



Neutral Citation Number: [2015] EWCA Civ 1151

Case No: A3/2014/2463 & 2463(Y)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (INTELLECTUAL PROPERTY)
Richard Meade QC (sitting as a Deputy High Court Judge)
[2014] EWHC 1690 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2015

Before:

LADY JUSTICE ARDEN
LORD JUSTICE KITCHIN
and
LORD JUSTICE LLOYD JONES

Between:

(1) BSI Enterprises Ltd

(2) Cayman Music Ltd

- and -

Blue Mountain Music Ltd

**Claimants/
Appellants**

**Defendant/
Respondent**

Madeleine Heal (instructed by Briffa Solicitors)
for the Appellants
Ian Mill QC and Tom Cleaver (instructed by Russells Solicitors)
for the Respondent

Hearing date: 27 October 2015

Approved Judgment

Lord Justice Kitchen:

Introduction

1. This dispute concerns the ownership of the copyrights in the music and lyrics of thirteen songs (“the Works”) written by the famous reggae musician Bob Marley in the 1970s. The Works include one of Bob Marley’s most famous songs, “No Woman No Cry”.
2. In these proceedings the appellants sought a declaration that the first appellant was the owner and the second appellant was the licensee of the copyrights in the Works. They also claimed an account of the royalties received by the respondent from copyright collecting societies in respect of the Works.
3. It was common ground in the proceedings that whether the first appellant was the owner of the copyrights in the Works depended upon the proper interpretation of an agreement made in March 1992 between, on the one hand, Island Logic Ltd (“ILL”), a member of the Island group of companies (“Island”), and, on the other hand, Cayman Music Inc (“CMI”), a New York company. I will refer to this agreement as the March 1992 Agreement.
4. It was also common ground in these proceedings that, at the date of the March 1992 Agreement, the copyrights in the Works belonged to CMI. As I shall explain, the question whether CMI owned these copyrights has been heavily disputed at earlier times, however.
5. The respondent maintained at trial that the copyrights in the Works passed to ILL under the March 1992 Agreement and that it, as another member of the Island group, was entitled to exploit them. The appellants contended that the copyrights in the Works did not pass to ILL and that they remained with CMI, from whom the first appellant later acquired them.
6. The action came on for trial in May 2014 before Mr Richard Meade QC sitting as a deputy judge of the High Court. In his judgment given on 14 June 2014 he held that the first appellant did not own the copyrights in the Works because they did pass to ILL under the March 1992 Agreement and accordingly the claim for a declaration failed. It followed that the appellants’ claim for an account of the royalties received by the respondent necessarily failed too. The deputy judge went on to hold that, if he was wrong about the ownership of the copyright in the Works, there had been a long delay on the part of the copyright owner in asserting its rights, during which time it was aware that the copyright collecting societies were paying royalties to the respondent. Accordingly, he continued, he would have held that Island, including the respondent, had a gratuitous licence to exploit the Works which was terminated only with the issue of the claim form.
7. The deputy judge gave the appellants permission to appeal against his finding on the issue on interpretation. The appellants did not, however, seek permission to appeal against his findings in relation to the claim for an account of royalties or gratuitous licence.

8. At this point I must say a little more about the way that the appellants developed their case on interpretation before the deputy judge. As I shall explain, they contended that the parties to the March 1992 Agreement agreed expressly or impliedly that the Works were to be treated as falling outside the scope of that agreement. The deputy judge rejected that submission although, as I have said, he granted the appellants permission to appeal against his findings and consequential order.
9. Upon this appeal the appellants have abandoned the case they advanced at the trial. Instead, they have sought the permission of this court to advance the very different argument that the March 1992 Agreement does not, on its proper interpretation, include the Works. They have also sought the permission of this court to appeal against the judge's findings and consequential order in relation to the account of royalties and gratuitous licence issues.
10. At the hearing of the appeal the appellants confirmed to us that a finding against them on interpretation would be dispositive of their entire appeal. Accordingly we indicated that we would like to hear full argument on that issue first. Having done so, we arrived at the clear conclusion that the appeal must be dismissed and we so informed the parties. We also indicated that we would give our reasons in writing as soon as possible. That I now do.

