

NEUTRAL CITATION NUMBER: [2022] EWHC 187 (Ch)

Claim No: IL-2018-000095

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

7 Rolls Buildings,
Fetter Lane, London
EC4A 1NL

Wednesday, 26 January 2022

BEFORE:

THE HON SIR GERALD BARLING
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

BETWEEN:

- (1) MR EDWARD CHRISTOPHER SHEERAN MBE**
- (2) MR STEVEN MCCUTCHEON**
- (3) MR JOHN MCDAID**
- (4) SONY/ATV MUSIC PUBLISHING (UK) LIMITED**
- (5) ROKSTONE MUSIC LIMITED**
- (6) POLAR PATROL MUSIC LIMITED**

Claimants

-and-

- (1) MR SAMI CHOKRI**
- (2) MR ROSS O'DONOGHUE**
- (3) ARTISTS AND COMPANY LIMITED**

Defendants

IAN MILL QC and JESSIE BOWHILL and RAYAN FAKHOURY (Instructed by Bray & Kraiss, Fulham Business Exchange, Suites 9 & 10, The Blvd, London, SW6 2TL) appeared on behalf of the Claimants.

ANDREW SUTCLIFFE QC AND TOM RAINSBURY (Instructed by Keystone Law, 48 Chancery Lane, London, WC2A 1JF) appeared on behalf of the Defendants.

JUDGMENT
(Approved)

Transcript by John Larking Verbatim Reporters
One Cow Lane, Church Farm, South Harting, West Sussex, GU31 5QG Phone: 01730 825 039

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SIR GERALD BARLING:

1. This pre-trial review is in a copyright action relating to a song called "Shape of You" written by claimants (1) to (3), Mr Edward Sheeran, Mr Steven McCutcheon and Mr John McDaid. The song has been very popular and successful. 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. The defendants filed a Defence and a Counterclaim alleging infringement. There followed a Reply and a Defence to Counterclaim by the claimants denying infringement, and ultimately a Reply to the Defence to Counterclaim.
2. In the Reply to the Defence to Counterclaim, other examples were pleaded of what were said to be instances of copying by one or more of the claimants. One concerned a song called "The Rest of our Lives", which was said to be in part copied from another song. That allegation was struck out at an earlier stage of the proceedings. However, certain other instances survived the strike out application; in particular, paragraph 4(3) of the pleading alleges that "Shape of You" itself was in part copied from a song called "No Scrubs". Paragraph 6 of the pleading refers to a song called "Photograph" which, according to the evidence, was written by the first and third claimants, Mr Sheeran and Mr McDaid, and which is said to be in part copied from a song called "Amazing".
3. In June 2016 proceedings were brought in California by the songwriters of "Amazing" against the songwriters of "Photograph" alleging copyright infringement. The latter denied infringement, and Mr Sheeran and Mr McDaid maintained that denial in the present proceedings. The Californian proceedings were settled. The Settlement Agreement, dated 6 March 2017, has been disclosed. Whilst the claimants maintained their position that no infringement had occurred, the Settlement Agreement involved a very substantial payment to the writers of "Amazing" and a 35 per cent share of the musical rights in the allegedly infringing song. No claim in the Californian proceedings was based on infringement of copyright in the lyrics.
4. In the present proceedings, the defendants rely upon the settlement as giving rise to an inference that, despite their denial, the claimants had copied "Amazing", and this,

together with the other similar fact material, is said by the defendants to show that the claimant songwriters were engaged in habitual copying, a factor in turn said to support the claim that in their song “Shape of You” they copied the defendants' song “Oh Why”.

5. With that preamble I turn to the issues before me in this PTR. These have been helpfully narrowed, as explained in their written and oral submissions by Mr Ian Mill QC, who appears with Ms Jessie Bowhill and Mr Rayan Fakhoury for the claimants and by Mr Andrew Sutcliffe QC and Mr Tom Rainsbury for the defendants.

The present application - Paragraphs 17 and 18 of CPR PD51U

6. By reference to the draft minutes of order provided to me at the hearing, the only remaining contentious issues relate to paragraph 2.2 of the draft. One or two other aspects of the draft may require some further discussion and tweaks as between the parties, but neither side envisaged that agreement would not be reached on those. So it is the two-part proposed order at paragraph 2.2 with which I am now concerned.
7. In the version given to me yesterday (it may have changed slightly overnight) paragraph 2.2 reads as follows:

"2.2 The claimants are to produce unredacted copies of -

(1) the musicologist's report which was sent to Bray & Kraiss by Loeb & Loeb on or after the request from Bray & Kraiss on 15 January 2016; and

(2) all communications to and from Mr Guy Protheroe concerning 'Photograph'."

