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Case No: CA-2024-000560

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES, INTELLECTUAL PROPERTY LIST (ChD)

Mr Justice Michael Green
[2024] EWHC 128 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2025

Before :

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE BIRSS

Between :

(1) NOEL REDDING ESTATE LIMITED	<u>Claimants/</u>
(2) MITCH MITCHELL ESTATE LIMITED	<u>Respondents</u>
- and -	
SONY MUSIC ENTERTAINMENT UK LIMITED	<u>Defendant/</u>
	<u>Appellant</u>

Robert Howe KC (instructed by **Simkins LLP**) for the **Appellant**
Simon Malynicz KC and Phillip Johnson (instructed by **Keystone Law LLP**) for the
Respondents

Hearing date : 30 January 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 6th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. This is an appeal by the Defendant (“Sony”) against paragraph 3 of an order of Michael Green J dated 22 February 2024. By that paragraph the judge dismissed an application by Sony to strike out, alternatively for summary judgment dismissing, the Claimants’ claims for declarations as to the ownership of, and relief for infringement of, copyright and performers’ rights (save to the limited extent ordered by paragraphs 1 and 2 of the order) for the reasons given by the judge in his judgment dated 29 January 2024 [2024] EWHC 128 (Ch).
2. Sony appeals with permission granted by Falk LJ on two grounds. Ground 1 is that the judge was wrong to reject Sony’s contention that the Claimants’ claim for infringement of performers’ rights is precluded by the transitional provisions contained in section 180(3) of the Copyright, Designs and Patents Act 1988, regulation 27(2) of the Copyright and Related Rights Regulations 1996 (SI 1996/2967) and regulation 32(2) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498). Ground 2 is that the judge was wrong to reject Sony’s contention that the Claimants’ copyright claim is statute-barred as being a claim in respect of partnership assets.

Background

3. Jimi Hendrix (“Hendrix”) was a rock guitarist whose fame endures to this day despite his having died at the tragically young age of 27 on 18 September 1970. Most of his success was achieved as a member of the band The Jimi Hendrix Experience (“JHE”), which he formed in 1966 together with Noel Redding (“Redding”, bass guitar) and Mitch Mitchell (“Mitchell”, drums). Redding died on 11 May 2003 and Mitchell died on 12 November 2008.
4. The Claimants plead in their Particulars of Claim that JHE was “at all material times ... a partnership at will, pursuant to the Partnership Act 1890”. The Claimants also plead that there was an oral agreement in around May 1967 between the members of JHE regarding the ownership and division of monies received by JHE to the effect that all profits would be divided 50% to Hendrix, 25% to Redding and 25% to Mitchell. It is common ground that, if JHE was a partnership, the partnership dissolved at the latest when Hendrix died.
5. At least to begin with, JHE was managed by Michael Jeffery (who died in 1973) and Chas Chandler (who died in 1996). On 11 October 1966 Hendrix, Redding and Mitchell entered into an exclusive recording agreement with Messrs Jeffery and Chandler (referred to as “the Producers”) for an initial term of seven years (“the 1966 Agreement”). At that time, sound recordings were commercially exploited primarily by the manufacture and sale of vinyl records reproducing them.
6. It is common ground that, by virtue of the 1966 Agreement, Hendrix, Redding and Mitchell all consented to the recording of their musical performances. Furthermore, clause 6 of the 1966 Agreement provided that the Producers would have, among other rights:

