

## Get up, stand up—copyright and issues of contractual interpretation

15/12/2015

**IP & IT analysis:** Island Records has successfully defended a copyright action regarding Bob Marley's music and lyrics. David Bowden, freelance independent consultant, considers the Court of Appeal's judgment in *BSI Enterprises Limited and another* and talks to Mark Anderson, partner at Anderson Law LLP on what lessons can be learned from this case for IP practitioners.

### Original news

*BSI Enterprises Limited and another v Blue Mountain Music Ltd* [2015] EWCA Civ 1151, [2015] All ER (D) 151 (Nov)

*The Court of Appeal, Civil Division, dismissed the claimants' appeal regarding dismissal of their application for declarations regarding the ownership of copyright in the music and lyrics of certain Bob Marley songs (the works). On the true construction of an agreement, which pre-dated the claimants' purported acquisition of copyright, a group of companies, of which the defendant company was a member, was the copyright owner of those works and there had been no error of law in the judge's interpretation of that agreement.*

### What was the factual background to the High Court action?

**David Bowden (DB):** In 1968 Bob Marley made a publishing agreement with Johnny Nash Music Ltd. Johnny Nash was a partner in a record company called JAD with Danny Sims. Bob Marley was signed as a recording artist to JAD (subject to an exclusive licence to CBS). In the early 1970s, Bob Marley met Chris Blackwell, the moving spirit behind Island Records. In 1972 he signed as a recording artist with Island Records. On 11 October 1973, Bob Marley entered into a publishing agreement with Danny Sims' publishing company, CMI. Between 1973 and 1976 Bob Marley wrote the works. He did not publicly describe himself as the author of them.

Instead, he deliberately misattributed their authorship to various friends and associates in order to gain control of the copyrights subsisting in them and gain remuneration from them (the misattribution ploy). Bob Marley's purported justification for the misattribution ploy was that he had not been paid any publishing royalties under the 1968 or 1973 agreements. The deputy judge accepted that Bob Marley thought he had a genuine grievance.

In May 1981 Bob Marley died intestate. In 1984 CMI issued proceedings in New York against Rita Marley (Bob Marley's widow and administratrix of his estate) and among others, Island Records. CMI sought damages and recovery of money obtained by the estate using the misattribution ploy. The New York action was dismissed on 14 January 1988 on limitation grounds. New York had a limitation period of two years for such claims.

In the years following Bob Marley's death, Chris Blackwell became concerned to safeguard Bob Marley's legacy in partnership with his estate. He decided to seek to acquire the rights in Bob Marley's works. Island's first step was to make an agreement with the estate on 27 April 1988. This agreement specifically listed the works as being acquired by Island Records. This gave rise to a number of legal challenges in both the Jamaican and English courts. Eventually, a further agreement was made between another Island company, Island Licensing Ltd (ILL) and the estate on 10 September 1992, which confirmed the 1988 agreement in modified form.

Island Records became aware that Danny Sims was seeking to sell rights in various works by Bob Marley. Chris Blackwell was very keen to acquire these rights because it would give him, through Island, virtually complete control over the Bob Marley catalogue. Island Records negotiated and concluded an agreement in relation to these works on 20 March 1992.

The claimants sought declarations that they were respectively the owner/exclusive licensee of the copyrights in the music and lyrics for 13 songs written by Bob Marley between 1973 and 1976 and for an account of sums they alleged had been mistakenly received by the defendant in respect of those works. The claimants argued that on a proper interpretation of the March 1992 agreement the copyrights in the 13 songs which had formed part of Bob Marley's 'misattribution ploy' did not pass to defendant at all, but rather remained with the publishing company from who the first claimant later acquired them. The claim was dismissed at trial by Mr Richard Meade QC sitting as a deputy High Court judge on 4 June 2014

(see *BSI Enterprises Ltd and another v Blue Mountain Music Ltd* [2014] EWHC 1690 (Ch), [2014] All ER (D) 23 (Jun)). The lengthy March 1992 agreement was labelled as 'in some respects, rather scrappy' by the trial judge.

### **The appellants advanced a new case before the Court of Appeal. What was the basis of the new case?**

On appeal, the appellants abandoned the case they had pursued at trial. They had two main submissions on appeal:

- o on its proper interpretation, the agreement imposed no obligation on Cayman Music to transfer the rights in the 13 works,
- o the judge had erred in directing himself that the language of the agreement had to accommodate the Island group aim of obtaining as many rights in Bob Marley's works as possible

The appellants submitted that the true interpretation of the March 1992 agreement is a question of law for the court and that in March 1992:

- o the copyrights belonged to CMI and not to the estate
- o the New York claim had been dismissed for limitation reasons and not on the merits, and
- o there was a possibility that a claim would be revived in some other forum

The appellants relied on a 'preliminary statement' to the March 1992 agreement. This provided that the seller wished to sell 'certain of [its] music publishing rights and interests as are hereinafter specified'. The appellants submitted that this preliminary statement meant that only some of CMI's publishing interest assets were to be transferred.

The appellants submitted that the term 'compositions' is nowhere defined in clause 2.1. Clause 1.8 defines the term 'catalogue' but not the term 'composition'. The scope of the term 'composition' is to be found not in clause 1 but in clause 5.10. Schedule 2 contains 'a complete and accurate list of all of the compositions'. Only the compositions in Schedule 2 were transferred by clause 2.1. Clause 5.11 makes it clear that the term 'composition' has a narrower meaning--the effect is that it means those songs for which the relevant documents could and would be delivered.

