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Case No: IL-2022-000013

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/01/2024

Before:

THE HON MR JUSTICE MICHAEL GREEN

Between:

(1) NOEL REDDING ESTATE LIMITED
(2) MITCH MITCHELL ESTATE LIMITED

Claimants

- and -

SONY MUSIC ENTERTAINMENT UK LIMITED

Defendant

Simon Malynicz KC, Bruce Drummond & Jamie Muir Wood (instructed by **Keystone Law LLP**) for the **Claimants**

Robert Howe KC (instructed by **Simkins LLP**) for the **Defendant**

Hearing dates: 26 & 27 October 2023

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This judgment was handed down remotely at 10.30am on Monday 29 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Michael Green:

INTRODUCTION

1. Arguably the greatest rock guitarist ever, James Marshall ‘Jimi’ Hendrix (“**Jimi**”), sadly died on 18 September 1970, aged just 27. This was over 53 years ago. His band, the Jimi Hendrix Experience (“**JHE**”) was formed in 1966 with two other band members: David Noel Redding (“**Mr Redding**”) on bass guitar; and John Graham ‘Mitch’ Mitchell (“**Mr Mitchell**”) on drums. Together they recorded three studio albums: Are you Experienced; Axis: Bold as Love; and Electric Ladyland (the “**Recordings**”). Mr Redding died on 11 May 2003; and Mr Mitchell died on 12 November 2008.
2. This claim is brought by two companies that are said to have succeeded to the rights in the Recordings owned by Mr Redding and Mr Mitchell on their deaths. The Claimant companies seek to establish that they own a share of the sound recording copyrights in the Recordings and also to certain performers’ property rights.
3. The Defendant, Sony Music Entertainment UK Limited (“**Sony**”), is the sub-licensee of Sony Music Entertainment (“**SME**”), which is a partnership constituted under the laws of the State of Delaware, USA. SME has a licence from Experience Hendrix L.L.C. (“**Experience**”) to exploit, publish and/or distribute the Recordings and the Claimants say that such exploitation has infringed their rights and they should be compensated accordingly.
4. Experience and its subsidiary, Authentic Hendrix LLC (“**Authentic**”) are limited liability companies established under the laws of the State of Washington, USA. Sony says that Experience is the assignee and sole owner of the copyrights and trademarks owned by Jimi and is the proprietor of the intellectual property rights in and to the large catalogue of musical compositions and sound recordings that Jimi created. Authentic is the worldwide licensing arm of Experience.
5. On 8 September 2022, Sony issued an application for summary judgment and/or strike out of the whole claim; alternatively certain parts of it. This judgment is principally concerned with that application, which had a number of different grounds. Sony had previously sought to have the proceedings dismissed on jurisdictional grounds, but this was itself dismissed by Deputy Master Rhys on 21 June 2022, whose order was upheld on appeal by Edwin Johnson J on 25 April 2023. Edwin Johnson J’s judgment is at [2023] EWHC 941 (Ch).
6. There is also before me an application by the Claimants dated 14 August 2023 for permission (if needed) to rely on the report of Mr Marc C. Rifkin, a New York attorney, for the purpose of considering Sony’s application for summary judgment and/or strike out.

FACTUAL BACKGROUND

7. As stated above, the JHE was formed in 1966. The Claimants plead that the JHE was “*at all material times a joint venture group and a partnership at will, pursuant to the Partnership Act 1890*”, which is relied upon by Sony as one of its grounds of attack against the claim. JHE was managed by Mr Michael Jeffery and Mr Brian ‘Chas’ Chandler and on 11 October 1966 they, as producers, entered into a recording agreement with Jimi, Mr Redding and Mr Mitchell jointly as the members of JHE (“**1966 Recording Agreement**”). The 1966 Recording Agreement was for an initial term of 7 years with an option to extend for a further 5 years.
8. The Claimants plead that there was an oral agreement entered into around May 1967 between the JHE band members regarding the ownership and division of monies received by JHE and it was to the effect that any such profits would be divided as to: 50% to Jimi; 25% to Mr Redding; and 25% to Mr Mitchell.
9. After Jimi’s death, it is Sony’s case that Jimi’s father, Mr James Allen ‘Al’ Hendrix (“**Al Hendrix**”) was the sole heir to his estate which would include any copyrights or share of copyrights that he owned. Al Hendrix incorporated Experience and Authentic and Sony says that he assigned all the rights he inherited in relation to JHE to Experience.
10. In March 1972, Mr Redding and Mr Mitchell brought claims in the New York courts against the administrator of Jimi’s estate and a company called Are You Experienced Limited that sought an account and payment of royalties said to be due to them. Those claims were settled by the entry into separate releases, on 22 April 1973 for Mr Redding and 30 September 1974 for Mr Mitchell, whereby in return for a sum of money, they released and covenanted not to sue Jimi’s estate and any record companies distributing the Recordings (the “**Releases**”). There is no dispute that the Releases were properly executed. Mr Redding received \$100,000 and Mr Mitchell received \$247,500.
11. The Releases were followed by Stipulations entered into by the Supreme Court of the State of New York in respect of Mr Redding on 9 May 1973 and Mr Mitchell on 14 June 1974 and 1 October 1974, whereby their claims were discontinued “*with prejudice*” (the “**Discontinuances**”). Sony says that the Releases and Discontinuances cover the subject matter of these proceedings and therefore constitute a full defence to any claim that the Claimants have any rights in the Recordings. I will deal with that argument more fully below.
12. Since the Releases and Discontinuances, there are only three small examples where Mr Redding made some sort of claim in relation to the Recordings. (Mr Mitchell made no such claim during his lifetime.) In 1996, Mr Redding made a “*moral*” claim by letter on Jimi’s estate on the basis that his Release was “*unfair*”. In 2003, again by letter, Mr Redding made a financial claim based on the alleged partnership between the members of JHE. And, after Mr Redding’s death, in an email from his attorneys to his manager on 12 January 2004, it was recorded that Experience’s lawyer, a Mr Reed Wasson, had offered Mr Redding \$20,000 on a “*take it or leave it*” basis, even though he had thought that their claim was “*frivolous*”. The offer was not accepted.
13. The Claimants have said in their evidence that both Mr Redding and Mr Mitchell died in relative poverty. Mr Redding’s estate was left to his partner, Deborah McNaughton,

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and, after she died a year later in 2004, to her sisters, Nancy and Alexis McNaughton. It was perhaps because of this that the above claims were not taken forward at that time. In April 2015, the sisters are said to have assigned any rights owned by Mr Redding on his death to Noel Redding's Experience LLC, a company incorporated under the laws of the State of California, USA. Then in April 2020, those rights were further assigned to the First Claimant, then called Firefly Entertainment Limited. That agreement was varied by a further assignment made in August 2021.

