

**Neutral Citation Number: [2024] EWHC 561 (Ch)  
IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
INTELLECTUAL PROPERTY LIST (ChD)**

7 Rolls Buildings  
Fetter Lane  
London

**Before THE HONOURABLE MR JUSTICE MICHAEL GREEN**

**IN THE MATTER OF**

**NOEL REDDING ESTATE LTD & ANOR (Claimants)**

**- v -**

**SONY MUSIC ENTERTAINMENT UK LIMITED (Defendant)**

**MR S MALYNICZ KC appeared on behalf of the Claimants  
MR R HOWE KC appeared on behalf of the Defendant**

**JUDGMENT  
22 FEBRUARY 2024**

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MR JUSTICE MICHAEL GREEN:

1. The Defendant (“Sony”), represented by Mr Howe KC, seeks permission to appeal from my judgment, and consequential order, handed down on 29 January 2024 [2024] EWHC 128 (Ch) on only two grounds. Even though the two grounds concern separate parts of the claim, Sony says that if it is correct on both these grounds it will effectively amount to a strike out of the whole of the claim. That is because one of the grounds concerns performers’ property rights and the other concerns the copyright claim.

2. I will take my judgment as read and adopt the same definitions as used therein.

3. Sony has not sought permission to appeal in relation to what seemed to me to be the main point at the hearing concerning the effect of the Releases that were signed in New York in 1973 and 1974. It has also not sought permission in relation to any of the other aspects that might have led to the whole of the case being struck out.

4. Ground 1 concerns the claims in relation to performers’ property rights which Mr Howe submitted were precluded by the wording of the relevant transitional provisions. He said that it was accepted that Mr Redding and Mr Mitchell consented to the recording of their performances in the 1960s and that therefore the current exploitation of those recordings is “in pursuance of” those original consents (that is the wording from the transitional provisions). He said that there needed to be no further factual enquiry because all the relevant parties are dead and no one has identified, in particular the Claimants have not identified, any additional facts that might be said to qualify that original consent.

5. The trouble with that is, it seems to me, that Sony has not yet pleaded its defence and nor have the Claimants had the opportunity of identifying what facts they might rely on to qualify the original consent. I take the point that Mr Howe made that they could have put in evidence on the application that might have given an indication as to the nature of their case in this respect but they have not done so.

6. They do plead that there was an oral agreement at the time as to the division of the royalties and we do not know yet what Sony says about that factual plea. But Mr Howe’s claim that this is essentially Micawberism and the Claimants are waiting to see what might turn up or what they might be able to raise by way of factual defence I do not think that is wholly fair and the Claimants are entitled to wait and see exactly what the Sony pleads in this respect.

7. But furthermore I decided this point on the basis of distinguishing Lewison J’s judgment in *Barrett v Universal-Island Records Ltd* [2006] EMLR 567 because I thought it was arguable that the change from straight vinyl recordings as they were at the time of the original consent to the modern digital formats may be a much more fundamental change than that from video to DVD, which was what Lewison J referred to in the *Barrett* case.

8. Mr Howe’s point that this would throw the recording industry into chaos is not something that I feel is suitable for determination on a summary basis.

9. Furthermore, there is actually very little authority so far dealing with this seemingly quite fundamental point. There is only Lewison J’s judgment in *Barrett* but also the other case referred to by him, the Shirley Bassey case (*Bassey v Icon Entertainment plc* [1995] EMLR 596), in which there was a factual issue as to the scope of the consent.

10. It seems to me that a difficult legal point like this would be much better decided on the basis of the actual facts of the case that will be determined at a trial. I therefore think that there is no real prospect of succeeding in overturning my decision to allow this matter to be taken to a trial along with the copyright issues, if they do actually get there.

11. So turning to Ground 2, which concerns the suggestion that, insofar as the claim to copyright is based on it being effectively a claim to a share of partnership assets, that would necessarily be time-barred as it is much more than six years after the said partnership was dissolved.

12. Mr Howe suggested that I overlooked essentially the way that this was pleaded in the Particulars of Claim and he said that the Claimants clearly pleaded that the JHE (Jimmy Hendrix Experience), which was the name of the band, was a partnership at law and that as a partnership it was the maker and first owner of the copyright.

13. Therefore, even though the Claimants did not expressly say so and they separately pleaded that Mr Redding and Mr Mitchell and Jimi Hendrix jointly had first ownership of the copyright, Mr Howe said that in reality they are claiming a share of a partnership asset. That is of course what he argued at the hearing and *Marshall v Bullock*, the case that he relied upon, was very clearly about partnership assets and the effect of a dissolution.

14. In this case the dissolution of the partnership is not pleaded or relied upon. Indeed, I am not really sure why partnership was pleaded in this case and Mr Malynicz KC for the Claimants did not really come up with a credible explanation as to why it was pleaded if it adds nothing to the case.

15. If copyright was a partnership asset it also may be relevant to ask what the New York proceedings were all about and what Sony says was being released by the settlement of them. So far as I recall there was no reference to these being partnership assets in those proceedings. Rather, it was based on the oral agreement that I referred to as to the division of royalties.

16. It seems to me that Sony can, if it wishes, make this argument at trial, but it is really a pleading point. Maybe the Claimants should not have pleaded a partnership at all, but the fact that they have done so does not mean that their claim should be characterized in the way that Sony seeks to do so to fit it in within the *Marshall v Bullock* principle.

17. For the purposes of a strike out I think I was perfectly entitled to conclude that that was not what they were claiming for the reasons that I gave. There is no good reason it seems to me for this to go to the Court of Appeal on that narrow point and there is no real prospect of Sony successfully showing that I erred in law or made a perverse decision to allow this claim to go to trial.

