



Neutral Citation Number: [2021] EWHC 2277 (IPEC)

Case No: IL-2019-000038

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

7 Rolls Building
Fetter Lane
London EC4A 1L

Date: 11th August 2021

Before:

MR JUSTICE ZACAROLI

Between:

KELLY-MARIE SMITH

Claimant

- and -

- (1) **KESI DRYDEN**
- (2) **PIERS SEAN AGGETT**
- (3) **AMIR IZADKHAH**
- (4) **JAMES RICHARD NEWMAN**
- (5) **EDWARD JONATHAN HARRIS**
- (6) **SONY/ATV MUSIC PUBLISHING (UK)
LIMITED**
- (7) **BMG RIGHTS MANAGEMENT (UK) LIMITED**
- (8) **BUCKS MUSIC GROUP LIMITED**

Defendants

- (9) **CHRISTOPHER ROBINSON**

Defendant/Part
20 Claimant

Hugo Cuddigan QC (instructed by **Keystone Law**) for the **Claimant**
Tom Weisselberg QC and **Celia Rooney** (instructed by **Bray & Kraus**) for the **Defendants**

Hearing dates: 20th, 21st, 22nd, 26th July 2021

APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be NB 10:00 AM on 11th August 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. Kelly-Marie Smith (“Ms Smith”) is the composer and lyricist of a song, “Can You Tell Me”. Can You Tell Me was never released commercially, but in October 2007 Ms Smith performed an acoustic version of the song that was recorded for the purposes of a short promotional video, containing an interview with her interspersed with performances of some of her songs (the “2007 Video”).
2. The first to fifth defendants (but predominantly the fourth defendant, James Newman (“Mr Newman”), and fifth defendant, Edward Jonathan Harris (“Mr Harris”)), are the composers and lyricists of a song, “Waiting All Night”. Waiting All Night was released as a single in April 2013 by the band “Rudimental” (of which the first three defendants are members). In the same month it was included on Rudimental’s first album, “Home”. Both the single, Waiting All Night, and the album, Home, achieved considerable commercial success. I will refer to the first to fifth defendants as the Rudimental Defendants.
3. Ms Smith claims that the lyrics and melody of the chorus of Waiting All Night were copied from Can You Tell Me, and constitute an infringement of her copyright. Although the claim was brought against all the Rudimental Defendants (as they all had co-writing credits on Waiting All Night), by the end of the trial the allegation of copying was pursued against Mr Newman alone. It is accepted that the contributions to the song by the other Rudimental Defendants related to other aspects that were not copied from Can You Tell Me.
4. The sixth to eighth defendants are music publishing companies which have exploited Waiting All Night.
5. The ninth defendant, Christopher Robinson (“Mr Robinson”) played acoustic guitar on Can You Tell Me with Ms Smith in the 2007 Video. He claims that he co-wrote Can You Tell Me with her in 2007. He was joined to these proceedings by order of Chief Master Marsh on 7 July 2020, in order to assert a counterclaim to a 50% share in the copyright of the song, and to join in the claim for breach of copyright against the defendants.
6. On the eve of the trial, Mr Robinson became unwell and was unable to attend the trial in person, having been advised to self-isolate. He was also concerned that he may be too unwell to play a part in the trial remotely. He sought an adjournment of his counterclaim against Ms Smith, although not of his claim for breach of copyright as against the defendants. His claim against the defendants is dependent upon his counterclaim succeeding, and otherwise completely reflects the claim of Ms Smith. He made it clear that he did not want to disrupt the main breach of copyright claim, and he accepted that he would be bound by the result in respect of that claim. The other parties were

content that his counterclaim against Ms Smith be adjourned, and I acceded to his request.

7. Accordingly, I do not address in this judgment the possibility that Can You Tell Me was co-written by Ms Smith and Mr Robinson. I received and have taken into account written submissions from Mr Robinson during the course of the trial relating to the breach of copyright claim.

The law

8. There was no dispute as to the applicable law. By Section 1(1) of the Copyright, Designs and Patents Act 1988, copyright subsists in original literary or musical works. By section 3(1), a literary work means any work (other than a dramatic or musical work) which is written, spoken or sung, and a musical work means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.
9. The allegation of copying is confined to the lyrics and melody of the chorus of Can You Tell Me. This case is not concerned, therefore, with other musical features of the song such as the chord progression or any aspect of the accompaniment.
10. It was common ground that in order to establish infringement, it is not enough to show that the lyrics and melody of the respective choruses of Can You Tell Me and Waiting All Night are materially similar or even the same. It is necessary to demonstrate actual copying of the copyrighted work. As HHJ Birss QC (as he then was) put it, in *Mitchell v BBC* [2011] EWPC 42, at [33], “[t]he defendant’s work must be causally connected to the work of the original author. If it is an independent work, then, though identical in every way, there is no infringement.”
11. Inadvertent or subconscious copying is sufficient (in which case the state of mind of the defendant is not in issue): *Mitchell v BBC* (above), at [38].
12. While a note for note comparison may be useful, this is not the sole basis for determining infringement - the issue is to be determined by the ear as well as by the eye: Copinger and Skone James on Copyright, 18th ed., para 7-102.
13. It is also common ground that the burden rests on Ms Smith to prove copying. While Mr Cuddigan QC (who appeared for Ms Smith) contended that I could and should draw clear inferences from the high degree of similarities between the two songs, and from the possibility of access given the overlapping professional and personal circles involving Ms Smith and the defendants, he did not suggest that this gave rise to any shift in the legal burden of proof.
14. As to the test to be applied in considering the question of copying, the direction by Wilberforce J to himself in *Francis Day & Hunter Ltd v Bron* [1963] 1 Ch 587 (cited with approval of by Wilmer LJ in the Court of Appeal at p.614-615) remains a valuable guide:

“The final question to be resolved is whether the plaintiffs' work has been copied or reproduced, and it seems to me that the answer can only be reached by a judgment of fact upon a number of composite elements: The degree of familiarity (if proved at all, or properly inferred) with the plaintiffs' work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendants' work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences upon the defendant composer, and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiffs' work.”