The background

11. There was very little dispute between the parties as to the relevant background. The following summary is taken in large part and with gratitude from the judgment of the deputy judge.
12. In 1968 Bob Marley made a publishing agreement with Johnny Nash Music Ltd ("the 1968 Agreement"). Johnny Nash was himself a well known recording artist and 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.
13. In the early 1970s, matters changed in that Bob Marley met Chris Blackwell, the moving spirit behind Island, and in 1972 he signed as a recording artist with an Island group company. Island was at that time and remains a very well known and successful music business concern, with both recording and publishing interests.
14. Further, on 11 October 1973, Bob Marley entered into a publishing agreement with Danny Sims' publishing company, CMI ("the 1973 Agreement").
15. Between 1973 and 1976 Bob Marley wrote the Works. He did not publicly describe himself as the author of them, however. 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. This arrangement was referred to by the parties at trial as 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 made no finding as to whether or not this was true but he accepted that Bob Marley thought he had a genuine grievance. It also appears that Bob Marley made Mr Blackwell aware of the Misattribution Ploy at the time it was being perpetrated and that Mr Blackwell

sympathised with him in so far as he had not been paid. But Mr Blackwell was not privy to any discussions or arguments between Bob Marley and Danny Sims.

16. In May 1981 Bob Marley died intestate.
17. In 1984 CMI issued proceedings in New York against Rita Marley, Bob Marley's widow, as administratrix of his estate ("the Estate") and various other parties, including Island Records Inc, another Island group company. In this action CMI sought damages and recovery of money obtained by the Estate and a number of other defendants using the Misattribution Ploy. It was not suggested that Island Records Inc had received any such monies but it shared lawyers with the other main defendants.
18. The New York action was eventually dismissed on 14 January 1988 on limitation grounds, a jury having concluded that Danny Sims had discovered the Misattribution Ploy prior to October 1982. It seems that New York had a limitation period of two years for such claims. It was accepted by the parties at the trial before the deputy judge that, the New York action having been dismissed for limitation reasons and not on the substantive merits, there was a possibility that the Misattribution Ploy dispute would be revived in some other forum.
19. I should also explain that the New York action had been met with a counterclaim brought by Rita Marley on behalf of the Estate. She sought rescission of the 1968 and 1973 Agreements. As the deputy judge explained, this counterclaim, if successful, would have had profound effects going well beyond the Works because it would have meant that all copyright in works written by Bob Marley from 1968 to 1976 would have reverted to the Estate, regardless of their attribution. This counterclaim appears to have subsisted for some time beyond the dismissal of the claim but it was not pursued with any vigour and it never went to trial.
20. In the years following Bob Marley's death, Mr Blackwell became concerned to safeguard Bob Marley's legacy in partnership with the Estate. He, together with Island, therefore decided to seek to acquire the rights in Bob Marley's works, including the musical copyrights and publishing rights subsisting in them. Island's first step, taken through Island Logic Inc, was to make an agreement with the Estate on 27 April 1988 ("the 1988 Agreement"). This agreement specifically listed the Works as being acquired by Island. However, as Mr Blackwell explained, it gave rise to a number of legal challenges in both the Jamaican and English courts. Eventually, a further agreement was made between ILL (which had by this time taken an assignment from Island Logic Inc of its rights under the 1988 Agreement) and the Estate on 10 September 1992 which confirmed the 1988 Agreement in modified form.
21. In the intervening period, Island became aware that Danny Sims was seeking to sell rights in various works by Bob Marley, including the rights which CMI had acquired under the 1968 and 1973 Agreements. Mr Blackwell was very keen to acquire these rights for he believed they would give him, through Island, virtually complete control over Bob Marley's creative output which he could then share with Bob Marley's family. Accordingly, Island negotiated and concluded the March 1992 Agreement.
22. There is one further matter I must mention. In 2006, Lewison J (as he then was) gave judgment in an action brought by Aston Barrett claiming rights in six of the Works.

One of the defendants to that claim was an Island company and Mr Blackwell gave evidence on its behalf. In the course of it, he said that those six compositions were not included in the March 1992 Agreement, a statement which he subsequently retracted. But this statement apparently inspired the first appellant to make contact with CMI with a view to buying the copyrights in the Works on the basis that if the copyrights were not included in the March 1992 Agreement then they must still be with CMI. It duly made an agreement with CMI on 20 May 2008, and it is this agreement which has formed the basis of the appellants' claim in these proceedings.