- “(ii) The sole and exclusive rights to manufacture sell lease assign licence distribute or otherwise use or dispose of the said sound recordings and records tapes or other reproductions by any method now known or hereafter to be known made therefrom ...
- (iii) The sole and exclusive right to perform publicly or permit the public performance of the said sound recordings including performances by broadcasting tape wire diffusion television or by any other means now known or hereafter to be known.”
7. There are other provisions in the 1966 Agreement which are at least potentially relevant to any question of interpretation of the provisions quoted above, such as clause 8, which provided for Hendrix, Redding and Mitchell to receive a total royalty of 2½% (rising to 5% after 11 October 1968) of the net retail list price (excluding packaging costs and taxes) of 90% of records made and sold under the 1966 Agreement. For the reasons explained below, however, it is not necessary to go into such details for the purposes of the appeal.
8. JHE recorded three studio albums: *Are You Experienced*, released in the United Kingdom in May 1967; *Axis: Bold as Love*, released in the UK in December 1967; and *Electric Ladyland*, released in the UK in October 1968. I shall refer to the sound recordings on these albums as “the Recordings”.
9. It is common ground that sound recording copyrights subsist in each of the Recordings. The Claimants contend that, by virtue of Part II of the 1988 Act, which came into force on 1 August 1989, performers’ rights subsist in Redding’s and Mitchell’s performances in the Recordings. This is not admitted by Sony, but Sony advances no positive case to the contrary. For present purposes, therefore, it may be assumed that performers’ rights do subsist in those performances.
10. It is pertinent to note that the duration of both sound recording copyrights and performers’ rights was extended from 50 years to 70 years from the applicable starting point by amendments made to the 1988 Act by the Copyright and Duration of Rights in Performances Regulations 2013 (SI 2013/1782), which implemented European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.
11. The Claimants claim that the first owner of the copyrights in the Recordings was JHE, and they claim to be the successors in title to Mitchell’s and Redding’s respective shares of those copyrights. The Claimants also claim to be the successors in title to Mitchell’s and Redding’s respective performers’ property rights. It is not necessary for present purposes to set out the Claimants’ claimed chain of title.
12. Sony Music Entertainment (“SME”), a partnership constituted under the laws of the State of Delaware, USA, has a licence to exploit the Recordings granted by Experience Hendrix LLC (“Experience”), a company established under the laws of the State of Washington. Sony is a sub-licensee of SME.

13. It is important to note that, although Sony made assertions both before the judge and in its skeleton argument in support of its application for permission to appeal as to Experience's title to any rights originally owned by Hendrix (or which would have vested in Hendrix if he had been alive at the relevant dates), no such case has been pleaded by Sony in the Defence which it served after the hearing before the judge. Accordingly, Sony does not rely upon any such case for the purposes of the appeal.
14. The Claimants contend that Sony's exploitation of the Recordings in the UK infringes both (their shares of) the copyrights in the Recordings and the performers' property rights in Redding's and Mitchell's performances on the Recordings. These claims are particularly focused on, although by no means limited to, infringement of the rights of communication to the public (copyright) and making available (performers' rights) by making available (or authorising the making available of) the Recordings through on-demand streaming services such as Amazon Prime and Spotify.

The proceedings

15. The Claimants commenced these proceedings as long ago as 4 February 2022. Procedural issues, including an unsuccessful jurisdictional challenge by Sony, mean that they have not yet progressed beyond disclosure. Sony's application to strike out or for summary judgment was made on 8 September 2022. The application was heard by the judge on 26 and 27 October 2023. Much of the argument before the judge concerned the interpretation and effect of two releases entered into by Redding and Mitchell on 27 April 1973 and 30 September 1974 respectively, and three discontinuances filed by Redding and Mitchell on 9 May 1973, 14 June 1974 and 1 October 1974, as part of settlements of claims brought by Redding and Mitchell in New York in March 1972 against the administrator of Hendrix's estate and a company called Are You Experienced Ltd. The judge held that the Claimants had a real prospect of successfully contending that their claims were not barred by those releases and discontinuances, and there is no challenge by Sony to that aspect of his decision.

Ground 1: Redding's and Mitchell's performers' property rights

Outline of the legislative framework governing performers' rights

16. Prior to the coming into force of Part II of the 1988 Act, performers were only protected against unauthorised exploitation of their performances by the Dramatic and Musical Performers' Protection Acts 1958-1972. Although these were purely criminal statutes, this Court held in *Rickless v United Artists Corp* [1988] QB 40 that performers could bring civil claims for breach of the statutory duties imposed by the Performers' Protection Acts. Part II of the 1988 Act repealed the Performers' Protection Acts and replaced them with a new regime of performers' rights. This Court held in *Experience Hendrix LLC v Purple Haze Records Ltd (No 2)* [2007] EWCA Civ 501, [2008] EMLR 10 that performers' rights may subsist under Part II of the 1988 Act even if the performer in question died before 1 August 1989.
17. Section 180(3) of the 1988 Act provides:

“The rights conferred by this Part 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.”