15. Although I was taken to authorities on the concept of “originality”, Mr Weisselberg QC (who appeared with Ms Rooney for the defendants) made it clear that the defendants do not contend that, if I were to find that Waiting All Night had been copied from Can You Tell Me, the part of Can You Tell Me that was copied lacked sufficient originality for the purposes of infringement. The defendants' submissions as to the lyrics and/or melody of Can You Tell Me lacking originality or being commonplace went only, therefore, to the question whether, as a matter of fact, copying was established. In other words, their reliance on such issues went to the question as to how likely it was that someone might independently have come up with the lyrics and melody in question in the chorus of Waiting All Night.

The witnesses

16. I heard evidence from Ms Smith herself. Much of her evidence went to the process by which she created Can You Tell Me, late one night in 2001 in her flat in Crystal Palace, which is relevant principally to Mr Robinson's counterclaim. She also gave evidence of the extent to which Can You Tell Me was made available to the public and of the connections between her and the Rudimental Defendants. I found her to be an honest witness doing her best to help the court.
17. A witness statement was produced from Ms Marlene Gaynor, who was managing Ms Smith in 2006-2007. Her evidence was accepted and she was not called to be cross-examined.
18. For the defendants, I heard evidence from Mr Newman, Mr Harris and three members of Rudimental: Mr Amir Izadkhah, Mr Piers Aggett and Mr Leon Rolle.
19. Mr Cuddigan accepted that Mr Harris, Mr Aggett and Mr Rolle were good witnesses and no criticism was levelled at them. Witness statements were also produced from a further member of the band, Mr Kesi Dryden, from Mr Newman's brother, Mr John Newman, and from Ms Ella McMahon who performed vocals on Waiting All Night. Their evidence was accepted and they were not called to give evidence.

20. Mr Cuddigan submitted, however, that the evidence of Mr Newman and Mr Izadkhah was unsatisfactory in key respects. I will address the criticisms of their evidence at appropriate points in this judgment below.

The expert evidence

21. Both sides called evidence from expert musicologists: Mr Christian Siddell for the claimant and Mr Peter Oxendale for the defendants. In a case such as this, where the claim of copying, so far as the music is concerned, relates to an extremely simple melody which utilises only three notes, there is limited need for extensive musicological analysis. Given the importance of the impact of the two melodies on the ear, a detailed accounting of the number of occasions when the pitch or length of notes (or both) coincided as between the two songs, when transcribed, transposed and written in the same time signature, is in this case of limited utility. A major point of contention appeared to be whether it was correct to transcribe a three-note phrase as ‘quaver, two tied quavers, quaver’, or as ‘quaver, crotchet, quaver’. This was particularly irrelevant given that both transcriptions *sound* exactly the same and neither song was composed by the notes being written on a page (or on a computer screen). Ms Smith and Mr Newman each came up with the respective melodies by singing them from scratch. For completeness, I reject the criticism that Mr Siddell transcribed the phrase by using two tied quavers in order to increase the number of points of coincidence between the two songs.

Recordings

22. I was presented with a large number of sound and video recordings. In the end, however, only four are directly relevant.
23. It is necessary to refer to only one recording of Can You Tell Me, namely the 2007 Video. I was also supplied with an audio recording of a demonstration version of Can You Tell Me made – according to Ms Smith (but challenged by Mr Robinson) – in 2006 (the “CYTM Demo”). Since I have rejected the submission, made for the first time in closing argument, that the CYTM Demo was uploaded to Ms Smith’s MySpace site, (see below at [44]), I need focus only on the 2007 Video, as this was the only version that was published in any way.
24. While it is the final version of Waiting All Night that is principally relevant, since this was what was released commercially, it is also necessary to refer to two recordings that demonstrate the creative process for Waiting All Night. The first is a voice memo made by Mr Newman on his iPhone in June 2012, recording his informal first “writing” session for Waiting All Night (the “Voice Memo”). This is of critical importance because it is the claimant’s case that Mr Newman copied Can You Tell Me in coming up with the relevant parts of Waiting All Night that appear in the Voice Memo. It is also helpful to refer to a demonstration version of Waiting All Night made by Mr Newman and Mr Harris in July 2012 (the “WAN Demo”).

Was Waiting All Night copied from Can You Tell Me?

25. As I have already noted, the claim of copying is asserted against only Mr Newman, who is alleged to have copied – knowingly or unknowingly – Can You Tell Me when he created the Voice Memo. It is not alleged that any changes to the song as it evolved after the Voice Memo were the result of copying.
26. Mr Newman denies that he had ever heard Can You Tell Me, as do all of the Rudimental Defendants.
27. In assessing the likelihood that Mr Newman copied Can You Tell Me, the composite elements, per Wilberforce J in *Francis Day & Hunter v Bron* (above), of particular relevance in this case are as follows: (1) the similarities between Can You Tell Me and the final version of Waiting All Night; (2) the availability of Can You Tell Me, generally, by the time Waiting All Night was written; (3) the likelihood that Mr Newman had access to Can You Tell Me by reference to the “overlapping circles” relied on by the claimant; and (4) the process of creating Waiting All Night as evidenced by the Voice Memo. This last element is of particular importance in this case, because it provides a contemporaneous insight into the composition and evolution of Waiting All Night. I address these elements in turn.