The March 1992 Agreement

23. As the deputy judge noted, the March 1992 Agreement is lengthy and was carefully negotiated with expert input. However, it is, in some respects, rather scrappy. It begins with the "Preliminary Statement" that ILL wishes to purchase, and CMI wishes to sell, "certain music publishing rights and interests" as set forth in the agreement.
24. Clause 1 defines various terms used in the agreement and, by clause 1.1, defines "Acquired Assets" as a series of eight music publishing interests including "Compositions" and "Songwriter Agreements".
25. Clause 1.8 defines the terms "Composition" and "Catalogue". This is the clause upon which the respondent primarily relies and it reads:

““Composition” and “Catalogue.” The term “Catalogue” shall mean all presently-existing musical compositions, or portions thereof, including cues, domestic or foreign, whether originally claimed or registered as a musical composition or as a part of a dramatic-musical work, consisting of lyrics and/or music whether or not registered in the United States Copyright Office or elsewhere, whether published or unpublished, written recorded by Robert N. Marley, Winston Peter McIntosh and/or Neville Livingstone, and/or certain musical compositions written or composed by Alfonso Pyfrom and/or Jimmy Norman (which were recorded by any of Robert N. Marley, Winston Peter McIntosh and/or Neville Livingstone), under their own names or under any pseudonyms, individually or as part of any collaboration between or among any of them or others (individually a “Composition” and collectively the “Compositions”) and all right, title and interest in and to such Compositions, including all copyrights and renewals and extensions of copyrights thereto in all jurisdictions throughout the Universe, to the extent such compositions, copyrights, renewals and extensions are owned, controlled or administered, in whole or in part, by any member of Seller or by Seller’s Music Publishing Business as of the Closing Date, or from which any member of Seller or Seller’s Music Publishing Business receives income, including, but not by way of limitation, the Catalogue listed on Schedule 2 attached hereto. In furtherance of the foregoing, and not by way of limitation, the Compositions also include all musical compositions owned

by Seller which were recorded by Robert N. Marley (whether alone or in combination with any other artists).”

26. Clause 1.9 defines “Encumbrance” to include claims or any other encumbrance or contingency of any nature whatsoever affecting any of the Acquired Assets.
27. Clause 1.20 defines “Restrictions” as any agreements limiting or restricting CMI’s rights to publish a substantial portion of the Catalogue or any of the Compositions, but not including non-exclusive agreements entered into in the normal course of business such as songwriter agreements and mechanical licences.
28. Clause 1.22 defines “Songwriter Agreements”. Again this is another clause upon which the respondent particularly relies and it reads:

““Songwriter Agreements.” All the agreements and all music publishing rights granted to the Seller or to Seller’s predecessors-in-interest pursuant to all songwriter contracts and agreements and assignments thereof whereby the Seller is entitled to the services of a lyricist and/or composer and/or rights to one or more Compositions.”

29. Clause 2.1 transferred the Acquired Assets from CMI to ILL. The purchase price was specified in clause 3.1 as being \$1,250,000.
30. Clause 5 contains various representations and warranties by CMI. Its opening words read:

“Seller hereby represents and warrants to Buyer (and Seller acknowledges that the same are material representations made to Buyer by Seller in inducing Buyer to enter into this Agreement).”

31. Clause 5.4 contains a warranty by CMI as to title to the Acquired Assets. They are said to be free of all encumbrances except for those specified in Schedule 8A. The clause also specifies that CMI makes no representations concerning title to those Compositions set forth in Schedule 8B.
32. Clause 5.7 explains that the books and records held by CMI are complete and correct and then refers to various statements presented by CMI to ILL which are annexed to the Agreement as Schedule 10 and are said to reflect all revenues earned from the exploitation of the Acquired Assets.
33. Clause 5.10 is one upon which the appellants have placed particular reliance and it reads, so far as relevant:

“Compositions. Schedule 2 contains a complete and accurate list of all of the Compositions. Each of the Compositions is an original creation of the author and protectable under the copyright laws of the United States, is subject to protection of the Universal Copyright Convention, and the Convention for the Protection of Literary and Artistic Works signed at Berne, Switzerland and all acts, protocols and revisions thereto, where

applicable, and does not infringe the copyrights of any musical composition owned by any other person, firm or entity...”