14. As for Mr Mitchell, his estate is said to have been left to his daughter, Aysha Mitchell. On 26 August 2021, she assigned all of the rights relevant to the claim to the Second Claimant.
15. Sony challenges the chain of title, saying that it is inadequately pleaded and/or evidenced. For their part, the Claimants also challenge whether Experience is the rightful successor in title to the rights that it has licensed to SME. Clearly I cannot resolve these points on this application. The question is whether the plea is so deficient that it can be said at this stage that there is no real prospect of the Claimants succeeding in establishing their chain of title.
16. After the above assignments had been effected, the Claimants' solicitors issued a letter of claim dated 8 December 2021. This seemed to have prompted Experience and Authentic, together with SME, to commence proceedings on 18 January 2022 against the Claimants in New York. The Claimants then issued this claim on 4 February 2022.

PROCEDURAL CHRONOLOGY

17. Particulars of Claim were served on 18 February 2022 and, on 3 March 2022, Sony filed its Acknowledgement of Service. It indicated that it intended to challenge jurisdiction and it did so by its application notice dated 16 March 2022. This was based on *forum non conveniens* grounds and in part on the existence of the New York proceedings.
18. On 13 May 2022, Sony sought security for costs for its own jurisdiction application. On 21 June 2022, Deputy Master Rhys heard the jurisdiction application and dismissed it. His decision is reported at [2022] EWHC 1752 (Ch). He also refused permission to appeal. On 12 July 2022, Sony lodged its application for permission to appeal the order of Deputy Master Rhys on the jurisdiction application.
19. On 8 September 2022, the application that is before me for reverse summary judgment and/or strike out was issued. Sony's application is supported by the fourth witness statement of Patrick John Gardiner, a solicitor acting for Sony.
20. The application for security for costs was amended on 12 September 2022 and, following hearings on 21 November 2022 and 1 March 2023, was resolved by the Claimants agreeing to provide security for certain costs and being ordered to pay Sony its costs of that application.
21. As to the jurisdiction application, on 4 November 2022, Edwin Johnson J directed a rolled up hearing for the application for permission to appeal and, if granted, the appeal

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itself. This was heard on 23 March 2023 and, although Edwin Johnson J granted permission to appeal on the majority of the grounds of appeal, he ultimately dismissed the appeal. At the consequential hearing on 3 May 2023, Edwin Johnson J gave directions for the hearing of this application.

22. The Claimants filed evidence in response to Sony’s application on 6 June 2023 and 4 July 2023 in the form of the second and third witness statements of Lawrence Howard Abramson, a solicitor acting for the Claimants. They also provided proposed Amended Particulars of Claim on 14 June 2023, which attempted to deal with some of the criticisms of it made by Sony in this application. Sony filed evidence in reply on 21 June 2023 in the form of the eighth witness statement of Mr Gardiner.
23. The Claimants filed their application in relation to the expert evidence of Mr Rifkin on 14 August 2023. This was supported by the fourth witness statement of Mr Abramson. Sony has not filed any evidence in response. Sony has also not filed its Defence to the claims. Because of its application, it is not obliged to.
24. Finally, on 16 May 2023, following the failure of the appeal on the jurisdiction challenge, the proceedings in New York were stayed pending the resolution of this claim.
25. In the Claimants’ skeleton argument, it was suggested that Sony has been deploying unfair tactics to string these proceedings out in an attempt to exhaust the Claimants’ available funds. Mr Robert Howe KC, representing Sony, took exception to these criticisms of his client, saying that they are unfounded on the facts and should be withdrawn. I agree with him that there is no real basis for the Claimants’ accusation. It is in any event irrelevant to the issues that I have to decide and I pay no attention to it. I would however make the point that it does seem to me that Sony has taken every possible point on this application and it might have been more realistic to have concentrated on its better points.

STRIKE OUT AND/OR SUMMARY DISMISSAL OF WHOLE CLAIM

26. There was no dispute between the parties as to the legal principles in relation to an application to strike out under CPR 3.4(2) or for summary judgment under CPR 24.3. Some of the grounds relied on by Sony are more apt for consideration under CPR 3.4(2), such as the alleged failure to comply with CPR 19.3 or the alleged incoherent claim for relief; whereas others are more suited to the CPR 24.3 application, such as the effect on the claim of the Releases and Discontinuances.
27. In relation to the latter, the court must consider whether the claimant has a “*realistic*” as opposed to a “*fanciful*” prospect of success: see *Swain v Hillman* [2001] 1 All ER 91. But the court does not conduct a “*mini-trial*”, and the court can take into account not only the evidence filed on the application but also any evidence that can reasonably be expected to be available at trial: see *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550. However it is not enough for the claimant to say that the claim should go to trial because something may turn up: see *King v Stiefel* [2021] EWHC 1045 (Comm) at [20] and [21].

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28. Sony relies on four grounds to strike out and/or for summary dismissal of the whole claim:
- (1) Failure to comply with CPR 19.3: the claim is said to be improperly constituted because Jimi's estate, or Experience, are not parties to the claim.
 - (2) No coherent claim for relief: this is said to be a breach of both CPR 16.2(a) and (b).
 - (3) Chain of title: as referred to above, there is said to be no sufficient plea or credible evidence that the Claimants are entitled to bring the claim.
 - (4) The Releases and Discontinuances: this seemed to me the most substantive basis, that the Releases and Discontinuances meant that Mr Redding and Mr Mitchell had no rights to pass to their estates. However this is very much tied in with whether I admit Mr Rifkin's evidence.