(1) Similarities

28. Mr Cuddigan contended that this case is unusual (indeed he said that he had been unable to find a case such as this) because of the high degree of similarity, not only as between (1) the melody and (2) the lyrics, but between the combination of the two. In other words, the part of Can You Tell Me that has been allegedly copied involves the same (or similar) lyrics sung to the same (or similar) tune.
29. Based in the first instance on the impact of the two songs on the ear, and ignoring extraneous matters such as instrumentation, tempo, performance and production, there are clear similarities between the melody and lyrics of the respective choruses in Can You Tell Me and Waiting All Night. For convenience, I have annexed to this judgment a transcription of the respective lyrics and melodies of the chorus of each song in full (taken from Annex 1 to the Particulars of Claim). The melodies of both are transposed into the key of A minor for ease of comparison.
30. The similarities consist principally in the following:
 - (1) In each song the phrase “tell me that you” is repeated a number of times, in each case sung to four semi-quavers, followed by one of a variety of two word phrases: in Can You Tell Me these are “love me”, “need me” and “won’t leave”; in Waiting All Night these are “need me” and “want me”;
 - (2) Accordingly, the whole phrase “tell me that you need me” appears as one of these variations in each song;

- (3) In both songs, the phrase is set to a melody so as to place the stress on the word “love”, “need” or “won’t” (in Can You Tell Me) or “need” or “want” (in Waiting All Night”). It does this by using similar techniques:
 - a. The stressed word is sung on the first beat of the bar, with the four semi-quavers immediately preceding the bar line (an “anacrusis”);
 - b. The stressed word is always set to a longer note, a quaver;
 - c. The stressed word is also set to a higher pitch. While the precise notes to which each of the four semi-quavers to which “tell me that you” is set differ, they are all either on a “D” or “C”, and the stressed word is higher: in each case it is set to an “E”, falling back to a “D” for the following word (except that in Can You Tell Me, “won’t leave” is set to “D” falling to a “C”)
31. There are nevertheless important differences, as follows:
- (1) The four semi-quavers to which “tell me that you” is sung in Waiting All Night are always sung to the same notes: C-C-D-C. In contrast, in Can You Tell Me, they are sung the first two times to C-C-C-C and the third time to D-D-D-D;
 - (2) Although the phrase “tell me that you need me” appears as one of the varied phrases in each song, the other phrase in Waiting All Night (“tell me that you want me”) does not appear in Can You Tell Me;
 - (3) In Can You Tell Me, the chorus consists of a series of questions, starting with the word “Baby”, sung to the notes E-D--E- (each “-“ being a quaver length), followed by “can you tell me that you [love me/need me/won’t leave]?” and then repeated. In contrast, in Waiting All Night the chorus consists of a statement, or demand: “tell me that you [need me/want me]” which is then repeated three times. Accordingly, the anacrusis consists of six semi-quavers in Can You Tell Me, but only four in Waiting All Night;
 - (4) The two choruses differ as to the treatment of the word “me” or (in Can You Tell Me) “leave” which immediately follows (variously) “love”, “need”, “want” or “won’t”. In Can You Tell Me, it is sung to either D--E-, D--C, (and the third time, the phrase “won’t leave” is repeated, to D-C--). In Waiting All Night, it is sung variously to E-D---, followed by two semi-quavers (to the A and G below), or to E-D---, or to E- followed by two semi-quavers (to the G and E above).
32. While I accept Mr Cuddigan’s point, in general, that the inference to be drawn from similarities strengthens as coincidences mount, and that in many cases there would be a very strong inference of copying if the same lyrics to the same melody appear in both songs, there are important features of this case which significantly diminish the strength of this point.

33. First, so far as the lyrics are concerned, I do not find it surprising that two people writing a popular song could independently alight on the phrase “tell me that you need me”. It is a commonplace expression. The defendants pointed to 14 examples of the phrase being used in published songs. Although many of these were by relatively obscure artists, the list included songs recorded by the Righteous Brothers, Huey Lewis and the News, The Romantics, Nazareth, Bruce Springsteen and one written by Michael Jackson. The importance of this list of songs lies, however, not in how well-known or popular they are, but in reinforcing the view that there is nothing groundbreaking or particularly original in the phrase “tell me that you need me”.
34. Second, given the genre of music involved, I do not think it is surprising that the words are set to similar melodies. There are two aspects to melody: (1) the length of the notes (creating the rhythm of the melody) and (2) the pitch of the notes to which the words are set. The melody of the chorus of both songs is of a type which is driven primarily by the words. As to the rhythm, it follows the same pattern as if the words were spoken (“tell me that you need me” would naturally be spoken as four faster beats (“tell me that you”) followed by slower beats on “need me”). As to the pitch, there is minimal variation, and the only time in which the pitch moves more than one tone is where it rises to stress the important word (“love”, “need”, etc), again naturally reflecting the emphasis of the words when spoken.
35. As I have already noted, that is not to say that the chorus of Can You Tell Me lacks originality for the purposes of infringement. Simplicity is often crucial to the success of such a song. Waiting All Night, for example, consists essentially of one phrase: “I’ve been waiting all night for you to tell me that you need me”, with the last few words changed on occasion to “that you want me” and “what you want”. Mr Newman said that, as the song was developed with Rudimental, various other lyrics were tried, but all were rejected because the song worked best by being kept extremely simple.
36. This goes simply to the likelihood of Mr Newman having independently thought of the lyrics and melody. As Mr Weisselberg put it in opening, whereas there would be a very high degree of coincidence if two composers both came up with the same highly unusual words to a melody spanning most of the notes in the scale (for example as in the following extract from Eleanor Rigby by the Beatles: “Eleanor Rigby, picks up the rice in the church where a wedding has been”), that is a very long way from this case. I consider that there is no particularly high degree of coincidence in two composers, writing in the genre of either song in issue in this case, independently setting “tell me that you need me” to a melody similar to that found in Can You Tell Me.