34. Clause 5.11 deals with delivery of all songwriter agreements and licences pertaining to the Compositions. Again, this is a clause of some importance and it provides:

“Acquisition Documents, Songwriter Agreements and Licenses. Seller shall deliver to Buyer at the Closing the originals of all Acquisition Documents, Songwriter Agreements and License Agreements (in each case, including all amendments) pertaining to the Compositions, and such documents will be complete and accurate when delivered.”

35. Clause 16.7 deals with the schedules to the Agreement and the various clause headings and it reads:

“Schedules, Exhibits and Headings. The Schedules and Exhibits attached hereto are made a part hereof with the same force and effect as if set forth herein in their entirety. The Article and Section headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.”

36. Finally I should mention the principal schedules. Schedule 2 contains a list of Compositions provided by CMI and is referred to in clause 1.8. None of the Works appears in it. Schedule 8A lists those encumbrances that CMI says relate to the “Acquired Assets”. The counterclaim by the Estate in New York is identified as one such encumbrance. Schedule 8B then provides a list of Compositions in relation to which CMI makes no warranty as to title. All of the musical works identified in Schedules 8A and 8B appear in Schedule 2. Schedule 10 recites that CMI has presented to ILL computer printouts setting forth the income earned in respect of each Composition during the relevant period. It says that copies of these computer printouts have been delivered separately to ILL at the closing of the Agreement.

Relevant principles and the matrix of facts

37. 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 and accordingly I shall adopt the same course.
38. There was no dispute between the parties as to the correct approach to contractual interpretation as a matter of English law. The relevant principles have been discussed in many cases including by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. The object is to determine what the parties meant by the language they used in the contract. This involves ascertaining the meaning which the language would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, that is to say the matrix of fact. The admissible background includes everything which would have affected the

way in which the language of the contract would have been understood by a reasonable person but it excludes the previous negotiations of the parties and their declarations of subjective intent.

39. We were also referred by the appellants to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900. There Lord Clarke explained at [21]:

“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

40. The factual matrix is of some importance in this case. The deputy judge identified the principal components of that matrix in these terms:

“67. I turn to the factual matrix, which I remind myself must be matters in the contemplation of both parties. This included the following:

- a. The 1968 and 1973 Agreements.
- b. The Misattribution Ploy (which was known as a fact to Island and strongly suspected by Mr Sims).
- c. The New York Action, including in particular (i) that CMI had alleged the Misattribution Ploy but that its claim had been dismissed for limitation reasons, and (ii) the counterclaim, which was extant.
- d. That it was possible the Misattribution Ploy would be complained of again in other future litigation because it had not been dismissed on the merits. As a result, ownership of (allegedly) misattributed works was unclear to some degree.
- e. That there were likely to be works created by Bob Marley during the currency of the 1973 Agreement which had not been specifically identified (“lost works”).
- f. That Island was in the process of acquiring the Estate’s interest in Bob Marley’s creative output.
- g. That this was being done by means of the 1988 Agreement, which remained under challenge, and although those challenges appeared to be slowly approaching a resolution, it was uncertain what form any final agreement would take.

- h. The general terms of the 1988 Agreement. Mr Cuddigan relies on two particular elements of it, (i) that the Works were specifically listed, and (ii) that the New York claim by CMI was acknowledged as a piece of actual or potential litigation. I doubt if these details were in the active contemplation of the parties to the March 1992 Agreement, objectively speaking, not least because CMI was not a party to the 1988 Agreement, but I do not think it would make much if any difference if they had been.
 - i. That Island were desirous of obtaining as many as possible of the rights in Bob Marley's creative output.
 - j. That the Works were registered at the US Copyright Office as written by the misattributed authors, and Island had been paying royalties accordingly."
- 41. The deputy judge went on to elaborate points c and d. He explained that the likelihood of the Misattribution Ploy being litigated again was low, but perceived as being just about possible. By March 1992 some ten years had elapsed since Mr Sims became aware of the possibility that the Ploy had been perpetrated. Further, the New York Action had been dismissed four years earlier. There was no sign of Mr Sims having threatened any other litigation.
- 42. The deputy judge also said a little more about Island's desire to obtain as much of the Bob Marley catalogue as possible. He put it in these terms at [72]:

