*229 Panayiotou and Others v Sony Music Entertainment (UK) Limited

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
21 June 1994

Report Citation
[1994] E.M.L.R. 229

High Court, Chancery Division

Jonathan Parker J

18 October 1993-13 April 1994, 21 June 1994

Contract — recording agreement — whether in restraint of trade — whether plaintiffs entitled to challenge enforceability of agreement in light of earlier compromise of proceedings — whether terms of agreement reasonable — whether plaintiffs had affirmed agreement — whether unconscionable for plaintiffs to challenge agreement — whether defendant guilty of inequitable conduct — whether agreement affected trade between Member States — whether object or effect of agreement prevention restriction or distortion of competition in Common Market — action dismissed.

HEADNOTE

The first plaintiff was a popular singer, musician and composer. The second and third plaintiffs were the first plaintiff's service companies. In 1982 the first plaintiff and R, who had formed a group W together, entered into a recording agreement with IV ('the IV Agreement'). In 1983 the first plaintiff and R commenced proceedings against IV for a declaration *inter alia* that the IV Agreement was void or unenforceable as being an unreasonable restraint of trade. Those proceedings were compromised by a tripartite set of agreements whereby the IV Agreement was terminated, the plaintiffs, R and R's service company entered into recording agreements and inducement letters with the defendant (collectively 'the 1984 Agreement') and the defendant paid IV compensation. Under the 1984 Agreement the defendant had the right to require W to deliver sufficient recordings for up to eight albums.

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Following the 1984 Agreement W achieved substantial success and delivered two albums. In 1986 the first plaintiff and R disbanded W. The defendant elected to continue the 1984 Agreement with the first plaintiff as a solo artist.

In 1987 the plaintiffs renegotiated the terms of the 1984 Agreement with the defendant. The renegotiation led to the plaintiffs entering into revised recording agreements and inducement letters with the defendant in 1988 (collectively 'the 1988 Agreement'). Under the 1988 Agreement the defendant agreed to improved financial terms for the plaintiffs in consideration of the plaintiffs' agreement to deliver a further two albums, making eight with the six still to be delivered under the 1984 Agreement, subject to an overall limit on the term of the Agreement of 15 years.

The first plaintiff spent 1988 abroad. For tax reasons the first plaintiff requested the defendant to bring forward the dates of payment of various sums due to become payable under the 1988 Agreement so that those sums were received in 1988. The defendant agreed and in 1988 the plaintiffs received a total of over £11 million.

In 1990 the plaintiffs renegotiated the 1988 Agreement with the defendant. This renegotiation was designed to place the first plaintiff on a par with selected American superstars and resulted in an agreement which further improved the financial terms for the plaintiffs ('the 1990 Agreement').

On 14 February 1992 the first plaintiff was advised that it was open to him to contend that the 1988 Agreement was unenforceable as being an unreasonable restraint of trade. On 20 February 1992 the plaintiffs' accountants wrote to the defendant requesting payment of an advance of $1 million due under the 1988 Agreement in respect of the next album. The advance was duly paid but was repaid by the plaintiffs in August 1992.

In October 1992 the plaintiffs commenced proceedings for a declaration that the 1988 Agreement (as varied by the 1990 Agreement) was unenforceable as being an unreasonable restraint of trade, alternatively void as being contrary to Article 85 of the EEC Treaty .

In support of the allegation of restraint of trade the plaintiffs contended that in the negotiations leading to the 1988 Agreement there was an inequality of bargaining power between the plaintiffs and the defendant because the negotiations proceeded on the basis that the 1984 Agreement was enforceable. The plaintiffs did not concede that the 1984 Agreement was enforceable, but advanced no positive case that it was unenforceable. The plaintiffs also alleged that there was unequal bargaining power because there was a lack of competition between major recording companies.

The plaintiffs contended that the 1988 Agreement was unreasonable because of the provisions relating to the following: (a) duration, (b) the ***231** lack of any obligation on the defendant to exploit the master recordings, (c) the remuneration received by the plaintiffs, (d) ownership of the master recordings and copyright therein, (e) the assignability of the defendant's rights, (f) the defendant's right of rejection and (g) miscellaneous restraints such as a re-recording restriction. As to remuneration, the plaintiffs contended that the proceeds of exploitation of the master recordings should be equitably apportioned so that the plaintiffs and the defendant received approximately the same sums after deduction of direct costs and that the advances for the last four albums were insufficient.

