

BARRETT v UNIVERSAL-ISLAND RECORDS LTD

HIGH COURT, CHANCERY DIVISION

(Lewison J.): March 16, 17, 27–31, April 3, 5–7, May 15 2006*

[2006] EWHC 1009 (Ch); [2006] E.M.L.R. 21

(✓) Abuse of process; Cause of action estoppel; Copyright; Music industry; Performers rights; Recording contracts; Royalties; Settlements

- H1 *Breach of contract—trust of a promise—unjust enrichment—claim by members of reggae band for past royalties arising out of recording contracts—claim to joint ownership of copyright in seven songs—ownership of copyright in a derivative work—performer’s rights—claim for damages for infringement of copyright in songs and performances by sales of CDs, records and DVDs—enforcement of settlement agreement—defence of abuse of process based on settlement agreement—cause of action estoppel—estoppel, acquiescence and laches—counterclaim for damages and injunction restraining further proceedings based on breach of settlement agreement.*
- H2 In the late 1960s, Bob Marley (“B”) formed a reggae band in Jamaica called the Wailers. Later renamed Bob Marley and the Wailers, the band to this day continues to enjoy immense commercial success. The claimant A and his brother C joined the band in 1970. It was initially agreed between A, B and C that earnings would be split equally between the three band members. Soon after the arrival of the Wailers’ new manager, Don Taylor, in May 1974, A and B agreed that earnings would be split so that B would receive 50 per cent of the band’s earnings, and the remaining 50 per cent would be shared by the other members of the band.
- H3 On August 30, 1974, lawyers representing Island Records Ltd (“I”), a predecessor in interest to the first defendant, sent a recording agreement to lawyers representing A and B. The recording agreement took the form of a letter addressed to A, B and C individually. On October 15 or 16, 1974, B alone signed the letter and initialled every page of the recording agreement.
- H4 The 1974 agreement was apparently terminated by letter from I to B dated August 5, 1975, addressed to and signed by B alone. On the same day B personally entered into a new agreement with I.
- H5 By letter dated December 15, 1976 from I to B, the 1975 agreement was terminated as from August 6, 1975 and it was confirmed that no recordings were delivered under it. A new recording contract in writing bearing the date August 6, 1975 but actually signed in late 1976 or early 1977 was made between Island

* Paragraph numbers in this judgment are as assigned by the court.

Inc, whose successor in title is now owned by the second defendant, and Media Aides Ltd, a company owned and controlled by B.

- H6 Apart from B, the other members of the Wailers were, on the whole, not interested in business or contracts. Throughout his life, B personally paid members of the band from time to time in varying amounts to reflect their overall contribution.
- H7 B died intestate in 1981. Following B's death, A, C and other members of the band signed a contract on December 2, 1981 with B's widow R, whereby R, purportedly on behalf of B's estate, agreed to pay A and C and the other members of the band royalties on the sales of the recordings that they had made with B. Considerable sums of money were paid to A and C under the 1981 agreement.
- H8 In August 1986, an action was commenced in New York on behalf of B's estate against B's former lawyer and former accountant. Six individuals intervened in the action including A and C (although by the time the papers had been served, C himself had died). The individuals advanced a claim against the defendants claiming entitlement to 50 per cent of the profits and assets of the Wailers, on the basis that they were partners with B. The application to intervene was dismissed and an appeal against this decision was unsuccessful.
- H9 In 1989, an action was begun by A and other members of the band (but not C's estate) in Jamaica against the administrator of B's estate claiming the same 50 per cent share of the royalties or other income received by B as a result of the activities of the band. In the same year, the same claimants began a parallel action in New York against Island Logic Inc and Island Inc.
- H10 In 1994, an agreement was made between Island Logic Ltd (but not the first or second defendants, nor their predecessors), the adult beneficiaries of B's estate and the claimants in the 1989 Jamaican action, including A but not C. Payments were made to the claimants in return for the release of all the claims they "now or hereafter can, shall or may have" against the defendants.
- H11 A brought a claim against the first two defendants for a share of the income that was still generated from recordings and copyrights of the Wailers. A also brought the claim on behalf of C's estate, of which he was administrator. The primary claim was that A and C were parties to the 1974 agreement, the 1975 agreement and the Media Aides agreement. Alternatively, the 1974 agreement was entered into as between A, B and C on the one hand and I on the other; and that subsequent agreements were entered into by B and Media Aides as agents for A and C. A claimed entitlement to money received by B pursuant to those agreements. A further claimed that the first defendant was a trustee for B's promise and that the first and second defendants had been unjustly enriched at the expense of A and C.
- H12 A also claimed for himself and C's estate ownership of the copyright in seven of the Wailers' songs on the basis of joint composition. A brought a claim for infringement of the copyright against, *inter alia*, the twelfth and thirteenth defendants who were the assignees of the copyright in the contested songs. A further claimed the defendants had infringed his performer's rights by the sale of two DVDs containing recordings of the band's performances.

H13 The defendants raised a number of defences to the claims: that A had compromised his claims in settlement of the previous litigation and that it was an abuse of process for him to bring the current proceedings, either on his own behalf or on behalf of his brother's estate. R and the fourth to tenth defendants were joined to the proceedings in order to enforce the 1994 settlement agreement. The defendants further maintained A was barred from bringing the claim through a cause of action estoppel, and that the claim on behalf of C's estate had been lost by estoppel, acquiescence or laches.

H14 As well as denying A's claim to copyright in the contested songs, the defendants argued that A had consented to the use of the works. Against the claim to breach of performer's rights, the defendants offered a defence of prior agreement under reg.27 of the Copyright and Related Rights Regulations 1996. The defendants further claimed damages and an injunction by way of counterclaim for breach of the 1994 settlement agreement.

H15 **Held**, dismissing the claim and the counterclaim.

Enforcement of the settlement agreement against A

H16 (1) As with any agreement, a settlement agreement or release had to be interpreted in context. The principal context was the dispute or disputes which the parties were seeking to compromise.

BCCI v Ali [2001] UKHL 8; [2002] 1 A.C. 251 applied.

H17 (2) The 1994 settlement agreement was not restricted to claims actually advanced in the 1989 Jamaican action and the 1989 New York action, and included all contractual claims, and claims to copyright and infringement of copyright relating to past compositions and past performances.

H18 (3) All the claims brought by A in his personal capacity were compromised by the 1994 settlement agreement.

H19 (4) Where a cause of action fell within the scope of a settlement agreement negotiated by lawyers, for which valuable consideration had been given, it was only in an exceptional case that the court would decline to give effect to the settlement unless there were grounds on which the contract itself could be set aside.

Colchester BC v Smith [1992] Ch. 421; *Hirachand-Punamchand v Temple* [1911] 2 K.B. 330; *Morris v Wentworth-Stanley* [1999] Q.B. 1004 and *Snelling v John Snelling* [1973] 1 Q.B. 79 applied.

H20 (5) There was no reason to decline to enforce the 1994 settlement agreement against A.

Deepak Fertilisers and Petrochemical Corp v ICI Chemicals & Polymers Ltd [1999] 1 Lloyd's Rep. 387 distinguished.

Enforcement of the settlement agreement against C's estate

H21 (6) It was contrary to public policy for a person to promise to give evidence to a particular effect, because that might interfere with the administration of justice.

Fulham Football Club Ltd v Cabra Estates Plc [1994] 1 B.C.L.C. 363 applied.

H22 (7) Any implied term in the 1994 settlement agreement binding on A would bind him only in his personal capacity and would not bind C's estate.

H23 (8) There was no implied term of the 1994 settlement agreement which prevented A from bringing a claim on behalf of C's estate.

Cause of Action Estoppel

H24 (9) A decision of a foreign court could be relied on as creating a cause of action estoppel if three requirements were fulfilled: (a) the earlier decision in question must be a final and conclusive decision on the merits; (b) the parties to the earlier action must be the same as the parties in the later action or their privies; and (c) the cause of action in the later action must be the same as the cause of action in the earlier action.

H25 (10) A foreign court reached a final decision on the merits when the merits are finally disposed of so that the matter could not be raised again in the foreign country.

Carl Zeiss Stiftung v Rayner & Keeler (No.2) [1967] 2 A.C. 853 applied.

H26 (11) An English court should not give a foreign judgment greater preclusive effect in England than it would have in its home jurisdiction. It would always be relevant (and might be necessary) to inquire what would happen in the foreign jurisdiction if the claimant sought to re-open there the issues that he wished to litigate in England.

Carl Zeiss Stiftung v Rayner & Keeler (No.2) [1967] 2 A.C. 853 applied.

H27 (12) No cause of action estoppel arose in this case as a New York court would not hold that the dismissal with prejudice had a preclusive effect in the present circumstances.

Allegheny Intern. Inc v Allegheny Ludlum Steel Corp, 40 F.3d 1416 (3d Cir. 1994) applied.

Abuse of Process

H28 (13) The bringing of a claim or the raising of a defence in later proceedings might, without more, amount to abuse of process if the court was satisfied (the onus being on the party alleging abuse) that the claim or defence should not have been raised at all.

Johnson v Gore Wood [2002] 2 A.C. 1 applied.

H29 (14) The principle in *Johnson v Gore Wood* [2002] 2 A.C. 1 applied as much to litigation that had resulted in settlement as to litigation that had culminated in a judgment.

H30 (15) Having compromised the claim of partnership by the 1994 settlement agreement, it was an abuse of process for A to bring a further claim applying a different legal analysis to the same underlying facts.

Hoystead v Commissioner of Taxation [1926] A.C. 155 applied.

H31 (16) A was not precluded from bringing claims on behalf of C's estate as this was the first time that C's estate had raised the claims.

Estoppel, Acquiescence and Laches

H32 (17) A claim was lost by estoppel or acquiescence if, in the particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment.

Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] Q.B. 133 applied.

H33 (18) C's ignorance of his rights could never operate as an absolute bar to the raising of an estoppel.

H34 (19) The 1994 settlement agreement contemplated that claims by C's estate might be made and therefore C's estate was not barred by estoppel, acquiescence or laches from raising any claim to which C was entitled.

Lindsay Petroleum v Hurd [1873] 5 A.C. 221 applied.

The Claim for Breach of Contract

H35 (20) Based on the evidence, the 1974 agreement was allowed to take effect as an agreement by B alone.

H36 (21) In any case, whether C was or was not a party to any of the contracts, there was no subsisting breach of contract for which his estate was entitled to maintain a claim as the first and second defendants had paid to B and his assignees all moneys due under the contracts.

Unjust Enrichment

H37 (22) The claim for unjust enrichment failed because the first and second defendants had not been enriched or benefited at the expense of A or C.

Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 A.C. 221 applied.

The Copyright Claims

H38 (23) A person was joint author of the copyright in a work if he had made a significant and original contribution to the creation of the work.

H39 (24) A and C could not claim to be authors of any of the seven contested works, except "Who the Cap Fit" to which A had contributed an instrumental bridge between the fifth and sixth verses.

H40 (25) Without expert evidence, it was impossible to reach any conclusion on whether A's contribution to "Who the Cap Fit" was an original composition, a question of interpretation or performance, or part of an overall arrangement of the song as a whole.

Hadley v Kemp [1999] E.M.L.R. 589; *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 109 and *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] E.M.L.R. 29; [2005] 1 W.L.R. 3281 considered.

H41 (26) In any case, A and C had given their consent to I and its predecessors in title to reproduce and distribute the seven compositions by recording them for the purpose of reproduction and sale.

Robin Ray v Classic FM [1998] F.S.R. 622 applied.

H42 (27) Even if A and C had granted no more than a revocable licence, which they had in fact revoked, that would not affect contracts or arrangements entered into before the revocation.

Brighton v Jones [2004] EWHC 1157 (Ch); [2004] E.M.L.R. 26 applied.

The Performer's Rights Claims

H43 (28) The rights conferred on a performer by ss.182A and 182B of the Copyright Designs and Patents Act 1988 as amended were rights to authorise or prohibit an act. They constituted "new rights" and did not correspond to s.182 of the unamended Act.

H44 (29) Therefore, reg.27 of the Copyright and Related Rights Regulations could, in principle, provide a defence to the claim for breach of performer's rights.

H45 (30) The facts of a case might be such that it was proper to infer from consent to the recording of a performance a consent to the subsequent issue of copies of the recording to the public.

Bassey v Icon Entertainment Plc [1995] E.M.L.R. 596 distinguished.

H46 (31) No separate consent was 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.

H47 (32) A had failed to establish the absence of consent in relation to the performances complained of and therefore the defence to infringement of performer's rights succeeded.

Counterclaim

H48 (33) Since A was not prevented by the terms of the 1994 settlement agreement from bringing a claim in his capacity as administrator of C's estate, the counterclaim for damages for breach of the settlement agreement failed.

H49 Additional cases referred to:

A & M Records Ltd v VCI [1995] E.M.L.R. 25

Beckingham v Hodgens [2003] EWCA Civ 143; [2003] E.M.L.R. 18

Blue Haven Enterprises Ltd v Tully [2006] UKPC 17

Bourne v Swan & Edgar [1903] 1 Ch. 211

Experience Hendrix LLC v Purple Haze Records Ltd [2006] EWHC 986 (Ch)

Heaton v AXA Equity and Law Life Assurance Society Plc [2002] UKHL 15; [2002] 2 A.C. 329

Homburg Houtimport BV v Agrosin Ltd (The Starsin) [2003] UKHL 12; [2004] 1 A.C. 715

The Indian Grace [1992] 1 Lloyd's Rep. 124

Interlego AG v Tyco Industries Inc [1989] A.C. 217

Lancashire CC v Municipal Mutual Insurance Ltd [1997] Q.B. 897

Mad Hat Music v Pulse 8 Records [1993] E.M.L.R. 172

MCC Proceeds Ltd v Lehman Brothers International (Europe) [1998] 4 All E.R. 675

Nemaizer v Baker 793 F.2d 58 (2d Cir. 1986)

Taube v FX Music Ltd [1999] E.M.L.R. 826

H50 **Legislation referred to:**

Contracts (Rights of Third Parties) Act 1999

Copyright Designs and Patents Act 1988 (as amended), ss.180, 182, 182A, 182B

Copyright Designs and Patents Act 1988 (unamended), s.182

Partnership Act 1890, ss.5, 33

Copyright and Related Rights Regulations 1996, regs 20, 25, 26, 27

Council Directive 92/100, Art.13

Stephen Bate and *Richard Munden*, instructed by Hamlins, for the claimant.

Elizabeth Jones Q.C. and *Daniel Lightman*, instructed by Eversheds, for the defendant.

LEWISON J.:

Introduction and parties

1 Bob Marley and the Wailers were among the first reggae performers to burst onto the international stage. Bob Marley remained the best-known reggae performer until his untimely death from cancer in 1981 at the age of 36. This case concerns the claim by two former members of the Wailers, Aston (“Family Man”) Barrett and his brother Carlton (“Carly”) Barrett to a share of the income that is still generated from recordings and copyrights. Carlton Barrett was murdered in 1987; and his brother brings this claim on behalf of his estate, of which he is the administrator, as well as on his own behalf. The claim is put in various ways. In setting out the uncontroversial facts I acknowledge my indebtedness to the comprehensive written arguments prepared by counsel on each side (Mr Stephen Bate and Mr Richard Munden for the claimant; and Ms Elizabeth Jones Q.C. and Mr Daniel Lightman for the defendants), which I have shamelessly plundered.

2 The primary claim is brought against the first two defendants. The first defendant, Universal-Island Records Ltd (“Island Ltd”), used to be called Island Records Ltd. It was the original party to a recording agreement made in October 1974 (“the 1974 agreement”) on which Mr Barrett relies. The company formerly known as Island Records Inc (“Island Inc”), which was the party to another recording agreement made with Media Aides Ltd (“the Media Aides agreement”), ceased to exist on November 30, 1999. On that date all of its assets and liabilities were assigned to and assumed by the second defendant, UMG Recordings, Inc (“UMG”), which is thus its successor in interest. The Media Aides agreement also features in the story. Except where it matters I have generally referred to both these defendants as “Island”.

3 In order to resolve the issues in this case it will be necessary to examine events going back over thirty years; and also examine litigation that has taken place in Jamaica and in the United States of America.

4 One of the defences raised by Island is that Mr Aston Barrett compromised his claims in settlement of the previous litigation; and that it is an abuse of process for him to bring the current proceedings, either on his own behalf or on behalf of his brother's estate. However, Island were not parties to the compromise agreement. The third defendant (Rita Marley) is Bob Marley's widow. The fourth to tenth defendants are some of his children. They were parties to the compromise agreement; and have been joined in order to enforce that agreement in these proceedings and seek an injunction against other proceedings.

5 The twelfth and thirteenth defendants claim to be the current owners of the copyrights in the disputed compositions. The thirteenth defendant ("56 Hope Road") is also the current owner of the rights to receive royalties under the 1974 agreement and Media Aides agreement. One of the subsidiary claims is that 56 Hope Road is bound by a trust of an obligation to pay royalties to the Barretts. The eleventh defendant was for a while the administrator of the disputed compositions in the United Kingdom.

Approach to the evidence

6 Most of the crucial events took place between 10 and 35 years ago. Many of those involved are now dead. I have been shown statements made by some of them in previous proceedings. Since many of the events took place on the other side of the Atlantic, some of the witnesses gave evidence by written statement only, so that their evidence was not tested by cross-examination. Some of the witnesses called to give oral evidence naturally have little independent recollection of the events in question. I have, therefore, placed considerable reliance on contemporaneous documents, and the inferences that can fairly be drawn from them. I have also tested the reliability of witnesses against the contemporaneous documents. In many instances a finding about reliability on events later in the story has helped me in coming to a conclusion on reliability about events earlier in the story. Partly for that reason I defer resolution of the conflicts of evidence about some of the contentious events from their place in the chronology until later in this judgment.

The witnesses

7 I should now say something more general about some of the witnesses whose evidence I did see. Some of the reasons for my general comments will become clearer when I deal with particular conflicts of evidence.

Aston Barrett ("Family Man")

8 Aston Barrett dropped out of elementary school without having learned to read or write. He still has great difficulty in reading. He was not at all interested in the business side of the Wailers; and left dealing with contracts and lawyers to others.

As a result he had the greatest difficulty in answering any questions about business dealings. He was plainly close to Bob Marley himself, whom he trusted implicitly. At this remove of time, his recollection of events was hazy; and I also consider that, as often happens, he has reconstructed events in his mind according to how he would like them to have been. In short, I did not find him a reliable witness of fact when it came to business dealings. I deal with his evidence on musical matters in more detail later.

Ian Winter (“Natty Wailer”)

- 9 Mr Winter is a musician who also looked after the building in which the band played and in which some of them lived. Without wishing to sound disrespectful, Mr Winter was not a core member of the Wailers; although he was more than just a hanger-on. I had the impression that he was doing his best to recall events as he perceived them. However, he was not in possession of the full picture and, not surprisingly after this lapse of time, his memory was hazy on details.

Errol Barrett

- 10 Errol Barrett is one of Carlton Barrett’s children. His evidence was peripheral to the issues I have to decide. He has a strong sense of grievance against Rita Marley; and believes that she ill-treated him when he was younger. His evidence was contradicted by Andrew Williams, whose evidence I prefer; and also by that of Mrs Marley. I found his complaints exaggerated.

Donald Kerr (“Junior Marvin”)

- 11 Junior Marvin is, I think, the best-educated of the Wailers. It was no doubt for that reason that he was effectively the spokesman for the surviving Wailers after Bob Marley’s death. He feels strongly that he and the Wailers have been cheated out of their entitlement. Although he himself has no financial interest in the outcome of the present case, he is concerned to see that after all these years justice is finally done. He gave his evidence carefully and calmly. However, where it could be tested against contemporaneous documents, his evidence could be demonstrated to have been flatly contradictory to them. This has led me to approach his evidence with great caution where it was challenged.

Al Anderson

- 12 Al Anderson is another of the surviving Wailers. He also gave his evidence in a calm and dignified manner. However, on several crucial issues I was unable to accept his evidence, which did not, in my judgment, accord with the inherent probabilities or the contemporaneous documents.

Christopher Blackwell

- 13 Chris Blackwell is the founder of Island Records, and was largely responsible for introducing reggae to the world stage. Some of his evidence was, in my judg-

ment, reconstruction rather than recollection; which, after all this time is not entirely surprising. However, in general I think that he was a reliable witness.

Rita Marley

- 14 Despite the attacks made on Mrs Marley's veracity, I found her to be a truthful witness. She fairly withdrew some of the more disparaging remarks she made about the Barrett brothers in her witness statement. But she did so with very little resistance. Over the years she has, I accept, tried to do her best both for the Wailers and for the estate, even though at times, their respective interests have been in conflict.

Reid Bingham J.

- 15 Mr Reid Bingham was an ancillary administrator of Bob Marley's estate. He gave his evidence by video link. Although his personal knowledge of the relevant events was limited, I found him to be a reliable witness.

Diane Jobson

- 16 Ms Jobson was Bob Marley's personal lawyer. She was an impressive and cogent witness.

Bob Marley and the Wailers: the early years

- 17 Bob Marley wrote, performed and recorded songs from the early 1960s. He married Rita Marley in 1966. By the late 1960s Bob Marley had formed a band called the Wailing Wailers, and subsequently the Wailers, with Peter MacKintosh (professionally known as "Peter Tosh") and Neville Livingston (professionally known as "Bunny Wailer").

- 18 The Barretts had played music since their early childhood. Aston Barrett is a proficient bass guitarist and keyboard player. Carlton Barrett was primarily a drummer and percussionist. They (and others) formed a band called "The Hippy Boys" in 1967. They also performed in a band called "The Upsetters". They had had international success with their recording work in the late 1960s, in particular, with two songs called "the Liquidator" and "Return of the Django". The second of these reached Number 4 in the British charts. At about this time Alva Lewis, who played with Family Man in The Upsetters, told him that Bob Marley had heard their music on the radio and had asked Alva to introduce him to Family Man, which he did. They met in an alleyway in Kingston, Jamaica. Bob Marley told Family Man that he was very interested in the sound that he had developed with The Upsetters and The Hippy Boys. Bob Marley told him that it was international success that he was after; and asked the Barretts to join the Wailers, which they did in about 1970.

- 19 Chris Blackwell had founded Island Records in 1962. His plan was to distribute Jamaican music in London, where he perceived a ready market among immigrants from the West Indies. At first he bought master tapes in Jamaica and re-issued them in London. Mr Blackwell first met the Wailers (then consist-

ing of Bob Marley, Peter Tosh and Bunny Wailer) in London in 1971. He agreed to finance their first album, which was eventually released as “Catch a Fire”. Mr Blackwell had grown up in Jamaica; and he owned a property at 56 Hope Road in Kingston, also known as “Island House”. Bob Marley and the Wailers had the use of it until Bob Marley’s death in 1981.

20 Before 1972 Bob Marley had entered into a number of publishing agreements and a recording agreement, with companies controlled by Johnny Nash, a successful US recording artist, and Danny Sims. JAD Records entered into an exclusive licence with CBS in respect of Bob Marley’s recording services. Bob Marley’s relationship with Danny Sims is of some importance in assessing some of the claims in this case.

21 On August 25, 1972, Bob Marley, Peter Tosh and Bunny Wailer entered into a recording agreement with Island Ltd. It is not suggested that the Barretts were parties to that agreement. Bob Marley, Peter Tosh and Bunny Wailer each signed the 1972 agreement on the lines provided above their typed names. They were paid an advance which enabled them to return to Jamaica to lay down tracks for the album. Entry into the 1972 agreement led to a dispute with CBS; and on December 22, 1972, CBS agreed terms for the release of Bob Marley from any further obligations to CBS.

22 Bob Marley brought the master tapes to London in late 1972; and the album was released in 1973 on the Island Records label. Two albums, “Catch a Fire” and “Burnin’”, were made under the 1972 agreement. The Barretts, and others including Earl “Wya” Lindo and other session musicians, performed on these albums which were released in 1973. Rita Marley said that the Barretts performed as backing musicians on these albums. Aston Barrett said that he was more than just a backing musician, even at that stage. He arranged some of the tracks. But he did not claim that his work on those albums entitled him to any share of copyright in either the lyrics or music of any of those tracks. The album credits on “Catch a Fire” said:

“Marley, Tosh and Livingston were joined by Aston ‘Familyman’ Barrett and his brother, Carly. The current Wailers stand unchallenged as the leading group on the reggae scene.”

23 In my judgment the album credits are more consistent with Aston Barrett’s perception of the role of the Barrett brothers as being more than just backing musicians, even if they do not entirely support his claim to have been the arranger of any of the tracks.

24 There were also disputes between Bob Marley and Danny Sims, as a result of which on October 11, 1973 Bob Marley signed a composer agreement with Cayman Music Inc for a period of three years. Cayman Music was a company owned or controlled by Danny Sims. This agreement provided for all songs written by Bob Marley during that period to be assigned to Cayman Music. The existence of this agreement is relevant to the disputed copyrights. Many of Bob Marley’s songs were assigned to Cayman Music under this agreement, including well-known songs recorded by other artists such as “I Shot the Sheriff”.

25 The 1972 arrangement with Peter Tosh and Bunny Wailer did not last long. In late 1973 or early 1974 they left the band. Bunny Wailer did not want to tour; and it seems likely that Peter Tosh was to some extent resentful of the attention and acclaim that Bob Marley was receiving.

26 After the departure of Peter Tosh and Bunny Wailer, Bob Marley continued to record and perform; and was backed by other performing artists, including the Barretts, and the trio of Rita Marley, Judy Mowatt and Marcia Griffiths, known as “The I Threes”. The musicians then performing with Bob Marley were billed as “the Wailers”. The identity of the musicians performing with Bob Marley changed from time to time during the remainder of Bob Marley’s life, but they always included the Barrett brothers, and were always billed as “the Wailers”.

27 However, precisely what happened is hotly in dispute. Mr Barrett says that Chris Blackwell was worried about the future of the band. Bob Marley and the Barretts had discussions not long after Peter Tosh and Bunny Wailer left, in which they agreed to re-form the group, and to divide equally the money they earned from their musical work. They also agreed that Bob Marley would deal with the business aspects of their musical work and with Island Records, and in particular negotiate a record deal for all three of them. The name of the new band was to be “Bob Marley and the Wailers”, a name chosen by Mr Blackwell, and which was to appear on the cover of their first album, “Natty Dread”, later released in [the] latter part of 1974 or January 1975. Recording sessions for “Natty Dread” took place in mid-1974. Mr Barrett says that Bob Marley particularly wanted to secure the Barretts, because Peter Tosh and Bunny Wailer had left him, and because the Barretts had a special musical talent and had discovered a sound that had appeal outside the Caribbean.

28 The defendants’ original position was that the Barretts were no more than “backing musicians” or in Rita Marley’s words “backing or session musicians”. However, during the course of the trial it became clear from the evidence both of Mr Blackwell and of Mrs Marley that they were more than just backing musicians. Aston Barrett, in particular, was recognised as having made an important contribution to the overall sound of Bob Marley and the Wailers. That, however, is not what this case is about; or at least not at that level of generality.

The contractual documents

29 A written agreement came into existence on October 15 or 16, 1974. It consists of a main agreement and at least two side letters. I will have to examine in detail the circumstances leading up to its negotiation, and its immediate aftermath, because one of the main issues in the case is whether the Barretts, who are named in the agreement but did not sign it, are parties to the 1974 agreement. The material documents are:

- (i) a letter dated October 15, 1974 and signed by Bob Marley;

- (ii) a recording agreement. It takes the form of a letter from Island addressed to Bob Marley and the Barrett brothers and incorporating standard conditions, but signed by Bob Marley alone;
- (iii) a side letter dealing with the possible role of a production company, again addressed to Bob Marley and the Barrett brothers;
- (iv) a side letter dealing with album sleeves, again addressed to Bob Marley and the Barrett brothers.

30 On August 5, 1975, the 1974 agreement was apparently terminated and replaced with a second agreement between Bob Marley alone and Island.

31 The third of the agreements is an agreement between Media Aides Ltd and Island made in 1976.

The contract claims

32 Mr Barrett says that he and his brother were parties to the 1974 agreement, although they did not sign it. He goes on to say that the letter of termination did terminate the 1974 agreement both as regards Bob Marley and the Barretts (except as to payment of royalties of recordings already delivered), on the basis that Bob Marley was acting as the Barretts' agent; and that, as part of a wider arrangement, Bob Marley signed the 1975 agreement on behalf of himself, and the Barretts; again acting as agent for the Barretts. In the alternative he says that if Bob Marley was not acting as the Barretts' agent with respect to the termination letter, their rights continued to be governed by the 1974 agreement.

33 So far as the subsequent arrangements are concerned, Mr Barrett says that in entering into the 1976 arrangement and procuring the execution of the Media Aides agreement, Bob Marley was either acting on his own behalf or both on his own behalf and as the Barretts' agent. If he was acting on his own behalf, he could not terminate the contractual rights of the Barretts under the 1974 or 1975 agreements. If, on the other hand, he was acting as the Barretts' agent then the arrangement was obviously self-dealing and does not bind the Barretts.

The copyright claims

34 Mr Barrett also claims for himself and his brother's estate copyright in seven songs, on the basis of joint composition. The seven songs, and Mr Barrett's claims about who composed them are:

Title	Author(s)
Rebel Music (3 O'Clock Roadblock)	Aston Barrett, Hugh Peart
Talkin' Blues	Carlton Barrett, Legon Coghil
Them Belly Full (But We Hungry)	Carlton Barrett, Legon Coghil
Revolution	Carlton Barrett, Legon Coghil
War	Carlton Barrett, Allan Cole
Want More	Aston Barrett
Who the Cap Fit	Aston Barrett, Carlton Barrett

35 Mr Barrett acknowledges that “Who the Cap Fit” is a derivation of a song called “Man to Man” originally composed by Bob Marley himself. The first four of these songs appeared on the album “Natty Dread” and the last three on “Rastaman Vibration”. “Them Belly Full” also appears on “Live!”; and “Rebel Music” and “War” appear on “Babylon by Bus”. Consideration of these claims requires an examination of the way in which the compositions performed by Bob Marley and the Wailers came into existence.

Money making: the general picture

36 Bob Marley and the Wailers toured in order to promote the sale of records. A succession of concert tours took place in the USA and Europe, sometimes playing to audiences of over 100,000. Records sold in their millions. It appears that merchandise was also sold bearing Bob Marley’s name and image.

37 The principal sources of income resulting from the composition, recording, touring and merchandising activities described above are as follows:

- (i) Artist royalties, paid by the artist’s record company to the artist or his company pursuant to the terms of the recording contract;
- (ii) Mechanical royalties, which are paid by the record company to the owner of the copyrights in the songs which have been recorded, in consideration of a “mechanical licence” from the copyright owner permitting the song to be reproduced by mechanical means, i.e. a record or tape and now a CD or DVD;
- (iii) Performance royalties, which are paid by collection societies, particularly ASCAP in the USA and PRS in the United Kingdom, to the owner of the copyrights in the songs (called the publisher’s share) and also (separately) to the writer of the songs (the writer’s share);
- (iv) Income from touring; this would be in part receipts from promoters, but also the tour would typically be supported by the record company which would pay “tour support”; and
- (v) Income from sales of merchandise.

38 Typically also, musicians other than the featured artist who is contracted to the record company also perform on a recording (“session musicians”). They do not have an agreement with the record company for royalties. Rather they are paid a fee either by the record company or by the artist, and in return for that fee they consent, either impliedly or expressly, to their performances being recorded and reproduced.