"... Island was seeking to put together a collection of a strictly limited class of rights which it hoped would be as complete as possible, and CMI was in a nearly unique position to profit from satisfying that desire. So it made sense for Island to buy everything CMI could offer in the way of Marley compositions, and for CMI to sell the same. It would have made much less sense for Island to buy only part of what CMI had or might have: from Island's perspective its catalogue would be unnecessarily incomplete, and from CMI's perspective the residue would be unlikely to be as valuable to anyone else."

The case at trial and the judgment

- 43. The appellants were represented at trial by Mr Hugo Cuddigan. He contended that clause 1.8 included the Compositions in Schedule 2 and, by way of sweep up, unknown songs written or recorded by Bob Marley and owned by CMI but not appearing in Schedule 2. However, he continued, the songs the subject of the Misattribution Ploy were not included in clause 1.8 and he invited the deputy judge to decide that the parties so agreed.
- 44. Mr Cuddigan developed various arguments in support of these contentions. He pointed first of all to the omission of any mention of the Works in the March 1992 Agreement. It was particularly striking, he continued, that there was no mention of what is perhaps Bob Marley's most famous song, "No Woman No Cry". He continued that it was common ground that there was still a dispute about the songs the

subject of the Misattribution Ploy but there was no language in the March 1992 Agreement to resolve that dispute. Further, under the warranty provisions of the March 1992 Agreement, there was a natural home for the Works in Schedule 8A or 8B for they were compositions for which no or only a restricted warranty could be given. Yet the Works were not included and this, Mr Cuddigan argued, indicated that they were not conveyed. Drawing these points together, Mr Cuddigan submitted that the parties to the March 1992 Agreement agreed, for the purposes of that agreement only, that the songs the subject of the Misattribution Ploy, including the Works, were not owned by CMI. As the deputy judge noted, this was a subtle argument for it did not involve a contention that the parties agreed that the Works were not actually owned by CMI, which would have had adverse implications for the appellants' case, but that the parties adopted a special and limited concept of ownership for the purposes of the agreement only.

45. The deputy judge had no hesitation in rejecting these arguments. He recognised that Mr Cuddigan's submissions had at their heart the contention that CMI and Island had agreed either not to address songs the subject of the Misattribution Ploy or to treat them as not belonging to CMI even if they did in fact so belong, but only for the purposes of the March 1992 Agreement. Such an agreement was, he held, nowhere to be found in the language used. He considered that his task was not to consider what, from the circumstances, the parties were most likely to have agreed but rather, to interpret the language that they had used in the light of the factual matrix.

46. Further, the deputy judge rejected the factual premise of Mr Cuddigan's argument for, to his mind, it would have made no sense for the parties to agree not to include songs the subject of the Misattribution Ploy because Island wanted to gather in all of the rights to the songs of Bob Marley that it could. The deputy judge put it this way at [99]:

“... Island wanted to buy everything it could and CMI's best opportunity to maximise its potential claim over the Misattribution Ploy was with Island. It would have made absolutely no commercial sense for the Works to be in a position of uncertainty with Island having an unnecessarily incomplete catalogue of uncertain scope and CMI retaining the rump of an old claim. For the parties to agree to leave out the Works without saying so in terms and so maximise future uncertainty seems to me to be little short of ridiculous.”

47. The deputy judge also thought that the fact that the New York counterclaim was mentioned but the claim was not was readily understandable for reasons which he gave at [101]:

“... As a matter of practical reality, I think it is quite understandable that the combined effect of the 1988 dismissal of the claim in New York, the fact that the estate was registered as the owner of the copyrights in the Works, and the 1988 Agreement was that the parties treated the Works and compositions in the same category as belonging to the Estate and therefore in all likelihood about to be transferred to Island once the 1988 Agreement was implemented, so that all that was

needed out of an abundance of caution was the very general sweep up of clause 1.8.”