Availability of Can You Tell Me

37. In the case of a well-known song that receives a lot of airplay, it will be easier to infer that the composer of an allegedly infringing song must have heard it. That is not so here, where Can You Tell Me was never released commercially and appeared only on social media sites belonging to Ms Smith and to a Mr Darren Cook (who directed the 2007 Video).

38. The claimant's case on the availability of Can You Tell Me changed over the course of the action. In closing submissions, however, her case was that the 2007 Video was (1) posted on the social media site MySpace; (2) distributed on a DVD within the recording industry in 2007, and (3) posted on the social media site Vimeo on or around 4 May 2012.
39. I accept that the 2007 Video was made available in each of these ways.
40. Ms Smith's MySpace page from that time no longer exists but her evidence that the 2007 Video was posted to it in 2007 was confirmed by the unchallenged evidence of Marlene Gaynor (Ms Smith's manager in 2007). She said that, in an effort to generate interest in Ms Smith, she referred various people in the recording industry to Ms Smith's MySpace page where the 2007 Video could be found.
41. The chance that someone accessing the 2007 Video would view Can You Tell Me, however, is reduced by the fact that it only appears after 12 minutes of interspersed snippets of interview and other songs.
42. It is common ground that the 2007 Video was also posted, on or around 4 May 2012, on Vimeo. It was posted by Darren Cook, the director of the 2007 Video, on his site, which was intended to showcase his work. It is introduced with the following: "A very personal interview with Kelly Marie Smith and some songs recorded live at Hammersmith". As well as the video of the whole interview, separate videos of the songs featured in the 2007 Video (including Can You Tell Me) are set out lower down the right hand side of the page. Someone who accessed this page could, therefore, scroll down and click on a standalone video of the song itself.
43. Ms Gaynor's (again unchallenged) evidence was that she circulated copies of the DVD and an EP containing some of Ms Smith's songs to "numerous people in the industry". There is no evidence that Can You Tell Me was included on the EP and Ms Smith does not rely on the song having been made available via the EP. There is no direct evidence as to the number of DVDs that were produced. The only indirect evidence is a letter from Mr Cook to Ms Kelly with a budget for his work in producing the 2007 Video, which included only five copies of the DVD. There is no evidence that any of Mr Newman or the other Rudimental Defendants were provided with the DVD, and it was not put to them that they had seen it.
44. In closing submissions it was suggested for the first time that the CYTM Demo that Ms Smith claims was produced in 2006 had also been posted to her MySpace page. I proceed on the assumption that the recording was made in 2006 (without prejudice to Mr Robinson's contention that the CYTM Demo dates from some time after October 2007). Ms Smith's case that the CYTM Demo was uploaded was based on the fact that, having been shown, in the course of cross-examination, a photograph on her MySpace page of her with the producers of the CYTM Demo, she thought that she would not have posted the photograph without posting the CYTM Demo. I do not accept this. Ms Smith said nothing about posting the CYTM Demo to her MySpace page in her witness statement. Prior to being shown the photograph, her evidence at

trial was that she had never “put that demo out”. Ms Gaynor’s evidence was that Ms Smith was unhappy with the finished demo and wanted to revisit it, which makes it unlikely she would have uploaded the demo to her social media site.

Access by the Rudimental Defendants

45. There is no direct evidence that Mr Newman ever heard Can You Tell Me. The claimant’s case that he must have done is based on inferences to be drawn from what Mr Cuddigan called the “overlapping circles” between Ms Smith and Mr Newman. The pleaded case, which involved numerous elements, was narrowed down in closing submissions to the following.
46. First, Ms Smith relies on Mr Newman’s involvement with Rudimental and the “collective” of musicians and writers working with Rudimental around the time that he came to write Waiting All Night. I accept that Rudimental’s style of working was to collaborate with other singers and songwriters. The “Home” album on which Waiting All Night appeared featured a variety of different singer/songwriters. I also accept that Mr Newman was by June 2012 a part of a collection of musicians working with Rudimental. His brother, John, had very recently written and sang on a hit song with Rudimental, called “Feel the Love”. Mr Newman had spent at least some days in the studio – “Major Toms” – which was Rudimental’s base. He knew reasonably well, and was reasonably well known by, members of the band. Others with whom Rudimental collaborated around this time included a singer called Louisa Allen, who went by the name “Foxes”, Mr Harris, Mr Aggett’s sister called Beth, and another singer called Becky Hill.
47. In itself, the fact that Mr Newman was part of a collection of musicians working with Rudimental proves nothing, but Ms Smith relies, secondly, on ways in which that collection of people overlapped with her, as follows:
 - (1) Ms Smith worked with Mr Izadkhah in 2010, when he worked as a producer on some of her songs. He was sent some of her material (but not Can You Tell Me). They met on one occasion, at Major Toms. Ms Smith relies on the fact that Mr Izadkhah’s initial work with Rudimental was also as a producer. Mr Cuddigan pointed to the fact that – according to emails from 2010 – both Mr Izadkhah and Mr Worthington (an experienced music industry professional to whom Ms Smith’s work was being pitched) were at that time very enthusiastic about her work;
 - (2) Alex Martin, who had managed Ms Smith in 2010-2011, also managed Becky Hill, who wrote and performed on one of the songs on Rudimental’s “Home” album, and for that purpose visited Major Toms in November 2012;
 - (3) Mr Izadkhah had also worked with Mr Martin and was keen to impress him;
 - (4) Mr Newman’s friend, Kirstenana, was working in 2012 with the band “Shapeshifters” (with whom Ms Smith had worked six years previously,

including on a record on which Nile Rodgers – the very well known musician and member of the famous band “Chic” – had performed); and