18. As originally enacted, Part II of the 1988 Act conferred performers’ rights which were personal to the performer save that they could be bequeathed or otherwise devolve upon death. These rights included the right which is now conferred by section 182 in its current form (the fixation right). Part II of the 1988 Act was amended by the Copyright and Related Rights Regulations 1996 in order to implement Council Directive 92/100/EC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. These amendments expanded the range of rights conferred upon performers and made some of them proprietary (“performers’ property rights”). The amendments included the insertion of sections 182A (reproduction right), 182B (distribution right) and 182C (rental and lending rights), all of which confer performers’ property rights. It should be noted, however, that section 182A replaced part of section 182 as originally enacted, which conferred a non-proprietary right of similar, but not identical, breadth.
19. Regulation 27 of the 1996 Regulations 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.”
20. Regulation 30(1) provides:

“Any new right conferred by these Regulations in relation to a qualifying performance is exercisable as from commencement by the performer or (if he has died) by the person who immediately before commencement was entitled by virtue of section 192(2) to exercise the rights conferred on the performer by Part II in relation to that performance.”
21. Regulation 25(3) provides:

“In this Part a ‘new right’ means a right arising by virtue of these Regulations, in relation to a copyright work or 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, or
 - (b) a right to remuneration arising by virtue of these Regulations.”

22. Part II of the 1988 Act was further amended by the Copyright and Related Rights Regulations 2003 in order to implement European Parliament and Council Directive 2001/29/EC of 22nd May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”). Among other things, the amendments inserted section 182CA, which confers the making available right on performers. This is another performers’ property right.
23. Regulation 31(1) of the 2003 Regulations provides, so far as relevant:
- “Subject to regulation 32, these Regulations apply to—
- ...
- (b) performances given,
- ...
- before or after commencement.”
24. Regulation 32(2) provides:
- “No act done after commencement, in pursuance of an agreement made before 22nd December 2002, shall be regarded as an infringement of any new or extended right arising by virtue of these Regulations.”
25. The 2003 Regulations contain no definition of “new or extended right”.

The Claimants’ claims for infringement of performers’ rights

26. The Claimants’ claims for infringement of performers’ rights are claims for infringement of the performers’ property rights conferred by sections 182A (reproduction right), 182B (distribution right), 182C (rental right) and 182CA (making available right). As explained above, the claims under section 182CA are of particular importance.

Sony’s case on the transitional provisions in outline

27. Sony contends that all the acts of infringement complained of by the Claimants were done “in pursuance of arrangements made before” 1 August 1989 within section 180(3) of the 1988 Act, and therefore do not infringe any performers’ rights. Sony also contends that they were done “in pursuance of” “an agreement made before 19 November 1992”, namely the 1966 Agreement, within regulation 27(2) of the 1996 Regulations, and therefore do not infringe any “new right”, which Sony says includes the rights conferred by sections 182A, 182B and 182C. Sony also contends that they were done “in pursuance of” “an agreement made before 22 December 2002”, namely the 1966 Agreement, within regulation 32(2) of the 2003 Regulations, and therefore do not infringe any “new right”, which Sony says includes the right conferred by section 182CA.

The judge's decision

28. The judge held at [78] that “the Claimants have a more than arguable case that the original consent [given by Redding and Mitchell in the 1966 Agreement] does not include consent to the present exploitation of their performers’ property rights and that this question may well involve a factual inquiry.”

Sony's appeal

29. Sony contends that the judge erred in reaching that conclusion: he should have held that it was sufficient to engage section 180(3) that, as is common ground, Redding and Mitchell consented not only to the making of the master sound recordings of their performances, but also to their subsequent commercial exploitation through the manufacture and sale of vinyl records. Accordingly, no factual enquiry is required. Nor is it even necessary to construe the 1966 Agreement.

The Claimants' respondents' notice

30. As well as supporting the judge's reasoning, the Claimants served a respondents' notice raising two additional or alternative grounds which were not advanced before him:
- i) Regulation 32 of the 2003 Regulations is *ultra vires*, and therefore cannot provide Sony with a defence to the Claimants' claim under section 182CA. This was said to be because it is inconsistent with Article 10(2) of the Information Society Directive and therefore outwith section 2(2) of the European Communities Act 1972.
 - ii) Regulation 27 of the 1996 Regulations and regulation 32 of the 2003 Regulations (and, indeed, regulation 26 of the 2013 Regulations) have been impliedly repealed by section 29 of the European Union (Future Relationship) Act 2020 giving effect to Articles 222 and 226 of the Trade and Cooperation Agreement between the European Union and the United Kingdom.
31. The first of these grounds was abandoned by the Claimants shortly before the hearing of the appeal. The second became redundant for the reasons explained below.