8. The defendants invite me to make these orders under paragraph 17.1(4) of CPR PD51U, on the ground that there has been or may have been a failure adequately to comply with an order for Extended Disclosure and it is reasonable and proportionate (as defined in paragraph 6.4) to make the order. In defining “reasonable and proportionate”, paragraph 6.4 refers to the overriding objective and a number of specific factors to which regard is to be had. These include the complexity of the issues, the importance of the case, the likely probative value of the documents in question, their number, the ease and expense

of searching for and retrieving them and the need to ensure that the case is dealt with expeditiously, fairly and at a proportionate cost.

9. Alternatively, the defendants seek the disclosure pursuant to paragraph 18 of CPR PD51U, on the ground that the disclosure in issue is “necessary for the just disposal of the proceedings and is reasonable and proportionate” as defined in the provision referred to above.

The Loeb & Loeb report

10. I deal first with the issue relating to the expert report sent to the claimants' solicitors by Loeb & Loeb, who were the lawyers acting for the plaintiff in the Californian proceedings. I need to explain a little background.
11. This report was apparently prepared on behalf of the plaintiff in those proceedings, which were brought against the claimants in the present proceedings in respect of the alleged copying of the plaintiff's song “Amazing” by the claimants' song “Photograph”. It is the report of an expert musicologist, although for convenience I will refer to it as the Loeb & Loeb report.
12. The claimants have disclosed the following emails relating to that report:

(1) An email dated 15 January 2016 from the claimants' solicitors to the Californian plaintiff's lawyers, Loeb & Loeb, as follows:

"Before replying fully to your claims, our client would like to receive a copy of the musicologist's report your firm commissioned ... In the meantime no admissions are made and all of our clients' rights and remedies remain expressly reserved."

(2) An email in reply from Loeb & Loeb dated 5 February 2016 as follow:

"Thank you for your email dated January 15 below. My client is willing to share the report of their musicologist as part of settlement discussions."

Please confirm that our providing a copy of the musicologist's report to you is for settlement purposes only and shall be deemed a confidential settlement communication.

Upon your confirmation we will be happy to provide you with a copy of the report.

All rights continue to be reserved."

(3) An email in redacted form from the claimants to Loeb & Loeb dated 23 February 2016 (before me at page 356 of the defendants' application bundle). I was told by Mr Mill that the first paragraph of this email states as follows:

"With regard to your email, I confirm that I agree that the furnishing of your musicologist's report will be considered a privileged and confidential communication."

The next paragraph of that email reads:

"I have some further questions that I think are important in order to evaluate your clients' claims beyond the musicologist's report."

13. It is not in dispute that a copy of the Loeb & Loeb report was then provided to the claimants' solicitors.
14. I note that in the present proceedings there are expert musicologist reports on both sides dealing with, amongst other things, the same question of whether the claimants' song "Photograph" infringed the Californian plaintiff's copyright in "Amazing". I have been shown these reports briefly. It seems that the defendants' expert expresses the view that it does infringe, whereas the claimants' expert expresses the contrary view.
15. The defendants submit that the Loeb & Loeb report is equally disclosable as the Settlement Agreement. (Mr Sutcliffe also relied upon a number of clauses in that agreement as supporting his application. I will refer to those clauses in a moment.) The report is said to be relevant and important; the present case is significant and complex; the material sought is likely to be highly probative, as shining a light on the claimants' decision to settle the Californian proceedings; the documents are limited in number,

easily produced and necessary for the expeditious and fair resolution of the case. Mr Sutcliffe expanded on these submissions as follows. If the Loeb & Loeb report were produced, he would be able to use it to cross-examine the claimants' expert in the present proceedings in order to challenge his view that the song Photograph does not infringe the Californian plaintiff's copyright in the song Amazing. This could bolster the similar fact argument relating to that alleged copying. Mr Sutcliffe relies on the same points *mutatis mutandis* in respect of the relevance and importance of what have been called the Protheroe communications, which comprise the second element in paragraph 2.2 of the draft order. I will return to that aspect in due course.