18. So I therefore reject both grounds relied upon by Sony for seeking permission to appeal.

(Following further submissions)

19. I now turn to deal with the costs of the application.

20. As to the incidence of costs the Claimants are claiming that they should have 90% of their costs of the application, recognizing that they lost on a couple of minor points but won

on the major substantive issues that were before the Court and the proceedings are surviving and going to a trial.

21. Mr Howe argued for Sony that there should be an order in these terms: that the Claimants pay 50% of Sony's costs up to 14 June 2023 which was when amended Particulars of Claim were served; and thereafter for the Claimants to pay 25% of Sony's costs.

22. I say at the outset that it seems to me that Sony's position is wholly unrealistic and unreflective of my judgment and the substantive result of the application.

23. I am of course very familiar with the general principles regarding costs as set out in CPR 44.2 and the first point to consider is generally as to who is the winner and who was the loser. There is no doubt in my mind that in substance the Claimants won this application by defeating it on all the major contentious issues.

24. Mr Howe relied on the following:

(1) that a number of claims were abandoned in the amended Particulars of Claim that were served almost a year after the points had first been raised by Sony's solicitors and those claims were abandoned in response to the application that had by then been made.

(2) that a further few claims were struck out by me in my judgment; and

(3) that the Claimants had unreasonably persisted in those claims.

25. Mr Howe accepted that the remaining claims of copyright infringement and performers' property rights infringement were the most important of the Claimants' claims but he maintained that the five other claims which were withdrawn or struck out were significant in their own right and justified the application being brought and indeed the costs order that he sought.

26. Mr Malynicz characterised the outcome in different terms and he relied on the decision in *Berezovsky v Abramovitch* [2011] EWCA Civ 484 for the proposition that the overall loser on a summary judgment or strike out application should normally pay the other side's costs. However, Mr Howe took me to the first instance decision of Sir Anthony Colman, with citation number [2010] EWHC 1511 (Comm), and he pointed out that the main reason for the decision in that case, which was upheld by the Court of Appeal, was that the amendments that had been made to the Claimant's claim in the face of the strike out actually saved the claim at the end of the day and that Mr Abramovitch, the strike out applicant, would have continued with his application anyway even after those amendments had been put forward. He, Mr Abramovitch, therefore was ordered to pay the costs of the application.

27. In this case, Mr Howe said that the situation is quite different and the amendments that were made to the Particulars of Claim actually removed certain claims. They were not curing the existing claims, nor the more substantive claims that I have referred to, the copyright and performers' property rights claims. They were simply removing claims that should never have been there in the first place.

28. I noted at the beginning of my judgment that the core of the claim was copyright and performers' property rights and they formed the vast bulk of the hearing with all the various different grounds upon which Sony had sought to have those claims removed. The attack

was on the entirety of the claim and the Claimants were striving to keep their claim alive. All of those grounds that Sony relied upon at the hearing in relation to those two main claims were rejected by me and Mr Malynicz said that Sony should have realized from a much earlier stage how hopeless its case was in that respect but had unreasonably persisted in the application.

29. It is correct to say that the focus of the hearing was on the removal of the whole claim on various grounds including by reliance on CPR 19.3, the fact that there was no coherent claim to relief and on the alleged inadequate chain of title all of which I found to be totally unsuited to a strike out application.

30. As to what I saw was the main substantive ground, namely the effect of the New York Releases, this all turned on the admittance of the New York law expert evidence and despite Edwin Johnson J saying at the jurisdiction challenge consequential hearing that New York law would be relevant to any decision on the effect of the Releases, Sony actually chose not to serve any expert evidence of its own and simply challenging that which had been served by the Claimants. So Sony's challenge to that part of the claim, the copyright claim, failed, and that claim survived.

31. As for the partial strike out, the two claims that had been withdrawn in the amended Particulars of Claim were the unjust enrichment and beneficial interest claims. One claim was withdrawn during the hearing after I had heard short argument in relation to it. It was withdrawn by Mr Malynicz, the claim under section 191(h)(b) of the Act, and the two other matters were struck out by me. One was the background facts that were pleaded, seemingly in support of an undue influence claim but which was never expressly made and I therefore thought the background facts should come out, and the second was the secondary copyright infringement claim. They occupied very little of the overall time at the two-day hearing but it does seem to me that there should be some reflection of the fact that these were persisted in and lost by the Claimants.

32. Mr Howe referred to the fact that even the secondary infringement claim was sought to be maintained by amendments to the Particulars of Claim and also the section 191(h)(b) claim. So clearly the Claimants were doubling down on those claims and persisting with them until almost the very end.

33. In my view, the Claimants are the overall winners and in principle they are entitled to their costs. I think there should be a deduction from their costs to take account of their losses on those minor issues and their earlier withdrawal of two of the claims. I do not think that the 10% reduction indicated by Mr Malynicz is enough and I propose to order that the Claimants should have 75% of their costs of this application.

34. As to an interim payment on account, I note that Sony's costs total some £250,000 which seems pretty high to me; whereas the Claimants' costs are approximately half that, at around £127,000. The Claimants suggested that they should have 70% of their costs on an interim payment on account basis; Sony, in their claim to costs was seeking 60% to take account of a perhaps robust margin for reduction on a detailed assessment.

35. I tend to err on the side of caution in these matters and what I am going to do is to order that Sony should pay 60% of the 75% that I have awarded in their favour and so I make that in total 45% of the costs being claimed in relation to the application should be paid by Sony to the Claimants, as an interim payment on account.

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This transcript has been approved by the Judge