The arrival of Don Taylor

39 In 1974 or 1975 Bob Marley and the Wailers were performing with Marvin Gaye in Jamaica. Don Taylor introduced himself to Bob Marley. According to some witnesses, he went down on bended knees, and kissed Bob Marley’s shoes, saying “I want to work for you, brother Bob”. At any rate, he became the manager shortly afterwards. The decision appears to have been taken by Bob Marley alone. Mr Barrett said that (as was usually the case) he left Bob Marley to take care of the business. All the witnesses agreed that Don Taylor arrived on the scene shortly after the Marvin Gaye concert. There was some dispute about when this happened. Mr Blackwell placed this in May 1974. Ms Jobson placed it in 1973 to 1974. The Wailers placed it in 1975. In an affidavit sworn in subsequent proceedings in Jamaica, Mr Taylor himself said:

“[F]rom the beginning of 1974 . . . I acted as Bob Marley’s personal manager including managing the business and financial matters of ‘Bob Marley and the Wailers’ partnership and of various companies affiliated with Bob Marley and/or ‘Bob Marley and the Wailers’.”

40 Ms Jones’ researches on the internet (after Mr Blackwell had given his evidence) produced information that two Marvin Gaye concerts took place in Jamaica in late May 1974. This is consistent with Ms Jobson’s evidence and directly corroborative of Mr Blackwell’s evidence. It was not, I think, disputed; and I accept it. Although it is a small point, it is one indicator of the reliability of evidence.

The 1974 agreement

What the documents show

41 On August 6, 1974 Bob Marley signed a letter authorising Island Artists Ltd to pay the sum of \$3,500 to the law firm of Sanders & Tisdale, Los Angeles to permit Mr Raphael (Ray) Tisdale of that firm to come to England on behalf of Bob Marley. The money was to be deducted from any future advance payable to the Wailers. Bob Marley signed the letter “on behalf of WAILERS”.

42 Bob Marley and Aston Barrett appear to have signed a letter authorising Mr Tisdale to represent them in negotiations relating to agreements with Island. The letter bears the date August 26, 1974 in manuscript. Island’s solicitors at the time were Harbottle & Lewis. The partner responsible was Mr Levison. His file has been made available. Mr Levison and Mr Tisdale met. Mr Levison, unsurprisingly, has no present recollection of a meeting that took place over 30 years ago,

but his manuscript note of the meeting has survived. At the top of the second page is a note reading:

“Wailers new deal for Bob Marley—[Family Carly]”

43 At the bottom of the same page is a note reading:

“Family (Carly)	Option to take up on same basis No advance We advance rec costs royalty as BM”
-----------------	--

44 On August 30, 1974 Mr Levison sent Mr Tisdale a draft agreement, under cover of a letter which read in part:

“I enclose herewith a draft of the proposed agreement with Bob Marley and the Wailers. If the agreement is in order would you please arrange for it to be signed by Bob Marley, Family Man and Carly and return it to me in due course.”

45 The draft recording agreement was in the form of a letter addressed to all three. The letter also enclosed a draft agreement giving Bob Marley and the Barrett brothers the option to buy the property at 56 Hope Road. During the option period they were to be entitled to use the property but they would not be entitled to use it after June 1, 1976 “or at any time if your exclusive recording agreement with Island Records Limited shall be terminated”. On September 2 Mr Levison sent the draft option agreement to a lawyer in Jamaica for advice about security of tenure. In his covering letter he explained that his client intended to grant the option to “some Jamaicans” (plural). Mr Tisdale replied to Mr Levison’s letter of August 30 on September 10, 1974. He said that he had reviewed the draft of the “new agreement between Bob Marley and the Wailers.” He suggested a number of detailed changes to the draft. One of his suggestions (which was not accepted) was that if it was agreed that “one of the ‘Artist’ should do a solo album, this album should count” towards the required number under the contract. He did not suggest any change to the parties to the agreement. His letter concluded:

“Our clients and I are most anxious to finalize execution of the subject agreements. It would be greatly appreciated if you can revise the agreements in accordance with our comments and transmit execution copies thereof to me for execution by our clients.”

The contents of the 1974 agreements

46 On October 15 or 16 Bob Marley (alone) signed the various letters and agreements I have already referred to. Bob Marley also initialled every page of the recording contract itself. The material documents are as follows.

47 First, a letter dated October 15, 1974 and signed by Bob Marley. The relevant parts of it read:

“Dear Sirs,

Concurrent with the delivery to you of his letter, I am executing an exclusive artist’s recording agreement with you dated as of August 27, 1974. Pursuant to the terms of such agreement, Island Records Ltd will be paying to me on behalf of ‘The Wailers’ an advance, which is due upon delivery of my next album ‘Natty Dread’, which was recently delivered to you.

Therefore, this letter constitutes my irrevocable authorization and instruction to you to disburse from such advance US\$3401.26 payable to the law firm of Sanders & Tisdale. You may deliver this check to Mr Raphael E Tisdale of that firm.

. . .

Very truly yours,

Robert Marley

PKA ‘Bob Marley’

on behalf of ‘The Wailers’”.

- 48 Secondly, a recording agreement. It takes the form of a letter from Island Records Ltd the relevant parts of which read:

“Mr Bob Marley

Mr Aston Barrett

Mr Carlton Barrett

p/k/a BOB MARLEY & THE WAILERS

Attention care of Mr Raphael E. Tisdale

Dear Sirs,

We hereby confirm the terms of your exclusive recording agreement with us which terms are contained in this letter and the annexed artists recording contract standard conditions (“the Conditions”)

- 49 Each page was initialled by Bob Marley and he signed the letter. The Barrett brothers neither signed the letter, nor initialled the pages. Clause 4 of the letter agreement required Island Records to pay advances to the Artist the sterling equivalent of the following sums:

Amount	Event
\$15,000	On acceptance of the first album
\$12,500	On completion of the first US tour
\$12,500	On acceptance of the second album
\$15,000	On completion of the second US tour
\$15,000	On acceptance of each album during the first renewal term
\$15,000	90 days after acceptance of each album during the first renewal term
\$20,000	On acceptance of each album during the second renewal term
\$20,000	90 days after acceptance of each album during the second renewal term

50 The annexed standard conditions also contained the following terms:

- (i) Condition 1, which contains definitions. The definition of “period” was contained in the letter agreement itself. The period was to begin with the beginning of the recording of “Natty Dread” and to end on August 26, 1975 or (if later) 60 days after the artists had recorded not less than two albums. Island Records also had an option to extend the period; in each case for one further year. The definition of “Artist” was as follows:

“‘the Artist’ shall mean the Artist or Artists whose names and addresses appear at the head of the Agreement . . .”;

- (ii) Condition 2A which entitled the Artist to a royalty in respect of each record solely incorporating his performance recorded in pursuance of the agreement;
- (iii) Condition 3 which said:

“The Artist shall during the period . . . shall render . . . such performances (whether alone or together with any one or more other artists . . . as the Company shall elect for the purpose of reproduction in or by any sound recording (which expression shall be deemed to include . . . video tapes and any similar devices whereby the Artist’s performances can be recorded for use in synchronisation with visual images).”

- (iv) Condition 5 (D) which said:

“The Artist warrants and undertakes with the Company that the material recorded hereunder shall be mutually agreed between the Company and the Artist . . . and will be available to the Company

for use in connection with records on the standard terms and conditions for the licensing of copyrighted material for records . . . and shall not infringe or violate any other right of any person . . .”

- (v) Condition 8, which required Island Records to account for payments at intervals of six months;
- (vi) Condition 10 by which the Artist assigned to Island Records the exclusive right of production reproduction sale and distribution of recordings incorporating the Artist’s performances made in pursuance of the agreement;
- (vii) Condition 18 by which the Artist gave Island Records the “requisite consents” under the Dramatic and Performers Protection Acts in order that Island Records “should have the fullest use of the Artist’s activities hereunder and the products thereof”.

51 Thirdly, a side letter dealing with the possible role of a production company. The relevant parts of it are:

“Mr Bob Marley
Mr Aston Barrett
Mr Carlton Barrett
p/k/a BOB MARLEY AND THE WAILERS
Dear Sirs

We refer to our agreement of even date herewith. We understand that you may wish to form a production company which will supply your services to us and we confirm that in such circumstances we would be prepared to enter into a new agreement with such production company to supply your recordings on the same terms and conditions as those set out in the said agreement provided that you personally guaranteed all obligations of such production company and provided that we would incur no greater obligations and we would suffer no diminution of rights than we have under the said agreement from monies payable to such production company under such new agreement.”

52 Fourthly, a side letter dealing with album sleeves, the relevant parts of which read:

“Mr Bob Marley
Mr Aston Barrett
Mr Carlton Barrett
p/k/a BOB MARLEY AND THE WAILERS
Attention care of SANDERS AND TISDALE
. . .

Dear Robert

With regard to our agreement of today’s date herewith, we confirm that the details of sleeves and the text of liner notes for albums released pursuant to the said agreement shall be subject to the approval of you or your authorised representative (subject to your availability to give such approval and subject

to such approval not being unreasonably withheld) until such time as your said approval is given we will have no obligation to pay the advance in respect of the album concerned . . .”

The immediate aftermath

53 On October 16, 1974 Mr Tisdale sent Mr Levison a letter enclosing authority from Bob Marley to pay monies to his office; and asked Mr Levison to give it prompt attention “as soon as Mr Marley has forwarded to you fully executed copies of the August 27, 1974 recording agreement.”

54 On October 29, 1974 Mr Levison wrote to Island Records. He pointed out that:
 “While Bob has signed it it still requires signature by Aston Barrett and Carlton Barrett before any money is paid.”

55 He also informed Mr Tisdale that payment would be made “as soon as the fully executed agreement has been received.” On November 1 Mr Tisdale chased for a fully executed copy of the agreement “between Island and our clients”. Mr Levison replied on November 11, 1974 that he was still waiting “to receive the agreement signed by Family and Carly”. Mr Tisdale chased again on February 3, 1975. After some confusion, Mr Levison (who had by now left Harbottle & Lewis and gone to work in-house for Island) wrote on March 27, 1975. He said:

“I can now confirm that we have not received a fully executed copy of the new Bob Marley and the Wailers agreement. Accordingly the old agreement is still in force and as a matter of goodwill we have been making certain payments to Bob Marley as advances in the spirit of the new agreement. This has been done entirely on an ex gratia basis and without prejudice to our contractual position.

Accordingly there are at present no advances due to Bob Marley out of which we can pay the balance of the legal charges which are due from Bob to you. However, as soon as we receive the fully executed contract we would be able to make payment of this balance.

With regard to the question of the amount due to you I confirm that it had been our impression . . . that the \$3,500 originally paid would cover your costs and that if there were any balance you would be returning this to Bob Marley. However you have assured me as Bob Marley’s attorney that Bob is fully aware of the full amount of your bill . . . and that Bob has authorised us to pay you the balance . . .”

Natty Dread and Rastaman Vibration

56 The sound recordings for the Natty Dread album were delivered to Island Records some time before October 15, 1974. Clearly the tracks had been laid down beforehand. It is not clear when the album was actually released. The sleeve of the original vinyl gives the date of 1974. So does the re-released album on CD. In his oral evidence Mr Blackwell thought that 1974 was probably right. But

Mr Levison's letter of March 27, 1975 records that the album was released on January 31, 1975. In my judgment the contemporaneous letter is more likely to be right.

57 In his letter of February 26, 1975 Mr Tisdale records a telephone conversation some 10 days earlier with Mr Levison in which the latter told him that Island had paid Bob Marley the advance due pursuant to the 1974 agreement. I infer that the advance was indeed paid to Bob Marley on or about February 16, 1975. The case papers include an undated calculation of deductions. It seems probable that these were prepared in about October 1974 by Island, and were deducted from the advance paid to Bob Marley in February 1975, although they may have represented actual payments made to Bob Marley some time earlier on an ex gratia basis, as indicated by Mr Levison's letter of March 27, 1975. The amounts included recording costs; and also air fares incurred by Aston Barrett while in the USA.

58 The Wailers toured the USA and Canada in June and July 1975. Island paid US\$38,000.00 for the expenses of Bob Marley and the Wailers in connection with that tour. The request for payment came from Bob Marley alone. Mr Blackwell said that Natty Dread was popular outside Jamaica, was well reviewed and "people liked it". His perception of the potential of the group came from the live performance at the Roxy in Los Angeles. The band then toured England and played at the Lyceum, where "No Woman, No Cry" and other songs were played. Mr Blackwell described that concert as "a sensational show" and "a turning point"; and "No Woman, No Cry", the single, and the album "Live!" were released.

Management changes

New advisers

59 Don Taylor explained to Bob Marley that he knew how to set up offshore companies, which would save tax; and that he had good contacts for this purpose: Marvin Zolt (an accountant) and David Steinberg (a lawyer), both in the USA. Partly as a result of this, Mr Tisdale ceased to represent Bob Marley. Messrs Zolt and Steinberg represented Bob Marley until his death.

A 50-50 split

60 Mr Barrett said that soon after the arrival of Mr Taylor he and Bob Marley came to a new arrangement. Instead of the three-way split originally agreed just before the making of the 1974 agreement, earnings would now be split so that Bob Marley would receive 50 per cent; and the remaining 50 per cent would be shared by the rest of the band. This would include income from all sources, including touring, record sales and merchandising; so Mr Barrett said that he thought it was a better deal. Mr Barrett was not able to give any details of when and where this arrangement was made. He said:

"As I told you, I don't do the business part of the deal. Bob did all of that with Don Taylor and Island."

61 The defendants' witnesses accepted that there was a 50-50 split of sorts. However, they said that it was confined to income from touring, and that although Bob Marley took 50 per cent of net income, he distributed the remaining 50 per cent among the members of the band as he saw fit.

62 There is no evidence that Island were ever informed of any change to the arrangements between Bob Marley and the Barretts as regards monies covered by any of the written agreements.

Bob Marley and his companies

63 Bob Marley had founded a record label called Tuff Gong in the early 1970s. (Tuff Gong was one of his nicknames). It does not appear to have had a corporate existence at that time. On June 2, 1975 a Delaware corporation called Tuff Gong Productions Ltd was incorporated. Bob Marley became one of the first directors of the company on June 5, 1975, and its President on June 30, 1975. Bob Marley also owned all its share capital. An agreement apparently dated January 1, 1975 between Tuff Gong Music, which appears to have been a division of Tuff Gong Productions, and Rondor Music (London) Ltd provides for Rondor Music (London) Ltd to administer certain compositions in the United Kingdom. A further agreement is dated "as of" January 1, 1975 between Tuff Gong Music and Rondor Music Inc, which as of its execution replaced the agreement with Rondor Music (London) Ltd. The songs licensed to Rondor were "No Woman No Cry", "Them Belly Full", "Rebel Music", "So Jah Seh", "Natty Dread" and "Talkin Blues". In addition, Tuff Gong agreed to license to Rondor all compositions which became owned by Tuff Gong during the period of the agreement.

64 Media Aides Ltd was a British Virgin Islands company. It was owned and controlled by Bob Marley.

65 On May 27, 1976, Bob Marley entered into an exclusive song writing agreement with a corporation owned by him called Bob Marley Music Ltd. That agreement was to take effect from the expiry of the agreement with Cayman Music, on October 11, 1976.

66 Also on May 27, 1976 Bob Marley Music entered into an administration agreement with Almo Music Corp. This agreement was extended a number of times and was in existence at the date of Bob Marley's death. Some of the subsequent agreements were in the name of Bob Marley Music Ltd BV, a Netherlands corporation, which was the successor in interest to Bob Marley Music Ltd.

67 In his witness statement Mr Barrett said that Bob Marley had told him he was going to set up an offshore bank account to which he and the Barrett brothers would be signatories. However, Mr Barrett said that he had told Bob Marley that this would not be necessary and that he should set up the account for the three of them in his own name. In cross-examination he was much less sure whether he knew that offshore arrangements were being made.

The 1975 agreement

68 The 1974 agreement was apparently terminated by a letter from Island Ltd to Bob Marley dated August 5, 1975, addressed to and signed by him alone. On the

same day Bob Marley entered into a new agreement with Island Ltd, the relevant parts of which are:

“Mr Bob Marley
p/k/a BOB MARLEY & THE WAILERS
all care of 56 Hope Road, Kingston, Jamaica
Dear Sirs,

We hereby confirm the terms of your exclusive recording agreement with us, which terms are contained in this letter and the annexed artist recording contract standard conditions . . .”

69 The letter was signed by Bob Marley and Chris Blackwell. The term of the contract began on August 5, 1975 and was to last for three years or (if later) until 60 days after delivery of sufficient tracks to make six albums. The conditions applicable to the 1975 agreement were, so far as is material, the same as those applicable to the 1974 agreement.

70 On November 25, 1975 Don Taylor wrote to Chris Blackwell. He said:

“[L]et this letter serve as authorization for you to advance a retainer of \$1400 U.S. per month to Carlton Barrett and Aston Barrett, members of the Wailers, when these individuals are not on tour, and to deduct same from session costs pertaining to your contract with Bob Marley.”

71 Mr Levison replied on December 17, 1975. He said:

“With regard to your letter concerning Carlton Barrett and Aston Family Man Barrett I have today forwarded the sum of \$8400 to your account . . . and I have instructed further payments to be made of the same amount on 1st March, 1st June, 1st September and 1st December. This is on the basis that Bob Marley can request us to terminate this arrangement at any time and on the basis that we can terminate it if it results in us paying monies that are in excess of those due under our contract with Bob Marley, and that we can also terminate it if Bob Marley should agree to Carly and Family Man recording for an artist not on the Island label. I should be grateful if you would let me have a copy of Bob’s agreement with Carly and Family Man just for the purpose of completing our records when this is signed.”

72 Thus instead of the monthly payments that Mr Taylor had asked for, the payments were to be quarterly. The first payment was in fact made on November 28, 1975. On February 26, 1976 Mr Taylor replied. He acknowledged the first payment and asked for subsequent payments to be made on slightly different dates. He continued:

“With regard to Carlton and Aston recording for an artist not on the Island label, I should like to make you aware of the fact that Bob Marley’s agreement with Carlton and Aston has nothing to do with his agreement with Island Records. In fact, Carlton and Aston are free to work with anyone Bob chooses without causing termination of Bob’s financial agreement with Island Records.”

73 In between this exchange of correspondence Island Records had written to Sire Records Ltd about the performance by the Barrett brothers and Bob Marley on an album recorded by Martha Valez. The relevant parts of the letter read:

“Dear Sirs,

You have informed us that Bob Marley, Carlton Barrett and Aston Barrett (hereinafter called ‘the Artists’) whose recording services are exclusively contracted to Island Records Ltd have performed on an album by your artist Martha Valez entitled . . .

. . .

6. Island Records Ltd shall receive a credit on all album sleeves containing recordings made by the Artists as follows

‘appears by courtesy of Island Records Ltd’”.

74 On the album, which was released under the name “Escape From Babylon”, the credits, as required by the letter, appeared on the sleeve. Mr Blackwell was asked about this in his evidence. The relevant passage was as follows:

“Q. . . . In what if any circumstances did Island Records require artist credits on albums released by other record companies not in the Island Group?

A. You mean if an artist appeared on another label?

Q. Absolutely.

A. We would ask for a credit. We would request a credit.

Q. In what circumstances?

A. If we requested a credit, it would be because the artist was signed to Island Records.”

75 He agreed that, based on the letter, it was a fair inference that in January 1976 Island believed that they had engaged the exclusive recording services of the Barrett brothers. However, a belief to that effect on the part of Island would have been inconsistent with the terms of Mr Levison’s letter of December 17, 1975. That letter was clearly written on the basis that control over the label for which the Barrett brothers were able to record lay with Bob Marley rather than with Island. Had Island been entitled contractually to the exclusive recording services of the Barrett brothers, it could have decided for itself which labels they could record for.

The Media Aides agreement

76 The genesis of the Media Aides agreement appears to be a proposal made by Don Taylor which was conveyed to Island Records by Mr Steinberg in a letter of July 12, 1976. This proposed a termination of the 1975 agreement upon the delivery by Bob Marley of sufficient tracks to make four albums. A new agreement would be entered into with Island Records Inc. The other contracting party would be a new British Virgin Islands company, owned by Bob Marley, which would have Bob Marley’s exclusive recording services. Media Aides Ltd was that company. By a letter dated December 15, 1976 from Island Ltd to Bob Marley, the 1975 agreement was terminated as from August 6, 1975 and it was confirmed that no recordings were delivered under it. A new recording contract

in writing bearing the date August 6, 1975 but actually signed, it appears, in late 1976 or early 1977 was made between Island Inc and Media Aides Ltd. The term of that contract began on August 6, 1975 and was to last for three years or (if later) until 60 days after delivery of sufficient tracks to make six albums. This period (barring one day) was the same period as that covered by the 1975 agreement. As with the previous agreements, this agreement incorporated standard conditions. Condition 1 defined “the Artist” as Bob Marley. The word “record” was defined as including “all forms of recording (both visual and non visual) now known or which may [hereafter] become known”. Condition 2 dealt with the payment of royalties. Condition 2b (xi) said:

“Any royalty due to [Bob Marley] or to a producer or Engineer or to any union or union fund . . . or to any third party (other than mechanical royalties . . .) in respect of recordings made hereunder shall be paid by [Media Aides] out of the royalty payable to [Media Aides] hereunder . . .”

77 The Media Aides agreement also contained the following relevant conditions:

“5D [Media Aides] undertakes with [Island] to procure that [Bob Marley] will record for [Island] and [Media Aides] will deliver to [Island] the amount of double sided long playing albums set out in the attached letter . . .

6A . . . [Media Aides] hereby indemnifies [Island Inc] from loss or damage . . . arising out of any claim by a third party which is inconsistent with any of the warranties representations and undertakings made by Media Aides and/ or [Bob Marley] in this agreement . . .

11. [Media Aides] hereby licences in perpetuity to [Island] all present and future record and recording copyrights and [Island] shall be entitled to the . . . sole and exclusive right in perpetuity . . . of production reproduction sale and distribution . . . by any means whatsoever of all such recordings . . .

18. [Media Aides] hereby grants unto [Island] all consents (including the requisite consents pursuant to the provisions of the British Dramatic and Music Performers Protections Acts 1958 to 1972) in order that the Company should have the fullest use of the Artist’s service hereunder and the products thereof;

22. Licensor shall pay to the Artist, to the individual producers and to any other persons participating in the production of the Masters any and all royalties which may be payable to them or any of them by reason of the manufacture and sale throughout the world of records embodying Masters recorded hereunder . . .”

78 As part of the arrangements Bob Marley signed an “inducement letter”. This letter warranted that he had contracted his exclusive services as a recording artist to Media Aides Ltd; and that it would continue to be entitled to his exclusive services for the term of the recording agreement.

79 Mr Barrett said (and I accept) that he knew nothing about the 1975 agreement or the Media Aides agreement at the time. Neither he nor his brother signed any inducement letter.

Other agreements

80 I have already mentioned some of the many other agreements entered into by companies associated with Bob Marley. One in particular deserves further mention. On January 1, 1981 Bob Marley Music Ltd BV entered into an administration agreement with Almo Music Corp. The purpose of this agreement was for Almo to administer:

“the musical compositions . . . listed or described below, the words and music of which were or shall be written by Bob Marley . . . or such other compositions written by other songwriters owned or controlled by [Bob Marley Music Ltd BV]”

81 Bob Marley Music Ltd BV warranted that:

“the Prior Compositions comprise all of the compositions . . . and that the names of the respective composers thereof, . . . are listed on Schedule A annexed hereto . . .”

82 Schedule A included the following:

Title and writer	Publisher
Belly Full a/k/a/ Them Belly Full (But We Hungry) <i>Legon Cogil/Carlton Barrett</i>	Tuff Gong Music
Rebel Music (3 O’Clock Road- block) <i>Aston Barrett Hugh Peart</i>	Tuff Gong Music
Talkin Blues <i>Carlton Barrett/Legon Cogil</i>	Tuff Gong Music
Want More <i>Aston Barrett</i>	Tuff Gong Music
War <i>Allen Cole/Carlton Barrett</i>	Tuff Gong Music
Who the Cap Fit <i>Aston Barrett/ Carlton Barrett</i>	Tuff Gong Music

83 Rita Marley signed the agreement on behalf of Bob Marley Music Ltd and Bob Marley Music Ltd NV. The compositions are those that are in dispute. The attributions of authorship correspond to the Barretts’ case.

Payments during Bob Marley’s lifetime

84 The Wailers were, on the whole, not interested in business or contracts. Junior Marvin described the general attitude of the band in terms which I accept:

“To my experience, the way Bob Marley and The Wailers were at that time [1977], they were more a spiritual type of band. They were more into the One Love facets of expressing themselves and it was not about Babylon system and Babylon style of making money. So I did not feel comfortable to approach him in a Babylon style fashion. When I say Babylon, I mean like western world, capitalism and stuff like that.”

85 Rita Marley’s evidence was that neither the Wailers nor the I Threes received payment direct from Island Records. They were always paid by Bob Marley (via Tuff Gong) whether for work in the studio or work on tour. She said that the Barrett brothers were treated in the same way as everyone else; although, having been in the band for the longest, they received more. Rita Marley said that band members were paid according to the number of tracks they recorded, with double payments for overdubbing. There was no express agreement about that. The understanding was that each band member would get a cheque or cash to reflect their overall contribution. If someone needed a loan or an advance against wages, they would ask Bob. Diane Jobson was responsible for giving out the money. When the band was on tour the arrangement was slightly different. Each band member would get a daily allowance to cover expenses. This would be authorised by Bob Marley, but handled by the tour manager. Bob Marley would arrange for each band member to be paid for stage appearances (but not for rehearsals). None of the musicians were paid direct by Island Records.

86 Diane Jobson was Bob Marley’s personal lawyer from 1974 until his death in 1981. She also accompanied the band on tour, at least in 1978. She said that from about 1978 Bob Marley would split tour income 50-50 with the band, once expenses had been covered; but that this did not extend to other income. Her impression, from discussions with Bob Marley, was that he decided on how the band’s 50 per cent was to be allocated between them, although there was a weighting for seniority. In her oral evidence she said that the band members “just received the monies”. She did not think that the Wailers were aware of the formula that Bob Marley used to split the money: they were just happy to get what was usually a very considerable bonus. She also explained how the Wailers were paid:

“You see, The Wailers were touring extensively. They had shows in between the tours. They were earning money from being paid for the tour. They were being paid monies while on tour. They came home. They were into a recording situation. They were paid for recording. It was not a matter like every six months they were getting money. Their money was coming in on a fairly regular basis from tours, shows and recording sessions.”

87 Mr Barrett’s evidence was that he received a few cheques direct from Island Records, but that in the main, he received his money from Bob Marley. He placed this in about 1975 or earlier. Island Records were obliged under the contracts to account for royalties at six monthly intervals. However, the Wailers did not want to wait that long between payments. So at some stage (which must have been in late 1975) the Barrett brothers asked Bob Marley if they could have money at

quarterly intervals. Bob Marley paid them quarterly after that. The money came from Bob Marley himself, rather than from Island. In particular, after Don Taylor became the manager, the Barrett brothers did not receive their royalties directly from Island Records. Mr Barrett's evidence on this point was:

“Q. So you asked Bob if you could have money every quarter?

A. It was done, yes.

Q. But you did not ask Island for quarterly payments, did you?

A. Bob did all the business, Miss Jones. Please, Miss Jones, Bob did that. I do the music.”

88 The arrangements for payment were arrangements for the Barrett brothers to receive fixed payments at three monthly intervals, as the contemporaneous correspondence makes clear. They were not royalties at all. Although Mr Barrett described receipt of these payments as “royalty time”, he was wrong about the character of the payments. Mr Barrett also said that on three or four occasions between the end of 1974 and the end of the 1970s the mother of one of his children would collect cash from Island (about £2,000 each time) after Mr Barrett had cleared the payment with Island (latterly in the person of Denise Mills). According to Mr Barrett, Bob Marley told him that he had set up an off-shore account into which the money was paid and funds were remitted from that account to a bank in Jamaica. Mr Barrett's evidence, consistently with the leitmotiv that ran through his evidence, was that “Bob took care of the business.” Following the 50-50 split Mr Barrett said that there was no fixed arrangement or practice about how the 50 per cent that Bob Marley did not retain would be split between the band. That depended on the contributions of the individual band members and how much work they had put in. Bob Marley would generally discuss it with him and they would agree who should be paid what. In his oral evidence he said:

“Bob took care of the business in that aspect, and I took care of the music; and whatever he gave to my brother and me and for the rest of the band, everyone was satisfied. We were happy.”

89 His cross-examination continued:

“Q. So after 1975 your understanding was that whatever Bob's arrangements were you were happy with them and you were happy with the money he was giving you, is that right?

A. That is right.”

90 Junior Marvin recalled that when he first began to play with the Wailers in 1977 Carlton Barrett was excited because he had just acquired a BMW paid for by Island Records, who would also ship it to Jamaica. Carlton Barrett told him that the price of the car would come out of his share of his entitlement according to the agreement that he had with Bob Marley.

91 Mr Blackwell's evidence was that:

“We never paid royalties to Aston Barrett or Carlton Barrett. If they were paid any money at any time, it was on the request of Bob Marley.”

92 He added:

“What happened was that Bob wished to have Aston Barrett and Carlton Barrett permanent members of his band. In order to do that, it was required to give them a regular pay cheque. If I may just say one thing, you know, we are talking about 32 years ago. At that period in time, as I think we have established, the records were not selling very much. Bob Marley now, at this point in time, has sold probably 20 times as many records post his passing than he did before. It would have made more sense, much more sense, for Aston and Carlton to get a regular pay cheque than to be a royalty earner. Now that we are looking at huge sales, it may look differently but, at the time—”

93 He had no recollection of a BMW. There is no documentary record of Island Records having paid for a car for Carlton Barrett, although some documentary records do exist for very modest cash payments to some members of the band. Junior Marvin’s evidence was that the BMW was paid out of Carlton Barrett’s entitlement under an agreement with *Bob Marley*; not out of an entitlement under an agreement with *Island*. I find that Island did not pay directly for any car for Carlton Barrett.

94 Denise Mills is now dead; but she made a statement in earlier litigation in 1989. In that statement she said that Bob Marley always authorised the payment of money to the Wailers, and that she would have him sign a confirmation to that effect. The amount of the payment would then be deducted from royalties due to Bob Marley. The amounts paid to individual Wailers, on Bob Marley’s instructions, bore no relationship to the royalties he earned; nor did they amount to 50 per cent of his earnings.

95 Carlton Barrett’s son, Errol, recalls that when he used to go to Island House, his father had large amounts of cash, many thousands of dollars in \$20 bills, out of which he would pay the staff. He cannot, however, say where the cash came from.

96 In the course of the subsequent proceedings in Jamaica against Bob Marley’s estate, which I describe later, Reid Bingham J. (who is an American lawyer and was the ancillary administrator of the estate) swore an affidavit in which he said:

“Bob Marley . . . made payments from time to time and in varying amounts to the various backup musicians who from time to time recorded with him or accompanies him on the tours under the name the Wailers. My investigation indicates that a total of at least 25 different individuals at one time or another during the period 1972 to his death were involved as members of such backup groups . . . the files in my possession and my investigation do not indicate any evidence whatsoever of any type of ‘joint venture’ or ‘partnership’ arrangements with the individuals who from time to time made up the backup groups . . . indeed this would be extremely difficult to even accomplish given the fact that from album to album and tour to tour the individuals comprising the backup group changed. All payments made by Bob Marley to the various members from time to time of the backup groups bear

no relation either in time of payment or in amount of payment to the royalties Bob Marley or Media Aides received from Island Records during this period.”

97 Mr Reid Bingham supplemented his written evidence via video-link. He said that the conclusion that he formed was based primarily on documents that he examined.

