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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
INTELLECTUAL PROPERTY LIST  
ON APPEAL FROM DEPUTY MASTER JEFFERIS



Claim No. IL-2018-000095

Appeal No: CH-2019-

000189

[2019] EWHC 3584 (Ch)

Rolls Building  
Fetter Lane  
London, EC4A 1NL

Monday, 9 December 2019

Before:

MR JUSTICE NUGEE

B E T W E E N :

- (1) EDWARD CHRISTOPHER SHEERAN MBE
- (2) STEVEN MCCUTCHEON
- (3) JOHN MCDAID
- (4) SONY/ATV MUSIC PUBLISHING (UK) LIMITED
- (5) ROKSTONE MUSIC LIMITED
- (6) SPIRIT UNIQUE JV SARL
- (7) KOBALT MUSIC COPYRIGHT SARL

Appellants/Claimants

- and -

- (1) SAMI CHOKRI
- (2) ROSS O'DONOGHUE
- (3) ARTISTS & COMPANY LIMITED

Respondents/Defendants

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MR I. MILL QC and MS J. BOWHILL (instructed by Bray & Krais Solicitors) appeared on behalf of the Appellants.

MR H. CUDDIGAN QC (instructed by Keystone Law) appeared on behalf of the Respondents.

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J U D G M E N T

MR JUSTICE NUGEE:

- 1 I have before me an appeal in a copyright action against an order of Deputy Master Jefferis given on 4 June 2019 in which he declined to strike out allegations in the defendants' pleadings seeking to rely on similar fact evidence. The claimants have appealed, with permission granted by Morgan J on 24 October 2019.
- 2 The claim in the action relates to a song written by the first three claimants, Mr Edward Sheeran, Mr Steven McCutcheon and Mr John McDaid, called "Shape of You", which has been a very successful song. I need not detail what the evidence reveals but it is, on any view, a significant hit.
- 3 The claimants brought the action for a declaration that they have not infringed any copyright of the defendants in a song called "Oh Why", it having been suggested in correspondence that "Shape of You" had infringed that copyright. That was met with a defence and counterclaim alleging infringement, a reply and defence to counterclaim denying infringement and, as the final pleading a reply to the defence to counterclaim.
- 4 In the reply to the defence to counterclaim there were four other examples pleaded of what were said to be instances of copying. Paragraph 4(1) concerned a song called "The Rest of our Lives", which was said to be, in part, copied from another song. I need not refer to that, because the Deputy Master struck it out and there has been no appeal against that and I have not been concerned at all with the basis of that claim.
- 5 Paragraph 4(2) of the pleading referred to a song called "Strip That Down", which was written by the first two claimants, Mr Sheeran and Mr McCutcheon, together with two other songwriters, Mr Liam Payne and Quavo, and was alleged to be, in part, copied from a song called It Wasn't Me. As pleaded, the case is that that song was also written on 12 October 2016, which is when "Shape of You" was written. I was told that that was based on something that the songwriters had themselves said, which is publicly available, but Mr Mill, who appeared for the claimants, said that that is, in fact, not the case and "Strip That Down" was written some three months later, in January 2017. Mr Cuddigan, who appeared for the defendants, accepted that that might be the case and I will proceed on the basis that even though that is relied on in the pleading as being support for the proposition that the first to third claimants were, consciously or subconsciously, in the habit of appropriating the compositional skill and labour of other songwriters during their song writing session on 12 October 2016, what the defendants really seek to rely on is the allegation of copying in support of the allegation that "Shape of You" was copied from "Oh Why".
- 6 Paragraph 4(3) concerns "Shape of You" itself and alleges that it was, in part, copied from a song called "No Scrubs". Then para.6 refers to another song called Photograph; it is said to be written in the pleading by the first and second claimants, but the evidence is that it was in fact written by the first and third claimants, Mr Sheeran and Mr McDaid, and that is said to be in part copied from a song called "Amazing".
- 7 The application to strike out those parts of that pleading was based on the fact that similar fact evidence is only admissible in civil proceedings in appropriate circumstances and it was common ground before the Master, and was common ground before me, that the most authoritative statement as to what those circumstances are is found in the House of Lords decision in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26 in the

speeches of Lord Bingham and Lord Phillips. I was referred in particular to the speech of Lord Bingham at [3]. He said that any evidence to be admissible must be relevant and then cited from what Lord Simon of Glaisdale said in *DPP v Kilbourne* [1973] AC 729 at 756:

“Evidence is relevant if it is logically probative or disprobative of some matter which requires proof... relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.”

At [4] Lord Bingham identifies two stages in the enquiry. The first stage of the enquiry is:

“Whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon’s sense probative. If so, the evidence is legally admissible.”

At [5] he deals with the second stage of the enquiry and he says this:

“The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which *ex hypothesi* is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge’s assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.”

