would work in a slightly odd way, I do not consider that their effect would be anything like strange enough to call into question the correctness of this construction. If the recoupment period is for one month (or, as the case may be, seven months) then no payment under clause 11(c) would be payable after it expires because the payments are only to be made "during the Term hereof" (see the opening words of clause 11). It is true that there will be one (or three) quarterly payment(s) although there will be only one month rather than three months (or seven months rather than nine months), but that appears to me to be a small quirk. After all, the recoupment period will last for a year unless there has been full recoupment by the end of the first (or seventh) month, and, therefore, this slightly odd quirk, which on the face of it works against RDM, will not in fact have any financial adverse consequences for RDM.

115. Fourthly, Mr. Sutcliffe makes the rather different point that it would be rather odd for clause 11(c) to provide for continuing payments in advance to Mr. Taylor, if the only circumstance in which it was to apply would be where there had been insufficient recoupment. Particularly if Mr. Mill is right in his submission that clause 12 does not apply during the recoupment period on his interpretation (an aspect which I will deal with next), I think there is force in that point, as a matter of commercial common sense. However, I do not consider that it is strong enough to justify rejecting Mr. Mill's interpretation. As a matter of language, and subject to any other points which may be made on behalf of RDM, it seems to me that there is nothing conceptually impossible, or even difficult, about the notion of Mr. Taylor having to be paid in accordance with the terms of clause 11(c), if and so long as the two year period of the Agreement is extended pursuant to the provisions of 4(a)(ii).

116. As Lord Reid said in *Adamast Shipping Co. Limited -v- Anglo-Saxon Petroleum Co. Limited* [1959] AC 133 at p. 173-4:

"[W]e are not concerned with what the [parties] may have intended or said. We are only concerned with interpreting the words which they chose to use in their contract. I do not think that we are entitled to assume that they must have had a clear intention and that it must have been a reasonable intention, × and to hold that, even if the words which they have used will not bear that construction, that intention must prevail. × It might be the law that a court should be entitled to amend the parties' contract if satisfied that no reasonable men could have meant what it says and also satisfied as to what they must have intended to do if, being reasonable men, they had directed their attention to the point. Perhaps that should be the law. But, so

far as I am aware, there is no authority for a court having that power".

117. There is also the small point that "the retention period" in clause 4(b) would be effectively extended as a result of the extension period. It is therefore by no means clear to me that it would be especially commercially surprising that RDM should be prepared to pay royalties in advance under clause 11(c) during the recoupment period.
118. The final, and most telling, point raised by Mr Sutcliffe against the contention that clause 11(c) is intended to apply during the recoupment period, is based on clause 12. Mr. Mill's argument is that clause 12 does not apply to a recoupment period. Clause 12(a) confers a right on RDM to receive, and a concomitant burden on Mr. Taylor to deliver, ten new compositions "in each 12 (twelve) month period of the Term". I cannot accept that it would involve a permissible reading of those words in clause 12(a) if they did not apply to the "12 (twelve) month period of this Agreement" identified in clause 11(c). As a matter of ordinary language, when one reads clause 11(a), (b) and (c) (each of which contain the identical expression) together with clause 12(a), it would be very strange construction if the period identified in clause 11(c) was not within the expression "each 12 (twelve) month period of the Term" in clause 12(a).
119. Mr. Mill argues that, because the period under clause 11(c) may not in fact be twelve months, but might be one month or seven months, it therefore cannot fall within clause 12(a). That argument rings very hollow. Mr Mill's fundamental point, namely that the reference in clause 11(c) to a twelve month period is to the recoupment period, even though that period may be only one month or seven months, lies very ill with his contention that the recoupment period cannot be within the ambit of clause 12(a) because it may not be a twelve month period. What makes the contention even more unattractive is that he argues that clause 12(a) does not apply to the recoupment period even if that period is twelve months. If that argument were right, then, in agreement with Chadwick LJ, I would have reached the view that, on analysis, clause 4(a)(i) and clause 11(c) are irreconcilable, because the only basis of the proposed reconciliation falls down as a result of the effect of clause 12. Once one construes the recoupment period as being "the third 12 (twelve) month period of this Agreement", in clause 11(c), it seems to me impermissible then to construe the expression "each 12 (twelve) month period of the Term", in the immediately succeeding clause 12(a), as not including the recoupment period.
120. Having said that, I have reached the conclusion, contrary, it is right to record, to Mr. Mill's submission and indeed the Judge's view, that clause 12(a) can in fact properly apply to the recoupment period, and that accordingly clause 11(c) can be fairly construed as referring to the recoupment period. If the recoupment period was, as would be commercially likely if there were an extension under clause 4(a)(ii) at all, the maximum period of twelve months, there would be no difficulty in applying the provisions of clause 12 to it. The position