(1) Failure to comply with CPR 19.3

29. Mr Howe KC argued that CPR 19.3 is a mandatory provision that required the Claimants to have joined the other owners of the copyright in the Recordings, namely Experience and possibly Authentic. He said that without their joinder the proceedings are improperly constituted. He relied on *Roche v Sherrington* [1982] 1 WLR 599 ("**Roche**"), a decision of Slade J, as he then was.
30. CPR 19.3 provides as follows (it has recently been amended but without changing its effect):
- "(1) All persons jointly entitled to the remedy claimed by a claimant must be parties unless the court orders otherwise.
 - (2) If any such person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise."
31. It is interesting that there is virtually no commentary in the White Book as to the application of this rule. There is certainly no suggestion that a failure to comply with the rule at the outset of the proceedings means that they are improperly constituted and should be struck out. Such an outcome would be somewhat inconsistent with the express power for the court to order otherwise.
32. Mr Simon Malynicz KC, who appears with Mr Bruce Drummond and Dr Jamie Muir Wood for the Claimants, submitted that the important words in the rule are "*jointly entitled to the remedy*". The focus is on the remedy being sought, not the cause of action. The relevant remedy being sought by the Claimants, as appears from the Prayer to the Particulars of Claim, is a "*declaration as to ownership of the copyright in the [Recordings]*". The Claimants want to establish that they own a proportionate share of the copyright. They recognise that they do not own all of the copyright and that they originally shared it with Jimi, and now the successors to Jimi's ownership are entitled to claim their share of the copyright. But they do not accept that Experience and/or Authentic are those successors and therefore the joint owners of the copyright. They do not allege in their Particulars of Claim that those companies are the joint owners with

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them of the copyright. (I should clarify that this argument on joinder does not apply to the performers' rights claims, as Mr Howe KC accepted.)

33. It seems to me that the rule is directed at protecting defendants from being subject to subsequent claims for the same relief. In *Roche*, the plaintiff was jointly entitled to the repayment of a loan with two other persons, as the monies that were paid in respect of the loan came out of an account that was in the joint names of those three persons. Slade J did not strike out the proceedings, but stayed them, so that the plaintiff could establish the position of the other two persons and see whether they were claiming any interest in the loaned money or whether they disavowed any such interest. The plaintiff was maintaining that he was the sole beneficial owner of the moneys loaned to the defendant. Slade J was concerned that, if the position was not clarified, and they were not joined to the proceedings, the defendant may remain “*exposed to future claims at their suit*”.
34. In this case Sony is not at risk of a claim by Experience and/or Authentic as to their ownership of the copyright in the Recordings. Indeed, Sony derives its title to exploit the Recordings from Experience's and/or Authentic's purported ownership of the copyright. Furthermore, Experience and Authentic, together with SME, began the proceedings in New York against the Claimants asserting their ownership of all the rights in the Recordings. They are effectively on the same side and I do not see that they are prejudiced by not being parties to this claim. Having said that, if they wish to be joined, I do not imagine that there would be any objection to this.
35. The real reason why Sony is running this point is because of the perceived difficulties that the Claimants might have in joining Experience and/or Authentic against their will as defendants to these proceedings. But it seems to me that that is an argument that runs counter to its point that they “*must*” be joined and that, if they are not, the proceedings are improperly founded. If the proposed defendants resist their joinder for jurisdictional reasons, the court would be entitled to say, under the power in CPR 19.3(1) and (2), that they need not be joined.
36. I therefore agree with Mr Malynicz KC that this is a procedural issue that can be dealt with during the course of the proceedings as necessary and it is not the fundamental matter that Mr Howe KC was suggesting it was. Certainly it would not justify the proceedings being struck out. In any event, it cannot affect the performers' rights claims, as has been accepted. And it is the Claimants' case that they do not know who are the other joint owners of the copyright in the Recordings and Sony has yet to prove that Experience and/or Authentic are those joint owners. If the Claimants have an otherwise good claim, it would be surprising, to say the least, that it would be struck out on this ground.
37. Mr Howe KC submitted that strike out is justified because the Claimants have deliberately decided not to join Experience and/or Authentic, despite knowing that those companies have been asserting their rights over the Recordings for over 50 years. If the Claimants are truly maintaining that those companies are not the joint owners, they must identify who they say the joint owners are and join them to the proceedings. Mr Howe KC submitted that the court should not make a declaration as to the ownership of the copyright in the Recordings without all the potential joint owners being before the court and so bound by the declaration.

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38. However, I do not believe the position is so dramatic. The court clearly has a discretion under CPR 19.3 and I think it is appropriate to see if Experience and/or Authentic wish to be joined to these proceedings. If they do so wish, that can easily be done. If they do not, and the Claimants are ultimately successful in establishing their joint ownership of the copyright, then that declaration can be used for the purpose of pursuing Sony for infringement of their shared interest in the copyright. Sony is able to defend the claim by providing evidence or running legal arguments that the Claimants do not have any interest in the copyright of the Recordings. I do not think that it causes Sony any prejudice that the other alleged joint owners of the copyright have not been joined to these proceedings.
39. I therefore reject this ground in support of the strike out.

(2) No coherent claim for relief

40. As Mr Howe KC submitted, this is a short point. The complaint is, I think, that the Claimants have not specified the actual percentage share of the copyright that they are each claiming. Instead, the Prayers for Relief simply seek declarations “*as to ownership*” or “*as to the extent of their performer’s rights*”. Mr Howe KC said that this is a breach of CPR 16.2(b) which requires a claimant to “*specify the remedy which the claimant seeks*”. This is such an essential requirement, he said, that the Claimants’ failure to do so means that there is no coherent claim for relief and accordingly the claim should be struck out.
41. While the claim for relief could perhaps have been better expressed, it is perfectly clear what the Claimants are seeking to claim. They aim to establish that they still retain the joint ownership of the copyright that Mr Redding and Mr Mitchell originally had. Mr Malynicz KC explained that they were each claiming a 25% share on the basis of the oral agreement referred to above, and pleaded in paragraph 6 of the Particulars of Claim, or derived from JHE which was a joint venture or partnership – see paragraphs 5 and 12 to 17 of the Particulars of Claim. By not specifying the percentage in the Prayer for Relief, the Claimants are leaving open the possibility that the court might find a different percentage of ownership to be declared vested in the Claimants. Mr Howe KC criticised that approach which he said required the court to carry out a roving inquiry as to the Claimants’ respective entitlements.
42. But I do not see that this form of relief is incoherent or a breach of CPR 16.2(b). The Claimants are entitled to run alternative cases and it will be up to them to prove their entitlement to a declaration as to their respective ownership rights in the copyright of the Recordings and to their performers’ rights.
43. I therefore also reject this ground for strike out.