98 Mr Al Anderson gave evidence substantially to the same effect. He said that when the band was on tour, they were paid weekly. This included the Barrett brothers. He left the band for a couple of years in the late 1970s. During that period, when he was contracted to CBS, he was not paid anything by Bob Marley. He accepted the following summary put to him by Ms Jones:

“Q. Mr. Anderson, what we say in fact happened was that Bob Marley paid all the band members what he considered appropriate when he considered it appropriate. You were paid, in effect, weekly when you were on tour and when you were recording, he would pay people according to their contribution to the recordings. So that somebody who had spent a lot of time and effort on it or perhaps gave him an idea for a song would get more money than somebody who had not done those things. Is that your recollection of what happened?

A. Yes.”

99 In the same Jamaican proceedings Mr Taylor said in an affidavit:

“[I]n the name of Bob Marley, I distributed 50% of the partnership’s profits to the members of The Wailers band after taking off all costs and expenses. Such distribution took place from time to time as revenues were collected.”

100 Ms Jobson said that Mr Taylor was careless with the truth; had been dismissed some years earlier for dishonesty and had an “axe to grind” against the estate. She said that this statement in his affidavit was untrue.

101 In evaluating all this evidence it must not be forgotten that although Island Records were obliged to *account* for royalties at six monthly intervals, the six monthly accounting would not necessarily result in an actual *payment*; because any advance that had been paid under the contracts would be deducted from the royalties otherwise due. Mr Blackwell estimated that Bob Marley was not “recouped” (i.e. had not earned royalty in excess of the advances) until some time in 1980. Ms Jobson also said that for the first few years that she worked for Bob Marley, he was not recouped. I accept this evidence.

102 The most significant evidence is, in my judgment, the contemporaneous exchange of correspondence between Don Taylor and Mr Levison on November 25 and December 17, 1975 (which I have already quoted). Don Taylor’s letter is significant in three respects. First, the money to be paid to the Barrett brothers is described as a monthly “retainer”. This points away from a conclusion that the Barrett brothers were partners with Bob Marley. It is also consistent with Mr Blackwell’s evidence that the Barrett brothers received a regular pay cheque. Secondly, the retainer is to be paid when they are not on tour. That is indirect cor-

roboration of the defendants' case that the 50-50 split applied only to touring monies, otherwise there would have been no need for the retainer. Thirdly, the retainer was to be deducted from session costs pertaining to a contract between Bob Marley (alone) and Island. Mr Levison's reply is equally significant. The payments were agreed on the basis that they could be terminated at Bob Marley's request (i.e. without reference to the Barretts). In Mr Taylor's subsequent letter to Mr Levison of February 26, 1976 he asserted that any arrangement between Bob Marley and the Barretts was none of Island's concern; and that assertion appears to have been accepted by Island. All this is, in my judgment, powerful evidence in support of the defendants' case that the Barrett brothers had no contractual relationship with Island.

103 I bear in mind also that the members of the band were not concerned with the business, which they left to Bob Marley; and were not particularly interested in money. Making music was far more important. I do not consider that any of the members of the band thought that they were entering into binding legal contracts between themselves. That would have been "Babylon style" which was not the band's way of life. As far as they were concerned, they were happy with whatever Bob Marley chose to pay them. In addition throughout the 1970s there were no royalties that were actually paid, because Bob Marley was not yet recouped. All of this, in my judgment, points towards the conclusion that the defendants' case on payments made during Bob Marley's lifetime is correct; and that he paid the members of the band (including the Barrett brothers) whatever he thought was appropriate.

Bob Marley's death and its aftermath

104 On May 11, 1981, Bob Marley died intestate. Following Bob Marley's death the Barrett brothers and other Wailers signed a contract on December 2, 1981 with Rita Marley, whereby she, purportedly on behalf of Bob Marley's estate, agreed to pay the Barrett brothers and the other Wailers royalties on sales of the recordings that they had made with Bob Marley. None of the Wailers approached Island seeking any payment. Their dealings were all with the estate. On December 17, 1981 letters of administration to Bob Marley's estate were issued to Royal Bank Trust Company (Jamaica) Ltd, which subsequently changed its name to Mutual Security Merchant Bank and Trust Company Ltd ("Mutual Security"). Rita Marley and George Desnoes were also initially appointed administrators but resigned later. Subsequently, as I have mentioned, Reid Bingham J. was appointed ancillary administrator in New York. The beneficiaries of the estate were Rita Marley, and also Bob Marley's 11 children, most of them infants in 1981.

105 Since the agreement between Rita Marley and the Wailers pre-dated her appointment as administratrix, it was not binding on the estate (as is common ground). Nevertheless, considerable sums of money were paid under it to the Wailers (including the Barrett brothers). Mr Aston Barrett himself received about \$344,000. The total sum paid by Rita Marley to the Wailers collectively

between 1981 and 1986 was some \$1.2 million. The money ceased to be paid in 1986.

106 In October 1984 the surviving Wailers and the I Threes toured the USA and Canada. They performed in support of an album entitled “Legend”, which was a compilation of previously recorded performances of Bob Marley and the Wailers. It was contemplated that a video of these performances would be released in due course; and a video, also entitled “Legend”, was released in 1984.

107 Since the Intestates’ Estates and Property Charges Act of Jamaica contains no express provision for the assets of an intestate’s estate to be held upon trust for sale, in October 1987 Mutual Security applied to the Jamaican court for directions as to whether it was its duty to sell the estate’s musical rights and, if and so far as necessary, for authority to retain them unsold. On October 8, 1987 Morgan J. declared that it was their duty to sell the rights but directed their retention until further order of the court.

108 On April 27, 1988, Mutual Security entered into a conditional agreement to sell certain of the assets of the estate including various music-related assets and rights to Island Logic Inc. Island Logic Inc was a company then in the same group as Island Ltd and Island Inc, having a common ultimate parent (Island International Ltd, a Bahamian company). On May 5, 1988, Mutual Security issued an originating summons in Jamaica seeking an order that the conditional agreement be confirmed subject to such modifications (if any) as the court might think fit and as might be agreed and that Mutual Security be at liberty to carry the same into effect. All of the Marley beneficiaries were made parties to the summons; and they objected to the sale. On December 30, 1988, Wolfe J. overrode the objections of the Marley beneficiaries and authorised Mutual Security to carry the Conditional Agreement into effect. The Jamaican Court of Appeal dismissed the Marley beneficiaries’ appeal and sanctioned the proposed transaction subject to two modifications which, if accepted, would have had the effect of substantially increasing the value of the consideration. The purchaser subsequently agreed to the modifications proposed by the Court of Appeal. The beneficiaries appealed to the Privy Council, which allowed their appeal, and remitted the matter back to the Jamaican courts. A further decision of the Jamaican Court followed on December 20, 1991, and pursuant to that decision a further agreement (“the 1992 Sale Agreement”) was entered into on September 10, 1992 between (1) Mutual Security, as administrator of the estate as seller, and (2) Island Logic Ltd and the then adult beneficiaries of the estate as purchasers.

109 In the meantime on December 19, 1989 Mutual Security assigned to Island Logic Ltd such title as it had to the writer’s share, performance royalties and copyright in compositions originally attributed to Aston Barrett and Carlton Barrett.

Previous claims by the Wailers*The 1986 New York action*

110 In about August 1986 it was discovered that Bob Marley's former lawyer, David Steinberg, and his former accountant, Marvin Zolt, had persuaded Rita Marley to sign certain back-dated stock transfer documents which had the effect of diverting assets from the estate. Rita Marley subsequently resigned as an administrator. On December 5, 1986 Reid Bingham J. began an action on behalf of the estate ("the 1986 New York Action") in the United States District Court for the Southern District of New York, seeking recovery of monies misappropriated by Mr Steinberg and Mr Zolt.

111 In the course of the 1986 New York Action, six of the individuals who had performed in the Wailers, including Aston and (according to the paperwork) Carlton Barrett, applied to intervene. Carlton Barrett had in fact died by the time that the papers were served; but he may well have given instructions before his death. In support of their application the six individuals advanced claims against the defendants to the 1986 New York Action. The basis of the claim was that the six would-be interveners were partners with Bob Marley and were entitled to 50 per cent of the profits and assets of the alleged partnership. Among other relief, the six individuals sought a declaration against the ancillary administrator of the estate in New York that they were equal partners with Bob Marley. The application to intervene in the 1986 New York action was dismissed on June 18, 1987 and the would-be interveners' appeal against that dismissal was itself dismissed on January 14, 1988.

112 In the course of the proceedings the Wailers' American lawyer, Leo Kayser III, had asked for copies of a number of documents. These included copies of songwriter agreements or hire agreements on all songs co-written by the Wailers (including those co-written by the Barrett brothers). The request was copied to the lawyer who was representing Carlton Barrett personally.

The 1989 Jamaican action

113 On January 6, 1989, an action was begun in Jamaica by Aston Barrett and other Wailers (but not Carlton Barrett, who by then had died) against Mutual Security as administrator of the estate.

114 The Amended Statement of Claim alleged:

"3. From in or about the year 1977 to the date of death of [Bob Marley] the Plaintiffs together with Carlton Barrett formed a partnership and/or joint venture with [Bob Marley] and carried on the partnership business of recording and publishing musical items, performing on concert tours and stage shows, product licensing and merchandising and sharing equally in all profits and losses arising therefrom.

3A. The said partnership or joint venture commenced prior to 1977, in or about the year 1967, when it included [Bob Marley] [Aston Barrett, Alvin Patterson and Earl Lindo] along with Peter McIntosh and Bunny Livingston . . . Peter Tosh and Bunny Livingston retired from the partnership and [Tyr-

one Downie] joined the said partnership in or about 1970. [Al Anderson] was admitted to the said partnership in or about 1973 and [Junior Marvin] in or about the year 1977. The said Carlton Barrett left the partnership in the same manner as did [Bob Marley], by way of death in or about 1987.

4. [Bob Marley] was the managing partner for the partnership known as “Bob Marley and the Wailers” and, either personally or through companies owned and controlled by him, negotiated and executed contracts on behalf of the Partnership.

5 to 7. [Dealt with the 1981 agreement between the Wailers and the Estate]

8. The Defendant has refused to recognise the said partnership or the Plaintiffs’ entitlement to a 50% share in the said royalties and threatens to sell the Royalty Rights and distribute the proceeds of the sale thereof to the beneficiaries of the estate thereby depriving the Plaintiffs of their share of the partnership profits and will do so [unless] restrained from so doing by this Honourable Court.”

115 In that action, the plaintiffs claimed:

- (i) a declaration that “during the lifetime of [Bob Marley] the plaintiffs were Partners with [Bob Marley] in the business of recording, producing, retailing and performing certain musical and other works”;
- (ii) an order that the estate account to the plaintiffs for “their 50% share of the royalties or other income received by the Defendant and due to the Plaintiffs as the result of the said Partnership”; and
- (iii) An injunction restraining the estate from disposing of any of the assets of the estate affected by the plaintiffs’ claim.

116 In its defence Mutual Security pleaded:

“... the arrangement that [Bob Marley] had with the Plaintiffs and with each of them was then whenever they performed along with the deceased he would pay them such remuneration as their services warranted and which was done for many years without complaint from the Plaintiffs or any of them.”

117 It also counterclaimed for the sums paid to the Wailers under the terms of the 1981 agreement. On April 5, 1989, the plaintiffs applied for a freezing order preventing Mutual Security from disposing of those assets of Bob Marley’s estate to which they laid claim. Both Aston Barrett and Junior Marvin swore affidavits in support of the application. Aston Barrett deposed to a partnership formed in about 1967 of which he and his brother were founding members. Otherwise he confirmed the truth of Junior Marvin’s affidavit. In his affidavit Junior Marvin said among other things:

“[M]ost of the songs preformed by the partnership were written by Robert Marley but some songs were co-written by members of the Wailers entitled those members to song-writing royalties as well.”

118 By this time Mr Barrett had himself discussed royalties with a Mr Jim Riley, a singer-song writer in New York; and had gone to ASCAP to enquire about royalties. He began to receive royalty payments from ASCAP representing the writer's share (but not the copyright owner's share) and, I understand, continues to receive them.

119 The freezing order was granted on an interim basis and renewed from time to time; but it was ultimately discharged and replaced by another interim order restraining the estate from disposing of 50 per cent of the proceeds of sale of record royalties claimed by the plaintiffs. This change appears to have been made on the basis that the plaintiffs' claim was not a claim to the assets themselves; but a claim to a share in their proceeds of sale. On February 19 Mr Byles on behalf of the estate swore an affidavit in which he said that it was of the utmost importance to the estate that the plaintiffs' claim be determined quickly, otherwise a considerable portion of the estate would remain unadministered. On March 22, 1990 the court made an order for a speedy trial.

120 Junior Marvin swore a second affidavit on April 26, 1990 in which he said:

“The [1974 agreement] is exceedingly significant, since it was the agreement which was specifically intended to re-establish a partnership between Bob Marley and those persons comprising the Wailers. Furthermore it was this agreement which established the nature of the relationship between Island Records on the one hand and Bob Marley and the Wailers on the other hand with respect to the course of dealing.”

121 Junior Marvin took the lead among the Wailers for instructing the lawyers. He confirmed in evidence that the action was about royalties past, present and future. As he put it:

“[I]t was natural to expect royalties as long as there were royalties. As long as the records were being sold, and publishing etc., we expected to be paid.”

The 1989 New York action

122 In parallel with the 1989 Jamaican action the six same individuals began an action in the United States District Court Southern District of New York on August 9, 1989. The defendants were Island Logic Inc and Island Inc. Island Logic Inc had by then provisionally acquired certain of the assets of the estate from Mutual Security by the conditional agreement. Island Inc was party to the 1975 recording agreement. In the 1989 New York action it was again alleged that there had been a partnership between Bob Marley and the Wailers. In para.12 of the complaint it was alleged that:

“Bob Marley was the managing partner for the partnership known as ‘Bob Marley and the Wailers’ and, either personally or through companies owned by him, negotiated for and executed agreements in the capacity of agent for ‘Bob Marley and the Wailers’.”

Paragraph 13 alleged that the partnership was dissolved on Bob Marley's death. (In the Jamaican action, it may be noted, the pleading claimed that Carlton Barrett

had left the partnership by death in 1987, some six years after Bob Marley's death). In paras 23–27 of the complaint the plaintiffs in that action set out their claim against Island Inc. It was alleged:

- (i) That pursuant to various record contracts between Island Inc and the Estate of Bob Marley, royalties were generated by partnership assets.
- (ii) That the plaintiffs had not, since Bob Marley's death, received from the estate or Island Inc an account of those royalties reportable by the estate as the succeeding managing partner of the partnership.
- (iii) That the estate as managing partner stood as fiduciary to the other partners and in that capacity had an obligation to account which it had failed to comply with, and that Island Inc, with whom the estate had contracted had also failed to make available accounts pursuant to its various contracts with the partnership.

123 As against Island Inc, the relief claimed was

- (i) an account from Island Inc of all revenues earned since 1981 by the alleged partnership and a declaration of the rights to and the ownership of the Wailers' interest in the partnership; and
- (ii) damages "representing the difference in royalties earned and actually paid to the Wailers".

124 On November 2, 1989, the 1989 New York Action was stayed pending the outcome of the 1989 Jamaican Action.

The 1994 Settlement Agreement

125 Some efforts to settle the litigation were made in 1992 and 1993; but they came to nothing. In the course of the 1992 negotiations Mr Gordon Robinson (the Wailers' Jamaican lawyer) asked what sort of deal the estate would offer for a world tour and for advances and royalties on a future album. The estate's lawyer replied in a manner that did not satisfy the Wailers. Mr Robinson expressed their concerns in a letter of May 20, 1992. They were not happy with the neglect of their claim for back royalties. They were prepared to participate in a tour; but were not interested in a one album deal. They were looking for a settlement in the region of \$500,000 together with a four album record deal and payment for performances on a world tour. These negotiations petered out. However, during the course of 1992 another video called "Time Will Tell", featuring further performances by Bob Marley and the Wailers that had been recorded during Bob Marley's lifetime, was released.

126 Mr Barrett said that in the middle of 1993 he met Diane Jobson at 56 Hope Road. She asked if he wanted to see Chris Blackwell, who was in Jamaica, and gave him a lift to Mr Blackwell's house at Strawberry Hill. Mr Barrett said that he and Mr Blackwell discussed the past and the current litigation. According to Mr Barrett, Mr Blackwell said that he could make the litigation go on for 20 years. But he also said that he wanted to put together a "Legend 2" tour to celebrate the 50th anniversary of Bob Marley's birth, put out another "Legend"

album of Bob Marley and the Wailers' recordings and pay them royalties on that. Mr Barrett said that he told Mr Blackwell that that was not enough. The case, he said, was all about royalties on all the work that he and Carly had done and was to get what was due to him and Carly's children. Mr Barrett said that he wanted royalties going forward; that the settlement would have to include acknowledgement of the royalties due and there would have to be payment on all future sales as well. Mr Barrett said that Mr Blackwell told him that he had no problem paying royalties to the Barretts and some others, and that he would start the royalties after the release of the new "Legend" album. Mr Barrett gave Diane Jobson his bank account details, and shortly afterwards \$10,000 was paid into his account.

127 Mr Blackwell had no recollection of any of this. However, he insisted that he did not say (and would not have said) that he could keep the litigation going for 20 years. He did, however, accept that money was paid to Aston Barrett; but that, he said, was because Aston Barrett was broke and needed help. Ms Jobson recalled meeting Aston Barrett and taking him to see Chris Blackwell. Her recollection is that the reason why Mr Barrett wanted to see Mr Blackwell was that he was short of money, and needed funds immediately. She recalled that Mr Blackwell did give Mr Barrett some money; but it was not through her, and she did not know how much. She also said that she had never heard Mr Blackwell say that he could keep the litigation going for several years. There was some talk of the future, and how the Wailers could get back to working, but she rejected the suggestion that Mr Blackwell made any promises about royalties. She also categorically denied that Mr Barrett had said anything about the case being about royalties for himself and Carly. So far as a promise of royalties was concerned, Ms Jobson said:

"There was no way Chris could have said that because The Wailers were never in a royalty-receiving situation. Chris could not be promising them royalties. He had no authority to do it. If there [were] any new recordings, then they would probably be entitled to royalties. As for what happened in the past, he could not have been in a position to offer Family Man royalties from Bob's estate."

128 I prefer the evidence of Mr Blackwell and Ms Jobson. Apart from my general comments about their evidence, there are a number of additional reasons for this conclusion:

- (i) Carlton Barrett's estate was not a party to the proceedings. The case was not about recovering money for his estate;
- (ii) Mr Barrett was not the kind of person who negotiated on business matters, as he repeatedly emphasised in his evidence. It is much more plausible that he went to ask for financial help;
- (iii) Mr Blackwell had no interest in Bob Marley's estate and it is implausible that he would have promised to pay royalties;
- (iv) It was in the estate's interest to bring the proceedings to a conclusion quickly, so as to be able to make undisputed title to the musical assets.

It would not have been in the estate's interest to prolong the litigation. Nor would it have been in the interest of any purchaser of those assets to have done so.

129 Mr Barrett went on to describe another meeting that took place when Chris Blackwell and Rita Marley met the Wailers outside the courthouse in Kingston. They persuaded the Wailers to have a meeting "but no progress was made and the meeting broke up quickly". Mr Barrett did not date this meeting, but from the general arrangement of his witness statement it appears to have taken place in 1993. Junior Marvin also gave evidence of a meeting, triggered by a meeting on the steps of the courthouse in Kingston, which he placed some time in 1993. He said that they went back to 56 Hope Road. According to him Chris Blackwell said that it would be in everyone's interest to settle the case. He said that the Wailers had a choice: either they could settle by splitting \$500,000 or \$1 million or he could give the money to his lawyers and keep the litigation going for 20 years. Junior Marvin said that they discussed settlement on the basis of a lump sum for back royalties, a lump sum for a tour, a sum for legal costs and payment of royalties going forward both for work on previous albums and also the forthcoming "Legend 2" album. Al Anderson also gave evidence of a meeting triggered by a meeting on the steps of the courthouse, which he also placed in 1993. The Wailers and Chris Blackwell and Rita Marley went back to 56 Hope Road. Rita Marley said that they should "stop all this now". Chris Blackwell said that he could hold the case up through his lawyers for another 20 years. Al Anderson thought that it was understood by everyone that the Wailers would settle if they got back pay for missing royalties, the tour and tour money and a royalty going forward on all albums as well as on "Legend 2". The reason why the witnesses placed this meeting in 1993 was because Don Taylor had recently sworn an affidavit which changed the balance of the case. Don Taylor in fact swore an affidavit on February 18, 1993.

130 Again Mr Blackwell had no recollection of such a meeting; and again denied that he said (or would have said) that he could keep the litigation going for 20 years. Ms Jobson also said that she could recall no meeting on the courthouse steps. Mrs Marley, too, had no recollection of a meeting triggered by a meeting on the courthouse steps. But she said that there had been many meetings with the Wailers at Hope Road at which they talked "as a family"; and tried to sort things out.

131 The first difficulty I have about accepting the account of a meeting on the courthouse steps is that, as Ms Jobson pointed out in her oral evidence, there does not appear, on the evidence, to have been any reason for both sides to have gathered at the courthouse in 1993. There was a procedural hearing in chambers on February 18, 1993. This was the hearing of a summons to strike out the defence for failure to serve a list of documents. But that would not have necessitated the attendance of any clients, let alone all of them. Moreover, that was the very day on which Mr Taylor's affidavit was sworn, and the witnesses said that the meeting took place *after* that affidavit was sworn. On October 11, 1993 a subpoena was issued summoning Mr Taylor to give evidence; and that was served on

him on October 21, 1993. The issue of the subpoena would not have needed personal attendance at court by the clients. There was a date fixing session due on November 22, 1993, but the case was not reached; and very shortly afterwards the parties' lawyers asked the court to fix a trial date in February 1994. So far as the papers reveal there was no other activity involving the court in 1993. Secondly, a meeting for the purpose of discussing settlement was mooted between the lawyers in June 1993; but was turned down on Mr Blackwell's instructions, on the ground that the two sides "were so far apart that there is little likelihood of our arriving at a settlement." In the face of this it seems unlikely that Mr Blackwell would have had settlement talks with the Wailers direct, let alone that he would in effect have conceded all the Wailers' claims. Thirdly, there is a serious discrepancy between Mr Barrett's statement that the meeting made no progress and broke up quickly, and those of the other Wailers that I have summarised. Fourthly, there is no hint of this meeting in the subsequent correspondence between the lawyers. If Mr Blackwell had made the statements which are attributed to him, I would have expected them to have been at least mentioned in subsequent correspondence. In fact there was a complaint made by the Wailers' US lawyers in December 1993 that Mr Blackwell had approached the Wailers, without counsel, and offered them "a side record deal and the payment of a relatively small token amount of cash". This is inconsistent with any understanding on the Wailers' part that they were being offered royalties on past recordings. Moreover, had Mr Blackwell threatened to keep the litigation going for 20 years (contrary to the interests of the estate and any purchaser from the estate) I think that the letter of complaint would have mentioned that too. Fifthly, the making of such a threat also seems to me to be inconsistent with the conduct of both sides' lawyers in pressing the court for a trial date in February 1994. Once again, I prefer the evidence of Ms Jobson and Mr Blackwell.

132

Serious settlement negotiations began in earnest through the lawyers towards the end of 1993 when Mr Michael Hylton, the Jamaican lawyer acting for the estate, sent Mr Robinson, the Jamaican lawyer acting for the Wailers, a draft settlement agreement. This draft proposed a payment to the Wailers of \$500,000 apportioned between the six plaintiffs and included a sum of \$60,000 for the estate of Carlton Barrett. On the Wailers' side Mr Aston Barrett again said that he did not do the paperwork or the business dealings. He left that to Junior Marvin who drove the litigation and arranged the lawyers. Mr Al Anderson also said that Junior Marvin took charge of dealing with the lawyers. The contemporaneous correspondence certainly suggests that Junior Marvin was active in giving instructions to the Wailers' lawyers. However, he himself said that he was unaware of what was passing between the lawyers; and that he did not receive correspondence copied to him or, if he received it, did not read it. I do not accept this evidence. Before coming to the oral evidence that Mr Barrett and Junior Marvin gave about the settlement, I will set out the relevant parts of the contemporaneous correspondence. It is, in my judgment, the best test of the reliability of the oral evidence.

133 On January 13, 1994, Mr Hylton wrote to Mr Robinson. He referred to “our many discussions” in relation to the action. He proposed terms of settlement:

- (i) \$500,000 to be paid to the plaintiffs to be shared in such manner as they thought fit; half payable immediately and the remainder after 12 months;
- (ii) A new compilation album, called “Legend 2” to be launched. The Wailers would be guaranteed involvement in its promotion and would be paid not less than \$500,000;
- (iii) A contribution of \$100,000 towards the Wailers’ legal costs;
- (iv) In return the Wailers would release all their claims.

134 Mr Robinson replied on January 24, 1994. He said that his clients had had discussions with Mr Hylton in New York and thought that the schedule of payments was not acceptable. He said that his instructions were that Mr Hylton had promised a revised proposal which would include accelerated payments and a greater initial payment. Over the next few days the offer was clarified. On January 28, Mr Hylton wrote to say that he had met two of the Wailers in New York and they had said that the payment schedule was not acceptable. He said that his clients would agree to pay \$400,000 immediately and a further \$200,000 within four months. On January 31, 1994, Mr Robinson wrote to Mr Hylton. He copied his letter to Junior Marvin. He pointed out difficulties with the drafting of the settlement agreement. He continued:

“Our clients have instructed us to accept the offer as set out in yours of January 13, 1974 subject to an improved scheme for payment which, in part, seems to be reflected in your latest letter.”

135 He also pointed out that he did not act for Carlton Barrett’s estate. The correspondence continued over drafting matters. However on February 10, 1974, Mr Robinson wrote, in a letter copied to Junior Marvin, to ask whether the estate would reconsider the matter of royalties to be paid from the Legend 2 album. He continued:

“. . . we can tell you from now that our clients would not be asking for any major share of any royalty payments to yours. If, cumulatively, your clients could consider, say, 4 points to the Wailers from the album and a similar sort of arrangement from the exploitation of the tour, that would be enough to satisfy the principle that our clients are trying to establish.”

136 Mr Hylton’s reply was unequivocal. On February 15, he wrote to say that “our clients cannot agree to conceding points on the album.” There the correspondence ended.

137 On March 2, 1994, an agreement (“the 1994 Settlement Agreement”) was made between Island Logic Ltd, the Marley adult beneficiaries (Julian Marley having by then joined that class) and the plaintiffs in the 1989 Jamaican Action, including Aston Barrett. The 1994 settlement agreement had the effect of settling the 1989 Jamaican action and the 1989 New York Action. The settlement agreement was in the form that had been agreed between the parties’ respective lawyers.

138 The parties to the settlement agreement were Island Logic Ltd; Rita Marley and eight of Bob Marley's children ("the Adult Beneficiaries") and the six plaintiffs (defined as "the Wailers"). The Wailers, as defined, did not include the estate of Carlton Barrett. The material parts of the 1994 Settlement Agreement provided:

"WHEREAS By an Agreement dated the 10th day of September 1992 Island Logic and the Adult Beneficiaries purchased certain assets from the Estate of Robert Nesta Marley, O.M. (hereinafter referred to as 'the Assets' and 'the Estate' respectively)

AND WHEREAS The Wailers have made certain claims in Suit No. CL B 003 of 1989 and in an action brought in the United States District Court for the Southern District of New York, Civil Action No 89 Civ 5286 (KC) and otherwise in relation to the Assets

AND WHEREAS The parties have agreed to settle the aforesaid and other claims in the manner hereinafter appearing

IT IS HEREBY AGREED AS FOLLOWS:—

1. Island Logic and The Adult Beneficiaries will pay to Messrs Nunes, Scholefield, DeLeon & Co. on behalf of The Wailers the sum of US\$500,000.00 payable as hereafter provided.
3. Upon execution of this agreement as aforesaid, Island Logic and The Adult Beneficiaries will pay the further sum of US\$100,000.00 towards The Wailers' legal fees.
4. It is agreed and acknowledged that the aforesaid sums are not paid pursuant to any liability on the part of Island Logic or The Adult Beneficiaries or The Estate or any related company or entity. The Wailers acknowledge and agree that they do not have now and have never had any claim against The Assets or The Estate or Island Logic, Inc., Island Logic, Island Records, Inc., Island Records, Limited or the Island Trading Co., Inc.
5. In consideration of the aforesaid payment, The Wailers hereby jointly, severally, unconditionally, irrevocably and absolutely release and discharge Island Logic, The Adult Beneficiaries, Mutual Security Merchant Bank and Trust Company Limited., Reid Bingham J., The Estate, The Infant Beneficiaries of the Estate, namely, Stephanie Sahi Marley, Makeda Jahnesta Marley, Kymani Ronald Marley and Damian Alexis Robert Nesta Marley, Island Logic, Inc., Island Records, Inc., Island Records Limited., Island Trading Co., Inc., and each of their parents, affiliates, licensors, licensees, predecessors, successors, designees, assigns and all persons claiming through or under them, and each of their officers, directors, representatives, agents, attorneys and employees (collectively, 'Releasees'), from and against any and all causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, trespasses, damages, judgments, executions or claims, however denominated, in law or equity, which

the Wailers ever had, now or hereafter can, shall or may have against the Releasees.

6. The Wailers agree to cause [the 1989 New York Action] to be removed from the Court's suspense Calendar and further agree to promptly execute and file a Stipulation and Order of Discontinuance with Prejudice of the [1989] New York Action, without costs of disbursements to any party.
7. The Wailers further agree that in the event that any claim in relation to the assets is made on behalf of the estate of Carlton Barrett, they will, if called upon by the person or persons against whom any such claim is made, testify as to the matters set out in paragraph 4 hereof."

139 The signature of each of the Wailers appears to have been appended in the presence of their Jamaican lawyer, Gordon Robinson. A further agreement was entered into on the same day between the parties under which the plaintiffs in the 1989 Jamaican and New York Actions were to take part in a concert celebrating the 50th anniversary of the birth of Bob Marley; and also in a tour to promote the anticipated release of a compilation album provisionally entitled "Legend II". The terms of the agreement included a "buy out" of the Wailers' rights in their performances on that tour. The tour took place subsequently and the album was in fact released under the title "Natural Mystic". Two of the tracks on that album are "War" and "Who the Cap Fit". On March 13, 1994, Mr Hylton sent Mr Robinson a cheque for \$400,000, as required by the agreement. Mr Aston Barrett was paid \$80,000 of that sum.

140 Mr Barrett says that at the time of the 1994 settlement agreement he and the other Wailers were in desperate financial straits. He also says that Chris Blackwell said (again) that if they did not sign the agreement he could keep the litigation going for 20 years. This would have been the third time that Mr Blackwell had said this. Diane Jobson had the settlement agreement ready for them to sign; and cheques for each of them. Al Anderson wanted to show the agreement to his personal US lawyer, but that was refused. The atmosphere got very tense. Junior Marvin and Al Anderson corroborated Mr Barrett's evidence. Junior Marvin said that Rita Marley and Chris Blackwell were speaking individually and secretly to the Wailers. Rita Marley said that "things could get very bad" if they did not sign. He found it intimidating. Al Anderson said that he was threatened by Rita Marley that if he did not sign he would be "done in." He took this threat seriously. He also said that he wanted to show the agreement to his US lawyer but that was refused. All of them also say that Mr Blackwell promised that they would have royalties going forward.

141 It is important to stress that Mr Barrett does not claim to be entitled to set aside the 1994 settlement agreement. At the outset of the trial I refused Mr Barrett permission to amend his Particulars of Claim to allege that Mr Blackwell had made a collateral contract to pay royalties going forward; principally for the reason that the amendment was made very late and raised issues about the authority of Mr Blackwell to enter into any contract on the part of Island (which he had sold by then) which would, in turn, have required further disclosure and the lead-

ing of evidence from other witnesses. The relevance of the allegations of pressure (or duress) applied to the plaintiffs is therefore not obvious, even if the allegations were true.