And then at [6] he sets out the considerations which are likely to recur which can be urged against admitting it. They are threefold, that the admission of the evidence might distort the trial and distract the attention of the decision maker, which he said is often a potent argument, particularly where trial is by jury. Secondly, and he says, again, particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice. Then, thirdly, stress will be laid on the burden which admission would lay on the resisting party. Then at the end of that paragraph he says:

“... the present case vividly illustrates how real these burdens may be. In deciding whether evidence in a given case should be admitted the judge’s overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties.”

I was also referred in the speech of Lord Phillips to [11], where he said that, among other things:

“evidence should not be admitted if its probative weight is insufficient to justify the complexity that it will add to the trial.”

8 The basis upon which it is said that the evidence of the other songs will, if admitted at trial, be potentially probative is as follows. I will start with the song *Photograph*, which is said to

be in part copied from the song “Amazing”. That (of which I was played, and the Deputy Master was played, a short clip) is said to be a self-evident case of similarities musically. I think, as it was suggested to me, that one should be wary of relying on instinctive reactions sitting as a judge, but I will say that I can see from the clip that was played to me why it might be suggested that there was a similarity. But rather than that, reliance was really placed on the fact that although proceedings were brought by the songwriters of “Amazing” against the songwriters of Photograph in the United States in 2016 alleging copyright infringement, and those allegations were denied by Mr Sheeran and Mr McDaid (and in the evidence of Mr Goodbody, their solicitor, he says that Mr Sheeran and Mr McDaid maintain they did not copy “Amazing”), nevertheless, those proceedings were settled. The terms on which they were settled are confidential and were not before the court. But what was before the court was evidence that the songwriters in “Amazing” appear now on the listing of the PRS distribution of income and it can be seen from that that Messrs Sheeran and McDaid and their publishers take between them 65 percent of the total, whereas Messrs Harrington and Leonard, the songwriters of “Amazing”, and their publishers take 35 percent. That was presented to me by the defendants on the basis that because the claim is only for the musical copyright and not the lyrical copyright that is a 35 percent share of 50 percent of the total, and hence 70 percent of the music rights. That is said to give rise to an inference, despite the denial by the claimants that they had copied “Amazing”, that there was, indeed, a case of copying.

- 9 Secondly, the song “Strip That Down”. In this case there was evidence that the claimants, through their management company, sought and obtained clearance from the copyright owners in the song “It Wasn’t Me”. That, the evidence is, was agreed in January 2017 on the basis of an acceptance by or on behalf of the claimants that the version of “Strip That Down” then being looked at had “a melodic similarity” to “It Wasn’t Me” and a deal was rapidly agreed under which payments to the copyright owners of It Wasn’t Me were 25 percent of the total and, again, on a similar basis, that was said to be equivalent to 50 percent of the music rights. In addition, I was shown an allegation, though not, I think, any evidence, that the writers of clearance were named as co-writers of “Strip That Down”. I should say that in that case as well the evidence from Mr Goodbody was that the claimants do not admit that there was any copying involved and what Mr Goodbody says is that “melodic similarity” is not, of course, the same thing as copying or reproduction of a substantial part of a copyright work.
- 10 Finally, “Shape of You”, which is the song in question and the suggestion that that was, in part, copied from “No Scrubs”. This was presented by Mr Mill as another case of clearance, although Mr Cuddigan showed me that the way in which it is pleaded by the claimants, which is found in para.11 of the reply and defence to counterclaim, leaves it somewhat unclear whether clearance was obtained before the song was actually published or whether it was a case of a claim being settled afterwards. That is because although it is accepted in that pleading that the Pre-Choruses in the First Version were very loosely inspired by the pre-chorus in “No Scrubs” (and that they remained in amended form in the Final Version) and that steps were taken to initiate contact with the owners of the copyright in “No Scrubs” and discuss clearance, the fourth claimant (which is the management company) had subsequently formed the view that clearance was unnecessary. The owners of the copyright in “No Scrubs” maintained that clearance was necessary. It is then pleaded: “The Claimants believed, and continue to believe, that the Composition does not reproduce a substantial part of, and does not infringe the copyright in, the musical work embodied in “No Scrubs,” but decided nevertheless to assign a share of the copyright in the Composition to the owners of the copyright in “No Scrubs” for commercial reasons. The registration for the Composition at PRS for Music was amended accordingly in or about 28 February 2017.”

That seems to be a date slightly later than when the song was first published. The PRS listing shows that the owners of the copyright in “No Scrubs” between them received 15 percent of the total, again said to be equivalent to 30 percent of the music. In addition, there is evidence that on the CD label for “Shape of You” there is a reference to it as follows: “Contains elements of “No Scrubs”, written by...” and then the names of the writers of “No Scrubs”.

11 That is really, at this stage, all the material on which the defendants rely. One of the points taken by Mr Mill which I must come to is that that does not tell him or his clients anything about the detail of what is said to be copied in the way that one would normally expect if one were making an allegation of copyright infringement and he says that that is not good enough, they simply do not know the case that they have to meet. As I say, that is a point I will have to come back to.