- (5) Rudimental appeared on the same bill as Nile Rodgers in Dubai (in 2013).
48. Third, Ms Smith relies on her existing significant profile. In 2006 she had sung on two singles with Shapeshifters. As noted above, one of these (“Sensitivity”) had been a joint release with Chic, featuring Nile Rodgers on lead guitar. Ms Smith was the featured (albeit unnamed) vocalist in the commercial videos.
49. Fourth, Ms Smith relies on a series of WhatsApp messages between herself and Leon Rolle, one of the members of Rudimental, in 2014. Mr Rolle messaged Ms Smith out of the blue. Ms Smith says that she had discovered, by this time, that Rudimental had (in her mind, at least) used her song in Waiting All Night. Mr Rolle’s evidence (which was not challenged) was that he had no recollection of how he came to have Ms Smith’s telephone number. The fact that this contact occurred was relied on in closing as further evidence of the overlapping circles: “another inexplicable coincidence”.
50. The strongest of these potential links between Ms Smith and Mr Newman is via Mr Izadkhah. He had met with her in 2010, been sent examples of her work, worked on some of her songs and expressed enthusiasm for them. In his evidence at trial, Mr Izadkhah sought to downplay his apparent enthusiasm for Ms Smith’s work in 2010. Mr Cuddigan criticised his evidence in this regard as wholly unconvincing. I accept that criticism. The manner in which Mr Izadkhah expressed his enthusiasm at the time for at least some of Ms Smith’s songs that he was sent is inconsistent with his suggestion (made in the witness box) that he was just being polite. I consider that his evidence at trial was an attempt to distance himself from Ms Smith so as not to damage the defence of the Rudimental Defendants.
51. Nevertheless, that attempt does not mean that he was not telling the truth in relation to the critical issue as to whether he became aware in 2010 (or any time afterwards) of Can You Tell Me or whether he introduced Ms Smith’s music to Mr Newman or the members of Rudimental two years later. There is a contemporaneous record of the songs that were sent to Mr Izadkhah in 2010, and Can You Tell Me is not among them. Indeed, I find it is unlikely that it would have been sent to him because, by the time she worked with Mr Izadkhah, Ms Smith was trying to promote a musical style that was very different to that of Can You Tell Me. Ms Smith was then working on a project under the name “Smith & Royal” (previously known as “Hepcats”), described in promotional material as: “a contemporary, fun, danceable, party, humorous sound, which carries an edgy, cool & sexy vibe”. Contemporaneous emails evidence the songs that Mr Martin was seeking to promote on her behalf. I was played extracts from at least some of them, which were nothing like the laid-back ballad style of Can You Tell Me.
52. The only other possibility is that Mr Izadkhah was prompted to look at Ms Smith’s MySpace page where he might have found the 2007 Video. Much was made of the fact that MySpace was regularly used in the music industry,

in the period 2010-2012, by artists as a medium for promoting themselves, and that both Mr Newman and Mr Izadkhah were active on MySpace at the time. Mr Newman, for example, had the web address of his MySpace page as part of his email signature. I accept that MySpace was indeed an important medium for musicians in 2010-2012, and was used by both Mr Izadkhah and Mr Newman.

53. I think it is highly unlikely, however, that Mr Izadkhah looked at Ms Smith's MySpace page at the time. The fact that he promoted his own work by posting it to his MySpace page is of little relevance to the question whether he would have searched MySpace for other artists. Having been sent directly the songs that Ms Smith and her management wished him to produce, he had no need to go looking for any other songs by her. It was suggested to him that he would have wanted to see videos of Ms Smith performing and would have looked at her MySpace page for that purpose. That is unlikely, however, given that on Ms Smith's own promotional material at the time there were links to numerous videos of her performing (including links to YouTube videos of her performing with Shapeshifters). This was ample evidence of her performance capabilities, in a genre that was much closer to the style she was trying to promote at that time.
54. Even if Mr Izadkhah had been prompted to look at Ms Smith's MySpace page, that only has any relevance to Ms Smith's case if he had found Can You Tell Me and passed that on to Mr Newman. That is also highly unlikely. First, as I have already noted, even if Mr Izadkhah had located the 2007 Video, he would have had to watch 12 minutes of the interview (and other songs) before reaching Can You Tell Me. Second, Mr Izadkhah did not know Mr Newman at all in 2010, so could not have possibly passed the 2007 Video on to him then.
55. More broadly, I consider it is equally unlikely that Mr Izadkhah would have drawn either Can You Tell Me or Ms Smith to the attention of Mr Newman or the members of Rudimental when he met them two years later. Even though I accept he expressed enthusiasm for Ms Smith's work in 2010, his work with her was very short-lived and never went anywhere. He was introduced to Rudimental in 2012 to produce their recording of John Newman's song "Feel The Love". It was no part of his role to introduce songs to Rudimental or Mr Newman. It is difficult to think, therefore, of any reason why he would have told them about Ms Smith.
56. I do not find anything in the remainder of the claimant's case as to the likelihood of Mr Newman having had access to Can You Tell Me at all persuasive. It consists of tenuous connections, such as the fact that Alex Martin managed at different times both Ms Smith and Becky Hill, with whom Rudimental collaborated, and the fact that Rudimental played on the same bill as Nile Rodgers who had played with Ms Smith. This latter point is particularly weak, given that Rudimental did not play on the same bill as Nile Rodgers until after Waiting All Night was released (and some six years after he had played with Ms Smith), and did not actually play with him. The suggestion that Mr Newman would have come across Can You Tell Me because his friend Kirstenana would have told him in 2012 that she was

working with Shapeshifters is equally tenuous. Even if she had told him of Shapeshifters' involvement with Nile Rodgers, this would have required him to have watched the video of Shapeshifters performing with Nile Rodgers, to have found out who the (unnamed) singer was, and then gone to look for other examples of her work, in the process finding the 2007 Video. This is mere speculation.