142 The allegation that Mr Blackwell promised to pay royalties is, in my judgment, improbable. First, under the terms of the settlement the plaintiffs were to keep the money they had been paid under the invalid agreement made by Rita Marley in 1981. If, on top of that, and on top of the payments to which they were entitled under the settlement agreement and the tour agreement they were to receive royalties going forward, the estate would effectively have conceded the whole of their claim. If that were so, then it is difficult to see how it could have been necessary to threaten the plaintiffs in order to induce them to sign. Secondly, in his letter of January 31, 1994 Mr Robinson expressly said that he had been given instructions to accept the offer as set out in Mr Hylton's letter of January 13, 1974, which did not mention future royalties. This acceptance was against the background of Mr Hylton having met two of the Wailers in New York at a time when the main stumbling block was the timing of the payments. It is not credible that Mr Blackwell would have offered the Wailers more than the offer which they had already accepted. Thirdly, the question of royalties was expressly raised in correspondence between the initial acceptance of the offer and the signing of the settlement agreement. The estate firmly rejected the claim. Fourthly, no claim to royalties was made for the best part of 10 years after the settlement agreement was signed.

143 Mr Michael Hylton is now the Solicitor-General to the Jamaican government. He gave evidence in writing. He said that his opposite number, Gordon Robinson, was an experienced litigator and "extremely competent Counsel". He denied that any threats were made by anyone (including Rita Marley) at any meeting that he attended. Mrs Marley denied having threatened anyone; or having spoken to the Wailers individually at any settlement meeting. Mr Blackwell, Mrs Marley and Ms Jobson all denied that Al Anderson was refused permission to show the agreement to his personal lawyer. Ms Jobson said that the settlement agreement was in fact signed, not at Hope Road, but at Gordon Robinson's offices; and that she was driven there by Aston Barrett in his car. The fact that the settlement agreement appears to record that Mr Robinson witnessed his clients' signatures gives some credence to her account. Although it is possible that Mr Robinson witnessed signatures that his clients had appended to an agreement in his absence, that would have been an unusual course for a lawyer to take, particularly since the agreement itself records that it was signed in his presence. Moreover, if the settlement agreement had been signed at Hope Road, in Mr Robinson's absence, there is no evidence to show how it made its way to Mr Robinson for him to witness the signatures. In addition if the Wailers had been intimidated as they suggest, it is surprising that Mr Robinson did not raise the question. That is all the more surprising, since the Wailers said that their lawyers were angry that they had signed the agreement. There is no trace of any such anger in the contemporaneous documents. The letter of complaint from the Wailers' US lawyers in December 1993 shows that they were not afraid to complain about perceived

improper conduct. Mr Robinson (who is still alive and active) did not give evidence.

144 Mr Jobson also said, to my mind with considerable cogency, that it would have been impossible for her to have had individual cheques ready for the Wailers. The settlement agreement provided for the payment of a lump sum, unapportioned between the individual Wailers, and she would have had no way of knowing who was to get what. Moreover, under the terms of the agreement, the lump sum was to be paid to Mr Robinson's firm and not to the Wailers personally. It was indeed so paid.

145 Once again, I prefer the evidence of Mr Blackwell, Mrs Marley and Ms Jobson. I reject the allegations that the Wailers were coerced into signing the 1994 settlement agreement.

146 In accordance with cl.6 of the settlement agreement the 1989 New York action was "dismissed with prejudice" on October 14, 1994.

Devolution of title

147 I have already mentioned the 1992 sale agreement. Under this agreement Island Logic Ltd and the then adult Marley beneficiaries became owners of the interest of Bob Marley's estate interest in a number of assets. These assets included:

- (i) the rights to receive royalties from Island Ltd and Island Inc under the 1974 and 1975 recording agreements;
- (ii) The master recordings owned by the estate embodying Bob Marley's performances (with or without others);
- (iii) the copyrights in the Bob Marley music catalogue (including the disputed compositions); and
- (iv) the copyrights in the Cayman Catalogue (including Revolution).

148 Since then the rights to receive record royalties from Island Ltd and Island Inc under the 1974 and Media Aides recording agreements have been further assigned. They are now owned by 56 Hope Road Ltd (the thirteenth defendant), a company of which the shareholders are the Marley adult beneficiaries and two other of Bob Marley's children. The seven disputed compositions have been further assigned and are now owned in 75 per cent/25 per cent undivided shares by 56 Hope Road Ltd and Odnil Music Ltd, the twelfth and thirteenth defendants. These defendants are purchasers of those assets for value.

The current claim and its progress

The strike out application

149 In early 2003, the first and second defendants applied to strike out the claim and to join the Marley beneficiaries in order to enforce the 1994 settlement agreement. Laddie J. heard argument over four days. He allowed the joinder of the additional defendants. However, he refused to strike out the claim (or to give

summary judgment in the defendants' favour): [2003] EWHC 625 (Ch). He expressed his ultimate conclusion on that question as follows:

“The four days this hearing occupied were filled with detailed arguments on the facts and the law. I have a strong suspicion that on many, if not all, issues the defendants are likely to prevail at the trial. This is bolstered by the fact that Mr Barrett admits that his case now is, in material respects, different to cases advanced by him in the past. But, to obtain relief at this stage it is necessary for the defendants to show that the claims of both of the Barretts are fanciful. That must be clear without the need for a mini-trial. It may be said that this plays into the hands of litigants who can engineer complexity. That may be so. At the end of the day such tactics will result in heavy awards of costs and, where appropriate, heavy orders for security. But if, as here, the issues appear to be complex and difficult to unravel even after a prolonged hearing, then the case is not suitable for summary determination. I have come to the conclusion that the issues raised here are far too complex and numerous. It would not be safe to strike out the claims at this stage. In the circumstances, the defendants' applications for summary judgment and to strike out fail.”

The first issues for decision

150 Logically, as it seems to me, I should first consider whether the Barretts are precluded from bringing any or all of the current claims. This requires a consideration of the effect of the 1994 settlement agreement; and questions of cause of action estoppel and abuse of process. To the extent that pleaded issues survive that challenge, I must then go on to decide them.

The effect of the 1994 settlement agreement

Introduction

151 Mr Aston Barrett was a party to the 1994 settlement agreement. Mr Carlton Barrett's estate was not. Accordingly, the defendants do not rely on the 1994 settlement agreement directly against Carlton Barrett's estate. But they do say that it is an abuse of process (and a breach of contract) for Mr Aston Barrett to bring this action on behalf of his brother's estate. It seems to me that five issues arise out of the 1994 settlement agreement:

- (i) What claims did it expressly compromise?
- (ii) What, if any, terms are to be implied into the express agreement?
- (iii) Should the agreement be enforced against Mr Aston Barrett?
- (iv) If the agreement does not cover the claims that Mr Aston Barrett now seeks to raise, is it an abuse of process for him to seek to raise them?
- (v) Is it a breach of contract or an abuse of process for Mr Aston Barrett to bring a claim on behalf of his brother's estate?

Approach to construction

152 The leading case on the interpretation of settlement agreements (and much more besides) is *BCCI v Ali* [2002] 1 A.C. 251. I derive the following relevant propositions from that case:

- (i) There are no special rules for interpreting releases or compromise agreements: Lord Bingham of Cornhill at [8]; Lord Nicholls of Birkenhead at [26];
- (ii) There is no question of a document having a legal interpretation as distinct from an equitable interpretation: Lord Nicholls at [24];
- (iii) The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made: Lord Nicholls at [26];
- (iv) A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention: Lord Bingham at [9];
- (v) The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object may be that the release should extend to any claims which might later come to light. The parties want to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge is a risk the person giving the release took upon himself. It is against this very risk that the release is intended to protect the person in whose favour the release is made: Lord Nicholls at [27];
- (vi) However, this principle cannot be pressed too far. In the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware: Lord Bingham at [10]; Lord Nicholls at [28].

153 As with any agreement, a settlement agreement or release must be interpreted in context. The principal context is the dispute or disputes which the parties were compromising. In *BCCI v Ali* Mr Naeem's claim was not caught by the settlement agreement because it was not a legally sustainable claim at the date when the agreement was made. Thus it fell into a category of claim which, *as a matter of law*, did not then exist and whose existence could not then have been foreseen.

The context of the 1994 settlement agreement

154 The plaintiffs in the 1989 Jamaican and 1989 New York actions were claiming that they had been partners with Bob Marley. They claimed that the partnership business extended to recording, writing and publishing songs, touring and merchandising; and that all contracts entered into by Bob Marley or companies controlled by him in respect of the partnership businesses were partnership property. The essential factual allegation relating to the contract was that Bob Marley “either personally or through companies owned and controlled by him, negotiated and executed contracts on behalf of the Partnership”. They were making those claims against (a) the estate (in the Jamaican proceedings), (b) the proposed purchasers of the estate’s rights in Bob Marley’s contracts (Island Logic Inc, in the 1989 New York action) and (c) the record company with which the principal recording agreement existed (Island Inc, in the 1989 New York action). Against Island Inc they were also asserting a right to be paid directly for their performances on the records recorded pursuant to the agreements which Bob Marley or his companies had entered into with Island Inc. The estate, the purchasers and the record companies therefore all had an interest in seeing finality as regards the Wailers’ claims that they had been Bob Marley’s partners and that certain rights flowed from that partnership.

155 The purchasers of the estate’s rights (Island Logic Ltd and the adult beneficiaries) had given an indemnity to the Estate against the Wailers’ claims. Media Aides had also given an indemnity to Island Inc in relation to any claims by the Wailers in 1985. Accordingly, the persons who from September 1992 had the economic risk of the action by the Wailers were Island Logic and the Marley adult beneficiaries, and they had taken over conduct of the 1989 Jamaican Action. It was for this reason that, although the 1994 settlement agreement settled litigation to which Mutual Security (the administrator of the Estate), Island Logic Inc (the originally intended purchaser from the Estate) and Island Inc were parties, it was Island Logic Ltd and the Marley adult beneficiaries (the actual purchasers) who were the parties to the 1994 Settlement Agreement. Nevertheless, it was essential to Island Logic Ltd and the Marley adult beneficiaries that a final settlement was also reached against Island Inc, Island Ltd and the estate, because otherwise they would be called upon under their indemnities.

156 If the litigation had gone to trial, and if the Wailers had lost, they would have had to repay the \$1.2 million that had been paid to them by Rita Marley between 1981 and 1986. In fact the settlement agreement gave them an additional \$500,000 and the opportunity to earn a further \$500,000 by touring, as well as a contribution towards their legal costs. Since it is now common ground that the 1981 agreement did not bind the estate, it is difficult to see how the Wailers could have resisted the counterclaim for repayment. In effect the settlement was worth \$2 million to them.

The words of the settlement agreement

157 The settlement agreement recites the claims brought by the Wailers both in Jamaica and New York. It goes on to recite that the parties desire to settle “the

aforsaid *and other* claims in the manner hereinafter appearing”. It is plain, therefore, that the settlement was not restricted to claims actually advanced in the two actions. The operative words of release themselves release the parties:

“from and against any and all causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, trespasses, damages, judgments, executions or claims, however denominated, in law or equity, which the Wailers ever had, *now or hereafter can, shall or may have.*”

158 Ms Jones submits that these words, read in context, are in the widest possible terms. The claims actually made in the two 1989 actions included specifically a claim for an account and payment of royalties under recording contracts; and also to “all and any action, suits, accounts, bonds, bills” etc. Clearly the very wide and comprehensive words in the settlement agreement are intended to indeed apply to all and any actions or claims whether known or unknown. Further, they are intended to apply not only to claims which already existed but to claims which might arise in the future. But the words of the release go even further. She submits that it is plain that the 1994 settlement agreement covers any sort of claim which arose out of the Wailers’ relationship with Bob Marley. The claims that Mr Aston Barrett brings in his personal capacity are claims which do not depend on any change in the law. They were therefore claims which it was possible to foresee, unlike Mr Naeem’s claims in *BCCI v Ali*. Nor are Mr Barrett’s current claims new claims in the sense of arising from new facts which were not in existence at the date of the 1994 settlement agreement. They all relate to the exploitation of recordings made between 1974 and 1981, which formed part of the assets that had been contracted to be sold. Moreover, it was specifically alleged in the Jamaican action that Bob Marley (either himself or through companies) signed contracts on behalf of the Wailers. Any cause of action which relies on that factual allegation must have been intended to have been included in the compromise.

159 Mr Bate submits that the words of the release relating to future claims is to be read as embracing all claims that may be brought in the future respecting then existing and past transactions. The wholly unrestricted terms of the release indicate that the parties cannot have contemplated that if for example one of the Wailers were later assaulted by one of the named Marley children, that they were releasing such a claim; or that if one of the Releasees were to commit a fraud on the Wailers 10 years after the settlement agreement, that the Wailers released such future claims. I agree with Mr Bate that the words of the release must, to some extent, be limited by context. I would have no difficulty in interpreting it as excluding claims for a subsequent assault; or for a subsequent fraud unrelated to the relationship between the Wailers and Bob Marley or the record companies at the date of Bob Marley’s death. But it seems to me that, looking at the settlement agreement objectively, and in context, it must have been the intention of the parties to draw a line under the relationship between the Wailers and Bob Marley; and to cap the amounts that the Wailers could claim arising out of past compositions and past performances. This, in my judgment, applies to all claims that were then legally permissible. It would include not only the contrac-

tual claims, but also the claims to copyright and to infringement of performer's rights.

160 Mr Bate goes on to submit that any claims compromised by the settlement agreement must be limited to claims relating to the "Assets" as defined by the first recital to the agreement. This submission, in my judgment, overlooks the third recital which expresses an intention to compromise not only those claims advanced in the Jamaican and New York actions; but also "other claims". It also overlooks the fact that cl.4 of the settlement agreement contains an acknowledgement that the Wailers not only have no claim against the Assets, but also no other claim against the listed parties. Mr Bate also says that the settlement agreement does not cover copyright infringement or declaratory relief as to ownership. It would have been all too easy, he says, to create an assignment of copyrights, if the intention had been to preclude copyright claims. This submission, in my judgment, presupposes that the parties to the settlement agreement acknowledged that the Wailers had claims to copyright. It would only have been necessary to assign copyright if the Wailers had copyright to assign. But, on the contrary, the settlement agreement contains an acknowledgement that the Wailers had no claim. The acknowledgment was given in the context of the affidavit sworn by Junior Marvin (and which Mr Barrett himself confirmed) which referred to songs having been co-written by the Wailers. That acknowledgement, in my judgment, encompasses claims to copyright.

161 Accordingly, in my judgment, Ms Jones' submissions are to be preferred. I conclude that all the claims that Mr Aston Barrett brings in his personal capacity have been compromised by the settlement agreement. As a matter of contract analysis, the settlement agreement was an accord and satisfaction.

Should the 1994 settlement agreement be enforced against Mr Aston Barrett?

162 Although Island Inc and Island Ltd were released from claims by the 1994 settlement agreement, they were not parties to it. However, Rita Marley and the other Marley children who were parties to the settlement agreement have been joined as parties to this action for the purposes of enforcing it. Should the court permit them to do so?

163 Ms Jones relies on [9] of Lord Bingham of Cornhill's speech in *Heaton v AXA Equity and Law Life Assurance Society plc* [2002] UKHL 15 [2002]; 2 A.C. 329 in which his Lordship said:

"(2) An agreement made between A and B will not affect A's rights against C unless either (a) A agrees to forgo or waive rights which he would otherwise enjoy against C, *in which case his agreement is enforceable by B*, or (b) the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party." (Emphasis added)

164 This suggests that in such a case B is entitled as of right to enforce a waiver of rights against C. However, the enforceability of the compromise was not the prin-

cial issue in that case; and authority relevant to that question does not appear to have been cited. Mr Bate relied in particular on *Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep. 387. The facts were complicated; but for present purposes can be summarised as follows. Deepak's plant was built with know-how derived from ICI. The transfer of know-how was not direct from ICI to Deepak, but via one of ICI's licensees: Davy. The contract between Davy and Deepak contained (it was assumed) a promise by Deepak to indemnify ICI. The plant was severely damaged by an explosion and Deepak sued. ICI was one of the defendants. Davy claimed to be entitled to a stay of the proceedings against ICI in so far as the claims were covered by the indemnity. One of the many questions argued on appeal was the question when a promise by A (Deepak) to B (Davy) that A will indemnify and hold harmless C (ICI) will be enforced at the suit of B for the ultimate benefit of C. Deepak submitted that there were two cumulative requirements for such a promise to be so enforced: (a) The promise involves, expressly or impliedly, a promise by A not to sue C, and (b) B has a substantial interest of his own in the enforcement of the promise. The Court of Appeal had no difficulty in concluding that an agreement to indemnify contained an implied promise not to sue. On the second part of the submission they held:

“From these cases (the facts of which do not matter) we think the following propositions emerge.

1. Equitable fraud (something which is unconscionably unfair) is the basis upon which the Courts will restrain or stay the proceedings on the application of a stranger to those proceedings. The power to do so is discretionary.
2. Something more than a promise not to sue is required. The applicant must show that he has some interest of his own to protect. This has been expressed in various ways viz.: ‘Some other good reason’, ‘the real possibility of prejudice’ and ‘some legal or equitable right to protect such as an obligation to indemnify the defendant’.
3. Whether the applicant has shown that he has such an interest depends upon the facts of each case. Where for example there is an issue as to whether the applicant will be required to indemnify the defendant if the proceedings continue the Court must consider the likelihood of a claim for indemnity being made and its merits if it is said to be obviously unsustainable, but no prolonged investigation of the issues or potential issues is called for.”

165

Deepak was not a case of a compromise of litigation. Ms Jones submits that in the case of a compromise of litigation for valuable consideration, the court has a strong interest in upholding the integrity of a settlement. Public policy requires that settlements should be enforced: *Colchester BC v Smith* [1992] Ch. 421. She submits that if a party (A) to a compromise agreement releases a third party (C) from liability for consideration moving from the other party to the compromise agreement (B) the court will not permit A later to sue C. The precise

legal basis for this is not clear but the following explanations have been put forward:

- (a) the cause of action against C is extinguished by the agreement between A and B: see *Hirachand-Punamchand v Temple* [1911] 2 K.B. 330 at 339 (*per* Fletcher Moulton L.J.);
- (b) for A to bring an action against C would be a fraud on B, in the sense of a breach of promise made for consideration: see *Morris v Wentworth-Stanley* [1999] Q.B. 1004 at 1018 (*per* Potter L.J.)
- (c) to bring an action in such circumstances is an abuse of the process of the court: see *Snelling v John Snelling* [1973] 1 Q.B. 79.

166 I agree with Ms Jones. The whole point of a settlement is to bring finality. Where a cause of action falls within the scope of a settlement agreement negotiated by lawyers, for which valuable consideration has been given, it is only in an exceptional case that the court will decline to give effect to the settlement unless there are grounds on which the contract itself could be set aside. In my judgment the principles in *Deepak* do not apply to this kind of case.

167 However, in case I am wrong, I turn to the matters on which Mr Bate relies in support of his contention that the 1994 settlement agreement should not be enforced against Aston Barrett. First he says that the settlement agreement should not be enforced against Aston Barrett because of matters pleaded in para.35 of the Reply. These matters relate to alleged mistreatment by Rita Marley of Errol Barrett, one of *Carlton* Barrett's children. I cannot see why those matters (even if true) should have any bearing on whether the agreement should be enforced against *Aston* Barrett. But in any event I accept Rita Marley's denial of these allegations. Secondly, he says that there is no evidence that any indemnity given by the releasees is likely to be enforced against them. Ms Jones retorts by pointing out that both 56 Hope Road Ltd (which is owned by the Marley Adult Beneficiaries) and Island have proceeded on the basis that this is a case where the benefit cannot be transferred without the burden. The indemnity has been called on and 56 Hope Road is paying the costs of the action. In addition, 56 Hope Road Ltd is directly affected since it owns both the copyrights (or a share in them) and the rights to receive the royalties under the Media Aides and 1974 recording agreements. In my judgment Ms Jones is right on this point too. There is, in my judgment, no reason to decline to enforce the settlement agreement against Mr Aston Barrett.

The position of the estate of Carlton Barrett

168 Ms Jones accepts that the estate of Carlton Barrett was not a party to the 1994 settlement agreement; and it cannot therefore be directly enforced against his estate. She submits, however, that it was both a breach of the 1994 settlement agreement and an abuse of the process of the court for Mr Aston Barrett personally to bring this action as Carlton Barrett's administrator (and to have himself so appointed for that very purpose); particularly when he has brought it together with an action on his own account. She submits that it is an implied term of

the 1994 settlement agreement that Mr Aston Barrett would not bring any claim against Island Ltd or Island Inc on behalf of Carlton's estate. This term should be implied both on the basis of the "officious bystander" test and in order to give business efficacy to the agreement. Not only did Mr Aston Barrett acknowledge and agree that the Wailers never have had any claim against those companies, he also agreed to give evidence against the estate of Carlton Barrett to that effect. Ms Jones submits that it is impossible to construe the agreement so as on the one hand to permit Aston Barrett to bring a claim on behalf of Carlton Barrett's estate but on the other hand to require him to give evidence against himself that Carlton Barrett's estate has no claim.

169

Mr Bate retorts that the term by which Mr Aston Barrett (and the other Wailers) agreed to give evidence to a particular effect is unenforceable on grounds of public policy because it is a contract tending to interfere with the administration of justice. In support of this submission Mr Bate relies on the decision of the Court of Appeal in *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 B.C.L.C. 363. That was a case in which Fulham FC, as lessees of their ground at Craven Cottage, entered into an agreement with Cabra, a developer, who had applied for planning permission to redevelop the ground. The agreement was made shortly before a public inquiry which had been set up to consider the planning application; and also a proposal by the local authority (which Fulham FC had supported) for the making of a compulsory purchase order of the ground. Under the agreement Fulham FC received a substantial payment from the developer; and in return agreed (among other things) not to provide witnesses or written material in support of the CPO; and that, if called upon to do so, they would write in support of the planning application. Dealing with the question of public policy the Court of Appeal said:

"The principle which underlies both the law of contempt of court and the rules governing the immunity of witnesses from suit, however, is that, as a matter of public policy, the court will prevent and, if necessary punish, conduct which interferes with the proper administration of justice. Thus, 'any contract which has a tendency to affect the due administration of justice is contrary to public policy': see *Halsbury's Laws of England*. In any individual case therefore the question is: has the act impugned interfered with, or will it interfere with, the due administration of justice? It is not sufficient merely to pose the question: is the effect of the agreement that a party or a witness may be prevented from putting forward a particular contention in court or before a tribunal? It is necessary to take a broad view of the public interest and, where necessary, seek to achieve a balance between counter-vailing public policy considerations. Thus in the present case there is the public interest in allowing business to be transacted freely and in holding commercial men to their bargains.

There are many circumstances where parties can properly and legally reach agreements as to the future course of legal proceedings. The law favours rather than disapproves of the compromise of a civil action, and the court will intervene to prevent a party pursuing a legal remedy in breach of a valid compromise. . . .

The court will consider the facts of each case. But where, as here, a commercial agreement relating to land has been entered into between parties as arm's, length and one party agrees in return for a very substantial payment to support the other party's applications for planning permission we can see no rule of public policy which renders such an agreement illegal or unenforceable. This does not mean of course that a witness could be prevented by agreement from giving evidence on subpoena, because this could involve an interference with the course of justice. But we are satisfied that on the facts of this case the covenantors cannot rely on any rule of public policy which would enable them to ignore the provisions in . . . the letter of undertaking and to volunteer to oppose [Cabra's] application. Nor can we find any ground of public policy which could be invoked to prevent the first plaintiffs and the club writing a letter to the Secretary of State and the planning authority in strict accordance with . . . the letter of undertaking stating that 'the Companies' support the planning application and are in favour of it being granted. We see no objection to the inclusion of a sentence in the letter to the effect that it is written in accordance with the letter of undertaking . . .'

170 There are, as it seems to me, three points that emerge from this. First, there is no public policy that precludes a person from promising not to bring a claim as part of a compromise. Secondly, there is no public policy that prevents a person from promising not to *volunteer* to give evidence. But thirdly, it is contrary to public policy for a person to promise to give evidence to a particular effect, because that might interfere with the administration of justice.

171 Before turning to the construction of the particular clause of the settlement agreement, there is one principle of construction I should notice. In *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] Q.B. 897, under the heading "Public policy as an aid to construction" Simon Brown L.J. said:

"The only way in which public policy can properly be invoked in the construction of a contract is under the rule *ut res magis valeat quam pereat*: if the words are susceptible of two meanings, one of which would validate the particular clause or contract and the other render it void or ineffective, then the former interpretation should be applied even though it might otherwise, looking merely at the words and their context, be less appropriate."

172 Staughton L.J. does not appear to me to have agreed with this; but Thorpe L.J. agreed with both judgments.

173 I have therefore considered whether cl.7 of the settlement agreement can fairly be construed simply as a promise on the part of the Wailers not to volunteer to give evidence in any claim brought by the estate of Carlton Barrett. If that construction is adopted, then cl.7 would not purport to prescribe the contents of their

evidence if, for example, a summons was issued requiring them to appear to give evidence. However, it seems to me that the clause cannot fairly be read as having that effect. The thrust of the clause is a positive promise that they *will*, if called upon by the person or persons against whom any such claim is made, testify as to the matters set out in para.4 of the settlement agreement: that is, that they have no claim. A promise to that effect is, in my judgment, invalidated as being contrary to public policy. I might add that Laddie J. also took this view in [58] of his judgment on the strike out application; and I agree with him. That said, cl.7 applies in terms only to the case in which the Wailers are called upon to give evidence by the person *against* whom the claim is brought. The defendants in the present case have not called upon the Wailers to give evidence: quite the contrary, they have been called by the claimants. I do not consider that I should give any effect to cl.7 (even if it is valid) that goes beyond its express terms.

174 The 1994 settlement agreement expressly recognises the possibility that the estate of Carlton Barrett might bring a claim against the Releasees. That is the trigger upon which the obligation in cl.7 depends. So the mere fact that a claim is brought by Carlton Barrett's estate cannot, in my judgment, amount to a breach of the settlement agreement. The fact that the settlement expressly contemplates the making of such a claim also means that no term precluding the bringing of such a claim is needed to give business efficacy to the agreement. Moreover, any implied term binding on Aston Barrett would bind him only in his personal capacity. It could not bind Carlton Barrett's estate, because neither Carlton Barrett nor his estate was party to the agreement; and moreover, Carlton Barrett's estate was unrepresented by an administrator at the time. The submission must, therefore, be that it is an implied term of the settlement agreement that Aston Barrett is precluded from acting as administrator of the estate of his late brother. There are a number of answers to this submission. First, if it had been desired to extract from the Wailers a promise that none of them would act as administrator of Carlton Barrett's estate it would have been easy to have done so. Secondly, even if such a promise had been given, it would not have prevented the estate (through some other administrator) from bringing a claim. Thirdly, the basis of the implied term is reliance on cl.7 of the settlement agreement which is contrary to public policy. That is not a promising foundation for an implied term. Fourthly, any implied term must be reasonable. It would not, in my judgment, be reasonable to have prevented Aston Barrett from acting as administrator of his brother's estate. I reject the submission that there is an implied term which prevents Aston Barrett from bringing a claim on behalf of his brother's estate. I think that Laddie J. came to the same conclusion in [58] of his judgment; and I agree with him.

Cause of action estoppel

Introduction

175 Neither the Jamaican action nor the 1989 New York action proceeded to a trial on the merits. Nevertheless, the defendants say that because the 1989 New York action was "dismissed with prejudice", a cause of action estoppel has arisen.

The English test

176 It is common ground that a decision of a foreign court can be relied on as creating a cause of action estoppel. The first requirement is that the earlier decision in question must be a final and conclusive decision on the merits. The second requirement is that the parties to the earlier action must be the same as the parties in the later action or their privies. The third requirement is that the cause of action in the later action must be the same as the cause of action in the earlier action.

177 In dealing with a foreign judgment Lord Reid explained the approach in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 2 A.C. 853. He said at 918 that a “final decision on the merits” meant that the merits must be finally disposed of so that the matter cannot be raised again in the foreign country. This, in turn depended on the rules applicable to the foreign jurisdiction in question; because, as Lord Reid explained at 919:

“ . . . it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the *lex fori* but the *lex fori* ought to be developed in a manner consistent with good sense.”

178 Lord Reid concluded that it had to be proved whether West German law would allow the issues in question to be re-opened.

179 Lord Guest said at 936:

“Another aspect of finality relates to the requirement that the decision relied upon as estoppel must itself be *res judicata* in the country in which it is made. . . . It would, indeed, be illogical if the decision were to be *res judicata* in England, if it were not also *res judicata* in the foreign jurisdiction. I am not satisfied that the respondents have discharged the burden of proof upon them of establishing that the West German judgment is *res judicata* in West Germany.”

180 Lord Wilberforce said at 969:

“The textbooks are in agreement in stating that for a foreign judgment to be set up as a bar in this country it must be *res judicata* in the country in which it is given . . . [G]enerally, it would seem unacceptable to give to a foreign judgment a more conclusive force in this country than it has where it was given. In relation to the present case I think that ‘conclusive’ must be taken in the sense that if the *Stiftung* represented by the Council of Gera were to attempt to commence another action in West Germany against the same defendants as were parties to the previous action they would, by the force of the previous judgment, be prevented from proceeding with it.”

New York law

181 New York law has a principle similar to our concept of cause of action and issue estoppel. They call it “claim preclusion”

182 I had the benefit of expert evidence on this topic from Professor Samuel Issacharoff. The general rule of New York law is that dismissal with prejudice operates as a “merits determination” for the purposes of claim preclusion and that as such forecloses re-litigation. Professor Issacharoff cited the following dictum from *Nemaizer v Baker* 793 F.2d 58, 60 (2d Cir. 1986):

“[a] dismissal with prejudice has the effect of a final adjudication on the merits favourable to defendant and bars future suits brought by plaintiff upon the same cause of action.”

183 He went on to consider what claims would be covered by the claim preclusion rule. He concludes that what is foreclosed is:

“the relitigation of transactionally-related claims that had accrued at the time of the original resolution, regardless whether asserted or not. The term “transactionally-related” refers to matters that are logically related to the events in dispute.”

However, in a supplementary report, Professor Issacharoff concluded that the rule in relation to actions seeking forward-looking declaratory relief is not so clear-cut. He referred, in this context to the decision of the Third Circuit in *Allegheny Intern., Inc v Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1430, (3d Cir. 1994) in which Greenburg C.J. said:

“. . . [W]e recognize that when declaratory relief is sought it may be possible to sue on a claim which could be regarded as not yet existing. Yet we think that it is reasonable to consider that when both damages for past conduct and declaratory relief governing future events are sought, the parties naturally would focus their attention on the existing monetary claims. Indeed, we believe that a court should be cautious in according *res judicata* effect to the dismissal of the declaratory judgment aspects of a combination damages and declaratory judgment action, lest a settlement leading to a dismissal with prejudice have unintended consequences.”

184 Professor Issacharoff’s opinion is that a New York court would not give preclusive effect to the declaration in the present circumstances, particularly lest it were to have unforeseen or unintended effects on any settlement.