12 In his judgment the Deputy Master, who gave an *ex tempore* judgment, set out the background in some detail and then dealt with each of the songs. He dealt first with the “No Scrubs” potential copying and he referred at [8] to a pleading in the defence and counterclaim which referred to a suggestion by Mr Sheeran that he had suggested it would be cool to include an interpolation of the “No Scrubs” tune in “Shape of You” and then said this:

“9. That seems to me to be bringing that “No Scrubs” potential copying closer to the nub of the case in relation to “Shape of You” and the fact that there has been clearance in that and it is said that the clearance was a settlement of 15 percent, which is of the total revenue, which means 30 percent of the music, shows that there is some real acceptance by the Claimants that there has been copying.

10. I do not accept that just because there was payment made of 15 percent that that means there has been copying. In my judgment, the parties are going to have to actually consider this carefully and see whether there is copying or not and, if so, in what way in the sense that if it is alleged that it is copied from two people, then we will need to see which bit relates to whom. So I consider that the “No Scrubs” bit, if that were made out, and I assume that it will be made out, then it seems to me that that is logically probative of the possibility of the same thing happening in “The Shape of You”. So I think the first part of the test in *O’Brien* is made out in relation to “No Scrubs”.”

13 He then dealt with “Strip That Down” at [11] as follows:

“Looking at the other three, the case of “Strip That Down” there was a clearance, not a court case and settlement, but a clearance for 25 percent of the total, or 50 percent of the music. It is said that that shows there was copying. Again, in my judgment, it does not but it does make it more probable that the claimants could see a risk of it being established. In the “Photograph” one, the settlement was 35 percent of the total, which meant 70 percent of music. So those two, if I am looking at the sort of preliminary position, I can see that there is a real chance that they are, if we really drill down to find out what happened, that the copying might be established in those cases.”

Then he considered the other song, “The Rest of our Lives”, with which I am not concerned. Then at [13] he came to the conclusion that “No Scrubs”, “Strip That Down” and

“Photograph” were cases in which the defendants had got over the first hurdle and then he said that they had not done so in relation to the other song.

14 He then moved on to the second part of the test and said this:

“Then I move on to the second part of the test - proportionality. It is suggested that I can look at this and say I can make some directions and minimise the cost of all this and this is only a secondary allegation; the primary one is all about “The Shape of You” and “Oh Why”. I fundamentally disagree with that submission. As it has been pointed out to me in the *O’Brien* case, reputation is a relevant feature in these cases. It seems to me that to have three more music pieces that have to be compared will greatly increase the cost and complexity and length of the trial.”

Then he accepted that it would have a major effect on the costs and the length of the trial. He said that there would need to be expert evidence from musicologists. He said that there would need to be expert evidence from the music industry practice about clearance, there would have to be disclosure, including computer disclosure of how the relevant bits of music were created. He said there would need to be detailed further pleadings and he says this: “because it was certainly not adequately pleaded. I do not think it would be right to strike out because it has not been properly particularised, but there will have to be an extensive Request for Further Information and a detailed Reply and, if that Reply is inadequate, then there may be an application to strike out again. I think it is premature at this stage to strike out for a lack of particularity.” I should interpose that Mr Mill told me that he did not suggest that it should be struck out on that basis. Then he said again that there would need to be expert evidence. He said that the judge would also need to decide not only whether there has been copying, but whether it is original or not, because “we have to look at the prior art if it is a copy of something else or whether it is original” and he accepted, given the seriousness of the assertions, that the parties should take this very seriously and incur substantial costs.

15 Then at [16] he dealt with the position of third parties and at the end of para.16 he said he took into account the point made by Mr Mill that “third parties had been slated and they are going to need to play a role in this”. He said:

“I think that is a feature to bear in mind but it is not hugely important.”

16 Then at [17] he said: “So there we are left with a situation where Quavo, Liam Payne, and Amy Wadge are going to be potentially incurring costs although they are not part of it. Again, consideration might need to be made to joining them so that they can get disclosure and that sort of thing, but that is for another day.” Mr Mill pointed out that, in fact, he was wrong in referring to Amy Wadge because she was only interested in the song which he had struck out. And then he said:

“So, there we are. We have, I consider, a very significant increase in costs being caused by this and in the second part of the test, in looking at proportionality, the question is whether I should decide that those significant costs make it disproportionate that I allow these matters to continue in the pleadings.

18. It is said that the value in terms of the revenue generated by “The Shape of You” is £30 million. That seems to be a gross figure, with no doubt significant advertising and production costs to be deducted. That is not a figure that is agreed by Mr Mill who suggests probably nearer half that, but however you look at it, even if you look

at it at £2 million plus costs for a £15 million claim, and I do not think it could be that much, I think the claim is only to the music part of it, £7.5 million, but even if you look at £2 million to £7.5 million, in my judgment it is not so disproportionate that I should decide to strike out because they should not be allowed to continue. In a sense, it would be saying that, "Because it is too expensive to prove, you cannot plead it." I do not think that is the right approach looking at the figures in this case."