The defendant contended that it was not open to the plaintiffs to challenge the enforceability of the 1988 Agreement since (1) the 1984 Agreement formed part of the arrangements for the compromise of the legal proceedings against IV and accordingly, (2) the plaintiffs had affirmed the 1988 Agreement and (3) it would be unconscionable for the plaintiffs to be permitted to challenge the enforceability of the 1988 Agreement. In reply to (2) and (3) the plaintiffs contended that the defendant had behaved inequitably in a number of respects (the 'counter-equities').

The plaintiffs did not adduce any evidence specifically directed to the Article 85 issue.

Held, dismissing the action:

Restraint of Trade Principles

1. The doctrine of restraint of trade was to be applied to factual situations with a broad and flexible rule of reason taking into account the wider aspects of commerce as well as the narrower aspect of the contract between the parties. Its application depended less on legal niceties or theoretical possibilities than on the practical effect of a restraint in hampering that freedom which it was the policy of the law to protect.

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269 applied.

2. In applying the doctrine of restraint of trade the courts recognised that there was a public interest in freedom of contract in addition to a public interest in freedom of trade.

Dictum of Lord Shaw in *Herbert Morris Ltd v Saxelby [1916] 1 AC 688* , 716 applied.

3. The application of the doctrine of restraint of trade to a particular contract fell into two stages. The first stage was to determine whether the contract was one which attracted the doctrine at all. If the contract did attract the doctrine, the second stage was to determine whether the restrictions contained in the contract were justified. ***232**

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) applied.

4. As to first stage, the right approach for the Court, once satisfied that the contract before it was (in ordinary parlance) in restraint of trade, was to consider whether in all the circumstances sufficient grounds existed for excluding that contract from the application of the doctrine.

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) applied.

5. As to what constituted sufficient grounds for this purpose, it was not possible to answer the question by reference to a formula applicable in all cases.

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) considered.

6. To determine whether a restriction in a contract was justified it was necessary to consider whether it was reasonable so far as the parties were concerned and whether it was reasonable so far as the public interest was concerned ('the *Nordenfelt* test').

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd [1894] AC 535 and *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd* (above) applied.

7. The onus of establishing that the contract was reasonable as between the parties was on the proponent of the contract, while the onus of establishing that, although reasonable between the parties, it was nevertheless contrary to public policy lay on the party challenging the contract.

Herbert Morris Ltd v Saxelby (above) applied.

8. For a restraint to be reasonable between the parties it must be no more than what was reasonably required by the party in whose favour it was imposed to protect his legitimate interests.

Herbert Morris Ltd v Saxelby (above) and *Macaulay v A. Schroeder Music Publishing Co Ltd [1974] AC 1308* applied.

9. In considering the first limb of the *Nordenfelt* test, but not the second limb, the consideration for the restraint was relevant to the question of the reasonableness of the restraint.

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) and dictum of Lord Cross of Chelsea in *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co. Pty Ltd [1975] AC 561* , 579 applied.

10. While the Court was in general slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the parties themselves in electing to enter into the contract, that consideration would carry less weight, and might carry no weight at all, where the evidence established that the parties were negotiating on other than equal terms. Thus inequality of bargaining power might be relevant to ***233*** negative an argument to the effect that the covenantor could not complain that the terms of the contract were capable of being worked unreasonably against him since in entering into the contract he chose to repose a measure of confidence in the covenantee.

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) applied.

11. Where the contract was of a standard form in the sense that such contracts had been settled over the years by negotiation by representatives of the commercial interests involved and had been widely adopted, the fact that they were widely used by parties whose bargaining power was evenly matched raised a strong presumption that their terms were reasonable. This presumption did not apply to standard forms of contract which were dictated by a party whose bargaining power, either alone or in conjunction with others providing similar goods or services, enabled him to say 'take it or leave it' . There were also intermediate cases.

Dictum of Lord Diplock in *Macaulay v A. Schroeder Music Publishing Co Ltd* (above) at 1316 applied.