57. I find it similarly unlikely that Mr Newman would have become aware of Can You Tell Me because the 2007 Video had been circulated to people in the music business. Any promotion of Can You Tell Me along these lines would have occurred in 2007 or shortly thereafter. It gained no traction at that time. It is not likely that it was still being promoted within the music business five years later. It is most unlikely that anyone would have passed it to Mr Newman who, prior to and at the time of writing Waiting All Night, was working in a restaurant. Although he had by this time developed links with the band members of Rudimental and Mr Harris, some of whom were established in the business, he was hardly the sort of person anyone would be pitching songs to. On the contrary, he was trying to realise *his* dream of writing a hit song that would be picked up by Rudimental. For similar reasons, the fact that Mr Newman used MySpace for promoting himself (as demonstrated by including his MySpace page web address in his email signature) is of little relevance.
58. The fact that Mr Rolle contacted Ms Smith out of the blue in 2014 is indeed an odd coincidence. It is at least possible that he obtained her number from Mr Izadkhah because (although Mr Izadkhah cannot remember this) Mr Izadkhah might have kept it in his phone from when he met her in 2010. It is, however, no more than speculation to suggest that he made contact to sound out Ms Smith because the Rudimental Defendants knew that they had copied Ms Smith's song. It is no longer alleged that any members of Rudimental were involved in copying her song. Mr Dryden's unchallenged evidence in his witness statement was that no-one involved in the creative process relating to Waiting All Night suggested it had been copied from anyone else's song. It was not put to Mr Rolle that anyone told him that Mr Newman had copied Waiting All Night from Ms Smith's song. There is accordingly no credible basis for the suggestion that he contacted Ms Smith because the members of Rudimental were concerned to find out what Ms Smith was thinking in light of the fact that they had copied her song.
59. Mr Cuddigan was highly critical of both Mr Newman and Mr Izadkhah for their failure to carry out proper searches of documents within their social media accounts. He criticised Mr Newman for having failed to carry out searches of one of his email accounts (the log-in details of which were not provided to his solicitors), of two of his three Twitter accounts, of his mobile phone messages, of his MySpace account, and of his Facebook and Twitter direct messages. He also criticised Mr Newman for the deletion of his Twitter account which was done by his social media team after proceedings were commenced, as a consequence of him having been picked to represent the UK at the Eurovision Song Contest in 2020 (postponed to 2021).

60. Mr Cuddigan criticised Mr Izadkhah for having failed to carry out searches of his Gmail account and of his MySpace account.
61. To a large extent, the criticism was aimed at the defendants' solicitors for having failed to supervise properly the disclosure process: leaving the witnesses to search their own social media sites, based solely on key words agreed between the parties.
62. I found the explanation of each of Mr Newman and Mr Izadkhah as to their attempts (or lack of them) to investigate and search their social media accounts to be unconvincing. The critical question, however, is whether this might indicate there are documents which they have failed to disclose and which might assist in showing that Mr Newman had access to Can You Tell Me before writing Waiting All Night. I do not think that it does. It is important to note that the gaps in the disclosure provided by the defendants have been apparent since October 2020. Mr Newman's disclosure certificate, for example, revealed that he had not been able to search his MySpace page or his electronic text messages. Mr Izadkhah's disclosure certificate stated that he had not been able to search for emails and text messages. Despite this, no application was ever made for further or specific disclosure. Instead, the defendants were faced in cross-examination with attacks on their – and their solicitors' – compliance with disclosure obligations. I do not accept that the cost of making an application for disclosure is sufficient reason to justify leaving the attack on the defendants to trial, when they were unprepared to deal with it and unable to discuss the matter with their solicitors. Although I have found Mr Newman's evidence to be unconvincing on this point, I do not think this undermined the credibility of his evidence on the critical question whether he had accessed Can You Tell Me. My conclusions on the likelihood of the defendants (and Mr Newman in particular) accessing Can You Tell Me are based primarily on the weakness (and the inherent improbabilities) of the claimant's case that they did so.
63. Mr Cuddigan also criticised Mr Newman for overstating in pre-action correspondence his lack of involvement with people involved in the music industry in 2012. Even if it is true that in correspondence from solicitors – on Mr Newman's instructions – prior to the commencement of the action, his links to the music industry were understated in order to persuade the claimant not to issue proceedings, that has little bearing on the credibility of his evidence at trial, and is not enough to outweigh my conclusions based on all the evidence, on the critical issue of copying.

The evolution of Waiting All Night

64. As I have already noted, this case is unusual in that there exists a contemporaneous recording of Mr Newman's creative process in composing Waiting All Night.
65. Mr Cuddigan criticised the Rudimental Defendants' case for lacking any explanation for how Mr Newman came up with Waiting All Night, in contrast to Ms Smith's evidence that she came up with the idea for Can You Tell Me

late one night in 2001, while listening to another song and contemplating feelings of jealousy about her relationship with her then boyfriend.