(3) Failure to plead and/or provide credible evidence of the chain of title

44. I am afraid that this ground also seems to me to be unfounded and totally unsuited to an application to strike out.
45. In paragraph 2 of the Particulars of Claim, the Claimants plead the most recent Deeds of Assignment to them of the rights in the Recordings and that they effectively represent the estates of Mr Redding and Mr Mitchell. It is true to say that there is no plea as to

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the chain of title before the assignors in those Deeds of Assignment, but this has been further explained in the evidence adduced on this application (I have dealt with this in [13] and [14] above). A chain of title in relation to Mr Redding's rights is contained in Schedule 1 of the April 2020 Deed of Assignment. The assignment to the Second Claimant was by Aysha Mitchell who is stated to be "*the sole beneficiary of the estate of [Mr Mitchell]*".

46. Mr Howe KC sought to pick holes in this evidence by suggesting an inconsistency between the documents in relation to Mr Redding's estate and by querying why a Personal Representative was appointed to Mr Mitchell's estate if his daughter was the sole beneficiary. These may or may not be good points, but it would be premature in the extreme to say at this stage that the Claimants cannot succeed in establishing their title to the rights in respect of which they are claiming. The Claimants have pleaded that they have title by reference to the Deeds of Assignment and this has been supported by a Statement of Truth. In due course, this will have to be substantiated by evidence, through disclosure and witness evidence, if it is disputed by Sony. There is no requirement for such evidence to be pleaded and the evidence that has been provided to date demonstrates that the Claimants have at least a real prospect of succeeding in establishing the necessary chain of title.
47. Accordingly it would be inappropriate to strike out the claim on this basis and this ground is rejected.

(4) The effect of the Releases and Discontinuances

48. This seemed to me the only really substantive matter in Sony's application, but even this has to a certain extent been diluted because of Mr Howe KC's concession that, if I permit the Claimants to be able to rely on Mr Rifkin's report on New York law, then the application must fail, at least in respect of copyright. I should therefore first decide whether to admit Mr Rifkin's report, although before doing so I will look more closely at the Releases themselves.

(a) The Releases

49. The Redding Release is dated 22 April 1973. There is a slight confusion in the parties in that Are You Experienced Ltd is described as the band in which Jimi was the lead performer, but also as a company owned by Jimi's estate. The material parts of the Release are as follows:

"1. I hereby release the Estate of JIMI HENDRIX, deceased, "ARE YOU EXPERIENCED", a corporation, the stock of which is owned by Estate of JIMI HENDRIX, deceased, Warner Brothers Records, and any and all other record companies throughout the world with whom JIMI HENDRIX in his lifetime, or the Estate of JIMI HENDRIX, deceased, have entered into contracts or agreements for the distribution and sale of recordings of JIMI HENDRIX on which I performed, from any and all liability or responsibility to me to account for any royalties or compensation to me in connection with said recordings. I further covenant not to sue any such record companies for compensation arising out of distribution of such recordings. By this release I acknowledge full settlement of any compensation which I may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future, both in the United States and

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throughout the rest of the world.

2. I hereby release the Estate of JIMI HENDRIX, deceased and Warner Brothers Pictures from any and all claims which I may have for their use of my likeness and sound in connection with the motion picture on the life of JIMI HENDRIX currently in production by Warner Brothers Pictures, including any sound track recordings from said film. I hereby assign to the Estate of JIMI HENDRIX, deceased, all right to grant consent for the use of my likeness and sound which may have been filmed and recorded at any time in connection with my performance as a part of the ARE YOU EXPERIENCED group in conjunction with the performance of JIMI HENDRIX. I further covenant with the Estate of JIMI HENDRIX, deceased, forever to refrain from instituting or in any way aiding any claim, demand, action or cause of action for damages, expense or compensation against said estate in connection with my performance or performances in connection with the ARE YOU EXPERIENCED group.”

3. This release goes to any recordings which may be released or mastered in the future as well as those already in release and goes to world-wide rights.”

50. Mr Howe KC submitted that this Release is extremely broad and comprehensive and the language is clear. Mr Redding was giving up all his past and future rights in relation to his participation in JHE and his performances that were embodied in the Recordings.

51. The Mitchell Release is dated 30 September 1974 and is in somewhat different terms, although Mr Howe KC submitted was similarly clear and unequivocal:

“1. I hereby release the ESTATE OF JIMI HENDRIX, deceased, its successors and/or assigns, Are You Experienced, Ltd., its successors and/or assigns and any and all record companies or other entities with whom said JIMI HENDRIX, his Estate, or their successors or assigns may have contracted in the past, or may contract in the future (excepting those reservations which are specifically set forth in paragraph 6 below) for the distribution and sale of records embodying performances of JIMI HENDRIX on which I performed, including any soundtrack recordings from any and all liability or responsibility to account to me for or pay royalties or other compensation to me in connection with any such recordings.

Further, I covenant, promise and agree not to sue the ESTATE OF JIMI HENDRIX, its successors and/or assigns, Are You Experienced, Ltd., its successors and/or assigns nor any such entities or record companies for compensation arising out of the distribution of any recordings made pursuant to such contracts or agreements.

2. By this release I acknowledge full settlement of any compensation which I may have claimed, now claim or in future may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future from the sale of such recordings.

...

4. I further covenant with the ESTATE OF JIMI HENDRIX, its successors and/or assigns and Are You Experienced, Ltd., its successors and/or assigns forever to refrain from instituting or in any way aiding any claim, demand, action or cause

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of action for damages, expenses or compensation against said Estate and said corporation in connection with my performance or performances as a part of the group known as “The Jimi Hendrix Experience” or as part of or in connection with any other recordings embodying any performance of the decedent, JIMI HENDRIX.

5. This release and covenant is made by me after negotiations in which I have been represented by counsel of my choice and is made by me on the advice of counsel and is not dependent on any facts now known nor which may hereinafter be discovered.

...