would be exactly the same in relation to the first and second twelve month periods referred to in clauses 11 (a) and (b).

121. However, there is an arguable problem if the recoupment period was seven months, and a greater problem if it was one month. If the recoupment period, whatever its length, is within the ambit of clause 12(a), then I can see no escape from the conclusion that Mr. Taylor would have been obliged to provide at least ten new compositions to RDM during that period. That can fairly be said to present a problem, particularly where the recoupment period is one month, because it would, at least at first sight, mean that the parties envisaged Mr. Taylor providing ten new compositions within a month, which is not only very surprising in itself, but is also inconsistent with what was anticipated for the previous two years.
122. However, clause 12(a) is, of course, to be read subject to clause 12(b). Once one turns to clause 12(b), it seems to me that it provides an answer to this problem, although it raises a fresh problem. The answer it provides to the original problem is that, if the minimum ten compositions are not supplied during the recoupment period, that period would be extended by a maximum of two years to enable the minimum ten compositions to be provided. Mr Sutcliffe rightly says that it is really inevitable that clause 12(b) would be invoked in a case where the recoupment period was one month, but that does not, at least of itself, concern me. The fact that a fall back provision may, on a certain interpretation of a contract, inevitably apply if one set of events arises, does not, as I see it, on its own do much to call into question that interpretation.
123. However, where clause 12(b) can be said to give rise to a fresh problem, in relation to this construction where the recoupment period is only one month, is as a result of the opening words of clause 12(b). Those opening words indicate that the extension contemplated by clause 12(b) will apply if ten new compositions have not been supplied "at least 60 (sixty) days prior to the expiration of the relevant 12 (twelve) month period". Where the "12 (twelve) month period" is only one month, this can be said to be pretty odd: it would seem absurd to ask, sixty days before the expiration of a one month period, whether ten (or indeed any) compositions have been delivered during that period. However, in my view, one can make sense of that by concluding simply that the extension provisions of clause 12(b) will inevitably apply where the recoupment period is one month, because, by definition, if one asks whether any compositions were supplied during a one month period, sixty days before the expiry of that period, the answer will be in the negative.
124. This effect of clause 12(b) in a case where the recoupment period is one month leads to a particularly careful scrutiny of Mr Mill's interpretation of clause 11(c). However, with the benefit of that scrutiny, it does not appear to me to give rise to an insuperable problem, because I consider that clause 12 can properly apply to the recoupment period, even if that period is as short as one month. There would be nothing inherently unworkable about clause 12(b) in those circumstances. All it would do would be to effect an inevitable extension to that

one month period of at least sixty days. I do not see anything particularly odd about that. Of course, it would be very surprising if, for instance, whatever the extension effected by clause 4(a)(ii), there was an inevitable further extension pursuant to clause 12(b), but that would not be the position if the extension (i.e. the recoupment period) was seven months or twelve months. Equally, it would be very surprising if the one month extension pursuant to clause 4(a)(ii) was inevitably extended to seven months or twelve months as a result of clause 12(b), but that is not the position either. The only oddity that can be said to arise under the opening words of clause 12(b) on this reading is that there would be an automatic extension of at least sixty days, but that would only be the case in the event of there being the minimum one month extension under clause 4(a)(ii).

125. Commercial reality, in my view, tends to support, rather than to call into question, the notion that the parties would have intended an automatic extension where the recoupment period was one month. As I have already mentioned, it seems very unlikely indeed (as Mr Sutcliffe himself emphasises) that the parties would have envisaged that, if the recoupment period was only one month, the minimum commitment under clause 12(a) could conceivably have been satisfied by Mr. Taylor during that period. Accordingly, once one considers the practical implications of clause 12(a) applying to the recoupment period where it is only one month, it can come as no surprise that the parties envisaged that the one month period would be automatically extended by at least sixty days as a result of the operation of clause 12(b).