Analysis

32. During the course of argument, counsel agreed that, at least for the purposes of the appeal, attention may be focussed on section 180(3). If Sony succeeds on section 180(3), it does not need regulation 27(2) of the 1996 Regulations or regulation 32(2) of the 2003 Regulations. If Sony fails on section 180(3), it is difficult to see how it can succeed on regulation 27(2) of the 1996 Regulations or regulation 32(2) of the 2003 Regulations. Moreover, the latter provisions give rise to difficult questions as to what constitutes a “new right” (see *Performers' Rights* (6th ed) at 2-52 to 2-55), as well as being the subject of the Claimants' second respondents' notice ground.
33. Before turning to the arguments concerning section 180(3), it is important to record four points of interpretation which are common ground.

34. The first is that the word “lawfully” should be taken to be implicit i.e. only acts done in pursuance of arrangements *lawfully* made before commencement should be protected from infringement. Section 180(3) is not intended to shield parties who were committing actionable breaches of their statutory duties under the Performers Protection Acts prior to 1 August 1989 from claims for infringement of the relevant performer’s rights by continuing to do the same acts after 1 August 1989.
35. The second point is that the word “arrangements” is not limited to contracts, but extends beyond contracts. (By contrast, regulation 27(2) of the 1996 Regulations and regulation 32(2) of the 2003 Regulations are narrower in this respect.)
36. The third point is that it is at least arguable that it is not necessary for the performer in question to have been party to the “arrangements” in question.
37. The fourth point is that, if the defence under section 180(3) is available, it extends to all of “[t]he rights conferred by this Part”, that is to say, all the rights which are now conferred by Part II as amended.
38. In order to determine whether Sony has a defence by virtue of section 180(3), it is necessary to answer two questions. First, were “arrangements made” prior to 1 August 1989? Secondly, have Sony’s allegedly infringing acts been done “in pursuance of” those arrangements?
39. So far as the first question is concerned, Sony relies solely upon the undisputed fact that, by entering into the 1966 Agreement, Redding and Mitchell consented not only to the making of the master sound recordings of their performances, but also to their subsequent commercial exploitation through the manufacture and sale of vinyl records. On this argument, it is the fact of the performers’ consent that matters, not the precise ambit of the 1966 Agreement. Sony does not contend that it has the benefit of any contractual consent to its allegedly infringing acts.
40. As for the second question, Sony submits that nothing further is required: it is sufficient that Redding and Mitchell gave what Sony characterise as consent to the full extent then required by the Performers’ Protection Acts. Sony argues that the purpose of section 180(3) is to protect parties who rely upon such consents from infringing the broader rights subsequently conferred by Part II of the 1988 Act. As Sony accepts, this amounts to an argument that Redding and Mitchell thereby exhausted their rights.
41. I cannot accept this argument for the following reasons. First, the words “in pursuance of” plainly require some nexus between the allegedly infringing acts and the “arrangements” relied upon. On Sony’s argument no nexus at all would be required. The party committing the allegedly infringing acts could be a complete stranger to the arrangements in question (as indeed, on Sony’s pleaded case, Sony is). This would eviscerate the rights conferred by Part II of the 1988 Act.
42. Secondly, a party who is in a position to rely upon consent given by the performer in question does not need to rely on section 180(3). Where consent is relied upon, the ambit of the consent is critical. It would be very odd if section 180(3) could be relied upon to circumvent the limits on any consent given by the performer. Yet the effect of Sony’s argument is that the ambit of the performer’s consent is immaterial. In saying

this, I am not intending to exclude the application of section 180(3) in some circumstances (such as the example of a distributor of illicit recordings postulated in *Performers' Rights* at 5-108).

43. Thirdly, section 180(3) has nothing to do with exhaustion of rights. If a performer's rights have been exhausted on ordinary principles (for example, a performer's reproduction and distribution rights will be exhausted in relation to a particular CD whose manufacture and sale the performer has consented to), section 180(3) is not required. If the performer's rights have not been exhausted on ordinary principles (for example, the performer's making available right, which is not exhausted by a previous making available of the same recording of the same performance), section 180(3) does not provide for exhaustion.

Ground 2: the copyrights in the Recordings

44. As explained above, it is the Claimants' pleaded case that: (i) JHE was a partnership; and (ii) JHE was the first owner of the copyrights in the recordings (on the basis that JHE was either the maker of, or commissioned the making of, the Recordings because Hendrix, Redding and Mitchell paid for the services of the recording studios). In the alternative to proposition (ii), the Claimants plead that, if (which the Claimants deny) the 1966 Agreement assigned any rights to the Producers, the 1966 Agreement terminated in around 1974 "and at that point all and any rights that had been purportedly assigned, reverted back to JHE by operation of law".