7. I further agree and understand that the word “Recordings” as used herein includes discs, tape recordings, cassettes, audio visual cartridges, and any other means or modes now known or used or hereafter developed and used for the reproduction of sound and sound synchronized with visual images”.

52. The Discontinuances are orders of the New York Court ending the actions that were before it. They are binding on Mr Redding’s and Mr Mitchell’s estates and Mr Howe KC submitted would be recognised and enforced by the English Court.

(b) The application to admit Mr Rifkin’s Report dated 3 June 2023

53. There is no dispute that the Releases are subject to New York law and should be construed according to the relevant New York principles of interpretation. Sony’s solicitor, Mr Gardiner, recognised this in paragraph 19 of his fourth witness statement, made in support of this application where he said:

“I understand that the effect of these Releases and Dismissals under New York law was and is to act as a final judgment which precluded Mr Redding and Mr Mitchell from ever again bringing subsequent claims that were, or even could have been, raised in the Historical NY Claims.”

At paragraph 6, Mr Gardiner clarified that his “*understanding of issues of New York law*” was based on information provided to him by SME’s (and Experience’s and Authentic’s) New York attorney, Ms Dorothy Weber of Herbsman Hafer Weber & Frisch, LLP.

54. Sony says that the Claimants should not be allowed to rely on their own expert evidence as to New York law because of various failures to comply with CPR Part 35 and for a number of other reasons. But, as Mr Malynicz KC submitted, there is an element of the pot calling the kettle black, in that Sony did not seek permission to adduce that evidence by Mr Gardiner. Sony has now stated that Mr Gardiner was not purporting to give expert evidence but was simply relaying instructions, but that seems inconsistent with paragraph 6 of Mr Gardiner’s witness statement.
55. Mr Rifkin’s report was attached to and served with Mr Abramson’s second witness statement and specifically in response to the contention of New York law in Mr Gardiner’s witness statement. At that time, the Claimants did not apply for permission to rely on expert evidence in accordance with CPR 35.4 and para. 9.2 of the Chancery

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Guide, but they subsequently did so when Sony complained about the service of the report.

56. Mr Rifkin is a New York attorney acting for the Claimants in the proceedings in New York. There is no doubt that he is not independent of the Claimants; but nor is Mr Gardiner or Ms Weber independent of Sony. The question is whether, at this stage of the proceedings, the Claimants should be allowed to rely on such evidence. I have little doubt that, if this remains an issue for trial, both sides would only likely be allowed to rely on independent expert evidence that complies with all applicable rules in CPR Part 35.
57. Mr Rifkin's main thesis is that, because of their nature, New York law would require the Releases to be narrowly construed and that they would not prevent the bringing of this claim. He opined that they would only bar claims that were within the contemplation of the parties when the Releases were given. Mr Howe KC submitted that Mr Rifkin had been asked to give his opinion on the wrong question and that his opinion should have been confined to setting out the principles of construction under New York law and then to leave it to the court to apply those principles to the Releases – see *Alrahami v Alrahami* [2014] UKPC 37, per Lord Clarke at [19]. However, as I indicated above, Mr Howe KC accepted that, if I give permission to rely on the report, he could not argue that the Claimants have no real prospect of succeeding on the limited effect of the Releases.
58. Despite Edwin Johnson J saying in his judgment on the consequential applications to the jurisdiction application that there may well need to be evidence of New York law for the purposes of resolving this application, Sony took the decision both to oppose the Claimants' application to adduce Mr Rifkin's report and not to serve any responsive expert evidence. Mr Howe KC did submit that, as New York law is a common law system with a common heritage to English law, there should be no material difference in approach to the interpretation of contracts. He relied on Lord Leggatt's judgment in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] AC 995, in particular where he discussed the "*presumption of similarity*" in [119] to [126]. But this presumption cannot apply where there is evidence to the contrary, and this is demonstrated by Mr Rifkin's report.
59. So Sony's objections really come down to the failure to observe all the requirements of CPR Part 35. Those objections are that: Mr Rifkin is not independent; there is no indication in the report that Mr Rifkin is aware of the requirements of CPR Part 35, in particular his duties as an expert and to the court; he has not addressed the report to the court or complied with any of the other requirements of CPR PD35, in particular the statement as to his duties and to be verified by a specific statement of truth. These are all valid points, but they fail to take account of the circumstances of this case and the reason the report was obtained.
60. The Claimants do not refer to the Releases in their Particulars of Claim. They will only become an issue when Sony relies on them in its Defence, as it inevitably will. So the Claimants could only reasonably have served a report from Mr Rifkin after Sony had raised the matter in Mr Gardiner's evidence and where he apparently relied on New York law as to the effect of the Releases. The Claimants could have probably simply denied Mr Gardiner's proposition and, as a factual matter, the court would have been minded to accept the Claimants' denial for the purposes of considering strike out or summary judgment. But the Claimants decided to go further and obtain an actual report

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on the New York law aspects relevant to the application. They should have made an application when they served the report (the Chancery Guide makes clear that this is required even for use in interim applications – paras. 9.51 to 9.53). But their failure in such respect should not be fatal.

61. Mr Malynicz KC drew my attention to paras. 9.46 to 9.50 of the Chancery Guide which specifically deals with expert evidence of foreign law and shows that there is a wide range of options available to the court in relation to such evidence. This includes the possibility of the court directing that the parties' retained foreign lawyers "*could assist the court with source documents and/or witness evidence on relevant legal principles*" without the need to instruct separate foreign law experts (see para. 9.48(d)).
62. These sorts of decisions are normally made at a case management conference and somewhat different considerations may come into play when considering the form of expert evidence for the trial, with the issues having been established by the pleadings. In this case, and on this application, where the Claimants are responding to a form of New York law raised by Sony's own lawyers, it seems to me to be appropriate that Mr Rifkin's report should be admissible to show that the Claimants have at least a real prospect of succeeding on this issue at trial. I cannot decide those contentious issues of New York law, but Mr Rifkin's report shows that there are sustainable arguments on such issues that will have to be decided at a trial.
63. I therefore admit Mr Rifkin's report into evidence on this application and the Claimants are allowed to rely on it for that purpose.