If the parties had truly intended to transfer the rights in the works, the March 1992 agreement would have said so. The natural place to have listed the works was in Schedules 2/8B. On its proper interpretation, the March 1992 agreement imposed no obligation on CMI to transfer to ILL any rights.

### **Is it a common approach not to lead with evidence of foreign law in such cases, and for English law to be applied?**

**Mark Anderson (MA):** If the case had been a direct dispute about the March 1992 agreement, the court would have had to have been persuaded that it was the appropriate forum to hear the case, and if the agreement were made under New York law it would have probably expected expert evidence on the effect of New York law--unless the parties had asked the court to decide the case on the basis of English law.

But here the primary case was about ownership of copyright. The March 1992 agreement was of critical importance, but it wasn't a case about that agreement as such. That agreement had different parties to the parties in dispute. So perhaps the court was less worried about the law and jurisdiction issue.

**DB:** Lord Justice Kitchin notes at para [37] of the judgment that:

'The March 1992 Agreement is subject to New York law. But neither side led evidence of New York law at the trial and accordingly the deputy judge assumed it to be the same as English law. It has not been suggested to us on this appeal that he fell into error in so doing...'

Foreign law is usually proved as a fact by a skilled witness (a practitioner or academic or similar), and while regarded as a question of fact, the judge alone will decide the issue. Expert evidence is admissible as to the content and general application of foreign law, but it is not the function of an expert to give an opinion on the application of such law to the specific facts of the case as that is the function of the trial judge--this can be a fine line to draw.

There is also the procedure under the Foreign Law Ascertainment Act 1861 for a superior court in this country to remit a case with queries a court in a foreign country in which the UK has a convention with to ascertain the law of that foreign country.

### What was the court's reasoning in dismissing the appeal?

The appeal was unanimously dismissed.

Lord Justice Kitchin said that he 'found myself unable to accept these submissions'. He said the attempt by the appellants' counsel to find a definition of the term 'compositions' in clause 5.10 and Schedule 2 was 'unsustainable'. He added he was 'wholly unpersuaded by...submissions in relation to clause 5.11 and Schedule 10.' In relation to submissions on the interpretation of the 'Preliminary Statement' Kitchin LJ ruled:

'In my judgment Ms Heal seeks to attach far more weight to the word "certain" than it can possibly bear...it is entirely consistent with the interpretation for which the respondent contended for it may simply mean that the extent of the assets being sold is to be determined by reference to the terms of the agreement.'

The language of the March 1992 agreement must accommodate Island's stated commercial objective. In Kitchin LJ's judgment there was nothing in the appellants' criticism of this objective. The deputy judge directed himself entirely properly as to the relevant principles governing the interpretation of contracts as a matter of English law. The trial judge had directed himself properly as to the principles governing the interpretation of contracts. He had emphasised that the parties' intentions were to be determined objectively and that the meaning of the agreement was to be determined from the document itself having due regard to the factual matrix. He had then fairly and properly indicated that the factual matrix included:

- o the fact that there were likely to be works created by Bob Marley after 1973 which had not been identified
- o the Island group was acquiring the estate's interest in Bob Marley's creative output, and
- o Island wanted to obtain as many rights as possible

Kitchin LJ said that:

'Far from adopting an illegitimate approach, this was, so it seems to me, a fair and proper elaboration of the factual matrix' and that 'I believe that the deputy judge's reasoning...is unimpeachable.'

The trial judge properly had regard to the fact that Island wanted to buy everything it could and that CMI's best opportunity to maximise its potential claim over the misattribution ploy was with Island.

Accordingly Kitchin LJ ruled that:

'In my judgment it is therefore clear that the Works were 'Compositions' within the meaning of the March 1992 Agreement because they did belong to CMI and fell within the scope of clause 1.8.'

### This seems a fairly clear cut case on contract interpretation, what can lawyers take from this case?

**MA:** According to the judge at first instance, the claimants' counsel below described a counterclaim as a 'Hail Mary', in other words 'a bold but desperate last-minute attempt to change the whole landscape of the dispute'. This comment seems ironic in light of what happened in the Court of Appeal. There, the claimants' new counsel abandoned the case that the previous counsel had advanced and lost, and argued a new case, based on an interpretation of the contract. The new case seems even bolder and more desperate than the case that failed at first instance. It could be characterised as several 'Hail Marys' and a couple of 'Our Fathers'.

In essence, the new counsel argued that a key term, composition, was not defined in clause 1.8 of the agreement, despite:

- o clause 1 being where terms were defined
- o clause 1.8 being headed 'composition and catalogue'
- o the text of clause 1.8 including the word 'composition' both collectively and individually

Instead, it was said that the meaning of this term should be gleaned from clause 5.10, which was a warranty that 'Schedule 2 contains a complete and accurate list of all of the compositions'. It was also argued that because a recital referred to the sale of 'certain' publishing rights, this showed that not all of the seller's rights were being sold.

These arguments were rightly rejected by the Court of Appeal. In my view, they are nonsensical.

No new points of law arise from the case. It is interesting mainly because of its subject-matter. The main thing lawyers can take from this case is a reminder that contract disputes are not just a matter of dispassionate interpretation of contractual language. Sometimes, clients are prepared to pay for bad points to be made in court. Lawyers can reassure their clients, in light of this case, that contracts are often interpreted sensibly by the English courts, in both the High Court and the Court of Appeal.

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*Interviewed by David Bowden.*

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