48. The deputy judge also rejected Mr Cuddigan’s submissions on the basis that they fitted poorly with the language of clause 1.8. In this regard the appellants accepted that clause 1.8 was a sweep up but contended that it only covered “lost” songs. But the deputy judge considered that there was nothing in the language of clause 1.8 or, indeed, anywhere else in the Agreement, to support that approach.
49. There was, the deputy judge went on, more force in the appellants’ arguments in relation to Schedules 8A and 8B where CMI’s warranties were limited or excluded. He explained that he thought it would have been natural for the Works to be acknowledged and included in one of these schedules. However, he continued, the fact that they were not might also be explained as a result of the parties assuming that such compositions were already in all likelihood in the hands of the Estate. In any event, this was, to his mind, a point of very modest weight compared with the other factors at play.
50. I should also mention clause 1.22. Island contended that, quite apart from clause 1.8, this provision was effective to convey to it the benefit of the 1973 Agreement, including “all music publishing rights” pursuant to it. The deputy judge concluded that Island was clearly correct about this point too. It would, so he held, have made commercial sense for this valuable Marley-related asset of CMI to be included in the overall sale to Island and it fitted in with the natural meaning of the language.

The appeal

51. As I have mentioned, the appellants have abandoned the case they advanced before the deputy judge as to the proper interpretation of the March 1992 Agreement and in relation to which they were granted permission to appeal. Accordingly, at the outset of her submissions, Ms Madeleine Heal, who has appeared on this appeal on their behalf, sought permission to advance a new case before this court. The true interpretation of the March 1992 Agreement is a question of law for the court and there was no challenge by the appellants to the judge’s findings as to the factual matrix. Accordingly, and so far as it may be formally be necessary to do so, I would grant the appellants permission to advance their new case.
52. Ms Heal developed the appellants’ new case in the following way. She began by referring to what she characterised as important matters which were common ground between the parties, namely that in March 1992 the copyrights in the Works belonged to CMI and not to the Estate; that the New York claim had been dismissed for limitation reasons and not on the merits, and so there was a possibility that it would be revived in some other forum; and that if the copyrights in the Works were not transferred to ILL by the March 1992 Agreement, they were transferred to the appellants in 2008.
53. Ms Heal then turned to the March 1992 Agreement itself and referred first to the “Preliminary Statement” that ILL wished to purchase and CMI wished to sell “certain” publishing interests. This, said Ms Heal, indicated at the outset that only some of CMI’s publishing interests were to be transferred under the agreement.

54. Focusing on clauses 1 and 2, Ms Heal recognised that clause 2.1 provides for the transfer of the “Acquired Assets” and that these are defined in clause 1.1 as including “Compositions”. However, she continued, the term “Compositions” is nowhere defined in that clause. As for clause 1.8, this, Ms Heal submitted, defines the term “Catalogue” but not the term “Composition”. In this regard, Ms Heal recognised that the terms “Composition” and “Catalogue” appear in the heading to clause 1.8, but she contended that this heading must be disregarded pursuant to clause 16.7.
55. Ms Heal submitted that the scope of the term “Composition” is to be found not in clause 1 but in clause 5.10. This, it will be recalled, says that Schedule 2 contains “a complete and accurate list of all of the Compositions”. Accordingly, so Ms Heal’s submission went, only the compositions in Schedule 2 were transferred by clause 2.1. Similarly, she continued, clause 5.11 makes it clear that the term Composition has the narrower meaning for which she contended, and that it meant those songs for which the relevant documents could and would be delivered. This, she argued, is also consistent with the terms of Schedule 10.
56. Ms Heal also criticised the deputy judge’s reasoning in his judgment at [72] and [99], both of which I have set out above. She contended that in these paragraphs the deputy judge fell into error in that he sought to identify and ascertain the parties’ intentions and the scope of their agreement from the surrounding circumstances and then made the language of the March 1992 Agreement yield to them, and that he ought rather to have discerned the scope of the agreement and the intentions of the parties from the language of the agreement itself.
57. Moreover, submitted Ms Heal, echoing the submissions made by Mr Cuddigan, 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 Schedule 2 and Schedule 8B. It was, she continued, striking that the Works are nowhere mentioned.
58. Drawing the threads together, Ms Heal submitted that, on its proper interpretation, the March 1992 Agreement imposed no obligation upon CMI to transfer to ILL any rights which it may have owned in any of the Works.
59. I have found myself unable to accept these submissions. I begin with clause 1. As I have explained, this clause is concerned with definitions and the preamble to it makes clear that, as used in the agreement, certain terms will have the meanings given to them by the clause. Clause 1.1 then defines “Acquired Assets” as meaning eight particular “publishing interests” of CMI, each of which is then itself defined in the remaining parts of the clause.
60. Clause 1.8 is headed “Composition” and “Catalogue”. For my part, I would reject the submission that these words must be disregarded pursuant to clause 16.7 because, appearing as they do at the head of clause 1.8, they identify the particular terms defined in the clause. Be that as it may, the words in the middle of the clause: “individually a ‘Composition’ or collectively the ‘Compositions’” clearly signify that all of the works identified in the preceding words, including specifically musical compositions written and recorded by Bob Marley, are indeed “Compositions” for the purposes of the agreement. Furthermore, if more were needed, the closing words of clause 1.8 read: “the Compositions also include all musical compositions owned by