185 The defendants did not call an expert witness of their own; but they attacked Professor Issacharoff’s ultimate conclusion. Mr Lightman (who presented this part of the Defendants’ case) submitted that the question whether the judgment of the New York court was a final judgment was to be determined by New York law; and that Professor Issacharoff had said that it was. That was sufficient to satisfy the first of the conditions necessary to produce a cause of action estoppel. But that, he submitted, is the only question that is to be determined by New York law. The question whether the cause of action sought to be asserted is the same as that which was the subject of the foreign judgment is to be decided in accordance with English law. The scope of the cause of action estoppel was likewise a matter of English law, not New York law. Accordingly, Professor Issacharoff’s views on whether a New York court would entertain the current

claim were irrelevant, whether or not he was right. In the alternative, Mr Lightman submitted that the policy reasons why US courts have refused to extend preclusive effects to claims for declaratory judgment are based on the fear of unintended consequences. Those reasons do not apply in this case; because it is clear from the wording of the 1994 Settlement Agreement that it was very much an intended consequence of the settlement leading to the dismissal with prejudice of the 1989 New York action that the plaintiffs' claim for declaratory relief governing future events would be precluded just as much as their existing monetary claims.

186 Since the defendant called no expert evidence of their own, and did not even wish to cross-examine Professor Issacharoff, I consider that I must accept his view of what a New York court would do. In effect, therefore, the question is whether what a New York court would do is relevant.

187 Mr Lightman referred to the decision of the Court of Appeal in *The Indian Grace* [1992] 1 Lloyd's Rep. 124. The case concerned the carriage of a consignment of munitions to Cochin on board the defendants' vessel. During the voyage a fire occurred, as a result of which part of the consignment was jettisoned and the remainder was damaged. On September 1, 1988 the plaintiff cargo owners issued proceedings in India claiming damages for short delivery under the bills of lading. This claim encompassed the jettisoned cargo only. The Indian judge held that the defendants were liable for the value of the undelivered cargo, about £6,000. On August 25, 1989 the plaintiffs issued a writ *in rem* in London claiming damages of some £2.6 million for the total loss of the cargo. The pleaded claim in the Indian action was in respect of short delivery of the cargo delivered at Cochin, *viz.* 51 shells (and a small item described as "charge green bag"). The claim was advanced under one of the two bills of lading under which the consignment was shipped. In the plaint, it was alleged that the ship-owners had been guilty of negligence while the cargo was in transit in the vessel, which was taken to refer to a breach of their duty as bailees (carriers for reward). It was either common ground (or found by the Indian judge) that the contract incorporated the Hague Rules. The claim in the English action was in the ordinary form for a damage to cargo claim, alleging against the ship-owners (1) breach of contract and/or duty as carrier by sea for reward to deliver the goods in like good order and condition as when shipped; (2) negligence, in breach of duty as carriers and/or as bailees for reward; and (3) breach of their obligations under art.III(1) and (2) of the Hague-Visby Rules, which apply to the contracts contained in or evidenced by the two bills of lading under which the goods were shipped. One of the issues in the Court of Appeal was the relevance of Indian law to the question of cause of action estoppel. Leggatt L.J. dealt with that issue as follows at 132:

"For my part, I see nothing in the suggestion that evidence of Indian law is required in order to establish that the cause of action sued on in India was the same as that relied on here. I accept Mr. Gruder's submission that it is a matter for English law to determine whether the causes of action were the same; there is no evidence or argument that they were not and, until the contrary is

proved, Indian law must be presumed to be the same as English law. *With the effect of the Indian judgment in India we are not concerned.*" (Emphasis added)

188 The *Carl Zeiss* case is not referred to in the judgment of Leggatt L.J.. It is not possible to tell from the report whether it was cited. The case proceeded to the House of Lords: [1993] A.C. 410. The argument in the House does not appear to have challenged this point. Although the appeal from the Court of Appeal was allowed, it was allowed on the quite separate question whether it was open to the claimant to allege and prove a waiver of the procedural bar. The decision of the Court of Appeal is, therefore, binding on me on the point that they decided. However, it does not appear to me that the decision of the Court of Appeal in *The Indian Grace* was concerned with the question whether the foreign judgment was conclusive; that is, whether the first condition was satisfied. Rather, *The Indian Grace* was concerned with the third condition; that is, whether the causes of action were the same. It seems to me, therefore, that Mr Lightman's submission is correct on the point that the question whether the causes of action are the same cause of action is to be decided in accordance with English law; that is whether the third condition is satisfied. However, the question that Professor Issacharoff addressed was directed to satisfaction of the first condition.

189 In my judgment the decision of the House of Lords in the *Carl Zeiss* case means that an English court should not give a foreign judgment greater preclusive effect in England than it would have it its home jurisdiction. It will always be relevant (and may be necessary) to inquire what would happen in the foreign jurisdiction if the claimant sought to re-open there the issues that he wishes to litigate in England. If the Court of Appeal in *The Indian Grace* decided otherwise (and I do not think that they did), their decision cannot be reconciled with that of the House of Lords in *Carl Zeiss*, which does not appear to have been cited. The question whether a New York court would have treated the dismissal with prejudice as preclusive (and if so to what extent) was the question that Professor Issacharoff addressed. I accept his evidence.

190 I hold therefore, that no cause of action estoppel arises, because the first condition is not satisfied in the circumstances of the present case. A New York court would not hold that the dismissal with prejudice had a preclusive effect in the present circumstances.

Abuse of process

The test

191 It was common ground that the test to be applied in determining whether an action amounts to an abuse of process is that laid down by the House of Lords in *Johnson v Gore Wood* [2002] 2 A.C. 1 at 30:

"The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the

earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”

192 This principle applies as much to litigation that has resulted in a settlement as to litigation that has culminated in a judgment. It is not dependent on the technicalities of cause of action estoppel. In the same case Lord Millett said at 59:

“It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen’s right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms . . . There is, of course, no doubt that Mr Johnson *could* have brought his action as part of or at the same time as the company’s action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court.” (Emphasis in original)

193 The principle underlying abuse of process is, however, capable of applying so as to bar a claim by a person who was not a party to the previous litigation relied on. Ms Jones referred in particular to *Morris v Wentworth-Stanley* [1999] Q.B. 1004 1017 in which Potter L.J. said that the principle was open to be applied where a plaintiff fails to join a defendant who should have been joined in earlier proceedings, and cited with approval the following statement by Mummery L.J. in *MCC Proceeds Ltd v Lehman Brothers International (Europe)* [1998] 4 All E.R. 675 696:

“There was no valid reason for Macmillan not joining L.B. as a defendant to the first action, so that all claims in relation to the title to the Berlitz shares could be decided in the same action and bind all interested parties . . . it is an abuse of the process of the court to bring [the action] against L.B.: the substantial issue raised in it (i.e. the title to the Berlitz shares) has already been decided, on both law and fact, in the first action in circumstances which preclude the parties in this action from attempting to litigate that issue again.”

Application: Aston Barrett

194 As I have said, one of the essential factual allegations made in the Jamaican action was that Bob Marley (either himself or through companies) signed contracts on behalf of the Wailers. The allegation was made in the legal context of an allegation of partnership. However, the allegation now made is that Bob Marley (or his companies) signed those contracts as agents for the Barretts. This, as it seems to me, is simply an alternative legal analysis of the same facts. After all, the authority of a partner to contract on behalf of a firm is simply one application of the ordinary law of agency. In England this is recognised in s.5 of the Partnership Act 1890.

195 In *Hoystead v Commissioner of Taxation* [1926] A.C. 155 165 Lord Shaw of Dunfermline said:

“In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to bring fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except where legal ingenuity is exhausted.”

196 In my judgment this principle applies in the present case. Having (at the very least) compromised the claim of partnership by the 1994 settlement agreement, it is in my judgment an abuse of process for Aston Barrett to bring a further claim applying a different legal analysis to the same underlying facts. The question of co-written songs was also raised in the evidence filed in that action, although no explicit claim to copyright was actually advanced on the pleadings. But plainly it could have been. In view of the fact that by the time of the settlement agreement Mr Barrett was aware of the prospect of obtaining royalties for song writing (and had been in receipt of ASCAP payments); that he was advised by competent lawyers; that he (or at least his lawyers) knew that copyrights or indirect entitlements to copyright were among the assets of the estate that were to be distributed, I consider that he should have done. In addition he knew that the “Legend” video had been compiled and released; and the state of the law in 1994 was such that a claim for infringement of performers’ rights was then legally permissible (albeit not in quite the same form as now exists). Had he wished to contend that performances had been recorded and issued to the public without his consent, he could have done. The claims now raised are a collateral attack on the settlement. I conclude therefore that Aston Barrett cannot be permitted to advance a claim:

- (i) That he was a party to the 1974 agreement;
- (ii) That Bob Marley entered into the 1974 agreement as his agent;

- (iii) That Bob Marley entered into the 1975 agreement as agent for the Barretts;
- (iv) That Media Aides is trustee of any promise that it made to Island Records;
- (v) That he is entitled to copyright in any of the disputed compositions;
- (vi) That his performer's rights have been infringed.

Application: the estate of Carlton Barrett

197 Although Carlton Barrett's name appeared on the application to intervene in the 1986 New York action, in fact he had died by the time that that application was issued. His estate was not a party to the Jamaican action or to the 1989 New York action; nor to the 1994 settlement agreement. As I see it, therefore, this is the first time that his estate has raised a claim. Lord Millett's observations in *Gore Wood* are directly in point.

198 Moreover, during the intervening period between Carlton Barrett's death and the making of the current claim there was no administrator of his estate who could have been expected to join in any of the then pending actions. Any suggestion that the estate could have brought a claim is theoretical. In addition it seems to me that different considerations apply to a case in which the complaint is that someone ought to have been added as a *claimant* from those that apply where the complaint is that someone ought to have been added as a *defendant*. In the latter case the claimant has the choice whom to sue. A person's consent is not required in order to join him in proceedings as a defendant. But a person's consent is required before he can become a claimant. In my judgment in such circumstances it is too great a leap to proceed from the proposition that because the estate, in theory, *could* have brought a claim to the conclusion that it *should* have.

199 The upshot is that in my judgment Aston Barrett is precluded from bringing his personal claims; but not the claims on behalf of Carlton Barrett's estate. However, I have heard all the evidence that would have been relevant to Aston Barrett's personal claims, had I allowed him to proceed with them. The evidence overlaps with the evidence relevant to the claims of Carlton Barrett's estate to such an extent that I have found or will find, I think, all the necessary facts in case I am held to have been wrong on this question. I should add that there is little difference in the legal basis for the claims of Carlton Barrett's estate on the one hand, and Aston Barrett on the other; at least in so far as concerns events that took place before Carlton Barrett's death. My findings of fact in relation to Carlton Barrett's estate can be applied to Aston Barrett as well, if I am wrong on the question of the scope of the 1994 settlement agreement and the question of abuse of process.

Estoppel acquiescence and laches

200 Ms Jones submits that even if Carlton Barrett had had a valid claim to benefit under the contracts or by way of unjust enrichment, that claim has been lost by estoppel, acquiescence or laches. Since the ingredients of all three principles

are much the same, and are very fact-sensitive, I think that I can deal with them together.

Estoppel

201 Estoppel and acquiescence are different facets of the same principle. Both sides were content to take the formulation from the well-known passage in the judgment of Oliver J. in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)* [1982] Q.B. 133 at 151–152 (recently approved by the Privy Council in *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17):

“the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* . . . principle — whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial — requires a much broader approach which is directed at ascertaining whether, in particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

202 Mr Bate submitted that the Barretts' ignorance of their rights should suffice to preclude any estoppel. In support of this submission he relied on *A & M Records Ltd v VCI* [1995] E.M.L.R. 25 at 36 where Sir Mervyn Davies said:

“However that may be, I am satisfied that Mr Ross was at all material times quite unaware of any activities of the plaintiffs being activities of a kind that he as owner of the copyright in the sound recordings could object to. It did not occur to Mr Ross that he had any right to copyright until it was explained to him about September 1994 that he might be the copyright owner. That being so I do not see how any estoppel can be raised against him or in turn against VCI. I do not see that Mr Ross acted unconscionably in failing to assert a right of which he was unaware.”

203 Although Sir Mervyn had cited from *Taylor Fashions*, he treated the claimant's ignorance of his rights as an absolute bar to the raising of an estoppel. The claimant's ignorance of his right is undoubtedly an important factor in considering whether, in all the circumstances of the case, it would be unconscionable for him to assert that right. In some cases it may be determinative. But I respectfully disagree with the proposition that a claimant's ignorance of his right means that an estoppel can *never* run against him.

Laches

204 The doctrine of laches is the equitable counterpart to estoppel and acquiescence. Its essence was summarised by Lord Selbourne L.C. in *Lindsay Petroleum v Hurd* [1873] 5 A.C. 221 at 239:

“Now the doctrine of laches in Courts of Equity is not arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might be fairly regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapses of time and delay are most material.”

205 One of the circumstances relevant to a consideration whether it would be reasonable to require a party to rebut a claim that had not previously been asserted is whether evidence by which he might have rebutted the claim has been lost or destroyed: *Bourne v Swan & Edgar Ltd* [1903] 1 Ch. 211 at 219. Mr Bate submitted that any reliance on lack of evidence caused by the passage of time proceeds on a false basis because it assumes that the Court has already decided that the Barretts do have contractual rights. I do not agree. Where the doctrine of laches applies as a result of the loss or destruction of evidence, the court declines to investigate the question whether there are any rights to enforce. It is not, in my judgment, a question of deciding entitlements on the basis of partial evidence and then speculating whether there might have been other evidence leading to the opposite conclusion. To use the words of Lord Selbourne, what the court declines to do is to permit a claimant to *assert* a remedy.

Application

206 In short, Ms Jones submits that since 1974, the Barretts have not been treated as parties to recording contracts by any party. They have never claimed to be contracting parties. Royalties payable under the contracts have at all times been paid to Bob Marley and to Media Aides (during Bob Marley’s life) and to their successors in title thereafter. The Barretts never protested against this during Bob Marley’s life. Neither did they do so after his death. In the years before Carlton Barrett’s death he never approached either Island Records or the estate to claim that he was a party to record contracts and entitled to payment under them. Indeed the pleading filed shortly after his death, but which must have been prepared on his instructions, refers to Bob Marley as having been the contracting party. At no time since Bob Marley’s death has either Aston Barrett or anyone on behalf of Carlton Barrett’s estate claimed that the Barretts were contracting parties, until the Aston Barrett did so in 2001. In the intervening period:

- (i) Bob Marley and Don Taylor, whose evidence would be crucial, have died;
- (ii) Documents have been lost and destroyed;
- (iii) The recollections of witnesses have faded beyond recall;
- (iv) Third parties, namely some of Bob Marley’s children and Island Logic Ltd, and then 56 Hope Road, have purchased from the Estate the rights to receive the royalties from Island Ltd and Island Inc under the recording agreements for full value and without any knowledge of any claim that

the Barretts were contracting parties who were contractually entitled to those royalties or any part of them. They did know that there was a claim to share in those royalties as partners (which was put forward on Carlton's behalf as well as Aston's behalf), and they had an opportunity to explore those claims before they bought the royalty streams; but they had no opportunity to investigate the claim now made because it had never been put forward;

- (v) No claim to copyright was advanced on behalf of either of the Barrett brothers;
- (vi) Island Ltd and Island Inc have paid the full amount of the royalties to those whom it has always believed to be contractually entitled to them.

207

Mr Bate countered Ms Jones' submissions by relying on a number of points. First, he said that until Bob Marley's death, the Barrett brothers thought that they were parties to the 1974 recording agreement; and that they were paid royalties by Island. I have rejected the second of these factual allegations. The true position was that the Barrett brothers, like the other members of the band, were content with whatever Bob Marley paid them; and all payments were made by or at the direction of Bob Marley. I deal with the first part of this allegation later; but as will be seen, I reject that too. Secondly, Mr Bate said that the settlement agreement expressly contemplated the possibility of a claim by Carlton Barrett's estate, with the result that Island cannot be said to have relied on any expectation that there would be no such claim. Thirdly, Mr Bate points to the very indemnities on which the Marley defendants rely as a reason for enforcing the settlement agreement as themselves demonstrating the parties' awareness that claims would or might be made. Fourthly, Mr Bate points to the evidence that Aston Barrett (and by inference Carlton Barrett) were unaware of potential rights to copyright until the early 2000s. However, in my judgment Mr Aston Barrett was aware, by 1985, of the existence of royalties, and at about that time (or shortly afterwards) in receipt of ASCAP payments. I do not consider that he knew as little about the possibility of a claim to copyright as his evidence suggested. I am not in a position to make any finding about Carlton Barrett's knowledge. Fifthly, Mr Bate relies on the allegation that promises of future royalties were made to Aston Barrett at the time of negotiating the settlement agreement; but I have also rejected that factual allegation.

208

During Bob Marley's lifetime, the Barrett brothers were paid by or at the direction of Bob Marley. They did not look to Island to pay them. After Bob Marley's death, they looked to the estate to pay them, rather than Island. Payments were made to them out of the estate, which they accepted. No claim for repayment of those monies is being made by the estate. Aston Barrett entered into the settlement agreement under which he was allowed to retain those payments and under which he also received a lump sum. The object of the settlement agreement was plainly to draw a line under Aston Barrett's claims arising out of his work with Bob Marley. Aston was publicly credited with co-authorship of some of the disputed songs, and was paid the writer's share of ASCAP royalties. He was advised by apparently competent lawyers both in Jamaica and in the USA. In my judg-

ment the defendants were entitled to assume that either in the Jamaican proceedings or the 1989 New York action Aston Barrett would advance whatever claims he had to advance.

209 The position as regards the estate of Carlton Barrett is different. Ms Jones did not, I think, rely on anything that happened after Carlton Barrett's death. Yet it was only after his death that the main dealings took place on the assumption that the Wailers' claims had been resolved. Even then the settlement agreement contemplated that claims by his estate might be made. I do not consider that the estate of Carlton Barrett is barred by estoppel, acquiescence or laches from raising any claim to which Carlton Barrett was entitled.

210 I am conscious that this recitation follows closely my conclusion on the question of abuse of process. But that, I think, is because the question of abuse of process and that of estoppel or acquiescence both require a broad merits based judgment. It is not surprising that the value judgment will be the same in both cases.

The contract claims

The pleaded case

211 Not counting the claims advanced in earlier proceedings, the contract claim is now in its sixth incarnation. The primary claim is that the Barrett brothers were parties to all three recording agreements: that is the 1974 recording agreement, the 1975 recording agreement and the Media Aides agreement: Re-Re-Re-Amended Particulars of Claim para.10A. Paragraph 13 of the Re-Re-Re-Amended Particulars of Claim alleges that Bob Marley signed the 1974 recording contract "on behalf of himself [Aston Barrett] and Carlton Barrett". Paragraph 16A alleges that he signed the 1975 recording agreement "on behalf of himself [Aston Barrett] and Carlton Barrett alternatively on behalf of the Joint Venture". The "Joint Venture" is a reference to a series of partnerships or joint ventures consisting of all the Wailers from time to time: Re-Re-Re-Amended Particulars of Claim para.9. No specific plea to like effect is made in relation to the Media Aides agreement. The alternative claim is that the 1974 recording agreement was entered into as between Bob Marley and the Barrett brothers on the one hand and Island Records on the other; and that subsequent agreements were entered into by Bob Marley and Media Aides as agents for the Joint Venture: Re-Re-Re-Amended Particulars of Claim para.10B.

Was Carlton Barrett party to the 1974 recording agreement?

212 It is clear that extrinsic evidence is admissible to establish who are the parties to a contract. In *Homburg Houtimport BV v Agrosin Ltd (The Starsin)* [2003] UKHL 12 [2004] 1 A.C. 715 at 794 Lord Millett said:

"The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract. Like the nature and amount of the consideration and the intention to create legal relations it is a question of fact

and may be established by evidence. Such evidence is admissible even where the contract is in writing, at least so long as it does not contradict its express terms, and possibly even where it does.”

213 Likewise, extrinsic evidence is admissible to prove that a person entered into a contract as agent for another: *Chitty on Contracts* (29th edn) para.12–114.

What Mr Barrett said

214 A theme that recurred through Mr Barrett’s evidence was that Bob did the business while he did the music. Since Mr Barrett can barely read and write this was not surprising. The impression I got was that Carlton Barrett was in the same position. As Mr Barrett said:

“He [Bob Marley] depend on me for the music and my brother and I depend on him on the business side.”

215 After Bob Marley’s death, it was Junior Marvin who did the business. Mr Barrett said that after Peter Tosh and Bunny Wailer left the band, Bob Marley was concerned for the future. Mr Barrett suggested that Bob Marley, Carly and he should form a new band, saying “This is the power of the trinity”. Their first move was to create a demo studio at Island House where they could record songs, which would avoid the need to hire expensive studios. Bob Marley told him that, having spoken to Chris Blackwell, the name of the new band would be “Bob Marley and the Wailers”. The Barrett brothers were happy with that. Mr Barrett said that it was agreed that they would split the money that they earned equally (one third each); that Bob would look after the business side and that Aston would look after the music. According to Mr Barrett Bob Marley said that he would negotiate a new deal with Island Records with all their three names on it. Together with Bob Marley and others (including Lee Jaffe) Mr Barrett went to Mr Tisdale’s offices in Los Angeles. He saw Mr Tisdale but did not talk to him about business matters. Mr Tisdale and Bob Marley (accompanied by Lee Jaffe) talked in a private office; and Mr Barrett sat in reception. Some time later, Mr Barrett said that they needed a lawyer; and Bob Marley said that he would arrange one. He recognised the signature on the letter of authority as his; but did not recall signing it. He did not recognise the manuscript in which the date had been added. According to Mr Barrett, during the second half of 1974 Bob Marley phoned him in Jamaica. He told Mr Barrett that Chris Blackwell had produced a contract that he was unhappy with; and that he had refused to sign it unless the Barrett brothers’ names appeared on the contract. He told Mr Barrett that a new contract had now been produced which did have all three names and that he was going to sign for all three of them. Mr Barrett told him to go ahead. Within a day or two Bob Marley rang back and said that he had signed. Later, three copies of the contract arrived by post at Island House: one copy for each of them. Bob Marley opened the envelope and gave each of them a contract, saying “Here is your contract” or words to that effect. He did not ask either of the Barrett brothers to sign the contract; and they did not.

Island Records' version

216 Mr Blackwell gave two reasons why the contract was made with Bob Marley alone. The first reason was that after Peter Tosh and Bunny Wailer left the band, his attention was focused on Bob Marley. He was the one who gave press interviews; and it was he who was popular with the public. Peter Tosh was erratic, and Bunny Wailer did not want to go on tour. Since the band was not getting exposure on the radio, touring was the best way to generate publicity and increase record sales. In Mr Blackwell's view the best thing was to persuade Bob Marley to go on tour "and spread the music". Although he might initially have been interested in signing the Barrett brothers, the emergence of Bob Marley as a solo artist changed that. The second reason he gave in his oral evidence (which was not mentioned in his witness statement) was the arrival of Don Taylor as Bob Marley's manager. He placed this in 1974, although he thought that Don Taylor might not have become Bob Marley's manager "officially" that early. He associated Mr Taylor's more official role with the dismissal of Mr Tisdale (which happened in June 1975). Don Taylor, he said, was not interested in anyone other than Bob Marley himself. Thus, even by the time that the draft agreement was sent out by Mr Levison at the end of August 1974, Mr Blackwell did not intend the Barrett brothers to be parties to the contract. Mr Blackwell said in his oral evidence that Mr Levison had drafted the agreement wrongly, and that he should not have included the Barretts as parties to it.

217 As I have said, Mr Levison had no recollection of having met Mr Tisdale, although he accepted that they must have done. But he did recall having had meetings or discussions with Mr Taylor. He thought Mr Taylor was behind Mr Tisdale's difficulty over his fees. Based on his reading of his manuscript notes, Mr Levison surmised in his witness statement, from other indications in the note, that Island was interested in taking up an option to secure the Barrett brothers. However, in cross-examination he accepted that during the drafting process and for some time afterwards it was Island Records' intention to have the Barretts as parties to the contract.

218 Mr Tisdale recalled his first meeting with Bob Marley in the following terms:

"When I first met Bob, besides Aston Barrett, he was with a fellow named Allan Cole who was, I guess, one of Bob's best friends. He was also with a fellow named Lee Jaffe. Both seemed to be very close to Bob. When we had our initial client conference, Bob insisted that Allan Cole and Lee Jaffe sit in on the meeting. Aston Barrett, as I recall, elected not to sit in on the meeting and sat in my reception room."

219 Mr Barrett agreed that Bob Marley was accompanied by Lee Jaffe and Allan Cole; and also agreed that he sat outside in the reception area while Mr Tisdale was consulted. The evidence that both Mr Tisdale and Mr Barrett gave about Lee Jaffe was given before it was known that he would be called as a witness.

220 Mr Tisdale also recalled negotiating the agreement. He spent three weeks in London for that purpose. He says that the only person he represented, and from whom he took instructions, was Bob Marley. He had no recollection of

the document signed by Mr Barrett authorising him to represent Mr Barrett, which had been sent to him, very recently, by Mr Barrett's US lawyer. As he said in evidence, he had no specific recollection of the details of the negotiation, some 32 years later. However, having been taken through the contemporaneous documents in the course of his cross-examination, he agreed that they suggested that it was the expectation of both sides that the Barretts would sign the agreement.

221 Both Mr Levison and Mr Tisdale were plainly honest witnesses. They made it clear where they were giving evidence of actual recollection and where they were doing no more than reconstructing from the documents, or agreeing to apparently plausible inferences that might be drawn from them. Where they were able to give evidence of direct recollection, I accept their evidence.

222 There is no evidence that Mr Tisdale was authorised to represent Carlton Barrett. The high point of Aston Barrett's case is the undated authorisation signed by him and Bob Marley. But that was not signed by Carlton; and it was not suggested that Aston Barrett was authorised to sign on his brother's behalf. Mr Barrett said in evidence that it was he who suggested to Bob Marley that they needed a lawyer. Mr Bate submitted that the suggestion must have been made *before* the visit to Mr Tisdale in Los Angeles. In the light of Mr Barrett's repeated insistence that he left the business to Bob and just got on with the music, I find that an implausible suggestion. If it was Aston Barrett's suggestion before the visit to get a lawyer, it is very surprising that (as both Mr Barrett and Mr Tisdale agreed) he sat outside Mr Tisdale's office in the reception area while Bob Marley and Mr Tisdale discussed business. Moreover, in his witness statement Mr Barrett said that he made this suggestion *after* the visit to Mr Tisdale's offices in Los Angeles. But Mr Barrett would already have known that Mr Tisdale was a lawyer acting for Bob Marley; so if the suggestion was made then, it appears to have been redundant. Mr Tisdale denies having represented the Barrett brothers. This was one of the few things about the negotiating process that he could remember. As I have said, he had no recollection of the document signed by Mr Barrett authorising him to represent Mr Barrett, which had been sent to him, very recently, by Mr Barrett's US lawyer. He remembered having had meetings with Bob Marley while he was in London and that although Mr Barrett could have stayed while the meetings took place, he chose not to. It is true that some of his letters refer to "clients" in the plural. On the other hand, his conduct in chasing for a fully executed copy of the 1974 agreement without, it seems, making any effort of his own to arrange signature by the Barretts suggests that they were not his clients. So does Mr Levison's letter of March 27, 1975, which refers to Mr Tisdale as "Bob's attorney" and deals only with Bob Marley's authority to make payments. In his own witness statement Mr Barrett, dealing with his visit to Mr Tisdale's offices, described him as "the lawyer Bob was using". I accept Mr Tisdale's evidence on this point. I do not, however, consider that my conclusion that Mr Tisdale was acting only for Bob Marley necessarily means that Bob Marley was to be the sole contracting party on the Wailers' side. But it is another instance where I have been unable to accept Mr Barrett's evidence.

223 The letter containing the 1974 recording agreement and the side letters that accompanied it are addressed to the Barrett brothers as well as to Bob Marley. The natural inference to draw from that is that it was at least the initial intention that the Barrett brothers should be parties to the agreement, in the same way that Peter Tosh and Bunny Wailer were parties to the 1972 agreement. This inference is significantly reinforced by Mr Tisdale's suggested amendments to the draft; especially that which referred to one of the "Artist" making a solo album. That amendment is, to my mind, only consistent with an appreciation that the "Artist" was to comprise more than one person. The correspondence that immediately followed the signing of the 1974 agreement by Bob Marley alone bears that out. It was Island Records' expectation, and I think Mr Tisdale's, that the Barrett brothers would sign the agreement; and at least at first Island Records did not accept that the agreement was in force because of the lack of signature by the Barrett brothers. I would infer from this that Island Records did not intend to be contractually bound until all relevant parties had signed the agreement, in the same way that Peter Tosh and Bunny Wailer had signed the 1972 agreement. It follows that I do not accept the reconstructed thought processes of Mr Blackwell or Mr Levison explained in their witness statements that the reason why the Barretts were mentioned in the documentation was that Island Records were simply interested in securing an option over the Barretts' services. Indeed Mr Levison, on being shown the documents in the course of his cross-examination accepted that it was a fair inference that it was Island Records' initial intention to contract with the Barrett brothers; and I do not think that Mr Blackwell was as firm in his oral evidence as his witness statement suggested. Nor do I accept that Island on the one hand and Bob Marley on the other had had a change of intention before Mr Levison's letter of March 27, 1975. The change of intention (if there was one) happened later.

224 There are, as it seems to me, three possible inferences that could be drawn from the contemporaneous correspondence:

- (i) Island Records agreed to treat the 1974 agreement as if it had been signed by the Barrett brothers;
- (ii) The 1974 agreement was allowed to take effect as an agreement by Bob Marley alone; or
- (iii) The 1974 agreement never came into force.

225 Mr Bate submitted that there had been, in effect, performance of the obligations under the 1974 agreement well before February 27, 1975. He relied, in particular, on the following all of which he said had legal consequences under the agreement:

- (i) The Barretts and Bob Marley (with other musicians) recorded Natty Dread at Harry Jay's studios (Standard Condition 3);
- (ii) The master of Natty Dread was delivered and accepted, so triggering the obligation to pay the advance (cl.4(i)(a) and 8);
- (iii) Deductions were made for recording and other costs incurred before the advance was paid (Standard Condition 9, cl.4 (iii));

- (iv) Island came under an obligation to release the album within three months of acceptance (cl.7(a)); and released it;
- (v) The right granted in the side letter with respect to the approval of the album sleeve had either been exercised or time for such exercise had passed on release;
- (vi) On release, Island assumed an obligation to use its reasonable endeavours to promote the sale of Natty Dread (Standard Condition 6)

226 These matters are, I agree, of significance in deciding whether or not there was a contract. However, they are only of limited significance in deciding whether Island made a contract *with the Barretts*. The only thing that the Barretts themselves did was to record the tracks for Natty Dread. Had they and Bob Marley alone done so, that might have been of significance. But as Mr Bate acknowledges, other musicians (with whom it is not suggested that Island contracted) also participated in that. Moreover the recording of “Natty Dread” began even before Bob Marley signed the 1974 agreement, which considerably blunts the force of that point. The masters were also delivered before that time. In addition, some of the acts relied on were not carried out exactly in the terms of the contract alleged. For example, the right to deduct advances for studio recording other than at Island’s studios was only recoupable from the second part of the advance, payable on completion of the tour. In fact the deduction was made from the first advance. The advance itself was paid to Bob Marley alone. There is no evidence that the Barretts (as opposed to Bob Marley) approved the album sleeve. I do not regard the matters on which Mr Bate relied as being of great weight.

227 The most compelling evidence in favour of the first of the three possible inferences is the agreement that Island made with Sire Records Ltd, which clearly assumed that the Barrett brothers were exclusively contracted to Island Records. On the eventual album, the Barrett brothers were described as appearing courtesy of Island Records. However, the impact of that evidence is to some extent reduced by Mr Taylor’s letter, written only three weeks later, refuting Island’s ability to control the Barrett brothers’ activities in recording on other labels. Indeed Mr Levison’s letter of December 17, 1975, to which Mr Taylor replied, itself assumed that there was a separate agreement between Bob Marley and the Barrett brothers and itself assumed that Island had no control over the Barrett brothers’ recording activities. Mr Taylor’s letter was put to Mr Barrett in cross examination, in the following passage:

“Q. Can I read you the letter because what happens is Don Taylor says: ‘I would like to make you aware of the fact that Bob Marley’s agreement with Carlton and Aston has nothing to do with his agreement with Island Records. In fact, Carlton and Aston are free to work with anyone Bob chooses without causing termination of Bob’s financial agreement with Island Records.’