- 17 That, then, is the judgment. That is said by Mr Mill to contain two fundamental flaws, one at each stage of the application of *O'Brien*. I asked him to summarise his case in relation to each limb and although this is only a summary and not a substitute for the rather fuller submissions he made, I think it is worth reading what he said to me. He said:

"The flaw in the deputy master's judgment in applying the first limb was that he found contrary to what he should have found that there was sufficiently credible evidence of copying based on the instances of clearances and settlement without any precise identification of what the evidence of copying was."

And he said that the fundamental flaw in the second limb was that he failed to weigh all the factors against the potential probative value of the evidence. As I say, those are only a summary of much more detailed submissions.

- 18 I accept, as both counsel accepted before me as well as before the Deputy Master, that the question whether these paragraphs of the pleadings should be struck out has to be assessed against the background of the guidance given by the House of Lords in *O'Brien*. But as I explored in argument with counsel, I think one should not lose sight of the fact that at this stage the application is an application to strike out a pleading. It is not an application to a trial judge or to a case management judge as to whether evidence should be admitted. It is entirely sensible that if an allegation of this type can be disposed of at the stage when it is first pleaded that it should be struck out because, as Mr Mill convincingly submitted to me, to leave an allegation on a pleading which should not be going forward because there is nothing in it is liable to cause the parties, and in this case particularly the claimants, significant cost in terms of preparing to meet that allegation in terms of disclosure, in terms of preparation of expert evidence and their own evidence and possibly evidence of other witnesses and the like. That, I accept.
- 19 Nevertheless, it does seem to me that there is a potential difference between an application as to whether evidence should be admitted at trial and an application to strike out pleadings. The question at the pleading stage, which is the stage we are at, does seem to me to be a question of whether the matters that are pleaded are capable of being matters which ought to form part of the trial.
- 20 Some of Mr Mill's objections to the Deputy Master's judgment were that he had formed a view as to the satisfaction of the limbs in *O'Brien* without having before him the detail of the case that the defendants were going to make and that, he said, was unfair. I think that if it can be shown that a plea is something that will not be of any potential probative value, the court can and should strike it out. But if the plea is one where it can be seen at this stage that there is potentially a case that could go forward for similar fact evidence to be admitted at trial, it is difficult to strike it out at this stage on the basis that the evidence itself is not sufficiently cogent because at this stage, of course, the parties have not adduced any evidence. One has to, I think, assume that the parties will be able to adduce evidence to establish what they plead and the question is whether if they were to do so that would be something which would be capable of being admitted at trial.

21 Mr Cuddigan showed me one authority in which a similar question arose. Most of the authorities are dealing with the question of admissibility of evidence, but in *Perrin v Drennan* [1991] FSR 81, a decision of Aldous J, who was faced with an application to amend the statement of claim, he said this at 84:

“As this is an application to amend the statement of claim the normal principles apply, namely that leave to amend will normally be given so that the issues between the parties are properly raised for determination at the trial. However, it would not be right to allow these amendments if they raise matters which are immaterial. That is the objection of the defendants. They submit that the matters sought to be raised in the pleading, even if factually correct, which they deny, would be irrelevant and inadmissible at trial.”

And he then referred to the Court of Appeal’s decision in *Mood Music Publishing v De Wolfe* [1976] 1 Ch 119, which was a case concerning the admissibility of similar fact evidence in a copyright action. And at 85, having cited from the judgment of Lord Denning in that case, he said:

“The matter for determination in the *Mood Music* case was whether the evidence was admissible whereas I have to decide whether the statement of claim should be amended. There is a slight difference in that I have to decide whether evidence to support the pleaded facts if proved could be admissible whereas the Court of Appeal had to decide admissibility of the evidence. The materiality of that difference is that the trial judge will have to decide whether the actual evidence given or sought to be given is admissible whereas I must decide whether, if the facts pleaded are proved, then those facts would be admissible and could be relevant.”

That seems to me to be the appropriate approach equally to an application to strike out a pleading and is the approach which I propose to adopt, that is whether if the facts pleaded are proved then those facts would be admissible and could be relevant.

22 I pass, then, to Mr Mill’s criticism of the Deputy Master’s decision on limb one of *O’Brien*, which is whether the matters which have been pleaded which he seeks to strike out have any potentially probative value. One starts with seeking to identify what is the issue in relation to which they are pleaded. The issue is whether the claimants copied the defendants’ song “Oh Why” and what Mr Cuddigan submitted that the facts which he has pleaded are facts from which the trial judge could properly infer three other instances of copying. He referred me to the fact that similar fact evidence is not infrequently adduced in copyright cases - see the discussion in **Copinger and Skone James on Copyright (17<sup>th</sup> Edn)** at §21/392 where it is said:

“Direct evidence of copying is rarely available and reliance frequently has to be placed on inference drawn from circumstantial evidence.”