[CMI] which were recorded by Robert N. Marley (whether alone or in combination with any other artist)”. Once again these words encompass the Works. Moreover, I would accept the submission advanced by Mr Ian Mill QC, who has appeared on this appeal on behalf of the respondent, as he did below, that if the parties had intended the term “Compositions” in clause 1.1 to mean something different from “Compositions” as defined in clause 1.8, they would have used a different term.

61. The attempt by Ms Heal to find a definition of the term “Compositions” in clause 5.10 and Schedule 2 is, in my judgment, unsustainable. Clause 5.10 appears in a section of the agreement concerned with the representations and warranties of CMI as seller. Seen in context, the terminology of clause 5.10 is readily understandable. It contains a warranty that the various compositions set out in Schedule 2 are original creations and protectable under the relevant copyright laws. Importantly, it does not purport to be a definition for the purposes of the agreement. What is more, Schedule 2 is specifically identified and referred to in clause 1.8 as providing a non-exhaustive list of the Compositions included in the Catalogue and forming part of the Acquired Assets.
62. Further, I am wholly unpersuaded by Ms Heal’s submissions in relation to clause 5.11 and Schedule 10. Clause 5.11 requires CMI, as seller, to deliver to ILL, as buyer, all documents which it has pertaining to the Compositions. As for Schedule 10, this refers to the financial statements presented by CMI to ILL which reflect the revenues earned by CMI from the Acquired Assets. Neither of these provisions purports to limit the scope of the term Compositions in any way.
63. Ms Heal also sought to derive support from the opening words of Schedule 10: “Seller presented to buyer computer print-outs listing the compositions as well as other musical compositions owned by the Seller which are not part of the Acquired Assets”. She contended that these words indicate that CMI was plainly retaining the rights in some of Bob Marley’s compositions. I disagree. There was no evidence before the court as to what these other compositions were or who made them.
64. It is convenient at this point to deal with Ms Heal’s submission concerning the Preliminary Statement. As I have mentioned, she attached importance to the use of the words “and Seller wishes to sell certain of Seller’s music publishing rights and interests as are hereinafter specified”. It is, says Ms Heal, apparent from this wording that only some of the music publishing assets of CMI were ever intended to be the subject of the March 1992 Agreement. In my judgment Ms Heal seeks to attach far more weight to the word “certain” than it can possibly bear. As Mr Mill pointed out, 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. Furthermore, said Mr Mill, the argument logically depends upon the proposition that CMI owned no music publishing rights or interests at the relevant time other than those that would fall within the March 1992 Agreement as the respondent has said it should be construed. But there is no evidence at all to support that essential proposition.
65. I turn next to what Ms Heal at one point characterised as the deputy judge’s main error, namely to insist that the language of the March 1992 Agreement must accommodate Island’s stated commercial objective to obtain as many rights in Bob Marley’s creative output as possible.