A. As I told you, Bob took care of the business, I take care of the music, and there wasn’t a problem, my Lord.”

228 This does not appear to me to have been a denial of the accuracy of what
Mr Taylor said.

229 Notwithstanding the Sire Records agreement, the second of these possibilities
is, in my judgment, the more probable. I say this for a number of reasons. First,
Mr Barrett's evidence was that both he and his brother left the business side of
things to Bob Marley. Secondly, if Mr Barrett were correct in saying that Bob
Marley gave him a copy of the contract, it is extremely surprising that he did
not ask him to sign it. Mr Barrett did not suggest that he had. But if (as I find)
Mr Barrett's recollection is wrong about that, and he was not given his own
copy of the contract at the time, that is another pointer to the conclusion that
the contract took effect as one between Island Records and Bob Marley alone.
Thirdly, Mr Taylor came onto the scene before the contract was made. He was
primarily interested in Bob Marley, and did not want others on the contract.
Fourthly, it is not suggested that the Barrett brothers received advances in accord-
ance with the timetable for advances set out in the 1974 agreement. On the
contrary Mr Tisdale's letter of February 26, 1975 records that the advance was
paid to Bob Marley. It is fair to say that this letter was followed by
Mr Levison's letter of March 27 in which he denied that there was any contract
in being at all. But the fact remains that, so far as the evidence goes, Bob Marley
retained the advance, and no further advance was made to the Barrett brothers.
Fifthly, the 1974 agreement was terminated by Bob Marley and Island Records
without reference to the Barretts, who were unaware that it was happening. If
Island Records had thought that they were contractually bound to the Barretts
by the 1974 agreement, they would surely have obtained the Barretts' consent
to that termination. Sixthly, as early as November 1975 Don Taylor was asserting
to Island Records that the arrangements between Bob Marley and the Barretts had
nothing to do with Island. It is true that by then the 1975 agreement had been
made with Bob Marley alone, but the letter is much closer in time to the signifi-
cant events than Mr Barrett's recollection in 2006. Seventhly, the payment to the
Barretts of a quarterly retainer is neither consistent with Island's contractual obli-
gation to account at six-monthly intervals, nor with the payment of a potentially
fluctuating royalty. Although this is conduct subsequent to the making of the con-
tract, it is not used in aid of interpretation but in order to determine whether the
alleged contract was made at all. Eighthly, there is no evidence that Island were
told of the alleged change in the arrangements made between Bob Marley and the
Barretts (from an equal split to the 50-50 arrangement), which they surely would
have been if it had been intended that this would affect Island's contractual obli-
gations. Ninthly, in the 30 years that elapsed after the 1974 recording agreement
was made the Barretts did not assert that they were parties to the contract itself,
even in the course of hostile litigation in New York and Jamaica, in which the
Wailers were advised by competent lawyers in both jurisdictions. None of
these reasons, individually, is of course conclusive. But taken together, they
lead me to the conclusion that the second of the two inferences is the correct
one to draw. The Sire Records agreement was, in my judgment, the product of
muddle; and was itself inconsistent with the letters of December 17 and February
26 which preceded and followed it respectively. Since all that Island wanted was

a credit, and did not ask for any money, it is quite likely that Sire Records simply agreed to the request without any investigation. In my judgment the Barretts were not party to the 1974 agreement.

Was Bob Marley an agent for the Barrett brothers?

230

There are two pieces of evidence that point towards the conclusion that Bob Marley entered into the 1974 agreement as agent for the Barrett brothers. The first is the fact that they are named as parties to the agreement. But the expectation at the date of the agreement was that the Barrett brothers would themselves sign the agreement at a time when Bob Marley had already signed it. The expectation was shared both by Island and by Mr Tisdale, who was acting for Bob Marley. That, in my judgment, is inconsistent with the notion that Bob Marley was already acting as their agent at the moment when he signed it. The second piece of evidence is Aston Barrett's evidence that he expressly authorised Bob Marley to sign the agreement not only on his own behalf, but on behalf of the Barrett brothers themselves. That evidence is, in my judgment, also inconsistent with what actually happened. If Bob Marley had been expressly authorised to sign on behalf of the Barrett brothers, it would surely have been mentioned to Island Records; and the hiccup over payment of Mr Tisdale's fees would not have happened. I do not accept Mr Barrett's evidence on this point. Mr Barrett also said that Bob Marley had told him that he (Bob Marley) was unhappy with a contract that mentioned only his name, and insisted that a contract be prepared in all three names. However, despite the disclosure of Harbottle & Lewis' file, there is no trace of a draft agreement in Bob Marley's name alone. There is no trace of any request by Mr Tisdale that an amendment be made to include the Barrett brothers, not least because the first draft that was sent to him already contained their names. Once again I reject Mr Barrett's evidence. And Bob Marley's action in entering into the 1975 agreement in his sole name is not, in my judgment, consistent with Mr Barrett's account of his solicitude for the Barrett brothers as parties to the contract. I do not accept Mr Barrett's evidence on this point either. In my judgment the truth is, as Mr Barrett so often stated, that Bob Marley got on with the business side of things, and the rest of the band simply made the music. Moreover, there is no doubt that Bob Marley was a generous man, and that the Wailers were well remunerated for what they did. As many of the band members said in evidence, they were happy with whatever arrangements Bob Marley chose to make.

231

I conclude that Bob Marley did not execute the 1974 agreement as agent for the Barrett brothers.

The 1975 agreement

232

The Barretts' case is weaker so far as the 1975 agreement is concerned. The letter recording the agreement is addressed to and signed by Bob Marley alone. The agreement was made without reference to and without the knowledge of the Barretts. In my judgment the highest that the case can be put is that Bob Marley was an agent acting for an undisclosed principal. This analysis has

some support from one interpretation of Aston Barrett's evidence that he and his brother let Bob Marley get on with the business side of things. But the overall context of that evidence was that Bob Marley was left to get on with the business side of things not merely by signing contracts, but also by allocating receipts from all the band's activities amongst the members of the band. By this time the 50-50 split of touring income had happened. Mr Bate submitted that the 50-50 split (which on his case was not restricted to touring income) was a private matter as between Bob Marley and the Wailers themselves; and did not affect the relationship between Island on the one hand and Bob Marley and the Barrett brothers on the other. But that does not respect Mr Barrett's own evidence. When asked about the 50-50 split he said:

“As I told you, I don't do the business part of the deal. Bob did all of that with Don Taylor *and Island*.” (Emphasis added)

233 This, in my judgment, is not consistent with Bob Marley having entered into contractual commitments binding on the Barrett brothers. Moreover, the contracts in question were for the unique services of a musician, which would not have been capable of being performed vicariously by an undisclosed principal. In addition, very shortly after the 1975 agreement was made, the Barrett brothers were paid a regular retainer, and the amount of the retainer was deducted from royalties payable to Bob Marley under the terms of the 1975 agreement.

234 In my judgment Carlton Barrett was not a party to the 1975 agreement; and Bob Marley did not enter into it as his agent.

The Media Aides agreement

235 The Barretts' case on the Media Aides agreement is weaker still. This contract was not even signed by Bob Marley personally but by Media Aides. Mr Barrett was unclear whether he knew that Bob Marley, on the advice of Don Taylor and Mr Steinberg, was forming offshore companies. But that very uncertainty makes it unlikely that Media Aides could be regarded, in any real sense, as agent for the Barrett brothers. In addition, if it had been the intention of Island Records that the Media Aides agreement should cover the services of the Barrett brothers, they would surely have insisted on the brothers signing inducement letters in the way that Bob Marley did.

236 There is another fundamental flaw in the way that the case is advanced in relation to the Media Aides agreement. If Bob Marley was not acting as the Barrett's agent in entering into the Media Aides agreement, then they cannot be undisclosed principals. On that basis they can have no rights under the Media Aides agreement. If, however, Bob Marley was their agent in entering into the Media Aides agreement, then Mr Bate submitted that the agreement was what he called a “self-dealing” agreement. Mr Bate submitted that it is settled law that the acts of an agent vis à vis a third party will not bind a principal if the transaction is obviously self-dealing or if the third party is put on inquiry; and that those criteria are satisfied in the present case. Assuming that that submission is

well-founded, it would also lead to the conclusion that the Barretts have no interest under the Media Aides agreement.

237 Mr Bate also submitted that if (as he said) the Barrett brothers were not bound by (and had no interest in) the Media Aides agreement, then the 1974 agreement must have continued in force so far as they were concerned. Since I have held that they were not party to the 1974 agreement, I can deal with this shortly. The 1974 agreement would have come to an end on the recording or release of the second album, unless Island chose to exercise an option to extend it. Island plainly did not exercise any option to extend; and I regard as fanciful any argument that Island should be deemed to have done so.

Trust of a promise?

238 The Media Aides agreement contained a clause (cl.2(b)(xi)) by which Media Aides promised Island to pay out of monies received by it under the agreement any royalties due to any third party. Mr Bate says that this clause amounted to a trust of a promise with the result that Media Aides was obliged to pay the Barretts one third each of the royalties payable to Bob Marley; and that Media Aides' obligation can be enforced against Island.

239 The principle of law on which Mr Bate relies is that:

“[W]here A makes a promise to B for the benefit of C, C can enforce the promise where B has constituted himself a trustee of the promise.”

240 In *Taube v FX Music Ltd* [1999] E.M.L.R.826 FX entered into an agreement with Warner under which Warner was licensed to release a song in return for the payment of a royalty. By a side letter from FX to Warner, FX authorised, requested and directed Warner to pay directly to the singer, producers, mixers and other third parties the royalties which FX was obliged to pay them in respect of the song and a second single. Warner agreed to this. Mr Nicholas Warren Q.C. held that the side letter created a trust of Warner's promise to pay royalty. The subject matter of the trust was Warner's contractual obligation to FX to make direct payment of specified sums to the third parties. Mr Warren described the legal consequences of this as follows:

“Accordingly, in my view FX is trustee of Warner's promise to account directly to Third Parties and those Third Parties would be entitled to enforce that promise (joining FX or a successor trustee if necessary) if Warner defaulted in its obligations (which there is no suggestion it will do). This applies both to the monies currently retained by Warner and to any future income flow.”

241 The promise to pay direct was a promise made by Warner. The promise was made to FX. FX held the promise on trust for the third parties. The third parties were entitled to enforce the promise against Warner, joining FX as trustee if necessary. Now transpose this into the current case. Media Aides promised Island to pay third parties. Island held that promise as trustee for the third parties. The

third parties are entitled to enforce that promise against Media Aides, joining Island as trustee if necessary.

242 The first question is whether the promise by Media Aides turned Island Records into a trustee of that promise. Looked at broadly (and from one angle) the promise was made by Media Aides for the benefit of third parties. But that is not enough. It must be established that Island Records intended to hold the promise as trustee. Mr Bate submitted, correctly in my judgment, that by the time of the Media Aides agreement Island was proceeding on the basis that the 1975 agreement (which the Media Aides agreement was to replace) was an agreement with Bob Marley alone. I think that one can go further and say that, in the light of Mr Taylor's letter of February 26, 1975, it is probable that Island Records thought that whatever arrangements there were between Bob Marley and the Barretts were not their concern. Why, then, should I infer that Island intended to constitute itself a trustee of the promise? If Island did have an intention to hold the promise as trustee, it would have been trustee not only for the Barrett brothers but also for any other third party, including producers, engineers and trade unions. I find that a very improbable intention to impute to Island; and I decline to do it.

243 The next question is: what is the obligation held on trust? By the time of the Media Aides agreement it was Aston Barrett's evidence that the one third split had been replaced by an arrangement with Bob Marley under which there was to be a 50-50 split: Bob Marley retaining one half of the income and the remaining half being shared by the other members of the Wailers. Mr Barrett did not suggest that there were any fixed proportions in which that 50 per cent was to be shared between the members of the band. It was left to Bob Marley to decide. Even on Mr Barrett's own evidence this is an unpromising beginning for the trust argument, unless the trust alleged is a discretionary trust. Mr Bate does not suggest that the trust encompasses anything other than what is contained in the contractual obligation itself. That required Media Aides to pay *royalties* due to third parties out of the money that it received from Island Records. Thus in order for Carlton Barrett to be entitled to anything under the trust alleged, he must show that, independently of the Media Aides agreement, he had an entitlement to be paid royalties. I have rejected the claim that the Barrett brothers were parties to any of the agreements with Island. I have also rejected the claim that the Barretts and Bob Marley agreed a 50-50 split of income from all sources. The 50-50 split was limited to touring income which was neither covered by the Media Aides agreement nor royalties. It cannot, in my judgment be seriously maintained that there was an agreement between Media Aides and the Barrett brothers that Media Aides would pay royalties to them. In addition, as I have said, the clause is so widely framed that it would include anyone (for example the other Wailers, record producers and others) to whom Media Aides might have promised to pay royalties. It is improbable, in my judgment, that Island would have agreed to make itself trustee for an unknown number of potential beneficiaries; whose entitlement to the monies it would have no means of knowing.

244 Finally, the trust analysis would, if a good one, lead to a claim against Media Aides; not against Island. But no claim is brought against Media Aides. So the claim fails on that ground too.

245 In my judgment the argument based on the allegation that Island Records was a trustee for the Barrett brothers of Media Aides' promise must be rejected.

What is the breach of contract alleged?

246 As I see it, it cannot be argued that Carlton Barrett was the sole party to any of the recording contracts; or, for that matter, that both the Barrett brothers were the only parties to the contract. Even if he was a party to any of the recording contracts, he could at best have been a joint party with Bob Marley or Media Aides. It is not disputed that Island Records have in fact paid all the royalties due under each contract. Nor is it disputed that 56 Hope Road Ltd is the assignee of whatever rights Bob Marley himself had in the benefits of the contracts. In essence, therefore, the complaint is that Island Records have paid royalties to one only of the joint promisees. However, payment by a debtor to one of joint creditors is valid performance of the contract and discharges the debt. The law is stated in Chitty on Contracts (29th edn, para.21–049) as follows:

“The payment of a debt to one of a number of joint creditors discharges a debt owed to them jointly. Similarly, as partnership is founded on agency, payment to one of a number of partners to whom a debt is owed binds them all, even after a dissolution of the partnership: this position holds even where the debtor had notice before payment that the partners had appointed a third person to collect the debts due to the firm, unless there is something in the notice which expressly takes away the right of the one partner to receive the money. Payment of a debt to one of two trustees is a good discharge as to both.”

247 In my judgment this principle means that whether Carlton Barrett was or was not a party to any of the contracts, there is no subsisting breach of contract for which his estate is entitled to maintain a claim. In my judgment this is another answer to the claim to past royalties payable under the contracts.

Unjust enrichment

248 The next way in which the case is put is that there is a claim in unjust enrichment against Island. There is no dispute about the legal test. Three questions arise when considering a claim for unjust enrichment. (1) Has the defendant been enriched or benefited at the expense of the claimant? (2) Was the enrichment unjust? (3) Is there any defence available to the defendant, or any reason why the claimant should be denied a remedy? (*Banque Financière de la Cité v Paragon (Battersea) Ltd* [1999] 1 A.C. 221, at 227 *per* Lord Steyn and 234 *per* Lord Hoffman).

249 Mr Bate submits that the case falls within the principles identified in the following passage from Goff & Jones, *The Law of Restitution*, (6th edn, 2002), para.6–008:

“P rendered services to D under mistake, in circumstances in which D did not know of his mistake. D should be required to make restitution only if P can prove that D has been incontrovertibly benefited by the receipt of the services. D will be incontrovertibly benefited if P can show that he has gained a financial benefit, readily realisable without detriment to himself, or has been saved a necessary expense. In such circumstances the equities of the plaintiff’s restitutionary claim are normally more compelling than the defendant’s plea that he did not request or freely accept services which he is now in no position to return.”

250 In my judgment this claim falls at the first hurdle. The important point is that the claim is made against Island and not against Bob Marley’s estate. Island have paid everything that was due under the contracts. Assuming that the payments were made to the wrong person, how, even so, can it be said that Island have been enriched at all? In my judgment it cannot.

251 In addition, on the evidence of Mr Barrett himself, the band were content to leave financial dealings to Bob Marley; and were content with what he paid them. In those circumstances, I cannot see that the Barretts rendered services under any mistake.

Partnership issues

252 Ms Jones, while denying that there was any partnership between Bob Marley and the Wailers, said that it did not matter anyway. If there was a partnership, it was dissolved in 1981 when Bob Marley died. The assets of the supposed partnership, namely the right to receive artist royalties under the 1974 and Media Aides recording agreements, have been sold by the estate. The Wailers, including Aston Barrett, have made a claim for an account; and that claim has been settled by a settlement agreement. In the case of the estate of Carlton Barrett that claim would now be barred by limitation. The partners now have no right to bring an action on a contract entered into by one of the partners when the supposed partnership has been dissolved and its accounts dealt with; and the assets of the partnership sold to a third party who has received the amounts contractually due.

253 If the 1974 and Media Aides recording agreements had been partnership assets, then the legal effect would have been as follows:

- (i) Bob Marley and Media Aides were the contracting parties, and Island were entitled and obliged to pay the royalties due to them;
- (ii) There has never been a breach of any of the recording agreements. Island have paid the party they contracted with, and (since 1992) that party’s assignees. Island would have no defence if they stopped paying Bob Marley/Media Aides or now their assignees.
- (iii) The other partners’ remedy is against the estate of Bob Marley for an account and the other remedies which would follow on dissolution of the partnership.

254 Accordingly, any case founded on partnership does not give rise to any claim against Island.

- 255 If there was a partnership, I agree with Ms Jones that it would have dissolved on the death of Bob Marley in 1981: Partnership Act 1890 s.33 (1). The allegation made in the Jamaican action that Carlton Barrett left the partnership on his own death in 1987 is unsustainable. I agree also with her analysis of the legal results that would follow if the recording contracts were partnership assets. Any claim arising out of a partnership would be a claim against Bob Marley's estate: not against Island.
- 256 In fact Mr Bate did not pursue a claim based on partnership; and in my judgment he was right not to do so.

Music making: the general picture

- 257 One of Mr Barrett's grievances is that his musical contribution to the success of Bob Marley and the Wailers has been insufficiently recognised. In his perception the Marley estate was taking away his talent and integrity: his lifetime achievements. He plainly felt aggrieved that his role had been downgraded (as he saw it) to that of a sideman. A sideman, he explained, is a man who works on a truck loading bananas. His role was far more important than that.
- 258 Rita Marley (who as a member of the I Threes was one of Bob Marley's backing singers) said that the role of the Barrett brothers was nothing like that of Peter Tosh or Bunny Wailer. According to her Bob Marley wrote all the songs, with the others making contributions to them. She accepted that songs were developed in the studio and that there was no doubt that all the band members contributed. But she did not agree that songs were created in the music room at Hope Road. She said that: "Bob wrote his songs wherever he got the feeling or felt the vibration". She was also prepared to accept that Aston Barrett was the band leader, but only in the sense of being responsible for making sure that everyone turned up on time and that they knew what the set list was for a concert. She acknowledged, too, that Aston Barrett or one of the other band members might come up with an idea for a song from time to time; but she said that the Barrett brothers were not creative. In her witness statement she went as far as to say that the Barrett brothers "were incapable" of writing a song; but she fairly and readily withdrew that in cross-examination.
- 259 In his witness statement Mr Blackwell also described the Barrett brothers as "session musicians", although he acknowledged that Aston Barrett was an important member of the group and that Bob Marley trusted his ear. In cross-examination, however, he was prepared to accord him a greater role. He thought that it was possible that Aston Barrett was the musical arranger; and he said that when the tracks were mixed, Aston Barrett was the only musician who was constantly there.
- 260 Al Anderson joined the Wailers in late 1974. During 1975 he took part in the laying of the tracks for the album that became "Rastaman Vibration". His evidence on musical questions was not challenged. He said that his experience generally was that:

“[W]hen Bob Marley came into the studio to lay down his vocals, he had already created the lyrics and basic melody. He was never instrumental in producing, orchestrating or engineering the song in the studio which was delegated substantially to Aston. Bob had the poetry, Aston and Carly had the music which with Bob’s poetry and melodies created the Wailers’ sound.”

261 He repeated this in his oral evidence.

262 Judy Mowatt joined the I Threes in 1974. She recorded a number of backing tracks for Bob Marley and the Wailers. She said that Family Man was at every studio session that she attended. He composed most if not all the bass lines which he played. Her perception was that he was responsible for the technical side of the music. She did not deal with authorship of any of the disputed compositions themselves. She gave her evidence in writing under a Civil Evidence Act notice.

263 Junior Marvin joined the Wailers in 1977, on meeting Bob Marley in London at Chris Blackwell’s request, following Al Anderson’s temporary departure from the band. The other members of the Wailers were also in London, where they were recording tracks for the album that became “Exodus”. He said that Bob Marley was the lead vocal and also played acoustic guitar. Carly played drums and percussion. Family Man played bass guitar, piano, guitar and percussion. Junior Marvin played lead guitar. The I Threes were the backing singers. In addition there were various session musicians. During the recordings they laid down a number of tracks: so much so that they formed the basis of a second album: “Kaya”. As Junior Marvin put it in his witness statement:

“It was decided to do the two albums because Bob had written a large number of songs and we wanted to record as many as possible.”

264 Junior Marvin also described Aston Barrett’s role in the making of the tracks:

“It was obvious to me from the very first moment that we were in the studio recording Exodus that Aston was very much in charge of the music. He was the arranger and the musical director and he would play not only bass guitar, guitar, keyboard, additional keyboard, he would be in charge of the recording re-recording and the overdubbing . . . Bob would delegate the overall sound to Aston who was clearly in charge, giving orchestrated parts to individual musicians.”

265 What he found particularly striking was that Aston Barrett’s bass guitar would carry the melody. In oral evidence he said:

“He [Aston Barrett] was a more quiet musician than Bob Marley and he would help to teach Bob Marley how to play guitar and sometimes have control over the melody of songs by the chords that he would choose to play when they were trying to write a song together. I mean, he directed the melody by the chords that he played, and any musician would tell you that if a particular chord is played, you have to follow that chord with the melody. You cannot go anywhere else.”

- 266 Describing the process by which the songs were created Junior Marvin said:
- “I remember on some occasions, he [Bob Marley] would say at the end of recording a song, “That’s not the song that I wrote, but it sounds great”, meaning that it started off in one way and ended up maybe 10 or 20 times better than what he anticipated or expected because we helped to create, alongside with him, something far better than he imagined in the first place.”
- 267 Mr Ian Winter (“Natty Wailer”) paid a generous tribute to Bob Marley’s song writing ability. As he put it:
- “I would hum a little thing to him and give him a little pitch and he made a whole circle, you know. These people are really talented people.”
- 268 Mr Roger Steffens was the National Promotions Director of Island Records during the late 1970s. He first met Bob Marley in 1978. Since he left Island Records he has pursued a career as a journalist, TV and radio producer, and researcher into reggae music. He is, I believe, one of the leading experts on reggae music. He has interviewed Bob Marley and others of the Wailers many times. His evidence was unchallenged. Mr Steffens said that Aston Barrett was “undoubtedly the leader of the band”. It was he who ensured that all the instruments were properly mixed; and he who created the sound of the Wailers. He regarded the contribution of the Barrett brothers to reggae as ground-breaking. He explained:
- “The Barretts gave the Wailers a sound like no other band working in Jamaica at the time: a raw, haunting sound in which Aston’s bass served not just as a rhythmic marker but also carried the melody of the song, in the manner of a lead instrument. Carlton’s pioneering ‘one drop’ drumming, utilizing the roots sound of Rastafarian ritualistic drum patterns, the music’s ‘heartbeat’, gave the Wailers a unique edge over their contemporaries, and their styles were often imitated, but never truly duplicated.”
- 269 Mr Steffens said that Bob Marley’s manner of composing was to bring the rough idea of a song to the band members, playing it generally as an acoustic number, and then leaving the band, under Aston Barrett’s direction, to flesh out the song. Many takes were created, but Bob Marley would select which of them to release. The general observations were, however, directed to a different period and the songs to which they relate do not specifically include any of the disputed compositions. Despite his extensive researches into reggae music, Mr Steffens does not specifically endorse any of the Barrett brothers’ claims to authorship of the disputed compositions. Amongst the interviews that Mr Steffens conducted was a series of interviews with Lee Jaffe in 2002. The fruits of these interviews were published in a book called “One Life” in 2003. In the book Mr Jaffe gave an account of the writing of two songs: “Rebel Music (Three O’Clock Road Block)” and “So Jah Say”. I refer to these accounts later, when dealing with the specific compositions.

270 Professor Vivien Goldman worked for Island Records in the late 1970s when she first met Bob Marley and the Wailers, on the promotional tour for “Natty Dread”. She has since become a journalist and professor of reggae music. Her evidence was not challenged. Bob Marley told her that he relied on Aston Barrett’s judgment on the rhythm and the sound of the music. Aston was the musical director of the band. Aston’s role was making the music. As she put it: “The rhythm section of Aston and Carlton were the people who defined reggae as we know it today”. She said that Bob Marley’s song writing talent leaned towards melody, lyrics and chords; and that it was Aston and Carlton’s rhythmic skills that turned Bob Marley’s lyrical, melodic and harmonic ideas into cohesive songs. She concluded:

“To write a song Bob might pull together lines and ideas that had come weeks or months apart but he could rely on Aston and Carlton to come up with a rhythm track that pulled it all together and to flesh out the basic but fundamental song elements that Bob provided, of words melodies and harmonies and chord changes into what Bob felt his tunes could be.”

271 Her evidence does not, in my judgment, support the claim that Aston or Carlton Barrett wrote lyrics for the songs; nor even that they composed basic melodies. According to Professor Goldman what they contributed was the rhythm track. But that is not what they claim.

272 Mr Blackwell recognised the contribution of the Barrett brothers; but said that the band was “all about Bob Marley”. He agreed that:

“[T]here is no question . . . that Family Man and Carly were an incredible rhythm section and contributed a lot.”

273 He agreed, also, that the bass player is the most important element in reggae music. But he said that although the Barretts contributed a lot, they played because Bob Marley wanted them to play; and that no one knew what would have happened if other players had played in their stead.

274 As I have mentioned, Mr Steffens interviewed Mr Lee Jaffe in the course of the preparation of “One Life”. Mr Jaffe gave a witness statement during the course of the trial, after Mr Barrett had given his evidence. For reasons that I gave at the time, I allowed him to be called, in the face of Mr Bate’s objections. But that necessitated recalling Mr Barrett. When recalled, Mr Barrett gave the impression that Lee Jaffe was just a cameraman, part of the entourage of one of Bob Marley’s girlfriends; an indifferent musician; and a person who was not “one of us” and was thrown out of the music room by Bob Marley. This seemed to me to be a significant shift from his evidence first time round, when he accepted that Lee Jaffe accompanied Bob Marley to the initial meeting with Mr Tisdale; and also described Lee Jaffe as a friend of Bob Marley’s in connection with an early trip to the USA. Mr Barrett’s evidence when recalled was also at odds with Mr Tisdale’s evidence that Lee Jaffe seemed very close to Bob Marley at their initial meeting in the summer of 1974. In my judgment, having been confronted with Lee Jaffe’s witness statement, Mr Barrett trimmed his evidence about him.

275 Mr Barrett’s own evidence included the following:

“Q. Mr. Barrett, really in this action the only reason you have claimed that you wrote Rebel Music, and indeed the other songs that have been put forward as being written by yourself and Carlton, is because they are credited to you on these albums, is it not?”

A. Miss Jones, my Lord, I am the one who set up the music room, turned it from a music room to a demo studio. I am the musician, the technician, the producer, everything. I am there, I did it. I can recall some things but not everything exactly as it was done, but I am telling you as much as I can recall. It has been a long time.”

276 The impression that I have from the evidence about the general way in which songs came into existence is that Bob Marley himself composed the lyrics and the basic melody. This impression is confirmed by

- (i) Al Anderson (“[W]hen Bob Marley came into the studio to lay down his vocals, he had already created the lyrics and basic melody”);
- (ii) Mr Steffens (“Bob’s manner of composing was to bring the rough idea of a song to the band members, playing it generally as an acoustic number”);
- (iii) Professor Goldman (“Bob Marley’s song writing talent leaned towards melody lyrics and chords”).

277 In conjunction with this, my general impression is that, as Junior Marvin described him, Aston Barrett was “the arranger”. Significantly, to my mind, Junior Marvin’s evidence about Aston Barrett’s contribution was given in the context of his evidence that *Bob Marley* had written the songs. In addition, the band would flesh out Bob Marley’s melodies and do so collaboratively in jamming sessions.

A fraud on Danny Sims?

278 It will be recalled that in October 1973 Bob Marley had signed an agreement with Cayman Music Inc (controlled by Danny Sims) for a three-year term, assigning copyright in all his compositions to Cayman Music. The defendants say that the reason why the composition of some songs composed between 1973 and 1976 was attributed to persons other than Bob Marley was a desire on his part not to let copyright fall into the hands of Danny Sims and Cayman Music. No songs were attributed to the Barretts as writers or co-writers before the beginning of or after the end of Bob Marley’s contract with Cayman Music. Monies received as royalties for the songs, including ASCAP monies for performance rights, were paid into Tuff Gong’s bank account. It was not suggested that the defendants were disentitled from taking this point, despite the fact that it involved a potential fraud on the part of Bob Marley.

279 In 1984 Cayman Music brought proceedings in New York against Bob Marley’s estate in seeking to recover various songs, including those in dispute in this action, on the basis that they were written by Bob Marley. The essential allegation made in the complaint was that by not listing himself as author of songs that he in fact wrote, Bob Marley was able to convey publishing copyrights to

songs that he had written to his two publishing companies. The estate denied the allegations; and also raised defences of limitation and laches. In an affidavit Mr Sims said that although Bob Marley had been a prolific songwriter until October 1973, and had recorded virtually only songs that he himself had written or co-written, he claimed not to have written a single song between October 1973 and October 1976. That was the precise period covered by his agreement by Cayman Music and was, moreover, the very time when Bob Marley's career was blossoming; and in which he became an international star. After October 1976 Bob Marley reverted to his previous practice of only recording songs that he himself had written or co-written. Mr Sims drew the inference that Bob Marley had concealed the true authorship of the songs that he recorded between October 1973 and October 1976.

280 In an affidavit sworn in those proceedings Allan Cole said that Bob Marley had been advised in 1974 by Mr Steinberg (the lawyer introduced by Don Taylor) to put songs in the name of other people to evade the publishing agreement with Cayman Music. He said that Bob Marley followed that advice. Among the songs that he put into the names of others were: "Them Belly Full" and "Rebel Music". He also said that he (rather than Carlton Barrett) was the co-

281 Mr Reid Bingham investigated the claim for the estate. He had no recollection (some 20 years later) of the specifics of the songs involved; but he recalled the general position that the estate took which he described as follows:

"The position was that Bob Marley had written these songs and through either agreements with the nominated song writers or through course of conduct, or both, the naming of the other writers was a matter of convenience and that Bob Marley collected and kept during his lifetime the royalties that were owned by these songs as his own and that, as such, the Estate took the position that these were assets of the Estate and not the assets of the individuals."