And at §21/393, where the editors deal with similar fact evidence and say this:

“Thus, where the issue in a copyright case is whether the similarity between the claimant’s work and the defendant’s work is due to copying or is a coincidence, it is relevant to know that the defendant has produced works which bear a close resemblance to works other than the work in question which are the subject of copyright. Whereas similarity between two works might be mere coincidence in one



case, it is unlikely that there could be coincidental similarity in, say, four cases. The probative force of several resemblances together is much better than one alone. It does not matter in such cases that the claimant has not alleged that infringement of copyright has occurred in the other cases. It is sufficient to allege that copying has occurred.”

- 23 He also referred me to what the Court of Appeal said in *Mood Music* and the judgment of Lord Denning at p.127 includes the statement that the issue in that case was whether the resemblances between two songs were mere coincidences or due to copying and added:

“Upon that issue, it is very relevant to know that there are these other cases of musical works which are undoubtedly the subject of copyright, but that the defendants have nevertheless produced musical works bearing close resemblance to them. Whereas it might be due to mere coincidence in one case, it is very unlikely that they would be coincidences in four cases. It is rather like *Rex v Sims* [1946] K.B. 531, 540, where it was said: “The probative force of all the acts together is much greater than one alone.” So the probative force of four resemblances together is much better than one alone.”

That decision was cited with approval by Lord Carswell in *O’Brien* at [72].

- 24 Mr Cuddigan also referred to a number of other cases which it is not necessary to cite from extensively - see *Trump International Limited v DTTM Operations LLC* [2019] EWHC 769 (Ch), a decision of the late Henry Carr J at [39] to [43]. That was a trademark case, but it is noticeable that at [42], having cited from *O’Brien*, he said:

“These principles will no doubt be familiar to intellectual property practitioners. In relation to allegations of copyright infringement, it is necessary to decide, as a matter of fact, whether copying has occurred. As with claims of bad faith, direct evidence of copying is rarely available. In this context, it is well established that similar fact evidence may be admissible.”

And then cited from **Copinger and Skone James on Copyright** the passage that I have already referred to.

- 25 There is also the judgment of Aldous J in *Perrin v Drennan*, which I have already referred to, and two decisions of Mr Lawrence Collins QC (as he then was), sitting as a Deputy Judge of the High Court in *Designers Guild Limited v Russell Williams Textiles Limited*, one before trial at [1998] FSR 275 and one after trial at [1998] FSR 803, where Mr Cuddigan pointed out that having allowed in some similar fact evidence in the first decision the judge found it helpful when he came to making the second decision. See also the decisions of Pumfrey J in *Stoddard International Plc v William Lomas Carpets Limited* [2001] FSR 44 and of Laddie J in *Mattel Inc v Woolbro* [2003] EWHC 2412. The first of those cases was one in which Pumfrey J said that he did not find the evidence convincing and said:

“Evidence of this sort deployed to demonstrate a willingness to copy is of no use unless it is clear. It is not clear in this case.”

Mr Cuddigan said that was simply a case where the evidence was not very good, Pumfrey J having found that the designs did not really look like each other. *Mattel* is a case where the objection was taken at the last moment and I think rather turns on the particular facts in that case. It is true that Laddie J said that:

“It is tempting to say “once a thief, always a thief”, but I suspect that this type of material is logically of minor probative value in many cases.”

But the question is whether it is of any probative value in this case.