126. I must confess to reaching the conclusion that clauses 4(a)(i) and 11(c) can be reconciled with a certain amount of diffidence. There are several objections which can be made to the conclusion, albeit, as explained, I consider that they can be satisfactorily met. The conclusion involves rejecting what amounts to a concession by Mr. Mill; it also involves a rather different approach to the construction of clause 12 from that adopted by the Judge in his impressive judgment; further, it is a different conclusion from that reached from Chadwick LJ; finally, as mentioned earlier, the exercise of the reconciliation of apparently conflicting contractual provisions can involve such an intricate examination of the trees that one risks losing sight of the wood.

Conclusion on the first issue

127. For the reasons set out above, I am, albeit with some diffidence, of the view that the two apparently conflicting provisions are ultimately reconcilable, but, even if they are not, then I consider that clause 4(a)(i) should prevail over 11(c), with the result that the term of the 1998 Agreement was two, and not three, years. Lewison J reached similar conclusions (albeit for slightly different reasons), and accordingly I would dismiss RDM's appeal on this point.

The second issue: the meaning of "Compositions" in its contractual context

128. As Chadwick LJ has explained, if (as I have concluded) the term of the 1998 Agreement was two years, RDM's claim for an injunction would have been justified (albeit subject to the point on which it failed, namely that of discretion), provided that the Judge was right on the issue to which I now turn. That issue involves interpreting the contract between RDM and Mr. Barry ("Mr Barry's Agreement"), with a view to deciding whether it applied, as the Judge thought it did, to unfinished compositions.

129. Other than with regard to dates, parties and financial details, Mr Barry's Agreement was in identical terms to the successive three Agreements entered into by Mr Taylor. In other words, it was in what I have referred to as RDM's standard form.

130. The centrally relevant provisions of Mr. Barry's Agreement and the issue of construction which divides the parties were succinctly summarised by the Judge in his judgment, in the following terms:

"244. Clause 1 of the publishing agreement assigned to RDM copyright in the 'Compositions' as defined by clause 3. Compositions were defined by clause 3 as including:

'all musical compositions and/or lyrics and/or original arrangements of musical works × and/or any compositions which are during the Term hereof written, composed or created in whole or in part by the Writer including the title, words and music thereof'.

245. Clause 12 dealt with the minimum commitment. It said:

'The Writer hereby undertakes to deliver to the Publisher in each 12 (twelve) month period of the Term a minimum of an aggregate of 10 (ten) new Compositions by the Writer of a quality commercially acceptable to the Publisher × and the Publisher undertakes to act reasonably and in good faith in assessing such acceptability'

246. Put shortly, the rival contentions were as follows. Mr Sutcliffe submitted that copyright vested under clause 1 as soon as a musical or literary work was fixed. Successive versions of a work resulted in successive assignments of copyright in each version. Clause 12 operated quite independently of assignment of copyright; and if necessary 'composition' should be given a different meaning in clause 12 to the meaning that it bears in clause 3. Mr Mill submitted that copyright did not vest until a composition was delivered under clause 12."