(c) The EU concept of consent

64. A further argument that Mr Malynicz KC has sought to run (Mr Howe KC said that this is the third time he has tried to run it) is that any defence based on the Releases must fall within the harmonised EU doctrine of consent to use, which requires such consent to have been clear and unequivocal, specific and informed – see eg *Marussia v Manor Grand Prix* [2016] EWHC 809 (Ch). Insofar as the Releases should be construed as, at least in part, a consent or authorisation to use the Recordings, Mr Malynicz KC submitted that Mr Rifkin's analysis of them would mean that they could not satisfy the EU requirements of consent as set out in *Zino Davidoff SA v A&G Imports Ltd* (C-414/99) (a trade marks case, but with the same applicable principles).
65. Mr Malynicz KC accepted that both Deputy Master Rhys and Edwin Johnson J, the latter more than the former, were sceptical as to this argument but he said that there were not full submissions to either judge as it was only of tangential importance to the jurisdiction application. Mr Howe KC submitted that it is a wholly bad point.
66. It seems to me that I need say nothing more about it in this judgment. It will be an argument that the Claimants will want to run by way of a Reply to Sony's Defence that will presumably, when it comes, rely on the extinguishing effect of the Releases. I have already decided that there is sufficient material before the court on the interpretation and effect of the Releases under New York law that this issue should go to trial. There was no application to prevent the Claimants from relying on this point by way of their Reply when served and so I do not decide anything about it at this stage.

(d) The effect of the Releases on performers' rights

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67. While I have already decided that the issue as to whether the Releases extinguished any rights in respect of the Recordings will need to go to trial, the Claimants also argued that, in any event, as performers' rights only came into existence later, they could not have been affected by the Releases. Sony is also seeking to strike out the performers' rights claims on the basis that Mr Redding's and Mr Mitchell's original consent to the fixation of their performances in the Recordings precludes any claim for infringement of their performers' rights in the Recordings.
68. It is necessary in order to deal with this briefly to explain the nature of performers' rights.
69. As summarised in *Copinger and Skone James on Copyright, 18th Edn*, at [12-02] to [12-05], prior to the entry into force of the Copyright, Designs and Patents Act 1988 ("CDPA"), performances were protected by a series of performers' protection Acts, dating between 1925 and 1972. While these were framed in terms of criminal liability for exploiting illicit records, films and broadcasts, it was eventually realised that they did also provide private enforceable rights for performers to give or withhold their consent to the recording and exploitation of their performances - see *Rickless v United Artists* [1988] QB 40.
70. Initially, Part II of the CDPA created two separate rights in performances: one was a personal and non-assignable right for performers in the exploitation of their performances; the other was a transferrable right for persons having an exclusive recording contract with a performer.
71. There have since been a number of amendments to performers' rights under Part II of the CDPA. So far as material for present purposes, they are: (a) the Copyright and Related Rights Regulations 1996 (SI 1996/2967) (the "**1996 Regulations**"), which added the so-called "*performers' property rights*"; and (b) the Copyright and Related Rights Regulations 2003 (SI 2003/2498) (the "**2003 Regulations**"), which (inter alia) added section 191HB, which is pleaded at para. 28 of the Particulars of Claim, but which was withdrawn by Mr Malynicz KC at the hearing.
72. When Part II was introduced, and when it was subsequently amended, transitional provisions were included to ensure that the new rights did not upset any previous agreements or arrangements. Thus:
- (1) Section 180(3) of CDPA provides that, although the rights conferred by that Part apply in relation to performances taking place before commencement, "*no act done before commencement, or in pursuance of arrangements made before commencement, shall be regarded as infringing those rights*".
 - (2) Regulation 27 of the 1996 Regulations states as follows:

"Saving for certain existing agreements

 - (1) Except as otherwise expressly provided, nothing in these Regulations affects an agreement made before 19th November 1992.
 - (2) No act done in pursuance of any such agreement after commencement shall be regarded as an infringement of any new right."

(3) Similarly, Regulation 32 of the 2003 Regulations states as follows:

“Savings for certain existing agreements

32.—(1) Nothing in these Regulations affects any agreement made before 22nd December 2002.

(2) No act done after commencement, in pursuance of an agreement made before 22nd December 2002, shall be regarded as an infringement of any new or extended right arising by virtue of these Regulations.”

73. Mr Howe KC relied quite heavily on the judgment of Lewison J, as he then was, in *Barrett v Universal-Island Records Ltd* [2006] EMLR 567 (“*Barrett*”). At the end of his long judgment, Lewison J considered performers’ rights claims and the transitional provisions, although not much had been said about performers’ rights during the course of the trial (see [367]). He held that Regulation 27 of the 1996 Regulations applied to the performers’ property rights contained in ss.182A and 182B of CDPA and that therefore the defendants in that case were entitled to rely on their prior agreements as a defence to those claims.
74. Mr Howe KC said that it was significant that the Claimants were not claiming under s.182 CDPA because that means that they accepted, indeed they relied on, the fact that Mr Redding and Mr Mitchell consented to the fixation of their performances and the subsequent release of the Recordings. As is apparent from paras.24 and 32 of the Particulars of Claim, the Claimants do rely and claim in relation to the performers’ property rights set out in ss.182A, 182B, 182C and 182CA of the CDPA. That is probably because these performers’ property rights are assignable and so can be enforced by successors in title – see s.191B CDPA. The performers’ property rights require consent to have been given by the performer, or their successors in title, to: reproduce recordings (s.182A); distribute recordings (s.182B); rent recordings (s.182C); and to make recordings available to the public by electronic transmission (s.182CA).
75. Insofar as Sony relies on the Releases as amounting to consent for the purposes of the above sections, I have already decided that the interpretation of the Releases as a matter of New York law is a triable issue. That is perhaps even more pertinent in relation to performers’ rights that did not exist at the time the Releases were entered into. There may also be further issues as to whether a non-party to the Releases can take the benefit of them and whether any alleged infringing acts were done “*in pursuance*” of the Releases within the meaning of the transitional provisions.
76. But as to Mr Howe KC’s more fundamental objection to the performers’ rights claims, namely that the original consent to the first fixation effectively exhausted any performers’ rights there may be in those Recordings, Mr Malynicz KC said that this would entail a highly fact-sensitive inquiry as to the extent of the consent. He referred to Lewison J’s judgment in *Barrett* where Lewison J distinguished *Bassey v Icon Entertainment plc* [1995] EMLR 596 on the facts, because the express terms of Shirley Bassey’s “*consent*” had included a right of veto over the release of any recordings to

the public. In the case before him, Lewison J held that a consent in relation to the issue to the public of copies in video format could be inferred as a consent to do the same act via DVD. At [385], Lewison J said:

“I do not consider that a separate consent would be required to the issue to the public of precisely the same performance merely because the method of fixing the performance had improved technologically, but where the target audience was, for all practical purposes the same, and the storage medium gave precisely the same aural and visual information to the listener or viewer.”