16. I do not share the defendants' view of the importance of this document. It is certainly conceivable that the Loeb & Loeb report contains material supportive of the Californian plaintiff's case – otherwise, it may be asked rhetorically, why would they have been willing to share it with the claimants? However, in the context of the present proceedings, the introduction in evidence and use in cross-examination of this material would be likely to add very little to the weight of the evidence already available to be put before the court on the similar fact issue. The author of the Loeb & Loeb report would not be available to be cross-examined nor could he or she provide any elucidation or explanation of anything in the report. This is in contrast to the two musicologist experts who are to be called and who will be available to be cross-examined. As I have said, both of the latter have provided an expert, reasoned, view on the alleged infringement of the copyright in the song “Amazing” by the song “Photograph”. The introduction of a further written expert report without the court being in a position to see the author cross-examined or to question the author itself, far from assisting, is likely to add to the burden on the trial judge with little if any compensating benefit in aid of the resolution of the case.
17. Further, the defendants already have access to the Settlement Agreement; this will no doubt be the basis for a submission that such substantial payments together with the grant of part-ownership in “Photograph” supports the allegation of habitual copying.
18. Nor, in assessing the importance of this material, should one lose sight of the fact that the alleged infringing nature of the claimants' song “Photograph” is not the central issue in the present proceedings, and goes only to the subordinate issue of similar fact. To

order the production of the Loeb & Loeb report in circumstances where each party has already engaged its own chosen expert musicologist, would not, in my view, be consistent with the overriding objective of dealing with the case justly and at proportionate cost. In particular, it would not save expense but rather be likely to lengthen the trial and add to the court's burden. It would not assist in ensuring that the case is dealt with expeditiously and fairly. I note that, although the emails referring to this report were before Meade J at the directions hearing on 2 December 2021, the relevant part of his order on that occasion did not appear to cover the report, nor did the defendants apparently raise the matter before him.

19. In those circumstances, I do not consider that it would be reasonable and proportionate to order disclosure and production of the report within the meaning of CPR PD51U, paragraph 17, nor that it is necessary for the just disposal of these proceedings, nor reasonable and proportionate within the meaning of paragraph 18 of the Practice Direction. The same would apply to any report or findings made by the claimants' musicologist expert in the Californian proceedings, namely Mr Protheroe. As I will explain, the claimants state that no such report or findings have ever existed.
20. Accordingly, I would not exercise my discretion to order disclosure and production of this material, quite apart from any merits of the claimants' alternative arguments relating to without prejudice protection and litigation privilege.

Without prejudice protection

21. The claimants submit that the Loeb & Loeb report attracts both without prejudice protection and litigation privilege. In relation to without prejudice privilege they refer to *Rabin v Mendoza* [1954] 1 WLR 271 where the Court of Appeal held that an expert report "made for the purposes of without prejudice negotiations" benefitted from without prejudice privilege, with the consequence that an order for production could not be made. It would be contrary to public policy, they submit, and liable to discourage settlement of litigation if documents of this nature, expressly shared on a without prejudice basis, were disclosable in subsequent proceedings raising similar issues; for parties may be disinclined either to share those documents in the first instance or to settle the dispute in

the light of those documents, if there were a risk that the same material may be relied upon or disclosed in subsequent proceedings.

22. They also submit that a contention of the defendants that without prejudice privilege cannot be asserted following settlement of a dispute is wrong in law in the light of the House of Lords' decision in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, particularly at page 1300.
23. In relation to litigation privilege, the claimants referred to two decisions, *The Palermo* (1883) 9 PD6 and *Watson v Cammell Laird & Co* [1959] 1 WLR 702, as authority for the proposition that copies of pre-existing documents obtained from a third party by a solicitor for the purposes of his client's litigation (or reasonably contemplated litigation) are subject to litigation privilege. They submit the fact that the report was obtained from a third party does not disentitle the claimants from asserting privilege over the report.
24. Mr Sutcliffe for the defendants submits, first, that it is not clear from the surrounding circumstances that the negotiations between the claimants and the Californian plaintiff were intended to be privileged. Moreover, he contends that the terms of the Settlement Agreement, and in particular clause 18(a) and clause 19, indicate that the parties intended a "carve out" for disclosure or discovery required by law or in a court procedure. Those clauses read as follows:

"18 Confidentiality

(a) Subject to the paragraphs that follow, the parties agree to keep the terms of this Settlement Agreement and the substance of all negotiations in connection with it confidential except to the extent disclosure is required by law or required to assist the parties' attorneys, accountants or tax advisers in the preparation of tax returns or other government filings."