- 26 So, coming to the particular songs which the Deputy Master found were potentially capable of being probative of copying, taking first “Photograph”, the points made by Mr Mill were that the defendants themselves have been a bit less than forthright in their allegations of copying, referring in their written submissions below to cases where the songwriters may have copied prior copyright works. That does not seem to me to be a reason to assume that there is nothing in the case because the pleaded case is that, as I read earlier, “Photograph” was, in part, copied from “Amazing”.
- 27 Secondly, Mr Mill said that the defendants had failed to specify the detail of any alleged infringement. Mr Cuddigan’s answer to that was that at this stage one could simply listen to the two songs and it was fairly obvious, even to a layman, what the alleged similarity was and that the relevance of this case did not turn on the precise detail that musicologists might point to but was premised on the fact that it was settled for 70 percent of the music. Mr Mill said that the fact that a jury action in America was settled by a well-known and wealthy English litigant was no evidence as to the underlying merits. But it seems to me that at this stage the Deputy Master was entitled to come to the view which he did, which is that “there is a real chance that... if we really drill down to find out what happened, that the copying might be established in those cases.”
- 28 That, for the reasons I sought to give earlier, seems to me to be sufficient to justify leaving it on the pleadings and I do not think that I can conclude that that was a decision that the Deputy Master was disentitled from coming to. It was, as Mr Cuddigan pointed out, a case in which the claimants denied that there had been any copying, in which proceedings were taken, and in which the proceedings were settled, the evidence being that they were settled for what, on the face of it, appears to be a substantial share of the revenue. I do not think it can be said that that is incapable of supporting a case that there was copying. It is true that the defendants have not pleaded in particular the aspects of copying but, as the Deputy Master said, that is something which can be addressed by a request for further information and a reply, and if the replies are inadequate an application can then be made to strike out on the grounds that the particulars do not support the allegation. But at this stage, I do not see why his conclusion that there might be a case of copying - that copying might be established - is one that was impermissible.
- 29 Secondly, “Strip That Down”. This, again, is a case in which the claimants do not accept that there was any copying involved. It was a case, they say, of straightforward clearance. The question is whether a clearance in circumstances in which it was accepted that there was a melodic similarity, and a clearance in which 50 percent of the music payments were assigned to the writers of the other song, is one that could support a case of copying. Again, it is suggested that there is a lack of details. Mr Cuddigan said, “Well, Mr Sheeran, who appears to have reported the melodic similarity, no doubt knew what he found to be similar.” Mr Mill says, “Just because Mr Sheeran found it similar it does not mean that he will know that that is the case sought to be advanced by the defendants.” Mr Mill also says that a clearance is not the same as a disputed allegation of copying, it is simply industry practice and is not logically probative of copying. Nevertheless, it does seem to me that so far as the lack of details are concerned, the position is the same as it was with “Photograph”, that particulars can be asked for and particulars can be given. And if those particulars

support the case that is one thing. If they do not, as the Deputy Master said, the claim can be struck out for lack of particulars.

30 But that is not the argument which is put forward. The argument which is put forward at this stage is that there is nothing which could logically support the allegation of copying. Mr Cuddigan said that the process of clearance, against a background of an acceptance of melodic similarity, was one that could support a case of copying. Again, it seems to me that the Deputy Master was entitled to take that view. Going back to what the Deputy Master said, he said, correctly, that “there was a clearance, not a court case and settlement, but a clearance for 25 percent of the total or 50 percent of the music.” And he said:

“It is said that that that shows there was copying. Again, in my judgment, it does not but it does make it more probable that the claimants could see a risk of it being established.”

And it is on the basis of that that he said that:

“...there was a real chance that... if we really drill down to find out what happened, that the copying might be established in those cases.”

I agree that it cannot be said at this stage that the conclusion that copying might be established in that case was one that he was disentitled from coming to.

31 Then there is the other allegation of copying in relation to the “Shape of You”, in this case from “No Scrubs”. Here, the criticism by Mr Mill of the Deputy Master was that he wrongly assumed that copying of “No Scrubs” would be made out. That does not seem to me to be a justifiable criticism. In assuming that copying would be made out in relation to “No Scrubs” he was doing what Lord Bingham had said he should do in *O’Brien*, which is to assume that the evidence that would be adduced would be accepted. What he said is, having said that he did not accept that “just because there was payment made of 15 percent that that means there has been copying”, but it would be necessary to see which bit relates to whom and the like, and then he said:

“So, I consider that the “No Scrubs” bit, if that were made out, and I assume that it will be made out, then it seems to me that that is logically probative of the possibility of the same thing happening in the “Shape of You”.”

In the light of the authorities to which Mr Cuddigan referred me, I cannot say that that is wrong. It is pointed out by Mr Cuddigan that the reliance upon “No Scrubs” had formed part of the defendants’ case from the outset in the defence. It was not very clearly pleaded in the defence that that supported, or why that supported, the allegation of copying from “Oh Why”, but I cannot see any reason why it should have been pleaded other than to suggest that the copying of “No Scrubs” was supportive of the allegation that “Oh Why” had been copied as well. That was para.34 of the defence. Paragraph 34 pleaded that the claimants:

“had access to “Oh Why”... and as a result reproduced a substantial part of the Defendants’ Works in the “Oh Why/Oh I chorus” sections of “Shape of You”.”

And then particulars were given and they said that:

“The Defendants do not know of all the First to Third claimants’ access to and acts of reproduction of the “Oh Why chorus” and consequent infringement of copyright

in the Defendants' Works but at trial will rely upon all such activities which come to light. In the meantime, they rely upon the following:"

And then a number of particulars are set out, most of which deal with similarities between "Oh Why" and "Oh I" and the like. But at 34.12 there is reference to "Shape of You", including reference to a video in which the claimants provided an explanation of the writing of "Shape of You", which included "a suggestion by Mr Sheeran...that he had suggested it would be cool to include "an interpolation" of the "No Scrubs" tunes, despite the fact that its writers were not credited in the original submissions made to PRS for Music in 2017." I cannot see why that is pleaded, unless it is to support the allegation that Mr Sheeran and the other claimants had also copied, as well as "No Scrubs", the defendants' song "Oh Why".