77. Mr Malynicz KC submitted that the evolution of new technologies for listening to sound recordings, in particular the advent of digital media and streaming, could not have been contemplated at the time that consent was given to make the Recordings. Therefore it was quite unlike the move from video to DVD referred to by Lewison J in *Barrett*, and the original consent to first fixation could not be extended to the exploitation of the Recordings in digital form via streaming services. Mr Howe KC countered this by saying that providers of streaming services, such as Spotify or Apple, could not possibly be required to go to the original performers on old recordings (for example all the members of a symphony orchestra) and obtain a new consent to their performances being used to provide their recordings to the public in a digital format. This, he said, would cause chaos in the industry and was not how it worked. However, Mr Malynicz KC said that this had indeed been done by way of collective licensing agreements.
78. I only have to decide at this stage whether the Claimants have a real prospect of succeeding on their performers’ property rights claims and therefore whether Mr Howe KC’s point that the consent to first fixation necessarily rules out those claims. I believe that the Claimants have a more than arguable case that the original consent does not include consent to the present exploitation of their performers’ property rights and that this question may well involve a factual inquiry. Accordingly, those claims should be allowed to go to trial.

(e) Conclusion on the effect of the Releases

79. For the reasons set out above, the Claimants have a real prospect of succeeding on their case in relation to the Releases and Discontinuances, namely that those documents do not provide a complete defence to the claims, both in copyright and based on performers’ property rights.

STRIKE OUT AND/OR SUMMARY DISMISSAL OF PARTS OF THE PARTICULARS OF CLAIM

80. If the whole claim has not been struck out or summarily dismissed, Sony has applied for parts of the Particulars of Claim to be struck out and/or summarily dismissed on the basis that they do not disclose any reasonable or realistic cause of action, and/or they are irrelevant or embarrassing. These were the grounds upon which Sony relied (I continue the numbering adopted in Mr Gardiner’s fourth witness statement)

- (5) Claims relating to partnership assets, which Sony says are incoherent and in any event time-barred;

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- (6) The claims in respect of performers' rights;
- (7) Claims to beneficial ownership;
- (8) Allegations in relation to the 1966 Recording Agreement;
- (9) Claims of Secondary Infringement;
- (10) Claims in unjust enrichment.

81. However, the Claimants have expressly withdrawn their claims of beneficial ownership and unjust enrichment (grounds (7) and (10)) and have proposed the deletion of the corresponding paragraphs in the Particulars of Claim. That means that the second sentence of paragraph 16, all of paragraph 18, the third sentence of paragraph 33 and the third paragraph of the Prayer in the Particulars of Claim in relation to beneficial ownership and paragraph 34 in relation to unjust enrichment should all be deleted. That is acceptable to Sony.
82. Therefore I need say no more about grounds (7) and (10) above. I will deal below with the remaining grounds.

(5) Claims relating to partnership assets

83. I have referred in [7] above to the Claimants' plea that JHE was "*a joint venture group and a partnership at will, pursuant to the Partnership Act 1890*". Mr Howe KC has latched on to this assertion of a partnership and has pursued an argument that the Claimants are therefore claiming that the copyright in the Recordings was a partnership asset and that this can only be claimed by way of an account but that that can only be done within 6 years of the dissolution of the partnership, which must have happened on Jimi's death. The Claimants' claims in relation to joint ownership of the copyright are, he said, in reality a claim to a share of a partnership asset and so statute-barred. He relied on *Marshall v Bullock*, Court of Appeal, 27 March 1998; [1998] WL 36015209 and the House of Lords case referred to therein, *Knox v Gye* (1871-72) L.R. 5 H.L.656.
84. I have to say that I do not understand this point. Nowhere in the Particulars of Claim do the Claimants assert that they are claiming a share to a partnership asset. On the contrary, the Claimants assert that they, or more accurately they should have said that Mr Redding and Mr Mitchell, together with Jimi, were the joint first owners of the copyright in the Recordings. In paragraph 15 of the Particulars of Claim, they plead: "*The Claimants jointly with [Jimi] therefore have first ownership of the [copyright in the Recordings], and in the case of the Claimants, alternatively if any rights were assigned under the [1966 Recording Agreement], which is denied, have done so from the expiration of the [1966 Recording Agreement] (1974) up to the present time.*" The last sentence necessarily assumes that it was not a partnership asset because the partnership had been dissolved by the time the copyright would have reverted to Mr Redding and Mr Mitchell.
85. Whether they will prove it or not is another thing. But the assertion that is made in the Particulars of Claim is that each of Mr Redding, Mr Mitchell and Jimi owned a share of the copyright in the Recordings, either by reference to their alleged first ownership or by reversion when the 1966 Recording Agreement terminated and the Claimants are

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seeking a declaration to such effect. They are not seeking historical royalties going back to the 1970s; rather they want to establish their ownership of the copyright to seek redress from Sony for its ongoing exploitation, and they would say infringement, of those rights.

86. I therefore reject this ground for partial summary judgment.

(6) The claims in respect of performers' rights

87. I have dealt with and rejected under ground (4) above the bulk of Sony's points in relation to performers' rights. There is one further issue concerning performers' rights and that is s.191HB of the CDPA. In paragraph 28 and part of the second paragraph of the Prayer in the Particulars of Claim, the Claimants attempt to mount a claim for remuneration under s.191HB of the CDPA. This is problematic as s.191HB only creates a right to remuneration that can be claimed by the relevant collecting society.
88. The Claimants originally sought to persist in this claim and proposed an amendment to the Particulars of Claim to make it clear that they were only seeking a declaration as to their entitlement ultimately to receive that money from the collecting society. But at the hearing, Mr Malynicz KC sensibly realised that this claim was really unsustainable and he agreed to drop it. It should therefore be removed from the Particulars of Claim.