"19. A party requested to disclose any information concerning this agreement pursuant to a validly served subpoena, civil investigative demand, discovery procedure permitted under the Federal Rules of Civil Procedure or other formal discovery

request (collectively a demand) shall assert an initial objection to the disclosure of such information to the extent permitted by applicable law and shall notify the requesting person or entity (the requesting party) that such information is confidential and shall further give notices of such requesting party's request by email and next business day delivery mail to all parties hereto promptly after receipt of such request."

25. Mr Sutcliffe also submits that in any event the claimants have impliedly waived any privilege by disclosing and producing the letters and emails relating to the Loeb & Loeb report.
26. It is common ground that the copy of the Loeb & Loeb report was supplied to the claimants in the course, and as part, of settlement negotiations between the claimants and the Californian plaintiff. There would therefore seem little doubt that as a matter of English law and procedure that copy is without prejudice and privileged as between those parties. Indeed, the terms on which it was supplied, which were agreed by the claimants, expressly refer to its being a "privileged communication".
27. I do not consider that the terms of the Settlement Agreement affect that privilege, even if, which is at least open to argument, the reference in clause 18(a) to "the substance of all negotiations in connection with [the Agreement]" cover the contents of the report. The stated exception is where disclosure is "required by law", which simply expresses what would otherwise be the case and does not assist on what actually is "required by law". Neither, in my view, does Clause 19 take the matter further.
28. Nor do I consider that there has been any waiver of the without prejudice protection afforded to the report by reason of its being referred to in emails disclosed by the claimants. Mere reference to the existence of the report and the circumstances in which it came to be provided are clearly insufficient to give rise to a waiver. These details, on the contrary, explain why it is said to be subject to without prejudice protection. Furthermore, as will be discussed in a moment, the protection also benefits the Californian plaintiff against whom waiver has not been asserted.
29. The real question, therefore, is whether the claimants can take advantage of the without prejudice privilege attaching to the report in circumstances where its disclosure is sought by the defendants in these proceedings, who were not parties to the Californian

proceedings. The decision of the Court of Appeal in *Rabin v Mendoza* (above) relied upon by the claimants, was a case where the parties to the disclosure application were the parties between whom the privilege had arisen. It does not therefore appear to help on this point.

30. Further relevant case law is referred to in the judgment of Newey J (as he then was) in *EMW Law LLP v Halborg* [2017] EWHC 1014 (Ch). At paragraphs 34 to 45, under the heading "Some principles", he said this:

"34. The 'without prejudice' rule operates to render evidence inadmissible. In general, '[t]he rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence' (Lord Griffiths in *Rush & Tompkins Ltd v GLC* [1989] 1 AC 1280, at 1299).

35. One justification for the rule can be found in 'the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues' (Robert Walker LJ in *Unilever plc v Procter & Gamble Co* [2000] 1 WLR 2436, at 2442). The rule is also 'founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish' (Lord Griffiths in the *Rush & Tompkins* case, at 1299).

36. Without prejudice negotiations will normally be inadmissible in their entirety. In the *Unilever* case, Robert Walker LJ said (at 2448-2449):

'But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.'

37. The without prejudice rule can continue to apply even after a compromise has been agreed. In the *Rush & Tompkins* case, Lord Griffiths said (at 1301):

'as a general rule the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement.'

In *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436, Lewison LJ (with whom Sharp and Burnett LJJ agreed) said (at paragraph 22):

'The general rule however is still that stated in *Rush & Tompkins Ltd v Greater London Council & Another ...*, namely that without prejudice negotiations once privileged remain privileged even after settlement.'

38. The implications of the without prejudice rule are, moreover, capable of extending beyond the parties to the relevant negotiations. In the *Rush & Tompkins* case, Lord Griffiths said (at 1301):

'It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party.'

In *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 AC 990, Lord Rodger observed of the *Rush & Tompkins* case (at paragraph 37):

'The decision is important because it establishes that not only the parties to the correspondence, but third parties also, are prevented from making use of the contents of without prejudice correspondence.'