32 So, going back to Mr Mill's criticism of the Deputy Master on the first limb, where, as I said earlier, he summarised it as being that there was a lack of sufficiently credible evidence of copying with no precise identification of that evidence, that, in my judgment, slightly misstates the test that the Deputy Master should have been applying, this being a case where the evidence has not been adduced and being a case where what he was faced with was an application to strike out a pleading. And, as I said earlier, the test that I think he should have been applying was that identified by Aldous J in *Perrin*, namely what needs to be decided at this stage is whether, if the facts pleaded are proved, the facts were admissible and could be relevant. It does seem to me that the Deputy Master was entitled to find on that basis that the first limb was satisfied in this case, not in the sense that he could now conclude that there was a sufficiently probative case of copying, but that he could, as he did, now conclude that the case of copying might be established in relation to the other three songs and that that could be logically probative of the case of copying in relation to "Oh Why" as well.

33 I will turn, then, to the second stage of *O'Brien*. Again, at this stage, what one has to, in my judgment, bear in mind is that one is allowing a case to go forward or a case not to go forward. As I have said, it is the case that if it can be seen at this stage that there is nothing in the suggested case of similar fact evidence it can be stopped. And no doubt also if it can be seen clearly at this stage that even if fully proved, the probative value was outweighed by the prejudice so that a fair trial would be not possible, the court could stop it under the second limb of *O'Brien*. But as Mr Cuddigan reminded me, and as, indeed, is reflected in something else said by Lord Bingham in *O'Brien* at [8], these decisions are case management decisions. Indeed, Lord Bingham had said in [5] that they are often very difficult and sometimes finely balanced decisions. It is, of course, well established that it is difficult to appeal case management decisions. They are discretionary decisions which the appeal court will not likely disturb. The way in which Lord Bingham put it at [8] is:

"In the absence of misdirection or demonstrable error, that is not a judgment with which an appellate court should interfere."

34 Mr Cuddigan also referred me to a statement by Potter LJ in *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 959.

"This was, of course, a case management decision involving the exercise of the judge's discretion of a kind with which this court has repeatedly expressed reluctance to interfere; indeed it has been emphasised that it is wrong to do so unless it can be clearly demonstrated that the overriding objective will not be observed or maintained if the decision is permitted to stand."

35 As Mr Mill put it, the flaw that he said the Deputy Master had committed was to have a look solely at the amount at stake, what was characterised as the question of proportionality, and fail to, as he said that he should have done, take into account how probative the evidence would be. He said that the Deputy Master was wrong to simply look at the cost of adducing the evidence and that one had to weigh in the balance the probative value, referring again to what Lord Bingham had said in *O'Brien* at [5]:

“The strength of the argument for admitting evidence will always depend primarily on the judge’s assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.”

And he said that when dealing with the second limb the Deputy Master did not come back to assess the probative value as he should have done and, again, relied on the fact that he could not do it because he did not have the materials.

36 As Mr Mill accepted, the Deputy Master does identify quite a number of factors when assessing the second limb: see [14] to [16] of the judgment which I referred to earlier, which identifies all the downsides, so far as they can be assessed at this stage, of allowing the plea to go forward. Those are the increase in the cost, complexity and length of the trial, the need for expert evidence and the possible impact on third parties and the like. Mr Mill said that there were various matters which he failed to take into account. Among other things, he said that so far as the quantum was concerned, when in [18] the Deputy Master weighed up the costs of £2 million against what was said to be a £7.5 million claim, he had made an error because the £7.5 million was 50 percent of the total value of £15 million and therefore was 100 percent of the music. He said that the way in which the Deputy Master had referred to the second limb as “proportionality” suggests that he had simply thought that all he had to do was weigh up whether the costs were disproportionate, given the amount at stake. I do not think that that is a fair reading of the Deputy Master’s judgment. He does say, this being an *ex tempore* judgment, right at the outset that he had been addressed by both counsel for quite some time, he said he would endeavour to be concise and added: “If I do not mention everything it is not because I have ignored it,” and he said he had considered their skeleton arguments in full. I think that it is a mischaracterisation to say that he thought that all he had to do was assess the question of whether the costs of possibly £2 million were disproportionate to a claim of possibly £7.5 million.

37 So far as the quantum of the claim is concerned, Mr Cuddigan pointed out that the figures were based on an estimate of the revenue up until sometime earlier this year but this song, which has been immensely successful, will continue to have a life for some time to come and indeed the copyright may last for a very long time and therefore one cannot simply compare the costs of the trial with the amounts which have already been earned. But rather more widely than that, I do not think it should be thought, reading the judgment as a whole, that the Deputy Master has ignored the terms of the overriding objective which require a case to be decided justly. When he says in [18] that:

“In a sense, it would saying that because it is too expensive to prove you cannot plead it. I do not think that is the right approach, looking at the figures in this case”

I do not think it should be interpreted as meaning that he thought that all one had to do was weigh up the cost of allowing this plea to stand against the amounts at stake. The first part of his judgment, in which he finds that there is a case on the first limb of *O'Brien* made out that the evidence is potentially probative, and that the plea should therefore be allowed to stand, is not something that he is likely to have overlooked when considering the second

limb. Once he has reached the conclusion that there is a sufficient case, that there will be relevant and admissible evidence to allow the plea to stand, one takes that as a given and then one looks at the reasons why it should, nevertheless, be said that the court should be deprived of relevant evidence. That, indeed, is what Lord Bingham envisages. In [5] of his opinion he says:

“For the party seeking admission, the argument will always be that justice requires the evidence to be admitted.”