(8) Allegations in relation to the 1966 Recording Agreement;

89. In paragraph 8 of the Particulars of Claim, the Claimants plead some allegations about the 1966 Recording Agreement which seemed to be leading to a claim that it should be set aside on various grounds including undue influence, unduly onerous agreement or for breach of fiduciary duty. Paragraph 8 stated:

“At the time of signing the [1966 Recording Agreement], [Mr Redding] and [Mr Mitchell] were both minors and had no guardianship nor had any legal representation or advice. [Mr Jeffery] and [Mr Chandler] were also the managers of JHE and under fiduciary duties to advise them objectively. The [1966 Recording Agreement] when considered as a whole, was unduly onerous and in these circumstances leads to an obvious presumption of undue influence.”

And paragraph 19 pleads as follows:

“Further and significantly, the [1966 Recording Agreement] was an agreement whereby there was an inequality of bargaining power, and the weaker side did not have the benefit of any legal advice and significantly they were both minors. The terms were onerous on any objective analysis of the facts. Where it is established that a claimant was induced to enter into a contract or transaction by the undue influence of the defendant, the contract may be rendered voidable. A transaction may be set aside if it was procured by the influence exerted by one person on another, such that the transaction cannot "fairly be treated the expression of [that person's] free will". In the premises it is denied any rights could have been legally assigned in the [1966 Recording Agreement].”

90. But these paragraphs are not followed up with a claim to set aside the 1966 Recording Agreement. Mr Howe KC submitted that any such claim would be hopelessly statute-

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barred, concerns events well over 50 years ago where all the parties are dead and their estates would in any event need to be joined, and is an embarrassing plea, as it has no relevance to the pleaded causes of action. Mr Malynicz KC seemed to agree that the averments in paragraphs 8 and 19 did not lead to any claim to set aside the 1966 Recording Agreement but said that these are “*background facts*” that go to the factual matrix behind this dispute. He said that they should not be struck out and Sony should be able to plead to them.

91. I disagree with the Claimants’ position on this. The Particulars of Claim should not contain “*background facts*” that do not lead anywhere and do not directly relate to causes of action that are being pursued. The matters pleaded in paragraphs 8 and 19 might be adduced in evidence in due course but I do not think that Sony should be required to answer these factual assertions in its Defence. I will therefore strike out both those paragraphs.
92. I should add that by virtue of paragraphs 14 and 15 of the Particulars of Claim, which will remain (contrary to the submissions of Mr Howe KC), the Claimants are still able to argue that the proper construction of the 1966 Recording Agreement is that it did not assign the copyright to Messrs Jeffery and Chandler; alternatively, if it did, that such assignment was limited to the term of the 1966 Recording Agreement. Those pleas are not dependent on establishing the “*background facts*” that had been set out in paragraphs 8 and 19.

(9) Claims of secondary infringement

93. In paragraphs 30 and 31 of the Particulars of Claim, the Claimants allege that Sony committed secondary infringement of copyright by possessing in the course of business, selling, offering and exposing for sale, and exhibiting in public and distributing in the course of its business infringing copies that Sony “*knew, or had reason to believe were, infringing copies*” of the Recordings. This claim is said to be brought under ss.23 and 24 of the CDPA, both of which have that knowledge requirement.
94. The allegations of knowledge relied upon by the Claimants are thin, even after their proposed amendments are taken into account. Originally, the Claimants simply relied on the fact that it was known that Mr Redding and Mr Mitchell had performed on the Recordings and that their estates had been paid equitable remuneration in respect of those performances. But, as Mr Howe KC submitted, copyright and performers’ rights are completely separate matters and it is commonplace for performers to have no interest in the copyright of the recordings of their performances. In my view, neither of these two matters can give rise to any credible inference that Sony knew or ought to have known, or had reason to believe, that Mr Redding or Mr Mitchell had any interest in the copyright of the Recordings.
95. By their proposed amendments, the Claimants wish to rely on a letter and agreement dated more than 20 years ago, to which neither Sony nor SME were parties. The letter is dated 16 April 2003 and was from attorneys acting for Mr Redding to Experience; and the agreement is dated 23 July 2002 between Mr Redding and Experience concerning an album released by Sony in January 2010 titled “The Experience Sessions”. The Claimants assert that if Sony had done reasonable due diligence at the time it would have discovered the letter and agreement and because of the claims to

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ownership contained therein would have been “*fully aware*” of the Claimants’ claims and interests.

96. Mr Malynicz KC said that I should assume these facts in favour of the Claimants on a strike out application. However, it seems to me that I am able at this stage to make an assessment as to the likelihood of the Claimants being to prove that Sony did conduct the due diligence that it is alleged it must have done and that knowledge can be inferred from the results of that. Mr Gardiner has stated in his evidence that he has been advised by Sony that it has never received any complaint from the Claimants, or Mr Redding or Mr Mitchell prior to this claim and that it has always acted on the basis of the sub-licence derived from Experience which has exercised the rights as owner of the Recordings without challenge for decades.
97. In my judgment Mr Howe KC is right to describe the Particulars of Knowledge in their proposed amended form to be fanciful and having no real prospect of success. The Claimants also rely on their letter before action dated 8 December 2021 but that was shortly before the claim was issued and cannot substantively affect matters any more than Sony’s knowledge derived from the claim itself (which is not relied on).
98. In the circumstances, I think this is more properly an application for reverse summary judgment as having no real prospect of success and so I will dismiss the claim for secondary infringement, which should have the effect of paragraphs 30 and 31 of the Particulars of Claim being struck out.

CONCLUSION

99. Therefore my overall conclusion is that the claims in respect of copyright and performers’ property rights survive and should go to trial. Certain claims were withdrawn by the Claimants (s.191HB CDPA, beneficial ownership and unjust enrichment) and I have struck out (or dismissed) paragraphs 8, 19, 30 and 31 of the Particulars of Claim.
100. I am grateful to counsel and their supporting legal teams for their helpful submissions and conduct of the hearing. If there are consequential matters arising out of this judgment that cannot be agreed between the parties, I am happy to hold a further hearing to deal with such matters.