282 At the end of November 1988 Legon Cogil wrote to Zolt & Loomis claiming to be the composer of "Them Belly Full" and "Talkin Blues". He complained that the estate had been collecting his ASCAP payments. Zolt & Loomis referred him to Mr Reid Bingham to whom he wrote in February 1989, repeating his claim. Mr Reid Bingham replied on April 12, 1989 refuting the claim; and saying that to the extent that any individual other than Bob Marley had any rights of authorship, they had been assigned to Bob Marley during his lifetime. Mr Cogil did not pursue his claim any further. Mr Reid Bingham was, however, prepared in his oral evidence to accept that the claim was an honest claim.

283 Some of Cayman Music's claims were dismissed by the judge summarily. A trial on the question of limitation took place before a jury. The judge directed the jury to assume that the alleged fraud had been committed; and required the jury to determine, on that assumption, whether Danny Sims had learned of it in or before 1980. The jury decided that Danny Sims had learned of the fraud in or before 1980, with the result that the claim was time-barred. The claim was therefore dismissed in January 1988. Danny Sims gave evidence both in pre-

trial depositions and at the trial itself. I have seen extracts from the transcript of his evidence. He said that Bob Marley had told him that he had credited others with having written songs that he himself had written. Mr Bingham summarised the jury's finding as one that Danny Sims had known what Bob Marley had done; and apparently condoned it. In the light of the judge's direction to the jury to assume the existence of the fraud, Mr Reid Bingham, in my judgment, read too much into the verdict.

284 Mr Blackwell said that his belief was that Bob Marley had written the disputed songs. He also understood at the time that Bob Marley had put these songs into other people's names because Danny Sims was not paying him royalties. Mr Blackwell went along with this because he thought that Danny Sims was in the wrong; and that if there was any risk that Mr Sims might sue Island Records, it was a small one.

285 In November 2005 Mr Steffens published a book called "Bob Marley and the Wailers: The Definitive Discography". He says in the book:

"At this point in Bob's career he began assigning composer credits on many of his best songs to friends in an attempt to avoid old contractual obligations which he felt robbed him of his proper royalties. All the songs done in this manner required royalties to be paid into an account in the Cayman Islands, which only Bob and manager Don Taylor had access to. 'Road Block' was credited to A. Barrett and H. Peart. 'Talkin Blues' was credited to Carlton Barrett and Cogil Legon . . ."

286 Mr Steffens said that his source for this information was Danny Sims. Other biographies of Bob Marley make the same assertion. Professor Goldman does not comment on it. Mr Steffens did not refer, in his first witness statement, to the book on which he collaborated with Mr Jaffe, which deals with the writing of "Road Block", and which contains the assertion of the misattribution of writing credits.

287 In her witness statement in this action Rita Marley says that there was an arrangement between the Barretts, Bob Marley and others to put songs in the names of the Barretts (among others) to enable Bob Marley to avoid his obligations to Cayman Music. However, Rita Marley was a defendant to the action brought by Cayman Music. In that action she denied that there had been a fraud on Cayman Music. In her oral evidence in this action she accepted that she did not know what arrangement Bob Marley may have made with others; and acknowledged that Mr Barrett might be right in denying the existence of any such arrangement. I do not consider that I can place weight on Mrs Marley's evidence on this topic.

288 In "One Life" Mr Jaffe is also quoted as having said that Bob Marley gave the writing credit to people who were not even there at the time; an assertion that he repeated in more general terms later in the book; and which he maintained in his oral evidence.

289 What can, I think, be said with confidence is that it is part of Bob Marley "lore" that writing credits on songs were given to people who played no real part in the actual composition. From what I have read and been told about Messrs

Steinberg and Zolt, I find it plausible that they advised Bob Marley to deceive Danny Sims in the manner alleged. Mr Reid Bingham came to the same conclusion when he investigated the allegation on the part of the estate. It is also, in my judgment, of significance that no songs were attributed to other writers after the end of Bob Marley's arrangements with Cayman Music; and that royalties were paid to and retained by Bob Marley or one of his companies without serious complaint by the supposed authors. Weighing all this evidence, I conclude that Bob Marley did deliberately give writing credits to people who had no part in the composition of songs with whose authorship they were credited. This conclusion necessarily influences my approach to the claims relating to the individual compositions. However, as Mr Bate points out, the fact that Bob Marley may have attributed some compositions which he in fact wrote (notably "No Woman No Cry") to others, does not mean that he necessarily attributed the compositions in dispute to others.

Music making: the documentary evidence

290 I have already mentioned the 1981 agreement in which Bob Marley Music BV warranted the correctness of the attribution of authorship of the disputed compositions. The attribution of authorship was that for which Mr Barrett contends. Naturally, Mr Bate relies on this as a powerful piece of evidence in Mr Barrett's favour. On the other hand, the agreement does not attribute ownership of copyright to the named authors.

291 Mr Bate also relied strongly on the credits as they appeared on the released albums. The original vinyl of "Natty Dread" stated that four of the disputed songs that appear on that album were "Copyright Control" (except "Revolution" which was stated to have been written by Bob Marley). However, Aston and Carlton Barrett were credited on the CD reissue of the album in the manner for which they contend. Carlton was also credited as co-writer of "Them Belly Full" on the original vinyl and the CD re-issue of "Live!". The song-writing credits on the original vinyl of "Rastaman Vibration" stated that the three songs on that album were (variously) written or co-written by Aston and Carlton Barrett in the manner for which they contend. They were credited as co-writers of "Rebel Music" and "War" respectively on "Babylon by Bus". The DVD "Legend: the best of Bob Marley and the Wailers", released in 2003, included "Want More", "Them Belly Full", "War" and "Revolution", and the sleeve notes credited Aston and Carlton Barrett on all four disputed songs, including "Revolution".

292 The first time that any of the six disputed songs were not credited to Aston or Carlton Barrett, was on an album called "Chant Down Babylon" which included a version of "Rebel Music". Its sleeve notes stated "All songs written by Bob Marley"

293 The six songs were all originally registered for copyright in the US under the names "Tuff Gong Music Co (employer for hire)" and "Tuff Gong Music (employer for hire)". "Revolution" was registered in the name of Bob Marley.

294 A licence of March 3, 1975 identifies Carlton Barrett as co-author of “Them Belly Full”. A letter of March 12, 1976 from Almo Music Corp to ASCAP identifies Aston and Carlton Barrett as the co-authors of “Rebel Music”, “Talkin’ Blues” and “Them Belly Full”. The Barretts remain registered with ASCAP as the authors of the six songs and there is no evidence that their registrations have been challenged.

295 In a document dated as of November 30, 1980, Tuff Gong Music assigned its interest in certain compositions, including the six songs to Bob Marley Music Ltd. Aston and Carlton Barrett are credited as authors and co-authors and the publisher is identified as Tuff Gong. Rita Marley signed for both companies.

296 The strength of this apparently weighty body of evidence is, however, diminished by the fact that almost all of it predates the jury’s finding in the fraud action brought by Danny Sims. The copyright registrations and the credits on albums may all have been part of the plan to keep Danny Sims ignorant of the true authorship of the songs. Moreover, the weight of the attributions of authorship is counterbalanced by the registration of copyright in persons other than the named authors. Following Bob Marley’s death, and absent any contest about the authorship of the songs (and more importantly absent any challenge to the ownership of the copyright in them) apart from Danny Sims’, there would have been no reason for any of the signatories to the various agreements to have undertaken any detailed investigation into the true position. I cannot attribute to this body of evidence the weight that Mr Bate places on it.

Music making: the specific compositions

Preliminary

297 The claims to authorship of the disputed compositions are claims to authorship or co-authorship of both lyrics and music. They are not claims to copyright in an arrangement or arrangements. However, where the claim is a claim to co-authorship it is *not* a claim to co-authorship with Bob Marley himself. This is of considerable significance when evaluating Mr Barrett’s evidence about how the disputed compositions came into existence. I should say also that Mr Barrett did not appear to me to have a reliable recollection of the circumstances in which the specific compositions came to be written. This is exemplified by a short passage during his re-examination:

“Q. Can I just be clear: who are you saying thought up the new lyrics and melody for Rebel Music, was it Bob or you?”

A. Yes, we had been exchanging ideas, yes, myself mostly in a certain area, because we wanted to make an extended version of the original Man To Man.

Q. No, I am not on Man To Man.

A. Oh, Rebel Music I keep forgetting.

Q. We are on—

A. They done the same time, you know, so I keep chipping back into all of them really.”

Who the Cap Fit

298 “Who the Cap Fit” was registered at the US Copyright Registry in 1976, with Tuff Gong Music named as the copyright owner and as the writer as employer for hire. The composers were credited as Aston Barrett and Carlton Barrett. The song appeared on the album “Rastaman Vibration”.

299 Mr Winter says that he recalls being in the rehearsal room when “Who the Cap Fit” was written. He says that Carly wrote most of the words. Family Man was putting the words to music. Carlton was playing his drums and when not playing his drums he was humming and suggesting words to Family Man. Mr Winter recalled Carlton saying “How about this, Family Man. “Coop, coop, coop” or “Cluck, cluck, cluck””, and then when he started playing and singing again he would sing the first verse. However, Mr Winter also attributed the words “ya don’t know who to trust” and “who the cap fit” to Carlton. This attribution goes far beyond the claim. It is clear that these words were in fact written by Bob Marley himself. Mr Barrett himself says that “Who the Cap Fit” was based on a song written by Bob Marley called “Man to Man”. Carly added a few lines to the lyrics. The addition of these words meant that an instrumental bridge was needed. Carly also changed the rhythm of the original song; and Aston Barrett gave it a more international sound by adding strings, extending the chorus and arranging the tempo. He described “Who the Cap Fit” as an extended version of “Man to Man” with an extra verse and a solo.

300 In fact “Man to Man” was recorded by Bob Marley well before 1974 and released as a single. The writer credits on the single are Bob Marley and Lee Perry. The lyrics of the song (with the additions said to have been made by Carlton Barrett italicised) are as follows:

“Man to man is so unjust, children:
 Ya don’t know who to trust.
 Your worst enemy could be your best friend,
 And your best friend your worse enemy.
 Some will eat and drink with you,
 Then behind them su-su ’pon you.
 Only your friend know your secrets,
 So only he could reveal it.
 And who the cap fit, let them wear it!
 Who the cap fit, let them wear it!
*I say I throw me corn, me no call no fowl;
 I saying, ‘Cok-cok-cok, cluk-cluk-cluk.’*
 Some will hate you, pretend they love you now,
 Then behind they try to eliminate you.
 But who Jah bless, no one curse;
 Thank God, we are past the worse.
 Hypocrites and parasites
 Will come up and take a bite.
 And if your night should turn to day,
 A lot of people would run away.

And who the *stock* fit let them wear it!
 Who the cap fit let them wear it!
I say I throw me corn,
I say I call no fowl,
I saying 'Cok-cok-cok, cluk-cluk-cluk.'

—
 /Instrumental break/
 —

Some will eat and drink with you,
 Then behind them su-su 'pon you, yeah!
 And if night should turn to day, now,
 A lot of people would run away!
 And who the cap fit, let them wear it!
 Who the cap fit, let them wear it!
 Throw me corn, me no call no fowl;
Throw me corn; Me no call no fowl
I saying cok cok cok
I say cluk-cluk-cluk"

301 I do not doubt that Mr Winter was doing his best to recollect what he saw and heard. He may well have heard Carlton Barrett sing the words of “Who The Cap Fit” on that day in the music room. But his conclusion or assumption about who actually wrote the majority of the words and the basic melody is plainly wrong. In my judgment this casts considerable doubt on Mr Winter’s evidence about the authorship of the remaining compositions in dispute.

302 There are other versions of “Man to Man” which contain words similar to those that Carlton Barrett is said to have added to turn “Man to Man” into “Who the Cap Fit”. A version called “Dub Plate Pressure” includes the words “Throw corn, call no fowl”, repeated three times. A further version called “Sufferers Mix” contains the same phrase repeated three times, once with the addition of “Cok-cok Cluk cluk”. The Barretts do not claim joint authorship of these versions; and Aston Barrett did not refer to them in his evidence. Ms Jones submits that the conclusion to which I should come is that “Who the Cap Fit” simply evolved from changing versions of “Man to Man” and that the additional words and instrumental bridge cannot be attributed to the Barretts. She also points out that Mr Anderson, who was present throughout the recording of “Rastaman Vibration”, says that he does not know anything about the Aston and Carlton Barrett writing “Who the Cap Fit”; and that if this song had been partly composed by Aston or Carlton Barrett, Mr Anderson would have been able to give evidence about this. There is force in this point.

303 Reaching a conclusion on this claim has been the most difficult. The defendants have little positive evidence to rebut Mr Barrett’s claim. On the other hand (as will be seen) I do not accept Mr Barrett’s evidence on the authorship of the other disputed compositions. Yet this one is different. Mr Barrett does not claim that he personally did more than compose the additional bridge to a song whose melody Bob Marley had already written. He does not claim that Carlton

did more than add some relatively simple lyrics to a song whose theme and lyrics Bob Marley had already created. It is not disputed that Mr Winter was an honest witness. The attack on his reliability was on the conclusions that he drew from what he had seen and heard. His evidence about this composition was that he heard Carlton Barrett suggest different forms of words to Family Man. However, one of the versions (“coop coop coop”) is not in the song as performed; and the other (“cluck cluck cluck”) was already in an earlier version. Not without hesitation, I find that Carlton Barrett did not make any original contribution to the lyrics as they already existed. However, I find that Aston Barrett played an instrumental bridge between the fifth and sixth verses for the first time. I will return to the legal consequences of this finding.

Rebel Music (3 O’Clock Roadblock)

304 During Bob Marley’s lifetime composition of this song was credited to Aston Barrett and Hugh Peart. Copyright was registered in the US Copyright Registry in 1974. The copyright owner is given as Tuff Gong Music Co, which is also shown as “employer for hire”. The song appeared on the album “Natty Dread”. It also appears on “Babylon by Bus”.

305 Mr Barrett’s pleaded case was that he wrote the song with Hugh Peart (the other person to whom composition was initially credited). However, in his witness statement he said that he did not know Hugh Peart. In his oral evidence he again said that he did not know Hugh Peart, but:

“Well, maybe the man was there but I can’t remember who it was, and am sure anyone who put any input with what we were doing, Bob is there, he take care of the business. Anything he do, Bob say I had written is correct. No one questioned that.”

306 Hugh Peart was in fact a cousin of Bob Marley’s. It is not now seriously suggested that he contributed to the composition. He was generally known by his nickname of “Sledger”. Mr Barrett knew Sledger by that name. Even if Mr Barrett had not known Hugh Peart by his given name rather than his nickname, I would have expected him to have been able to identify the person with whom he claimed to have written the song, even if only by his nickname.

307 Mr Barrett’s account of how the song came to be written has evolved during the course of the case. Mr Barrett said in his witness statement that the inspiration for this song was a song called “Soul Rebel” which he had recorded when playing in The Upsetters in the late 1960s. Bob Marley had written the original song. Mr Barrett said that he had thought up new lyrics and melody, which were developed during jamming sessions. In his cross-examination he said that they had already done “Soul Rebel” and “Soul Revolution”; and he said to Bob Marley that they should take it to “the third stage”. Mr Barrett himself played an F sharp on his guitar, and the music went from there. It was built round that note by the Barrett brothers and the keyboard player. Then he said that having discussed taking it to the third stage he and Bob Marley began to jam it together. In cross-examination he did not claim to have written the words themselves; his principal

claim was to the “idea of the lyrics”. However, in re-examination he said that the creation of the lyrics was a collaborative effort: he and Bob Marley and others were laughing, talking and merry-making; and that is how the words came out. His general account in re-examination was that:

“So Rebel Music is now ‘I Love Rebel Music’, and then we choose a chord with a pitch and *Bob go up in a high pitch, and say, ‘Aaahhh, Rebel Music’*, and I tape him as usual. I run the tape, and I remember we were coming to a place at the time where there was a road block, and at the time exactly it was three o’clock, and *we said, ‘Three o’clock, road block’*, and we recut, and *somebody said, ‘And hey, Mr. Cop, ain’t got no birth certificate on me’*, or my passport or my driver’s licence and get caught in a road block, would have no ID, no identity, so that is why *we say, ‘We ain’t got no birth certificate’*, you know, a little bit of island Jamaica slang.” (Emphasis added)

308 On the other hand, when the words of the song were put to him a few minutes later virtually line by line, he claimed personal authorship of almost all the words, although he said that “Bob said a couple of little things”. So far as the melody was concerned Mr Barrett said in re-examination:

“Q. [W]ho thought up the basic melody?

A. The melody comes through the jamming and the chords, and we were making it. Like we really have not set an idea, it was there before, we create whatever idea.

Q. Yes, but, Mr. Barrett, who actually created it? I know that there were changes and you all got to a place—

A. It is coming from me.

Q. From you?

A. Yes, and it coming from me but it can come from Bob too, when it coming from me setting the chords and setting it, so—

Q. Right, so what did Bob do?

A. He tried to catch on. That is why I—

Q. I see.

A. — he catch onto it.”

309 Following my decision to admit Lee Jaffe’s evidence Mr Barrett was recalled. In this part of his evidence he said that the song had been created on the demo tape before Bob Marley came into the music room and heard them. Bob Marley’s role was limited to overdubbing; and he was “trying to learn the vibe and get into it”. Bob Marley, he said, spent most of the day outside the music room playing football with his friends. His final position on “Rebel Music” in cross-examination was that it:

“is coming from Family Man jamming there with Sledger. That was coming from my brain, the music man who let the thing value what it is today. I did it.”

310 Then in answer to a question from me:

“MR. JUSTICE LEWISON: I wonder if I could ask you this, Mr. Barrett. You just said that Rebel Music came from you and Sledger. Was it the music that came from you and Sledger or the words and the music?”

A. The words coming from I and Sledger, but I set the music, the chords, the keyboard, because there was no guitars, no keyboard around, my Lord.”

311 Despite the apparently vivid recall of Bob Marley’s part in the creation of the song (in particular the high pitch with which it began) to which he spoke in his first cross-examination, Bob Marley’s part in the creation of the song had all but disappeared by the time that Mr Barrett finished giving his evidence. Sledger, who had not featured at all in his first account of how the song came to be created, assumed a greater and greater role as Mr Barrett’s evidence went on.

312 Mr Winter says that he recalls being in the rehearsal room when Family Man and Carly were creating this song, which Family Man was developing as they were jamming. He says that Family Man wrote the words to this song. He was not, in my judgment, able to distinguish between which of them first uttered which words. The melody, he said, came out of the jamming. He did not mention Sledger at all. Once again, I consider that Mr Winter came to the wrong conclusion.

313 Mr Jaffe gave a very different account. He said that Bob Marley wrote “Rebel Music” in late 1973 or 1974 during a long car journey in Jamaica. They were driving late at night. Mr Jaffe was in the back of the car with Bob Marley; and Hugh Peart (Sledger) was driving. Mr Jaffe was playing the harmonica and Bob Marley started singing. They were smoking marijuana. On the journey they passed many roadblocks, which were common in Jamaica at that time. The police were on the lookout for Rastafarians; and they were in danger at being arrested. This was the inspiration for the song. During the four or five hours of the journey, Bob Marley composed the basic lyrics and melody. He then worked on the song for some months before it was recorded. There was then a final jamming session, during which Mr Jaffe played the harmonica. Aston Barrett supervised the overdubbing.

314 The substance of Mr Jaffe’s account coincides with an interview he gave to Mr Steffens and which was reproduced in “One Life”. In the book Mr Jaffe is quoted as saying:

“Bob was writing — well, ‘3 O’Clock Road Block’ was written coming from there. It was at a time when there were lots of road blocks and you had to be careful . . . [W]e were driving, it was like three o’clock in the morning, and we just started singing that song, three o’clock road block. And I had my harmonica, I was always playing, and I think Sledger was driving, and I was just playing harmonica and Bob just came out with ‘three o’clock road block’. And we just wrote the song right in the car.”

315 I cannot see any reason why Mr Jaffe would have made up the claims in the book. At the time when the interviews which form the basis of the book took place, this dispute over authorship had barely surfaced, at least publicly. His account of how the song came to be written has telling detail which, in my judg-

ment, gives authenticity to his account. The detail also seems to me to fit more naturally with the lyrics of the song than Mr Barrett's much more generalised account. Mr Barrett's evolving and changing version of how the song came to be written does not give me confidence in its accuracy. It took considerable prompting (and in re-examination at that) for him to claim authorship of the lyrics. Mr Jaffe's account in the book begins with a question from Mr Steffens which is phrased in leading form: in other words it assumes that Mr Jaffe was present when the song was written. I have no reason to doubt Mr Jaffe's account of how the song came to be written; and I accept it. My acceptance of this account of how the song came to be written, in preference to Mr Barrett's also helps me to resolve other conflicts of evidence about song writing. Mr Barrett's account seemed to me to rely heavily on Bob Marley's attribution of the authorship, rather than any recollection that he himself had.

316 I find that Bob Marley was the composer and author of "Rebel Music"

Talkin' Blues

317 Copyright was registered in the US Copyright Registry in 1974. The copyright owner is given as Tuff Gong Music Co, which is also named as the writer as "employer for hire". The composers are named as Carlton Barrett and Legon Coghil. The song appeared on the album "Natty Dread".

318 Mr Winter says that he was in the studio when "Talkin Blues" was composed. He recalls Family Man and Carly talking about Bunny Wailer and Peter Tosh leaving the band and how sad that was. Carly came up with the expression "talkin blues" and the song was developed from there. Carly composed the lyrics during the jamming session. Mr Winter recalled the line "their feet is too big for their shoe" and the phrase "they are just talking blues". He did not recall Bob Marley being in the room at the time. Mr Barrett said in his witness statement that he recalled Carly singing the words and melody, which were then developed during jamming sessions. The idea came from the departure of Bunny Wailer and Peter Tosh; and he recalls talking about sleeping on the ground with a rock pillow, and how they were struggling since the other two had left. In re-examination, however, he said that the words were coming from Carly and Bob. Bob was singing with the guitar. He could not pinpoint which of the two of them contributed more to the lyrics, although Carly had the louder voice. So far as the melody was concerned, Mr Barrett said that Carly was not a singer, so most of the melody came from Bob Marley. The two accounts seem to me to be very different. In addition during his re-examination Mr Barrett suggested that he himself (rather than Carly) created the melody:

"Well, it first started by making that rhythm what I used to make Talkin Blues, it came up off a old rock steady song in Jamaica called (singing). It go: doo, doo, doo, doo, doo, doo, doom, you know? I have to have a guitar. I go: Bip. But we don't do that. I bring it around a different way and we give it an intro."

319 This claim was quite contrary to the case advanced.

320 Again Mr Jaffe gave a very different account. He said that Bob Marley wrote the song at Rita Marley's house in late 1973 or 1974. Mr Jaffe had been sleeping outside on the porch. Bob woke him the next morning singing the first few lines of the lyric: "cold ground was my bed last night and rock was my pillow too." Mr Jaffe got up and started playing his harmonica. Bob Marley carried on composing on his acoustic guitar; and again worked on the song for some months before it was recorded. Mr Jaffe said that he had been trying to interest Bob Marley in blues, and had made tapes of blues singers for that purpose. He thought that the title "Talkin Blues" had been inspired by "Walkin Blues", which was on one of the tapes. At the time when this took place Rita Marley was inside the house, cooking breakfast, and the children were up and getting ready for school. Mrs Marley did not, however, claim to have heard the composition of this song; and none of Bob Marley's children gave evidence. This, naturally, leads me to pause for thought. It is common ground that the house was a small one, and that what was happening on the porch could have been in earshot of the kitchen. Why, then did Rita Marley not hear the song, if it had been written in the way that Mr Jaffe describes? Moreover, as Mr Bate pointed out, there is no account of the writing of this song in "One Life".

321 Again, I cannot see why Mr Jaffe would have made up his evidence. It is true that this account did not appear in "One Life"; but that was a memoir of life with Bob Marley in the early years: not a chronicle. If Rita Marley was busy cooking breakfast and getting the children ready for school, she may well not have heard what was happening on the porch, or what she did hear may not have stuck in her memory all these years later. I compare Mr Jaffe's consistent account in his witness statement and his cross-examination, with what I regard as material discrepancies between Mr Barrett's accounts of the composition of "Talkin Blues". I also take into account my findings about Mr Barrett's reliability on the composition of "Rebel Music". Again, I prefer the evidence of Mr Jaffe.

322 I find that Bob Marley was the composer and author of "Talkin Blues".

Them Belly Full (But We Hungry)

323 Copyright was registered in the US Copyright Registry in 1974. The copyright owner is given as Tuff Gong Music Co, which is also named as the writer as "employer for hire". The composers are credited as Carlton Barrett and Legon Coghil. The song appeared on the album "Natty Dread". It also appears on "Live!"

324 Mr Winter says that he recalls being in the rehearsal room when "Them Belly Full" was composed. He says that it was created and composed by Carly. Mr Winter says that he recalls Carly philosophising and expounding on political matters in Jamaica. As he expounded he became musical. As he talked, he had the sticks; and he was playing and singing. Mr Winter and Legon Coghil contributed to the ideas; and made suggestions for improvements. Eventually Carly came up with the words "Them belly full, them belly full, but me hungry". The words and melody were then developed during a jamming session. Bob Marley was not in the room at the time. By the end of the jamming session the composition had got

far enough for Mr Winter to say that it was a song. I could not discern from Mr Winter's evidence that Legon Cogil had made any real contribution to the song (or, at least, no greater contribution than Mr Winter himself in simply participating in a jamming session).

325 Mr Barrett's account was different. In his witness statement he said that this song was also inspired by Peter and Bunny leaving. It was Carly's way of expressing that Peter and Bunny were getting the benefit of their touring and the promoting of "Catch a Fire" and "Burnin'" as they were on the 1972 Island Records Ltd contract. It was not enough for them. He sang the words "your belly full and you still hungry". This particular phrase does not in fact appear in the song, and is actually contrary to the message of the lyric. Moreover, the song appeared after touring for "Catch a Fire" and "Burnin'" had ceased; and by the time it did appear on "Natty Dread" Peter and Bunny had left the band. I also take account of the fact that there does not appear to have been any lasting resentment about Peter and Bunny having left the band. On the contrary Mr Barrett helped Peter Tosh with the recording of "Legalize it"; and played on the album. In cross-examination he explained that the song was a political song, without mentioning Peter Tosh or Bunny Wailer. He said that he recalled Bob Marley calling a discussion. He and Bob talked. He set up the studio ready for a demo and took up his bass. It was Bob who said that the guitar, keyboard and everything was OK. Thus Mr Barrett (unlike Mr Winter) acknowledged Bob Marley's presence. This of itself, together with no significant evidence about Legon Cogil's supposed contribution to the song, suggests that the credits on the song are wrong. As I have said, in an affidavit sworn in the Cayman Music proceedings, Allan Cole claimed to have co-written this song with Bob Marley. It will also be recalled that Legon Cogil also claimed to have written this song in his letter written to Mr Reid Bingham.

326 Mr Jaffe's account was as follows. One day on the way home from eating at Port Royal near Kingston Bob Marley started writing the song. He carried on writing it late into the night at Hope Road. The song was a political song about the division between rich and poor in Jamaica. It had nothing to do with Peter Tosh or Bunny Wailer leaving the band: in fact they were still part of the band when the song was written. Mr Jaffe's account seems to me to fit the lyrics of the song far better than Mr Barrett's account.

327 Mr Jaffe's account of the composition of this song is similar to an account in part of the interview recorded in "One Life". In the book he is quoted as describing a trip to Port Royal in early 1973. On the way back the talk turned to the Spanish and English colonials, and the injustices suffered by the indigenous people of Jamaica. Bob Marley asked Mr Jaffe to go for his guitar. He goes on to describe how he could sense a song brewing; and says that Bob Marley began to sing. However, the words he describes (and quotes) in the book are not the words of "Talkin Blues", but the words of "So Jah Say". In his oral evidence Mr Jaffe said that the trip described in the book was typical of trips they made to Port Royal several times a week; and that "Them Belly Full" was composed by Bob Marley on another such trip.

328 Mr Bate strongly criticised Mr Jaffe for not having revealed the origin of this song to Mr Steffens in the course of compiling “One Life”. But if, as Mr Jaffe said, the circumstances surrounding the composition of this song were the same as those surrounding the composition of “So Jah Say” then it makes sense, in publishing terms, for the account to be given once only. I accept Mr Jaffe’s evidence on this composition. I find that Bob Marley was the author of “Them Belly Full”.

Revolution

329 “Revolution” was registered at the US Copyright registry by Cayman Music in 1975, naming Bob Marley as the writer. The song appeared on the album *Natty Dread*, where it was also credited to Bob Marley. However, on the re-release of “Legend” in 2003 (after this action had begun) it was credited to Carlton Barrett and “Lecon Coghill”. The claim to copyright in this song was added by amendment in 2005. If Carlton Barrett had written the song a claim to that effect would surely have been made when the action was begun. Mr Cogil did not claim to have written this song in his letter to Mr Reid Bingham in 1988.

330 Mr Winter has no recollection of how this song came to be composed. Mr Barrett says that he recalls Carly “singing (creating)” the song in the music room, and setting the tempo with his drums. If this was Mr Barrett’s genuine recollection it is surprising that a claim to co-authorship of “Revolution” was not advanced until 2005. Moreover, if the true authors of Revolution had been Carlton Barrett and Legon Cogil, it is surprising that Mr Cogil did not advance his own claim in 1988.

331 Mr Jaffe recalled being in the rehearsal room at Hope Road when Bob Marley wrote this song. Again this was in late 1973 or 1974. It was another political song. Bob Marley wrote the song in the course of a single evening.

332 I prefer Mr Jaffe’s evidence. It is supported by the original writing credit at the US copyright registry. I find that Bob Marley was the author of “Revolution”

War

333 “War” was registered at the US Copyright Registry in 1976, with Tuff Gong Music named as the copyright owner and as the writer as employer for hire. The authors were credited as Carlton Barrett and Allan Cole. The song appeared on the album “Rastaman Vibration”. It also appears on “Babylon by Bus”.

334 Mr Winter says that he remembers that about the same time that “Who the Cap Fit” was written, Allan Cole came up with the idea of putting a speech by the Emperor Hailie Selassie to music. Carly put parts of the speech to music. Mr Winter says that he himself played keyboard while this song was being created. Mr Barrett recalls that Carly selected parts of the speech and created the basic melody. He, Mr Winter and Mr Barrett then laid the basic tracks, with Bob Marley playing rhythm guitar. Carly created the special drum beat that gave a military feel to the song. As I have said, in an affidavit sworn in the Cayman Music proceedings, Allan Cole claimed to have co-written this song with Bob Marley; and denied that Carlton Barrett had been the co-author.

335 In my judgment it is unlikely that Bob Marley would have been a passive participant in the creation of a song. The fact that Mr Barrett acknowledges that Bob Marley was present, playing rhythm guitar, gives some credence to Mr Cole's account. But Mr Barrett's evidence suggests that he himself played a major part in the composition of the melody, which is not how the case is put. I am not able to find that Carlton Barrett and Allen Cole were the sole authors of the song. No other case has been advanced.

Want More

336 "Want More" was registered at the US Copyright Registry in 1976, with Tuff Gong Music named as the copyright owner and as the writer as employer for hire. The author is credited as Aston Barrett. The song appeared on the album "Rastaman Vibration".

337 Mr Winter says that Family Man wrote "Want More" which, like "Talkin' Blues", came out of the departure of Bunny Wailer and Peter Tosh. The idea behind the song was that although Bunny Wailer and Peter Tosh had got what they wanted (a contract with Island Records) they wanted more. Mr Barrett gives a similar account. He says that the song was created in the music room at Hope Road "by me playing and singing lyrics that I had thought up".

338 The defendants advance no positive case about the composition of this song. The real question, therefore, is the extent to which I can rely on the evidence of Mr Winter and Mr Barrett. I have already rejected their evidence about the composition of other songs. Is this one different? In my judgment, no. I do not feel able to base a finding on their evidence, which I consider to be unreliable.