66. In my judgment there is nothing in this criticism. The deputy judge directed himself entirely properly as to the relevant principles governing the interpretation of contracts as a matter of English law and reminded himself that his task was to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge which would have reasonably been available to the parties in the situation in which they were in 1992. He emphasised that the intention of the parties was 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. Having done so, the deputy judge turned to the factual matrix and explained that this included first, that there were likely to be works created by Bob Marley after 1973 which had not been specifically identified; that Island was in the process of acquiring the Estate's interest in Bob Marley's creative output; and that Island was desirous of obtaining as many as possible of these rights.
67. The deputy judge elaborated these points at [72] of his judgment which I have set out above. Far from adopting an illegitimate approach, this was, so it seems to me, a fair and proper elaboration of the factual matrix. Moreover, in assessing the parties' respective submissions, the deputy judge evidently had the relevant principles and the importance of the language used by the parties well in mind for he said at [66]:
- “I think a central fallacy in Mr Cuddigan's argument was to seek to identify the parties' intention and agreement from the surrounding circumstances and then to make the language of the document yield to them at all costs, rather than seek to find the intention and agreement in the document.”
68. Then, in considering Mr Cuddigan's main argument that CMI and Island agreed either not to address songs the subject of the Misattribution Ploy or to treat them as not belonging to CMI, he explained (at [97]) that the agreement for which Mr Cuddigan was contending was simply nowhere to be found in the language that the parties had used. He again emphasised that his task was not to divine from the circumstances what he thought the parties were most likely to have agreed and then bend the language to that; it was to interpret the language they had chosen.
69. Against this background, I believe that the deputy judge's reasoning at [99] of the judgment is unimpeachable and entirely in accordance with the principles I have summarised. Here he was rejecting the factual premise underlying Mr Cuddigan's argument for it seemed to him to make no sense for the parties to agree not to include songs the subject of the Misattribution Ploy. He 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. Indeed I am not surprised that the deputy judge said that for the parties to leave out the Works without saying so in terms and so maximise future uncertainty seemed little short of ridiculous.
70. For much the same reasons, I am unable to accept Ms Heal's final submission. The deputy judge observed, and I agree, that it would have been natural for the Works to be acknowledged and included in one of the categories (Schedule 8A or 8B) where CMI's warranties were limited or excluded. But I think (as the deputy judge thought) that the fact that they were not may be explained as a result of the parties assuming that such compositions were already in all likelihood in the hands of the Estate. It

must be remembered that at this time the Estate was registered as the owner of the copyrights in the Works and the New York action had been dismissed some years earlier. There was a possibility that the Misattribution Ploy might be litigated again but the likelihood of this happening was low.

71. 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. The other provisions of the agreement upon which Ms Heal has focused her submissions, whether considered individually or collectively, cannot displace the express wording of that clause. It follows that the rights in these songs were transferred to ILL under the terms of the March 1992 Agreement.
72. In these circumstances, it is not strictly necessary to address the respondent's alternative argument that, even if the copyrights in the Works did not pass under clause 1.1(a), they passed under clause 1.1(c). This, it will be recalled, provides that the "Acquired Assets" include "Songwriter Agreements" and these are in turn defined in clause 1.22 to include all agreements and music publishing rights granted to CMI or to CMI's predecessors-in-interest pursuant to all songwriter contracts and agreements whereby CMI was entitled to the services of a lyricist or composer or rights to one or more Compositions. This, the respondent submitted, clearly included the 1973 Agreement.
73. As I have mentioned, the deputy judge considered that the respondent was clearly correct about this argument and that it would have made commercial sense for the 1973 Agreement to be included in the overall sale to Island and it fitted with the natural meaning of the language.
74. Ms Heal submitted that the deputy judge fell into error in reaching this conclusion for, once again, he failed to recognise that the clause was limited in its effect to all those agreements whereby the CMI was entitled to rights to "Compositions". Compositions were, she continued, those compositions described in Schedule 2.
75. It is apparent that Ms Heal's submissions on this subsidiary issue are closely aligned with her submissions in relation to the main issue. If, as I would hold, those submissions must be rejected then it follows that her reasoning in relation to the subsidiary issue must be rejected too. In my judgment the deputy judge came to the right conclusion. For the reasons I have given, the term Compositions does include the Works.
76. I would dismiss this appeal.

Lord Justice Lloyd Jones:

77. I agree.

Lady Justice Arden:

78. I also agree.