39. It is not open to one party to without prejudice negotiations to waive the privilege unilaterally. The privilege is a joint one and so can be waived only with the consent of both parties: see *Avonwick Holdings Ltd v Webinvest Ltd*, at paragraph 21.

40. There are, however, exceptions to the without prejudice rule. Robert Walker LJ provided a list of some of "the most important instances" in the *Unilever* case, at 2444-2445. Two of those he identified are particularly relevant to the present appeal:

'(1) As Hoffmann LJ noted in [*Muller v Linsley & Mortimer*], when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v. Standard Telephones and Cables Ltd.* [1969] 1 W.L.R. 1378 is an example.

...

(6) In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver'

41. The basis and extent of the latter exception (Robert Walker LJ's exception (6)) are controversial. I shall have to return to them later in this judgment.

42. The list of exceptions to the without prejudice rule is not closed. In *Ofulue v Bossert*, Lord Neuberger (with whom Lords Hope, Rodger and Walker expressed agreement) said (at paragraph 98) that it was open to the House of Lords to create further exceptions to the rule, while also expressing the view that it would be inappropriate to do so on the facts of that case. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662, the Supreme Court concluded that there should be an exception under which:

'facts identified during without prejudice negotiations which lead to a settlement agreement of the dispute between the parties are admissible in evidence in order to ascertain the true construction of the agreement as part of its factual matrix or surrounding circumstances'.

Lord Clarke (with whom the other members of the Court agreed) said (at paragraph 46):

'I would hold that the interpretation exception should be recognised as an exception to the without prejudice rule.

I would do so because I am persuaded that, in the words of Lord Walker in the *Ofulue* case [2009] AC 990, para 57, justice clearly demands it. In doing so I would however stress that I am not seeking either to underplay the importance of the without prejudice rule'

43. While '[n]early all the cases in which the scope of the "without prejudice" rule has been considered concern the admissibility of evidence at trial after negotiations have failed' (Lord Griffiths in the *Rush & Tompkins* case, at 1300), it can also render documents immune from disclosure. In the *Rush & Tompkins* case, Lord Griffiths noted (at 1304) that *Rabin v. Mendoza & Co* [1954] 1 W.L.R. 271 'shows that even as between the parties to "without prejudice" correspondence they are not entitled to discovery against one another' and went on to explain (at 1305):

'I have come to the conclusion that the wiser course is to protect "without prejudice" communications between parties to litigation from production to other parties in the same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing would be put on paper but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing.'

A little later, Lord Griffiths said (at 1305):

'In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties.'

44. In the course of the hearing before me, there was some debate as to whether a party to without prejudice negotiations can properly show a third party documents relating to the negotiations without obtaining the consent of his counterparty. The authorities show both that the without prejudice rule can be waived only with the consent of both parties and that the rule protects communications within its scope from disclosure. Does it follow that relevant documents can be shown to a third party only if both parties to the negotiations agree?

45. The answer, I think, must be 'No'. The voluntary provision of a document has, as it seems to me, to be distinguished from compulsory disclosure. The fact that a party to without prejudice negotiations is entitled to withhold communications within their scope on disclosure cannot mean that he is not free to show them to someone else if he so chooses, at least if there is a legitimate reason for doing so. Were the position otherwise, a litigant might find himself unable to provide relevant documents to, say, an expert unless and until the other side agreed, which would be absurd."

31. From this case law, cited by Newey J, the following principles emerge:

(1) If it applies, the without prejudice protection renders the material in question inadmissible.

(2) An important reason for the rule is to encourage litigants to settle rather than litigate. That policy is negated if statements made in the course of settlement negotiations can later be relied upon in legal proceedings.

(3) The reaching of a settlement does not, as a general rule, terminate the without prejudice protection so as to render the material admissible in subsequent litigation connected with the same subject matter. Subject to certain exceptions, the material, once privileged, remains so even after a settlement.

(4) The protection afforded to without prejudice material extends beyond the parties to the negotiations which give rise to it, and precludes third parties from relying upon it.

(5) So far as exceptions to the without prejudice rule are concerned, the categories are not closed and it is open to the courts, usually the Supreme Court, to create further exceptions. (In my view none of the exceptions, as currently understood, would apply on the facts of the present case.)