45. Having pleaded the allegations summarised in the preceding paragraph of this judgment, paragraph 15 of the Particulars of Claim continues:

"The Claimants jointly with [Hendrix] therefore have first ownership of the [copyrights in the Recordings], and in the case of the Claimants, alternatively if any rights were assigned under the [1966 Agreement], which is denied, have done so from the expiration of the [1966 Agreement] (1974) up to the present time."

46. Paragraph 33 of the Particulars of Claim states:

"The Claimants' case is that they are joint owners of the [copyrights in the Recordings]. In the circumstances, they seek a declaration ... as to the extent of any ownership they may have."

47. In the prayer for relief in the Particulars of Claim the Claimants claim a declaration as to ownership of the copyrights in the Recordings and an inquiry as to damages, alternatively an account of profits, for infringement of those copyrights.

48. Sony contends that this is a claim to a share of partnership assets, which (subject to certain limited exceptions which do not apply to this case) can only be brought by way of an action for account within six years of the dissolution of the partnership by virtue of section 23 of the Limitation Act 1980. The judge rejected this contention on the ground that the Claimants were not claiming a share of partnership assets. Sony

argues that the judge was wrong because that is exactly what the Particulars of Claim do.

49. Section 23 of the 1980 Act provides:

“An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.”

50. Counsel for Sony relied in support of Sony’s contention on the decision of this Court in *Marshall v Bullock* (unreported, 27 March 1998). The issue in that case was concisely stated by Peter Gibson LJ, with whom Pill and Ward LJJ agreed, in the first paragraph of his judgment:

“A partnership between A and B is dissolved at a time when there are partnership liabilities and there may have been partnership assets. Any such assets are taken by A who discharges the liabilities. More than six years after the dissolution, but within six years of the discharge of the liabilities, A brings proceedings to recover from B his share of the discharged liabilities. A has never accounted for any partnership assets which he took on dissolution, nor has any account been taken. An action for an account is out of time. Can A, relying on a right of contribution, nevertheless recover from B?”

51. The Court’s answer to that question was no. As Peter Gibson LJ stated at page 5 of the transcript:

“There can be no doubt but that in the ordinary way on the dissolution of a partnership an account would be taken of the partnership assets and liabilities. The entitlements and obligations of the partners would be computed having regard to such matters as any discharge by one partner of a partnership liability in respect of which the other partner would be obliged to make a contribution. A claim for the payment of a contribution is not inconsistent with an action for an account.

It is only in unusual circumstances that the court would permit one partner to sue another in respect of a partnership transaction, or the discharge of a partnership liability, or the receipt by one partner of a partnership asset, otherwise than in an action for an account.”

52. He went on to hold that it made no difference that A sought to recover from B by way of a contribution for the reasons he gave at page 9:

“Why should the principle as to the recovery of a share of a partnership asset be different from the principle as to the recovery of a contribution in respect of the discharge of a partnership liability? Both are relevant for the purpose of taking

an account. Both are necessary ingredients in any proper account. In my judgment in principle there ought to be no difference. Just as one cannot say what is the entitlement of a partner in respect of a partnership asset without the taking of an account, so one cannot say what is the liability of a partner in respect of a partnership liability discharged by another partner without that account being taken. The authorities show that unless the case is an exceptional one the court will not allow one partner to seek to recover from another partner a sum which is referable to a partnership asset save through an action for an account. So too, I would hold, generally a contribution in respect of the discharge of a partnership liability must be sought by an action for an account.”

53. He went on at pages 10-11 to say that there were good policy reasons why this should be so:

“When a partnership comes to an end, there is an obligation on the partners to agree, or to have determined by the court, their respective liabilities and their respective entitlements. Once partners have dissolved the partnership, each should after six years be free of the risk of any claims being made by another partner.

It would be unfortunate if the court were to encourage partners who have failed to obtain an account or who have allowed the time for an action for an account to be brought to expire, to rely years later on an individual item which would and should have featured in that account to make it the subject of a separate action for recovery. ... that is simply not fair, because, in ascertaining what is due from one partner to another, one has to look at both sides of the balance sheet, both sides of the account.”

54. In my judgment the judge was correct to hold that the Claimants’ copyright claim is not statute-barred by virtue of section 23 for two inter-related reasons. First, it is not an action for an account. It is true that the relief claimed by the Claimants includes, in the alternative to an inquiry as to damages, an account of profits. But the account of profits claimed is an account of the profits made by Sony from infringing the copyrights in the Recordings. Thus it is a remedy for the tort of copyright infringement. It follows that, as the Claimants accept, the Claimants cannot claim damages or profits which accrued more than six years before the issue of the Claim Form by virtue of section 2 of the 1980 Act. Thus the claim is a claim for copyright infringement, not an action for an account.