131. On that issue, the Judge found in favour of RDM, preferring Mr. Sutcliffe's submission to that of Mr. Mill. In reaching that conclusion, the Judge observed that "copyright is capable of subsisting in unfinished versions of a work", that "for copyright to subsist all that is required is that there is an original work which has been recorded", and that one of the ordinary meanings of "composition" is "a literary, artistic or other intellectual production". Essentially based on these propositions, all of which appear to me to be unexceptionable, he concluded that "each version of a song, if it is a musical and/or literary work, is a 'composition' within the meaning of the agreement".
132. I have reached a different conclusion on this point from the Judge, albeit that it is fair to say that the arguments developed before us appear to have been somewhat different from, and rather fuller than, those advanced to him. In my view, Mr. Barry's Agreement was concerned with "fixed", or completed, compositions, and not with compositions in the wider sense as concluded by the Judge.
133. So far as the construction of Mr. Barry's Agreement is concerned, it appears to me that the proper analysis is as follows. One starts, logically if unoriginally, with clause 1(a). By that provision, Mr. Barry effectively assigned the copyright "in the title, words and music of the musical compositions specified in clause 3 hereof" to RDM. That leads one to clause 3(a), which provided that "the term 'the Compositions' shall mean" certain specified compositions:
- "and/or any Compositions which are during the Term hereof written, composed or created in whole or in part by the Writer including the title, words and music thereof."
134. Mr. Sutcliffe does not suggest that the words "or in part" carry with them the notion that a work which was uncompleted could still be a composition for the purposes of clause 3(a). In my view he is correct in that connection: the words are intended to cover works to which Mr. Barry was one of a number of composers or creators.
135. If one limits one's analysis to clauses 1(a) and 3(a) of Mr. Barry's Agreement, I can well see the force of the Judge's conclusion. Although, as a matter for ordinary language, "Compositions" could be limited to completed compositions, it could equally well apply to any compositions whether completed or not, i.e. whether still in the course of development or not. In the absence of any words of limitation, and in the light of the general propositions I have quoted from his judgment, the Judge's opinion on the point is easy to understand.
136. However, when one examines other provisions of Mr. Barry's Agreement, it seems to me that there would be conceptual and practical difficulties if the expression "Compositions" in that contract extended to compositions which were still in the process of development. Thus, clause 1(d)(ii) provided that the rights assigned by Mr. Barry to RDM included "the sole and exclusive right to make

alterations to the Compositions at the discretion of [RDM]". On RDM's interpretation, that would mean that, once a song had been recorded, even at an early stage of its development purely for the purposes of seeing how it sounded with a view to carrying out some fairly substantial rewriting, it would be only RDM, and not Mr. Taylor or anybody else, who would be entitled to make or authorise alterations to it. That would be a very surprising and impractical result.

137. As the Judge effectively went on to acknowledge, his construction therefore must involve implying a term to the effect that there was to be a licence, in favour of Mr. Barry, to carry out such alterations as he wished to any compositions which had been recorded in the process of development, without reference to RDM. It seems somewhat peculiar to construe a contract, in which A expressly assigns to B "the sole and exclusive right" to do X, in such a way as to require implying an immediate licence back from B to A to do X, if another equally acceptable interpretation requires no such implication. It cannot be said that the implied term is actually inconsistent with the express term, but it is precious close to that. In my view, the fact that one interpretation of a contract requires one to imply a term into that contract, where another interpretation does not require the implication of any term, militates in favour of the latter interpretation.

138. Clauses 1(c), 1(d)(i), 1(d)(iii), and 1(d)(iv) all contained rights granted by Mr. Barry to RDM in respect of "Compositions". They respectively dealt with renewal or extending of copyright, using and licensing of titles, publishing and printing, and reproduction. At best, from RDM's point of view, they are consistent with either party's case, but it seems to me that the notion they were intended to apply only to completed compositions is rather more likely. If Mr Barry had thought a composition worth publishing, for instance, it seems to me that he would consequently have had to accept that it was fixed, or completed, so as to have become a "Composition" within the meaning of his Agreement, as a result of which copyright in it would immediately have vested in RDM by virtue of clause 1(a).

139. By clause 5(b) of his Agreement, Mr. Barry agreed that he would "not grant any rights in the Compositions" to anyone other than RDM. Mr Sutcliffe suggests that this provision is more commercially consistent with RDM's construction, because otherwise Mr. Barry would have been free, even during the term, to grant rights in compositions which were still in the process of development to third parties, or to delay completion until after the end of the term.

140. While I accept that clause 5(b) would make commercial sense if it applied to compositions in the process of development as well as completed compositions, I do not think that there is any problem in terms of business efficacy if it was limited to completed compositions. Even if it was limited to completed compositions, the clause conferred a substantial commercial benefit on RDM. Provided a composition was completed by Mr Barry during the term, the

copyright would automatically have vested in RDM under clause 1(a), and RDM was entitled under clause 12 to a minimum of ten completed compositions each year of the term.