66. That criticism is not justified. It is true that Mr Newman does not have the same personal back-story to explain the lyrics of Waiting All Night, but that is not surprising given their simplicity. He nevertheless has a credible explanation for how he came up with the song. He is open about the fact that he simply wanted to emulate what his brother had already done, namely write a hit song for Rudimental. He said he was trying to come up with something that had a similar feel to his brother's song "Feel The Love."

67. Mr Cuddigan also pointed to what he said were inconsistencies in Mr Newman's account of how he came up with the song. In an interview posted on Instagram on 14 March 2020, Mr Newman had said (after mentioning that his motivation was to emulate his brother's success with "Feel the Love"): "I wrote it in my head, in the restaurant". In his evidence for the trial, however, Mr Newman appeared to give the impression that the entire song had been created in the moment as he recorded himself in the Voice Memo. In his witness statement he said:

"I picked up the guitar and started strumming and singing over the top ... As far as I recall, the process was very quick. The vocal ideas came spontaneously as I was recording."

68. In the witness box, before being reminded of the interview, Mr Newman said that the words and music came to him spontaneously as he played the guitar: "I literally picked my guitar up and went "I have been waiting all night for you"." He accepted, however, that he had told the truth in the interview. There was then the following passage in his evidence:

"Q. ...So what I am putting to you is you had two parts of this song in your head, written already and then when you picked up the guitar to record them, you played those with certainty but the other parts with uncertainty?"

A. I started the voice note and then if you -- if you listen to the rest of the voice note, you can hear me finishing it off. Then I obviously had it in my head and was developing it after that."

69. I do not find these accounts materially inconsistent. Neither in the interview, nor in his evidence at trial, was Mr Newman purporting to describe the process in precise detail. Both explanations are consistent with him having thought of at least the basic idea for the start of the song before he turned on his phone to record the Voice Memo, but then making up ideas on the spot for the remainder of the song.

70. The best evidence as to what actually occurred is the Voice Memo itself. Mr Cuddigan submitted that the Voice Memo supports Ms Smith's case on copying because it is clear, upon hearing it, that Mr Newman had – before he started playing – two aspects of the song very clearly in mind. First, the opening phrase: "I've been waiting all night for you to bring me back around"

and, second, the phrase “tell me that you want me, tell me that you need me”, which first appears at 1 minute 27 seconds into the Voice Memo.

71. In my judgment, as I explain in the following paragraphs, a close analysis of the Voice Memo indicates that while both the words, melody and chord progression for the opening line to the song (“I’ve been waiting all night for you to....”) were in Mr Newman’s head before he started recording the Voice Memo, the remainder of the song, including – crucially – the passage alleged to have been copied from Can You Tell Me, emerges through trial and error as he tried out various ideas.
72. The fact that the opening phrase (“I’ve been waiting all night for you to....”) was in Mr Newman’s head before he started is evident from the way the words, tune and chord progression flow almost seamlessly from the start of the recording. None of these elements, however, are similar to Can You Tell Me. The words are self-evidently different and the tune bears no resemblance to either the verse or chorus of Can You Tell Me.
73. As to the remainder of the Voice Memo, I will address separately the evolution of the lyrics and the melody.

Lyrics

74. The first section of the Voice Memo consists mostly of Mr Newman singing the phrase “I’ve been waiting all night for you to ...” while he tries out various lines to follow it. In chronological order, what follows is: (1) pause, start again; (2) “bring me back around”; (3) (this time the opening words are “all these times I’ve been waiting...”), “for you but I know... nn nn nn”; (4) “make me feel that the one you did now”; (5) “bring me round, bring me round now”; (6) (after trying out some new chords over which there is mumbling) “bring me back around”.
75. After a pause of 12 seconds, Mr Newman starts up again with the same tune and words “I’ve been waiting all night to...”, this time followed by: (1) “to bring me...”; (2) “to say those three little words, yeh-yeh”; (3) “tell me... (slight pause) tell me that you love me baby that you need me”; (4) “tell me that you love me, baby that you need me”; (5) “tell me that you want me, tell me that you need me”; (6) “tell me that you want me, tell me that you need me”; (7) “tell me that you love me, no, tell me that you love me”; (8) “tell me that you love me, tell me that you need me”; (9) (this time changing the first line to “I’ve been waiting all day to”) “come around now, tell me that you need me”; (10) “tell me that you love me, tell me that you need me”; (11) “I’ve been waiting all night and I can’t take this no...”; (12) “tell me that you love me, tell me that you need me”; (13) “tell me that you love me, tell me that you need me”.
76. After an interlude where Mr Newman tries out various different ideas, none of which went any further, he returns to repeating the opening tune and words (“I’ve been waiting all day (night) for you to...”) followed by a variety of “tell me that you want me”, “tell me that you love me”, “tell me that you need me” and “tell me what you want, won’t you tell me what you want”. After that, he

tries out a number of different words and melodic ideas which, again, went no further, returning briefly just before the end of the recording to the now familiar: “I’ve been waiting all night for you to tell me that you want me, tell me that you need me”.

77. This analysis of the Voice Memo indicates, in my judgment, that the phrase “tell me that you need me” was most likely the product of trial and error as to what words might work in following on from “I’ve been waiting all night for you to...”. Mr Newman’s thought process in arriving at “tell me that you need me” is relatively clear: the first clue is in the phrase “I’ve been waiting ... for you to say those three little words”, which prompts the obvious “tell me that you love me”. Rather than repeating the same phrase, the variation to “tell me that you need me” is a natural progression. This is a strong indication against both (a) Mr Newman having already fixed upon “tell me that you need me” before he began recording the Voice Memo and (b) that phrase having been copied from Can You Tell Me.