55. It should perhaps be explained at this juncture that section 173(2) of the 1988 Act provides:

“Where copyright (or any aspect of copyright) is owned by more than one person jointly, references in this Part to the copyright owner are to all the owners, so that, in particular, any

requirement of the licence of the copyright owner requires the licence of all of them.”

56. It is well established that each owner of a copyright can sue for infringement without joining the other owners: see *Copinger and Skone James on Copyright* (19th ed) at 4-203 and the authorities cited. It is doubtful whether this long-standing substantive rule of copyright law can have been changed by CPR rule 19.3. In any event, the judge (despite not having been referred to the relevant authorities) declined to strike out the claim for non-compliance with rule 19.3 due to the Claimants’ failure to join any party said to own Hendrix’s share of the copyrights, and Sony has not appealed that part of his decision.
57. The second reason why the claim is not barred by section 23 of the 1980 Act is that the Claimants’ claim is not a claim to a share of partnership assets, which explains why it is not an action for an account. Sony’s contention overlooks the nature of a partnership share, which is illuminatingly discussed in *Lindley & Banks on Partnership* (21st edition and supplement) at 19-01 to 19-23. *Marshall v Bullock* is among the authorities cited in this passage. For present purposes it suffices to note the following points.
58. First, when analysing the proprietary nature of a partnership share, it is necessary to distinguish between the internal and external perspectives. As Hoffmann LJ, with whom Waite and Neill LJ agreed, explained in *Inland Revenue Commissioners v Gray* [1994] STC 360 at 377:

“As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share.”

59. Secondly, the classic definition of a partner’s share is that of Lord Lindley quoted at 19-08:

“What is meant by the *share* of a partner is his proportion of the partnership assets after they have all been realised and converted into money, and all the debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share; which under the old law was considered as *bona notabilia*; which on his bankruptcy passes to his trustee ...”

As the current editor comments:

“Although it would be more accurate to speak of a partner’s entitlement to a proportion of the *net proceeds of sale* of the

assets, the correctness of the statement of principle in the above passage cannot be seriously doubted, reflecting as it does the proper application of sections 39 and 44 of the Partnership Act 1890.”

60. Thirdly, while the partnership continues, if the legal title of a partnership asset is held by all of the partners, it might be described as an incident of each partner’s share, but it is not part of the share itself.
61. Fourthly, upon dissolution of the partnership, each partner will be entitled to insist upon the partnership assets being applied towards payment of the firm’s debts and liabilities and upon a division of any surplus proceeds. Unless and until those assets are sold or divided *in specie*, however, each partner’s share will have the same proprietary character as it had prior to dissolution.
62. In the present case the Claimants’ copyright claim is a claim by two of the former partners of JHE against Sony, which was never a partner. It is therefore the external perspective that matters, and from that perspective the relationship between the former partners is irrelevant. Even viewed from the internal perspective, however, this is not a claim to a share of partnership assets. On the Claimants’ case the legal title to the copyrights has either always been, or since 1974 been, jointly owned by Hendrix, Redding and Mitchell or, since their deaths, their respective successors in title. During the partnership, Hendrix, Redding and Mitchell will have held the legal titles as partnership assets. Upon the dissolution of the partnership, any of them (or in Hendrix’s case, his estate) could have insisted upon the legal titles being sold and the net proceeds being applied towards payment of any debts and liabilities with any surplus being distributed. There is no suggestion that this happened, however. By virtue of section 23 of the 1980 Act it is now far too late for any partner (or their successor in title) to bring an action for an account so as to force a sale, accounting and distribution. Thus legal title to the copyrights remains, on the Claimants’ case, jointly owned by the partners’ respective successors in title. There is no claim that the beneficial title is held differently.
63. The Claimants’ claim for a declaration as to the ownership of the copyrights is not in the least inconsistent with this analysis. It is not necessary relief from the Claimants’ perspective, since if their case is well founded they have a perfectly good claim for the financial remedies even if no declaration is made. In any event, the declaration sought reflects the Claimants’ case that the successors in title to the partners in JHE jointly own the copyrights.

Conclusion

64. For the reasons given above I would dismiss the appeal.

Lord Justice Birss:

65. I agree.

Lord Justice Newey:

66. I also agree.