141. The fact that Mr. Barry would have been free to develop compositions during the term of his Agreement without completing them during that period, and then have been able to complete them afterwards and to retain for himself (or assign to a third party) the copyright of the completed composition does not seem to me particularly unfair or surprising. On RDM's construction of Mr Barry's Agreement, RDM effectively would have had a complete monopoly over any composition, from the earliest stage of its development, created by Mr. Barry during the term, whereas on Mr. Taylor's construction, RDM's rights would have been rather more limited, but, as pointed out above, they would nonetheless have been real and substantial.

142. I know of no principle which requires one to lean in favour of a construction which would give a production company a monopoly over all the output of an artist during the period of an agreement such as this. Indeed, if there is any presumption in that connection, it seems to me that it would be in the opposite sense in a case such as the present, essentially for two reasons. First, Mr Barry's Agreement was in a standard form prepared by RDM and used by it virtually routinely; *contra proferentem*, while no doubt enjoying a more limited and rather weaker role than it used to have, may still sometimes be of assistance when construing a contract which is in the standard form of one of the parties. Secondly, if it would be right to approach a contract such as this with any particular bias, it seems to me that it should be one which is against monopoly, restraint of trade and impairing an artist's freedom to exploit his work commercially.

143. By clause 6(a), RDM "represent[ed] and warrant[ed] that it [would] use all reasonable endeavours to exploit the compositions". Although "compositions" there was with a lowercase "c", it must (as I think is common ground) be intended to be a reference back to "the Compositions" in clauses 1 and 3. It appears to me pretty clear that the reference to "the compositions" there must be a reference to the compositions which are actually delivered to RDM, and this in turn suggests pretty strongly that "compositions" means completed compositions. It would be odd if the warranty applied to a composition that was still in the process of being developed. As it appears that clause 6(a) only applied to completed compositions, I regard it as providing limited, albeit real, assistance to the construction advanced by Mr. Mill. Clause 6(b) referred expressly to "the delivery of a composition"; it raises the same point, in the present connection, as clause 6(a). By clause 8, Mr. Barry "agree[d] to submit each Composition~~x~~ upon completion of the composition or writing thereof". It seems to me that precisely the same point can be made about this clause as can be made about clauses 6(a) and (b).

144. Clause 9 was concerned with "credits, notices and copyright protection" and referred to "each copy of the Compositions published", which again must be

completed compositions. At the very least, therefore, it is consistent with the construction advanced on behalf of Mr. Taylor. The same point may be made about clause 10, which was concerned with royalties resulting from the "exploitation of the Compositions".

145. Finally, I turn to clause 12, the relevant part of which was set out in the passage in the judgment quoted above. It seems to me that the obligation to provide "10 (ten) new Compositions" tends to support the construction advanced on behalf of Mr. Taylor rather than that advanced on behalf of RDM. If the "new Compositions" meant new completed, or fixed, compositions, then there is no problem: each of the ten fixed compositions must be "new" when compared with the others, or indeed, when compared with any previous composition. However, if the expression includes compositions in the process of development, it seems to me that there is at least a real argument that each stage of a composition as it was developed, would have been "new" relative to the last. It can also be said that, if "compositions" had the meaning intended for by RDM, it would have been open to Mr. Barry to satisfy clause 12(a) by submitting a composition that he did not regard as complete, because it did not meet his particular standards, even though it could be said to be "of a quality commercially acceptable to the Publisher". In these circumstances, while, once again, it does not appear to me that clause 12 is of decisive assistance on the issue which divides the parties, it is more consistent with Mr. Taylor's construction than that advanced by RDM.

146. This somewhat detailed analysis of Mr Barry's Agreement appears to me to establish the following. First, it seems that the word "Compositions" is sometimes consistent with either interpretation, and is sometimes more, or only, consistent with the meaning contended for by Mr Taylor. Secondly, one would therefore expect the word to have the meaning contended for by Mr Taylor throughout the document, unless there was an extraneous reason to the contrary, because there is a presumption (albeit a rebuttable one) that the parties would have intended the same word to have the same meaning throughout their contract. Thirdly, there is no good reason to rebut that presumption in the present case; in particular, Mr Barry's Agreement makes perfectly good commercial sense if it is construed in that way.