Melody

78. Much of the Voice Memo consists of Mr Newman re-starting the phrase “I’ve been waiting all night [or day] for you to...”. I will refer to each re-start as a “take”. With each take, the melody starts on a top F and flows downwards over Eb, C, Bb and Ab, ending up at Bb for the first word of whatever follows (e.g., “bring...” or “tell me”). This is also the tonic of the Bb chord with which it coincides.
79. In each take Mr Newman continues by “riffing” over the chord of Bb. In the first two takes, he sings a downward turn to the notes Bb, Ab, F, Ab (the “downward turn”). In the third take (when the words are “make me feel that the one you did now”), however, he sings an upwards turn around the note of Bb, as follows: Bb, C, Ab, F (the “upward turn”).
80. Thereafter, in each take he mixes up the downward and the upward turns, with slight modifications. After the 12 second break, the first two takes use the downward turn, but on the third take (by which time the words have evolved to “tell me that you love me, baby that you need me”) he sings the first phrase to the downward turn, but the second phrase to the upward turn (modified now to Bb/Ab/C/Bb). It is at this point that a distinct similarity with Can You Tell Me emerges. The rhythm is four semi-quavers (“baby that you”) sung to Bb and Ab, followed by two quavers (“need”, sung to C, and “me”, sung to Bb). This is (once transposed) similar to what appears in the chorus of the final version of Waiting All Night: four semi-quavers to which “tell me that you” is sung on the notes C and D and two quavers to which “need me” is sung to E and D. The remaining takes repeat this basic idea, so that when Mr Newman alights on “tell me that you love me, tell that you need me”, the words “tell me that you need me” are sung to the upward turn Bb-Bb-Bb-Ab-C--Bb--.
81. Again, this close analysis of the Voice Memo provides strong support for the conclusion that the allegedly infringing musical phrase simply emerged naturally from the process of trial and error, as Mr Newman fitted the different

attempts at words to follow on from “I’ve been waiting all night for you to...” to the notes of the Bb chord he was playing on the guitar.

82. The fact that similarities with another song only emerged as Mr Newman tried out ideas in the course of recording the Voice Memo does not rule out the possibility that his ideas coalesced around that other song because it was in the back of his mind. Such a possibility is greater if that other song is one which he might have heard in passing (e.g. playing on the radio or a restaurant play list). It is significantly less likely, however, in the case of Can You Tell Me, which Mr Newman would have had to go out of his way to access and hear. I consider that the Voice Memo provides strong evidence for Mr Newman having independently created the offending lyrics and melody.
83. This conclusion is reinforced by significant differences between the way in which “tell me that you need me” is set as between the Voice Memo version of Waiting All Night and Can You Tell Me. First, in Waiting All Night, each time “tell me that you need me” is sung to the upward turn, it is as the second half of a longer line, being a response to “tell me that you [love/want] me” sung to the downward turn. Second, whereas in Can You Tell Me (as noted above), the stressed word, placed on the downbeat, is “love”, “need” or “won’t”, in the Voice Memo version of Waiting All Night, it is the start of the phrase “tell me that you...” which is stressed by coinciding with the down beat (as shown by the strum of the guitar). Third, in the Voice Memo, in every take, what follows after “I’ve been waiting all night for you to...” is sung over a repeated Bb major chord, whereas in Can You Tell Me, the words are sung over a three chord progression.
84. It is true that all three differences were removed in the WAN Demo. It is the claimant’s case, however, that Mr Newman copied Can You Tell Me in creating the Voice Memo version of Waiting All Night. It was not suggested that he subsequently modified the song so as to sound more like Can You Tell Me, and no such case was put to either him or, importantly, Mr Harris (whose evidence was not challenged by the claimant). It was Mr Harris’ evidence that the relevant part of the Voice Memo was simply “stretched” to create the chorus of Waiting All Night in the WAN Demo, the result of which was carried through into the final version of Waiting All Night.

Conclusion

85. For the above reasons, having regard to each of the composite elements referred to by Wilberforce J, I conclude that Mr Newman did not copy any part of Can You Tell Me in creating Waiting All Night. Specifically, and in summary:
 - (1) While there are objective similarities between the choruses of both songs, there are differences which – in the context of a simple melody which spans only three different tones – are not insignificant, and it is plausible in my view that two persons trying to write a hit song in the genre of Waiting All Night would come up with the lyric “tell me that you need me” and would set it to music in a way that is similar to Can You Tell Me;

- (2) On the basis of all the evidence I have seen and heard it is unlikely that Mr Newman had access to Can You Tell Me. It was never produced commercially, so it is impossible that Mr Newman would have heard it in passing, for example being played in the background on a radio. Although the 2007 Video was posted to two social media sites, and made available in 2007 to some people in the music industry, the claimant's case that Mr Newman would have accessed the 2007 Video is extremely weak and involves too many tenuous links;
- (3) A close analysis of the Voice Memo provides strong support for the conclusion that Mr Newman came up spontaneously and independently with the allegedly offending lyrics and melody in the course of trying out various ideas.

86. Accordingly, the claimant's claim must be dismissed.

Appendix

Figure 1
Melodic comparison, Work A chorus and Work B chorus, transposed to A minor and tempo adjusted to 81 BPM

CYTM = Work A
Waiting = Work B

BPM \downarrow = 81

Work A
Ba - b - y, can you tell me that you love m - e? Can you tell me that you
need m - e? Can you tell me that you won't le - ave, won't leave?

Work B
Tell me that you need m - e Tell me that you want m - e Tell me that you
need m - e Tell me that you want m - e Tell me that you
need m - e Tell me that you want m - e Tell me that you
need m - e Tell me that you want m - e O - h