(6) Although the without prejudice protection from admissibility, being a privilege of both parties to the negotiations, can be waived only with the consent of both parties, it is possible that one party is entitled voluntarily to show the material to a third person where there is a legitimate reason for doing

so. This point was the subject of a debate before Newey J in the case I referred to, and his conclusion (reflected in point (6)) appears to distinguish between compulsory disclosure in the course of legal proceedings and the voluntary showing of the material in question to someone for good reason. This principle has no bearing, therefore, on the present issues.

32. It is worthy of note that the policy to which I referred at point (2) above would *prima facie* be just as much at risk of being frustrated if without prejudice material could be relied upon by a third party in different legal proceedings, as it would if one of the parties to the negotiations were able so to rely upon it. Hence the principle at point (4).
33. In the light of these principles, I am of the view that the without prejudice protection applies to prevent the defendants obtaining an order for production of the copy of the Loeb & Loeb report sent to the claimants in the settlement negotiations of the Californian proceedings.
34. In these circumstances, I do not need to consider litigation privilege insofar as it was relied upon as protecting the Loeb & Loeb report.

The Protheroe communications

35. In paragraph 2.2(2) of the draft minute of order, the defendants seek "all communications to and from Mr Guy Protheroe concerning "Photograph"". It is common ground that at some point, the claimants, as defendants in the Californian proceedings, had approached Mr Protheroe, who was a musicologist. The claimants have disclosed a number of emails in June and July 2016, between those I take to be the claimants' agents and Mr Protheroe, apparently seeking the latter's assistance in the infringement proceedings in California. One such email from a Mr Martin Toher to Mr Protheroe states:

"I look forward to your findings. Here's the link."

That link was to the plaintiff's song "Amazing". An earlier email from Mr Protheroe states:

"I hope to be able to report on progress very shortly."

36. As already mentioned, the defendants assert the relevance and importance of any report and findings of Mr Protheroe, for essentially the same reasons as are relied upon in respect of the Loeb & Loeb report. I have explained why I do not consider it appropriate to make any such order as sought, and why the criteria in paragraphs 17 and 18 of CPR 51U PD are not satisfied, whether for the Loeb & Loeb report or for any report and findings of Mr Protheroe.
37. Furthermore, the claimants have stated, through counsel's skeleton argument and through Mr Mill, that no report was made by Mr Protheroe and that Mr Protheroe has so confirmed to the claimants' solicitors: see the claimants' supplemental skeleton argument. In oral submissions, Mr Mill told me that there was no report nor any findings by Mr Protheroe, and that the claimants were willing to provide a witness statement to that effect. However, he submitted that I should not order such a statement unless I found that the material was of "importance", (a word which both counsel in the course of their submissions adopted as shorthand for the documents in question being able to satisfy the criteria in paragraphs 17 and/or 18 of the Practice Direction).
38. Mr Mill had another string to his bow in respect of any further Protheroe documents, namely that litigation privilege would apply to them if they existed. Mr Sutcliffe argues that there was no litigation privilege but that in any event the emails already disclosed amounted to waiver of any such privilege, and that those emails strongly suggested that there must have been other communications. He submitted that if I was minded to accept that there were no findings by Mr Protheroe, then a witness statement should be provided rather than accepting an assertion made in court. He expanded on these points in a responsive note given to me this morning. This note was partly in answer to a supplemental note sent to me last night by Mr Mill and partly a vehicle for further points.
39. I have read and considered both these documents, notwithstanding that they have been sent to me just before I was about to give judgment. Having considered them, they do not affect my conclusions or the outcome of this application.
40. In the light of (1) what I have decided in relation to the failure to satisfy the criteria set out in paragraphs 17 and 18 of CPR 51U PD, even should any report or findings by Mr

Protheroe exist, and (2) Mr Mill's assurance that no such material does in fact exist, I do not need to make any determination on the litigation privilege argument or as to any waiver of such privilege. It was only very succinctly argued and, as Mr Sutcliffe pointed out, only raised by the claimants on the evening before yesterday's hearing.

Conclusion

41. For the reasons set out in this judgment, I do not make any order under paragraph 2.2 of the draft minute of order, for production of either the Loeb & Loeb report or any further Protheroe documents. Nor do I consider it appropriate to order a witness statement in relation to the non-existence of the latter. What has been said about that is on the court record.