147. In these circumstances, I am of the view that Mr. Barry's Agreement (and therefore the three Agreements which Mr. Taylor entered into with RDM, insofar as that is relevant) applied only to completed compositions, and did not apply to compositions in the process of development. The Judge was plainly right in his view that the word "Compositions" could include compositions in the process of development, but it seems to me that it is perfectly capable of being limited to completed compositions, and, in light of the terms of the document read as a whole, that is what it does mean in RDM's standard form agreement, and, therefore, in particular, in Mr Barry's Agreement.

The third issue: the injunction and the extent of any implied or express licence

148. In the light of the conclusion that Mr. Barry's Agreement did not extend to compositions which were only in the process of development during its term, Mr. Sutcliffe accepts that he would have no basis for seeking the injunction which the Judge, although concluding that RDM was entitled to an injunction in principle, refused for the reasons explained by Chadwick LJ. In these circumstances, it is unnecessary to consider whether the Judge was right in deciding to exercise his discretion against the grant of an injunction: given that, at least in my view, RDM had no basis for seeking an injunction, the question becomes academic.
149. It is right, however, to record that we received far more detailed argument than the Judge on the issue of whether an injunction should be refused as a matter of discretion, and we were referred to authorities, which appeared to be of real relevance and which were not shown to the Judge. Nonetheless, in light of the fact that I take a different view from that of the Judge to the proper construction of Mr. Barry's Agreement, it seems to me that his decision to refuse the injunction sought by RDM was in any event correct. It would therefore be right in my opinion to dismiss RDM's appeal against the Judge's refusal to grant the injunction.
150. For the same reason, namely the fact that I have taken a different view from the Judge on the question of interpretation of Mr. Barry's Agreement, it is unnecessary to deal with two of the grounds of Mr. Taylor's cross-appeal, which relate to the licence implied into Mr. Barry's Agreement by the Judge, as a result of the way he construed that agreement. That implied licence (which no longer arises on my construction of the agreement) was that to which I have referred, namely that giving Mr. Taylor the right to carry on developing those compositions which were being developed during the course of the term of his Agreement.
151. It is argued on behalf of Mr. Taylor that the implied licence should extend more widely, namely to those other people, such as co-composers, and co-creators, who would have been involved with Mr. Barry in the development of such compositions. However, the Judge held that the implied licence only extended to Mr. Barry himself. In the light of my conclusion as to the proper construction of Mr. Barry's Agreement, there is no need for any licence to be implied, and accordingly this ground of cross-appeal falls away.
152. The other ground of cross-appeal which falls away, as a result of what I consider to be the proper interpretation of Mr. Barry's Agreement, is whether a letter written by M. Dreux-Leblanc of RDM to Mr. Taylor on 30 November 2000 constituted a sufficient permission under that licence to carry on developing with others certain compositions in the process of development. It raises a question of interpretation of that letter, which it would, in my view, serve no useful purpose to resolve.
153. That leaves two other issues, both of which are raised on Mr. Taylor's cross-appeal (because the outstanding issue on costs, raised on RDM's appeal only falls to be considered after our decision has been handed down).

The fourth issue: unlawful interference

154. On this issue, I agree with Chadwick LJ.

The fifth issue: the Cher Project

155. The final issue which falls to be considered at this stage relates to the Judge's finding that Mr. Taylor was in breach of an implied term of the production agreement in relation to what was called "The Cher Project". This project was concerned with a proposed recording by Cher which did not, in the event, take place. According to RDM, that recording should have occurred during the term of the 1998 Agreement, and would therefore would have been within the scope of that agreement, but, owing to a breach of contract on the part of Mr. Taylor, it did not do so. The Judge accepted that argument, and Mr Mill challenges that conclusion.

156. In order to deal with this point, it is not necessary to consider the facts in much detail. In paragraph 283, the Judge identified Mr. Mill's submission on behalf of Mr. Taylor as being that "Mr. Taylor's obligation to carry out production [of The Cher Project] for RDM was conditional on RDM winning the project." The Judge appears to have accepted that this was a fair summary of the parties' respective rights and obligations in relation to the Cher Project, and he immediately went on in the same paragraph to say this:

"But where a contract is conditional, it is commonplace to imply a term that neither party will prevent fulfilment of the condition."