The DVDs

339 The main DVD in issue is "Legend". It is a compilation of a number of performances by Bob Marley and the Wailers, all of which feature the Barrett brothers. Some of the tracks reproduce the sound alone, accompanied by images which do not depict the band. Others reproduce filmed performances, interspersed with other images, and with interviews with Bob Marley. The tracks in question and the performances that they reproduce were tabulated in an annexe to Mr Barrett's witness statement as follows:

<i>Track</i>	<i>Date of performance</i>	<i>Nature of performance</i>
(1) Want More	Unknown	Live performance
(2) Is This Love	March 1978	Sound track only
(3) Jammin'	1977	Film performance
(4) Could You Be Loved	June 1977	Sound track only
(5) No Woman No Cry	June 1977	Live performance
(6) Stir It Up	1973	BBC broadcast
(7) Get Up Stand Up	June 1977	Live performance
(8) Satisfy My Soul	1978	Studio broadcast
(9) I Shot the Sheriff	June 1977	Live performance
(10) Buffalo Soldier	1983	Sound track only
(11) Exodus	June 1977	Live performance
(12) One Love	1977	Sound track only

340 All these tracks first appeared on a video called “Legend” released in 1984. The DVD also contains “bonus tracks” which originally appeared on the video “Time Will Tell”; released in the early 1990s. These were similarly tabulated as follows:

<i>Track</i>	<i>Date of performance</i>	<i>Nature of performance</i>
Introduction: four edited tracks: Time Will Tell; Some People; Natty Dread; Exodus	Unknown	Sound track only
(4) Trench Town Rock	Unknown	Sound track only
(5) Concrete Jungle	Unknown	Studio footage
(6) Curfew Burnin and Lootin	1974	Studio footage
(7) Them Belly Full	1976	Live performance
(8) Lion of Judah	1978	Live performance
(9) Forever Lovin Jah	1980	Filmed in studio
(10) I Shot the Sheriff	1979	Live performance
(11) Lively up Yourself	1980	Mixed footage
(12) So Much Trouble	1980	Studio recording
(13) War	1977	Live performance
(14) Revolution	1980	Sound track only
(15) Ambush in the Night	1979	Live performance
(16) Running Away	1980	Live performance
(17) Jammin	1980	Live performance
(18) No Woman No Cry	1977	Live performance
(19) Take it Easy	Unknown	Video footage (not the Wailers)
(20) Could it be Love	1980	Mix of live performance and studio
(21) Exodus	1977	Live performance
(22) Africa Unite	1977	Live performance
(23) Zimbabwe	April 1980	Live performance
(26) Natural Mystic	1981	Part video, part live performance
(27) Get Up Stand Up	Unknown	Live performance

“Obviously, I was aware of being filmed whenever we were in a TV studio, such as the BBC. The purpose of attending the studios was to film our performances for broadcast and that is why I did that work. The broadcasts would, of course, promote the albums we were releasing. Where our performances on this DVD were recorded live, I was sometimes aware of this but often not, and even then I thought that the filming was only for the purpose of promoting record sales. Four of the recordings (‘Is This Love’, ‘Redemption Song’, ‘Buffalo Soldier’ and ‘One Love’) have appeared on the albums I have referred to in this statement. Apart from what may be in the record contracts, other than that, I gave no permission to the use of these tracks by Island Records for the video or for this DVD.”

342 “Stir It Up” was recorded at the BBC, and the BBC’s copyright in the recording is acknowledged on the DVD credits. Five other tracks (“Jamming”, “Could You Be Loved”, “No Woman No Cry”, “Get Up Stand Up” and “I Shot the Sheriff”) were filmed at a concert “Live at the Rainbow”, which was released as a video in 1983. The Barrett brothers knew that this video was being released and consented to it. The impression I had from Mr Barrett’s oral evidence was that, as a general rule, he knew when performances were being filmed:

“a couple of times when we came out of a concert after the show, reporting everything, a mobile recorder parked at the side, so whoever comes through the back they don’t want to come through the front so they go in the back to see us. They are trying to escape us through the back and we see mobile studios and recorders everywhere. They were taping the show. They were filming it. Mr. Blackwell had planned for us in this time it seems, we’re in the future.”

343 In addition Aston Barrett participated in the tour that was arranged in 1984. Part of the purpose of the tour was to promote the “Legend” album; and a video was then in contemplation. I have no doubt that Mr Barrett knew that that was so and consented to it. His evidence in re-examination on this point was:

“The Legend is recorded when we were doing the Legend tour in that time, I guess. In 84. This is what they make of in the 84 time, so I guess it’s released after that. They do some of the filming along the concert.”

344 Although Mr Barrett was wrong about the nature of the filmed performances that appeared on the video (they were all performances filmed during Bob Marley’s lifetime), I infer that he knew that a film would be released.

The copyright claims

Separate copyrights

345 There may be two independent copyrights in a song: one in the music and another in the lyrics.

Joint authorship

346 What makes a person a joint author of a copyright work has been considered in a number of cases. Park J. reviewed the authorities in *Hadley v Kemp* [1999] E.M.L.R. 589 (the Spandau Ballet case). He said:

“In my view the crucial expression . . . is ‘a significant and original contribution to the creation of the work’. There are four elements. (1) The claimant must have made a contribution of some sort. (2) It must have been significant. (3) It must have been original. (4) It must have been a contribution to the creation of the musical work. The last point is particularly important . . . the putative author must have contributed ‘the right kind of skill and labour’. In the present case contributions by the plaintiffs, however significant and skilful, to the performance of the musical works are not the right kind of contributions to give them shares in the copyrights. The contributions need to be to the creation of the musical works, not to the performance or interpretation of them.”

347 The judge went on to distinguish point out:

“a vital distinction between composition or creation of a musical work on the one hand and performance or interpretation of it on the other”.

Only the former was the right kind of skill and labour to attract copyright. He continued:

“The members of the band (and the session musicians, who cannot be differentiated from the other artists so far as this point is concerned) did what any good musician does: they performed the songs to the best of their considerable abilities, injecting elements of individuality and artistry into their performances. That did not make them joint authors of the songs. In my judgment that remains so even if there were some elements of improvisation in their performances.”

348 The judge added that in coming to his conclusion on the facts he was greatly assisted by expert and specialist evidence.

Derivative copyright

349 The starting point is the decision of Robert Goff J. in *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 109. Robert Goff J. said:

“Mr. Morrirt [submitted] that the degree of originality required is merely that the manner of expression in permanent form is such that it can be seen to have originated from the arranger, rather than having been copied from the original. To that extent only, he submitted, is the exercise of skill and labour in the production of different quality required. The authorities cited by Mr. Morrirt in support of his proposition show plainly that it is correct.”

350 The judge continued:

“An author composes a work: the copyright in the original work vests in him. He then licenses another person to arrange or adapt it—for example, to base a film script or a play upon a book. The copyright in the arrangement then vests in the arranger, who has originated it. Normally, of course, the license to make the arrangement or adaptation will carry with it a licence, for example, to perform the adaptation; but theoretically, if it did not do so, a performance of the adaptation could be restrained by the owner of the copyright in the original work as an infringement of that copyright. But it does not of course follow that the owner of the copyright in the original work owns the copyright in the arrangement, for example the film script or play; if that were so, it would lead to the absurd conclusion that the owner of the copyright in the original work, having licensed the adaptation—possibly for a substantial consideration—would be free to exploit the adaptation himself. For these reasons I have no hesitation in rejecting Mr. Bateson’s second argument. I therefore decide this question in accordance with the submissions advanced on behalf of Chappells, *viz.* that all that is required is that the work in question should originate from the arranger or adaptor rather than being a mere copy of another’s work.”

351 What, then, is “the work in question”? Mr Bate relied on the recent case of *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281 at 3295 in which Mummery L.J. said:

“It is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators, if they are the product of a person’s effort, skill and time, bearing in mind, of course, the ‘relatively modest’ level of the threshold for a work to qualify for protection: see Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs*, 3rd ed (2000), para 3.58. The work of the claimant has sufficient aural and musical significance to attract copyright protection.”

352 It is necessary to read this quotation in context. Dr Sawkins had compiled performing editions of works of Lalande, a baroque composer. As Mummery L.J. made clear, Dr Sawkins did not claim any copyright in (a) the music composed by Lalande; or (b) an arrangement, transcription or interpretation of Lalande’s music; or (c) a compilation of Lalande’s music; or (d) a typographical arrangement of Lalande’s music. Mummery L.J. went on to explain that if Dr Sawkins’ claim to copyright in the performing editions were upheld, that would not prevent other musicologists, composers, performers or record companies from copying Lalande’s music directly or indirectly or from making fresh performing editions of their own. All that Dr Sawkins could prevent them from doing, without his consent, was taking the short cut of copying his performing editions in order to save themselves the trouble that he went to in order to produce them. The quotation on which Mr Bate relied was directed to the question: what is a musical work? There is no doubt that both “Man to Man” and

“Who the Cap Fit” are each musical works. The question is: who composed them?

353 In the *Chappell* case the judge distinguished between a work that originated from the adaptor and a “mere copy”. In considering what is meant by a “mere copy” Ms Jones referred me to the well-known observations of Lord Oliver of Aylmerton in *Interlego AG v Tyco Industries Inc* [1989] A.C. 217, at 262:

“Originality in the context of literary copyright has been said in several well known cases to depend upon the degree of skill, labour and judgment involved in preparing a compilation . . . To apply that, however, as a universal test of originality in all copyright cases is not only unwarranted by the context in which the observations were made but palpably erroneous. Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an ‘original’ artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality. . . There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work. Of course, even a relatively small alteration or addition quantitatively may, if material, suffice to convert that which is substantially copied from an earlier work into an original work. Whether it does so or not is a question of degree having regard to the quality rather than the quantity of the addition.”

354 It is, however, the case that the test of originality is set at a low threshold.

Who the Cap Fit

355 In the light of my findings of fact, the only part of “Who the Cap Fit” that I need to consider is the instrumental bridge. In the case of the instrumental bridge, neither “Man to Man”, in which the original copyright subsisted, nor “Who the Cap Fit”, in which the derivative copyright was claimed, was the subject of any expert musicological evidence. Neither was even played in court. Instead Mr Bate simply invited me to listen to both songs privately, and then come to a conclusion whether the addition of the bridge was sufficient to attract copyright. Ms Jones objected that this was not the way to proceed; and in principle I agree with her.

356 Nevertheless, I did listen to both the version of “Man to Man” and the version of “Who the Cap Fit” with which I was supplied. The tempo of “Who The Cap Fit” is different from that of “Man to Man”, although the melody is the same. There is an intro which is not on “Man to Man”, for which no copyright is claimed, presumably because it is no more than an arrangement or an immaterial addition; and the claim has not been advanced on the basis of a claim to copyright in an arrangement. Had it been advanced on that basis Island would have wished to call expert evidence, which in the event it did not. The bridge, in which copyright is claimed, is not purely instrumental. It is backed by vocalists and it is not

played on a bass guitar, which was what Mr Barrett's oral evidence would have led me to expect. To my ear at least the bridge fits in with (and does not change) the underlying melody. It does not, to my ear at least, differ markedly in character from instrumental passages, either intros or bridges, on the original version of "Man to Man", or the intro on "Who the Cap Fit" itself. I am quite unable, on my own and without expert assistance, to reach any conclusion about whether the bridge was an original composition; a question of interpretation or performance; or part of an overall arrangement of the song as a whole. This claim therefore would have failed, even if I had concluded that Aston Barrett was entitled to assert it.

Licence

357 In the light of my conclusions thus far, the question of licence is academic. I will deal with it as briefly as I can. The act of infringement is the doing of a restricted act without the consent of the copyright owner. The defendants say that if the Barretts are entitled to any copyright, their copyright has not been infringed, because they have give their consent to the reproduction of the songs. This argument is put in two ways. First it is said that by participating in the recordings of the songs, knowing that they were to be delivered to Island for the purpose of inclusion in an album for distribution to the public, the Barretts must have consented (or be taken to have consented) to the reproduction of the songs for that very purpose. Secondly it is said that by leaving all the business arrangements to Bob Marley and Don Taylor, the Barretts cannot now go behind such business arrangements as they chose to make.

358 It is, in my judgment, clear that the Barretts knew that the purpose of making the recordings was to enable Island to make records and sell them. The point was specifically put to Mr Barrett in relation to "Catch a Fire" and "Burnin" and he agreed. There is no reason to suppose that his understanding (or that of his brother) changed as regards later recordings. That must, in my judgment, amount to an implied licence. The real question, as Mr Bate submitted, is: what were the terms of the licence? This kind of licence is an implied licence; so its terms must be decided by implication.

359 In *Robin Ray v Classic FM* [1998] F.S.R. 622 Lightman J. reaffirmed that in deciding what contract to imply between the parties, a "minimalist approach" is necessary. No more should be implied than is necessary. In the case of copyright, an assignment of copyright is not to be implied where a licence will do. And if a licence is to be implied, an exclusive licence should not be implied, where a non-exclusive licence will do. Lightman J. expressed the principle as follows:

"[I]t seems to me that the principle involved is this; that the engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission, or consent, or licence in the person giving the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement . . . [T]he licence accord-

ingly is to be limited to what is in the joint contemplation of the parties at the date of the contract, and does not extend to enable the client to take advantage of a new unexpected profitable opportunity.”

360 In my judgment the application of that principle produces the following result. In so far as the Barretts are entitled to copyright in any of the compositions recordings of which were delivered to Island for the purpose of incorporating them in albums for sale to the public, there must be an implied licence to Island to reproduce those recordings. At the time when the recordings were delivered the means of reproduction were vinyl records and, I think, cassettes. But I do not consider that the advent of CDs (and latterly DVDs) as a more technologically advanced means of reproducing the same work in essentially the same form would have required a fresh licence, especially since the contracts under which the recordings were delivered (albeit that the Barretts were not parties to them) specifically contemplated reproduction by other means, including audio-visual means. I do not, however, consider that it is necessary to imply an exclusive licence. If, for example, the Barretts authorised other performers to perform any songs in which they have copyright, or wished to perform them themselves, I do not see why they should not be free to do so. The most contentious point, however, is whether any implied non-exclusive licence would be terminable as regards the continuing reproduction of the recordings that first appeared on the albums released in Bob Marley’s lifetime. (It is, I think, accepted that if any licence was terminable, it has been terminated).

361 Ms Jones submits that Aston and Carlton Barrett clearly gave their consent for Island Ltd and Island Inc to reproduce and distribute the seven compositions by recording them for the purpose of reproduction and sale. They also permitted Bob Marley to make whatever business arrangements he thought fit, and were content with whatever money he paid them in respect of any work which they performed. They were in fact paid. The arrangements which Bob Marley made include the 1974 recording agreement and the Media Aides recording agreement. Each of these agreements included a warranty that all material recorded under the agreement would be available to Island for use in connection with records on the standard terms and conditions for the licensing of copyrighted material for records; and would not infringe or violate any other right of any person. These warranties were part of the contractual arrangements which governed the making of the recordings and exploitation of the copyrights in the songs. Since the Barrett brothers left it to Bob Marley (and Don Taylor) to make such contractual arrangements as they thought fit, they cannot now go behind them, especially since these contractual arrangements have led to considerable expenditure by Island and have been acted on for over 20 years.

362 Mr Bate submits that since neither of the Barrett brothers knew that they were entitled to copyright there can be no intention to create legal relations with respect to any “licence” to reproduce a copyright work. I am prepared to accept that until the 1980s the underlying factual premise is correct. If the question of licence is analysed as a matter of contract, I think that Mr Bate may well be right. But a licence need not be contractual. An explicit or tacit consent to repro-

duce a work can amount in law to a licence, whether or not the person giving the consent meant to contract. But it does follow from Mr Bate's submission that the licence would not have been a contractual one. I would have reached this conclusion anyway, since I have found that there was no contract between the Barrett brothers and Island. Mr Bate also analysed the identity of any supposed licensee. But if, as I think, the allegation that the licence cannot now be revoked is based on a species of estoppel, then this contractual analysis does not, in my judgment, matter. Mr Bate accepted that in this context the principles of *Taylor's Fashions v Liverpool Victoria Insurance Ltd* apply.

363 Mr Bate submitted that in any event, any estoppel that might have arisen could itself be terminated by reasonable notice. In this connection he relied on *Beckingham v Hodgens* [2003] EWCA Civ 143; [2003] E.M.L.R. 18. However, as I see it that was a different case. The case concerned a claim by a session musician to have written a violin part for "Young at Heart", in collaboration with a band called the Bluebells, sufficient to entitle him to joint musical copyright in the song. The judge found that he was so entitled. He had, however, given a gratuitous licence to the Bluebells to exploit the work. The work had been exploited for some years, and the claimant then revoked the licence. The issue whether the licence could be revoked was, therefore, an issue as between the joint authors of the work. It was not an issue between one of the joint authors of the work and a recording company who had entered into a contract with one of those joint authors for the exploitation of the work with an express warranty that the work could lawfully be reproduced. No claim in the present case is made against the estate. The claim is made solely against Island. In my judgment *Beckingham* does not advance the Barretts' case.

364 Had the point arisen for decision, I would have accepted Ms Jones' submissions.

Effect of revocation

365 Ms Jones also submitted that even if there was no more than a revocable licence, which was in fact revoked, that would not affect contracts or arrangements entered into before the revocation. This argument is, in my judgment, supported by the decision of Park J. in *Brighton v Jones* [2004] EWHC 1157; [2004] E.M.L.R. 26 (Ch), in which the judge said:

"I do agree that, because the implied licence for Miss Jones to use the draft opening script was gratuitous, Miss Brighton could revoke it on reasonable notice (subject to possible estoppel arguments, which I will consider below). However, she had not revoked it when Miss Jones rewrote aspects of the 1996 script in 1999. Therefore the creation of the 1999 script was not a breach of Miss Brighton's copyright in the draft opening script. Nor in my view was the making of any contracts by Miss Jones for the exploitation of the 1999 version of the play, as long as the contracts were made before the licence was revoked. It does not make any difference if the contracts continue to operate after the licence has been revoked as long as they were made before then."

366 I see no reason not to follow that decision.

The performers' right claims

Introduction

367 Very little attention was devoted to these claims at trial or in the witness statements. Mr Barrett's case has shifted during the course of the action. That has made the task of fact finding particularly difficult. However, both counsel made written submissions after the conclusion of the oral hearing. I have done the best I can on the basis of those.

The scope of the claim

368 "Redemption Song" (track 12) does not feature any performance by the Barrett brothers, and is not, therefore, within this claim. On March 8, 2006, Mr Barrett's solicitors abandoned the claim for infringement of performer's rights in relation to "Is This Love", "Buffalo Soldier", "One Love" and "Revolution" (tracks 2, 10, 13 and 19) to the extent that they appeared on the album "Natty Dread". The claim was maintained in so far as copies of those performances appeared on the DVD itself.

The statutory provisions

369 The relevant provisions of the Copyright Designs and Patents Act 1988 (as amended) are as follows:

"180 (3) the rights conferred by [Part II of CPDA] apply in relation to performances taking place before the commencement of this Part; but no act done before commencement, or in pursuance of arrangements made before commencement, shall be regarded as infringing those rights

182. Consent required for recording, etc. of live performance

(1) A performer's rights are infringed by a person who, without his consent

(a) makes a recording of the whole or any substantial part of a qualifying performance directly from the live performance,

(b) . . .

(c) makes a recording of the whole or any substantial part of a qualifying performance directly from a broadcast of, or cable programme including, the live performance.

. . .

(3) In an action for infringement of a performer's rights brought by virtue of this section damages shall not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given.

182A. Consent required for copying of recording

- (1) A performer's rights are infringed by a person who, without his consent, makes, otherwise than for his private and domestic use, a copy of a recording of the whole or any substantial part of a qualifying performance.

...

- (2) It is immaterial whether the copy is made directly or indirectly.

182B. Consent required for issue of copies to public

- (1) A performer's rights are infringed by a person who, without his consent, issues to the public copies of a recording of the whole or any substantial part of a qualifying performance."

370 Section 182 in its present form and ss.182A and 182B were introduced by reg.20 of the Copyright and Related Rights Regulations 1996, with effect from December 1, 1996. Those regulations were intended to give effect to Council Directive 92/100 of November 19, 1992. Article 13.8 of the Directive provided that:

"This Directive shall, without prejudice to paragraph 3 and subject to paragraphs 8 and 9, not affect any contracts concluded before the date of its adoption."

371 Regulation 26 provides that, in principle, the regulations apply to performances given both before and after commencement. However, reg.27 provides:

"(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."

372 November 19, 1992 was, of course, the date of adoption of the Directive.

373 Section 182 in its original form provided:

"Consent required for recording or live transmission of performance

182.— (1) A performer's rights are infringed by a person who, without his consent —

(a) makes, otherwise than for private and domestic use, a recording of the whole or any substantial part of a qualifying performance, or

(b) broadcasts live, or includes in a cable programme service, the whole or any substantial part of a qualifying performance.

(2) In an action for infringement of a performer's rights brought by virtue of this section damages shall not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given."

374 Section 182 in that form was brought into force on August 1, 1989.

375 Although Carlton Barrett died before August 1, 1989, that does not matter: *Experience Hendrix LLC v Purple Haze Records Ltd* [2006] EWHC 986 (Ch).

A new right?

376 Mr Bate submitted that the rights now embodied in s.182A were not “new rights” as defined by reg.25 (3) which provides:

“In this part ‘new right’ means a right arising by virtue of these Regulations, in relation to a . . . qualifying performance, to authorise or prohibit an act. The expression does not include:

- (a) a right corresponding to a right which existed immediately before commencement . . .”

377 If this is right it follows, according to Mr Bate, that reg.27 does not provide any defence to the claim.

378 There is no authority on the question. *Copinger & Skone James on Copyright* (14th edn, paras 12–21 to 12–23) and Laddie, Prescott & Vitoria, *The Modern Law of Copyright* (3rd edn, para.12.93) take the view that the rights conferred by ss.182A and 182B are new rights. Although I was referred to Mr Richard Arnold Q.C.’s monograph on Performers’ Rights (3rd edn), I do not think that he expresses a firm view one way or the other. In *Experience Hendrix LLC v Purple Haze Records Ltd* Park J. referred in passing to the rights contained in ss.182A and 182B as being “new rights”. The point does not appear to have been argued, although I note that Park J.’s comment is contained in a paragraph agreeing with the submissions of Mr Arnold Q.C. who appeared for the successful claimant.

379 There is no doubt that the rights conferred on a performer by ss.182A and 182B are rights to authorise or prohibit an act. These rights exist in their current form because of changes to the 1988 Act made by the Regulations. Accordingly, on the face of it they are “new rights”. It seems to me, therefore, that the real question is whether the rights conferred by ss.182A and 182B “correspond” to a right that existed before the regulations came into force. If they do, then they are not new rights. The only candidate for a corresponding right is that contained in the original s.182.

380 There are a number of differences between the original right conferred by s.182 and the right conferred by s.182A, of which the most important are the following:

- (i) The original s.182 right was a personal right, which was not assignable. The s.182A right is a property interest;
- (ii) Consent for the purposes of the original s.182 right could be granted by the Copyright Tribunal, where the performer had unreasonably refused consent. Consent for the purposes of 182A gives the performer an absolute right to refuse consent;
- (iii) It was a defence to a claim for damages for infringement of the original s.182 right that the alleged infringer believed, on reasonable ground, that

consent had been given, even if it had not. No such defence is available in relation to a claim for infringement of s.182A.

381 In addition, the remedies available for infringement of the right conferred by s.182A are more extensive than those available for infringement of the original s.182. I put that to one side, because there is force in Mr Bate's point that one must not confuse the right with the remedy. Even so, I consider that, cumulatively, the differences between the rights conferred by s.182A, and their different legal character, are sufficiently different from those conferred by the original s.182 as to make the former a new right. I am reinforced in this view by the fact that s.182 in its amended form overlaps to a very great extent with s.182 in its original form; although it is limited to the making of direct recordings, whereas the original s.182 extended to the making of indirect recordings as well. The two versions of s.182 may, in my judgment, be said to contain corresponding rights, at least to the extent that they both concern direct recordings.

382 I conclude, therefore, that reg.27 may, in principle, afford a defence to the claim.

Consent to what?

383 Mr Bate said that the consent in question must be a consent to the specific act which would otherwise amount to an infringement of a performer's rights. Thus, for example, it is not enough to show that a consent was given to the recording of material for the purpose of an album. A specific consent must be shown with respect to the act in question, in this case the manufacture and sale of an audio-visual recording: see *Bassey v Icon Entertainment plc* [1995] E.M.L.R. 596 at 605–606. In *Bassey* Shirley Bassey had agreed to make studio recordings of certain songs. However, it was expressly agreed that she would have a veto over the release of those recordings to the public if she was not satisfied with their quality. She objected successfully when recordings were released without her consent. In giving summary judgment in her favour, Sir John Vinelott declined to follow Mervyn Davies J. in *Mad Hat Music v Pulse 8 Records* [1993] E.M.L.R. 172 in distinguishing between a record and a recording. Mervyn Davies J. had held that if a performer had consented to the making of a recording it was possible to argue, or might be argued, that the making of records from the recording was something that could be done without his consent. Sir John went on to say:

“It may well be, as the authors [*Laddie Prescott & Vitoria on Copyright*] observe in the same paragraph, that Mervyn Davies J's decision may be justified on the basis that the performer who gives his consent to the making of a studio recording impliedly consents to the making of records from it for a subsequent issue to the public. However, in the absence of any such authority, whether express or implied, the making of a record to my mind clearly infringes a performer's rights. Indeed, it would largely defeat the rights conferred by the Act on a performer if, having once consented to the making of a recording, albeit on terms that records were not to be

released unless the performer was satisfied with the recording, the recording could be exploited by the making of records from it and by the sale of the records by a third party into whose hands the recording had come and who could not be restrained by any contractual right from the exploitation of it.”

384 I do not consider that the quoted extract establishes Mr Bate’s proposition. The facts may be such that it is proper to infer from consent to the recording of a performance a consent to the subsequent issue of copies of the recording to the public. That inference was not possible in *Bassey*, because Miss Bassey had expressly retained the right of veto over the finished product. It all depends on the facts.

385 Mr Bate also submitted that if a performer had consented to the issue to the public of video containing a recording of a performance, a separate consent would be required for the issue to the public of the same performance on a DVD. 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.

Prior arrangements or agreements

386 Accompanying her written submissions made after the end of the trial, Ms Jones appended a number of documents that had not previously been disclosed. Mr Bate objected to my considering these documents, on the basis that they were disclosed too late. I consider that his objection is well-founded; and I have ignored those documents.

387 It is common ground that the tracks that originally appeared on “Natty Dread” were recorded under the terms of the 1974 agreement. It is also common ground that the rights of reproduction conferred upon Island by the 1974 agreement extended to audio-visual reproduction. In those circumstances, it seems to me that Island is doing no more than continuing to exercise rights conferred upon it by the 1974 agreement. Accordingly, these tracks are issued to the public pursuant to an agreement made in 1974.

388 Five of the tracks on the original compilation “Legend”, as released in 1984, were taken from the video “Live at the Rainbow”. It is plain that the Barrett brothers agreed to this and were paid for their agreement in 1983. These were “Jamming”, “Could You Be Loved”, “No Woman No Cry”, “Get Up Stand Up” and “I Shot the Sheriff” (tracks 3, 4, 5, 7, 9, 11, 17 pt 2 and 18 pts 1 and 3). These tracks were therefore reproduced pursuant to an agreement with the Barretts themselves.

389 One of the tracks, “Stir it Up” (track 6) was originally recorded by the BBC in 1973 for The Old Grey Whistle Test. Another, “Satisfy My Soul”, (track 8) was also originally recorded by the BBC in 1978 for Top of the Pops. A licence of April 16, 1984 granted by BBC Enterprises Ltd licences reproduction of this material for “Home Video”. In his written submissions filed after the end of

the trial Mr Bate submitted that “Home Video” is not the same as DVD. However, there is no evidence of any complaint by the BBC; and in the absence of any argument at trial on this point, I do not consider that I should accept this submission.

390 In addition, tracks 2, 10 and 13 were recorded pursuant to the Media Aides agreement. This was an agreement made in 1975.

391 This leaves “Want More” (track 1). This was originally part of a film called “Roots Rock Reggae”, released by Harcourt Films. A licence from Harcourt Films to Island Pictures is dated April 24, 1984.

392 I conclude, therefore, that all the tracks on the “Legend” video were issued to the public pursuant to agreements or arrangements made before August 1989.

393 The contents of “Time Will Tell”, originally released on video in 1992, were compiled in accordance with contracts for the inclusion of the individual parts of the compilation. The first of the agreements was dated June 3, 1990 and the last was dated October 30, 1991. Thus all the agreements were in place before November 19, 1992. It is true that the Barretts were not parties to any of the agreements; but, as I have said, in my judgment that does not matter.

394 I conclude, therefore, that all the tracks on the “Time Will Tell” video were issued to the public pursuant to agreements made before November 19, 1992.

Was there no consent?

395 Since the absence of the performer’s consent is part of the definition of infringement, it seems to me that the burden must be on the performer to establish the lack of consent. Mr Barrett accepted, even in his witness statement that he had known and consented to the broadcast of some of his performances. He mentioned both the BBC and also those live performances than he knew were being filmed. What is impossible to tell, given the level of generality at which his evidence was pitched, is which of the performances fell into the latter category. As I have said, my impression from his oral evidence is that he knew, by and large, when live performances were being recorded. It is clear that consent was given to the recording of the live performances at the Rainbow and to the issue to the public of copies of that performance; and it seems to me also that in view of Mr Barrett’s participation in the Legend tour, that consent must have been given to the reproduction and issue to the public of those performances that first appeared on the “Legend” video. The same must be true of the performances recorded by the BBC.

396 Mr Barrett’s witness statement also appeared to me to recognise that consent had been given under the recording agreements. Although he was, of course, contending that he himself was a party to the recording agreements, his evidence about consent having been given was not expressed to be dependent on the success of that contention. Ms Jones submits that the giving of consent under the terms of the recording agreements is part and parcel of the course of conduct by which the Wailers left it to Bob Marley to make such arrangements with Island as he thought fit. In my judgment Mr Barrett would have been estopped from going behind these arrangements.

397 In his closing address, Mr Bate accepted that in the majority of the audio-visual recordings of performances included on the DVD, a limited consent was given by Aston and Carlton Barrett: they consented to the performance being recorded and broadcast to promote sales of the Bob Marley and the Wailers' albums. However, he submitted that at no time prior to the issue of these DVDs to the public were the Barretts made aware that the audio-visual recordings of their performances were to be exploited at all, or that the audio recordings of their performances were to be exploited in the form of a DVD. As such, he said, there is no question of any consent having been given in respect of these performances.

398 Had the question arisen for decision, I would have held that Mr Barrett had failed to establish the absence of consent in relation to the performances now complained of.

399 In addition, all the arrangements under which the DVD was compiled and released to the public were made before any licence was revoked. For the reasons I have given, I would have held that the revocation of the licence would not have affected agreements made before the revocation.

Counterclaim

400 The counterclaim is a claim for damages for breach of the settlement agreement. The alleged breach consists in Mr Aston Barrett's having brought a claim in his capacity as administrator of his late brother's estate. Since I have held that the terms of the settlement agreement do not prevent him from doing so, it must follow that the counterclaim fails.

Result

401 I will dismiss both the claim and the claim for damages by way of counterclaim. The counterclaim also claimed an injunction restraining further proceedings. No argument was directed to this at trial. I will give the parties an opportunity, if they wish, to argue this point in the light of my conclusions at the handing down of this judgment.