He then identifies some other factors. Then at [6] he identifies what can be urged against that. It does seem to me that that is what the Deputy Master has done. He has identified that there is a case under the first limb and having done that what he then does, when considering the second limb, is identify what could be urged against it. He does not overlook the things which could be urged against it, but having weighed them up against the size of the case decides there is not sufficient reason not to allow that evidence to be adduced, or (to be more accurate) not to allow that plea to stand on the pleadings.

- 38 As to the particular matters which it is said that he overlooked, they are identified in para.27 of Mr Mill’s skeleton. The first of those is the impact on the reputation both of the claimants and of third parties. I do not think he can be said to have overlooked the impact on the third parties, because at [16] and [17] he expressly refers to the need for third parties to play a role in the case. It is true that he says that it is not hugely important, but he says it was a feature to bear in mind. The weight that he gives to any particular factor is a matter for him. I do not think it can be said that he has overlooked it. As to the suggestion that he overlooked the impact to the reputation of the claimants, as Mr Mill accepts he himself said at [14] that reputation is a relevant feature in these cases and it was, indeed, for that reason that he rejected Mr Cuddigan’s submission that it could all be dealt with in a fairly secondary and offhand way. He accepted that if these allegations were to remain in the trial they would have to be dealt with properly. That deals with para.27(a) and 27(c) of Mr Mill’s skeleton.
- 39 Paragraph 27(b) is the lack of particularisation. Mr Mill accepts that he was not seeking to strike out the pleading for lack of particularisation, but because the lack of particularisation meant the defendants failed to satisfy the test, and that I have already referred to when dealing with the first limb.
- 40 As to para.27(d), which is the impact on the length of the trial - the increase in trial length - which would be bound to increase the burden on the claimants and the court and other court users, again, I do not think it can be said that the Deputy Master overlooked the increase in the trial length and he expressly accepted it at [15]. Again, the weight that he gives it is a matter for him.
- 41 At para.27(e), the last matter relied on is the fact that the impact of the claim is to cause PRS to suspend the claimants’ royalties. The evidence is that interest is not being paid and will not be paid at the end of the day even if the claimants are entirely successful. That, he said, was unfair, and he also said that just because the claimants are wealthy it should not be assumed that they cannot suffer from a lack of cash flow if their income is being withheld from them. As to the latter point, Mr Cuddigan said that if any reliance was going to be placed on any particular difficulties that the suspension would put them in, then it should have been dealt with in evidence, which it was not, a point which I accept. But I do accept that Mr Goodbody said that the PRS does not pay interest on monies held in suspense for the period they are held, which is why the claimants indeed brought these proceedings and want

to have them resolved promptly. Mr Cuddigan accepted that those were the facts, that is how it works, and it was not suggested by either counsel that there is any mechanism for compensating the claimants if it turns out that this counterclaim fails and that the claimants receive late the monies which PRS are withholding. It is true that that does not appear to have been specifically dealt with by the Deputy Master but I do not think that it can be said that a point like that which, although mentioned in the evidence, does not appear to have featured as a major point argued before him, is one that can justify the conclusion that his assessment of the factors is so flawed as to amount to a misdirection such that I can properly, in accordance with the principles applicable to appeals against case management decisions, set aside his decision with a view to taking it again.

- 42 In all the circumstances, I do not think that the criticism made of the Deputy Master's judgment, either in his approach to the first limb of *O'Brien* or in his approach to the second limb of *O'Brien*, is made out. The Deputy Master himself envisaged that there would need to be further pleading, as I have already referred to, and nothing in this hearing in which I propose, for the reasons I have given, to dismiss the appeal, will preclude an application in due course being made, if particulars that are thought to be inadequate are given, for the pleas to be struck out for lack of particularisation. Nor if one gets to the stage of adducing evidence does anything prevent an application being made to say that once the evidence that is provided is looked at, it does not amount to a sufficiently cogent case to justify being admitted. So, in that sense, this is not, by any means, the end of the question, but it is, for the reasons I have sought to give, a case in which I have not been persuaded that there was any flaw or misdirection in the Deputy Master's judgment, which means that the pleading will stand in the way in which he directed, which involves the striking out of the reference to "The Rest of Our Lives" song, but otherwise leaving the reference to the other songs on the pleading as they stand.

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