157. Whatever may have been his submission before the Judge, Mr. Mill (correctly, in my judgment) does not challenge that proposition either as a generality or insofar as it was applicable to Mr. Taylor's obligations in relation to the Cher Project. However, it is important to note the nature of the obligation as described by the Judge, namely that Mr. Taylor would not "prevent fulfilment of the condition". That, as I see it, as a matter of language, more naturally constitutes a negative obligation, and not a positive obligation.

158. The notion that the implied obligation should be limited to forbidding positive acts appears to me to accord with principle. If the implied obligation extended to forbidding negative acts, it could have been onerous, because it would have had the inevitable effect of requiring positive acts of Mr Taylor. It is not possible to be confident, as one has to be before an obligation can be implied, that a reasonable person in the position of Mr Taylor would have agreed to such an implied obligation, when the production agreement was entered into. The notion, that the obligation on Mr Taylor only extended to forbidding positive acts which would prevent fulfilment of a condition, is also consistent with the general proposition that a term is to be implied only to the minimum extent necessary to

give a contract business efficacy. It is also consistent with the general proposition that an implied term should be clear in its effect: it would be normally easy to identify whether a positive act precludes fulfilment of a condition; it is often much harder to determine what positive steps a person should be expected to take to enable a condition to be fulfilled.

159. The finding made by the Judge in paragraph 284 as to what he considered constituted a breach of Mr Taylor's obligation in this connection was that "Mr. Taylor delayed work on the Cher Project with a view to obtaining that project for the new company", that he was in the process of forming with a view to taking over the project when the production agreement expired. It was on this basis that, in paragraph 285 of his judgment, the Judge accepted Mr. Sutcliffe's contention "that Mr. Taylor cannot rely on the non-fulfilment of the condition precedent to excuse his breach of contract". In my view, the crucial finding that the Judge made in relation to the cause of the delay (which was expanded in paragraphs 205 and 283 of the judgment) was simply that Mr. Taylor did nothing, or, to put it another way, that he dragged his feet rather than pressing ahead. There was no finding (and, so far as I can see, no evidential basis for finding) that Mr Taylor took any positive step towards impeding, let alone any positive step which actually did impede, any recording by Cher during the term of the 1998 Agreement.

160. As I have mentioned, there appears to me to be not merely a linguistic, but also an important conceptual, difference between preventing the fulfilment of a condition, which involves some positive act of prevention, and simply doing nothing, as a result of which the condition is not fulfilled. The inaction of Mr. Taylor in the present case does not appear to me to have amounted to a breach of a term that neither party would prevent fulfilment of a condition, which is, as the Judge said, a type of term which the court will normally - or at any rate, often - be prepared to imply. Such inaction seems to me to be a breach of a type of term which the court is much less ready to imply, namely some sort of duty to cooperate, which gives rise to the difficulties identified and discussed by Devlin J in *Mona Oil Equipment and Supply Co. Ltd -v- Rhodesia Railways Ltd* [1949] 2 All ER 1014. It was not suggested by Mr. Sutcliffe that any term other than that identified by the Judge in paragraph 283 was to be implied, and, given that it appears to me that there was no breach of that term, I am of the view that the Judge reached the wrong conclusion on this issue.

Conclusion

161. In these circumstances, for my part, I would:

- (i) Affirm the Judge's conclusion that the 1998 Agreement was for a term of two years;

- (ii) Conclude that Mr. Barry's Agreement only extended to "fixed", or completed, compositions;
- (iii) Affirm the Judge's refusal to grant the injunction sought by RDM;
- (iv) Reverse the Judge's finding of unlawful interference against Mr. Taylor;
- (v) Reverse the Judge's finding that Mr. Taylor was in breach of contract in relation to the Cher Project.

Lord Justice Chadwick:

Summary of Conclusions

162. In the light of the judgments which have been delivered the court proposes to make the following order: (i) RDM's appeal on the first issue (duration of the 1998 publishing agreement) is dismissed; (ii) Mr Taylor's cross-appeal on the second issue (infringement of copyright) is allowed; (iii) RDM's appeal on the third issue (injunction) is dismissed; (iv) Mr Taylor is granted permission to appeal on the fourth issue (interference with goods) and his cross-appeal is allowed; (v) Mr Taylor's cross-appeal on the fifth issue (breach of the production agreement) is allowed.