12. The mere fact that the operation of a restraint was limited to the period of the contract might not suffice to justify the restraint, but it was a factor to be brought into account on the side of justification.

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) applied.

13. It was relevant to consider the background against which the contract was negotiated and the circumstances in which it was negotiated. That included the pre-existing contractual relationship between the parties (if any).

Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd (above) and *Alec Lobb Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173* applied.

14. The validity of the agreement was to be determined as at the date when it was signed and therefore the motives of the plaintiff in alleging that it was unenforceable were not material.

Dictum of Lord Reid in *Macaulay v A. Schroeder Music Publishing Co Ltd [1974] AC 1308* , 1309 applied.

First Stage: Application of the Doctrine

15. In the absence of any allegation that the 1984 Agreement was unenforceable the Court had to regard it as enforceable.

North Western Salt Co v Electrolytic [1914] AC 461 and *Petrofina (Great Britain) Ltd v Martin [1966] Ch. 146* applied.

16. This did not mean, however, that the doctrine of restraint of trade did not apply to the 1988 Agreement. A renegotiation of an existing contract ***234** might produce a set of obligations which so far exceeded, or were so different in nature from, the obligations imposed under the existing

contract that it would make no sense to conclude that because the original contract was enforceable *ergo* the renegotiated version did not require to be justified.

17. It was beyond doubt that both the 1984 Agreement and the 1988 Agreement contained restraints of trade (in ordinary parlance). It could not be said that such agreements had passed into the accepted and normal currency of commercial relations by assuming a form which passed the public policy test. Moreover a recording agreement of the same general type had been found by the Court of Appeal to be in restraint of trade. Accordingly there were no sufficient grounds for excluding the 1988 Agreement from the application of the doctrine of restraint of trade.

Zang Tumb Tuum Records Ltd v Johnson [1993] EMLR 61 referred to.

Settlement of Proceedings

18. Where disputes between parties had arisen and those disputes had been disposed of by means of a settlement, public policy favoured giving effect to that settlement and to refuse to allow a party thereto to resurrect issues identical or similar to those which the settlement had laid to rest.

19. In the present case it was common ground that there had been pending litigation as to whether the IV Agreement was unenforceable as being in restraint of trade which had been settled by the tripartite set of agreements which included the 1984 Agreement. In the circumstances it would be contrary to public policy for the Court to entertain an argument that the 1984 Agreement was unenforceable as being in restraint of trade. If it were open to a plaintiff to challenge a compromise of a restraint of trade issue by alleging that the compromise was itself in restraint of trade, it would never be possible to compromise a restraint of trade issue by the substitution of a new agreement.

Binder v Alachouzos [1972] 2 QB 151 and *Colchester Borough Council v Smith* [1992] Ch. 421 applied.

20. It followed that it would be contrary to public policy for the Court to entertain an argument that the 1988 Agreement was unenforceable. Accordingly the 1988 Agreement did not require to be justified.

Second Stage: Justification Inequality of bargaining power

21. If there was inequality of bargaining power between the parties in the negotiations leading to the 1988 Agreement it arose purely from the fact that the parties were renegotiating the terms of an existing enforceable agreement. There was no inequality of bargaining power between the ***235** parties to the negotiations which led to the 1984 Agreement since none of the parties could know what the outcome of that action would be if it proceeded to trial and so each had to take their own view as to the likely outcome.

22. The similarity between the contracts offered by the major recording companies was not due to a lack of competition between them but was a direct consequence of the fact that the negotiation of recording agreements tended to be concentrated in the hands of a relatively small band of experienced professionals. The comparability of financial rewards offered to artists was not due to lack of competition but was the product of competition.

Relevance of the 1984 Agreement

23. In considering the cumulative effect of the restrictions contained in the 1988 Agreement it was necessary to bring into account the existing (enforceable) restrictions imposed by the 1984 Agreement.

Alec Lobb Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173 applied.

Legitimate interest of defendant

24. The desire to sell as many records as possible was a legitimate interest of the defendant.

Petrofina (Great Britain) Ltd v Martin (above) applied.

Duration of the 1988 Agreement

25. As to the duration of the 1988 Agreement:

(a) The duration of the Agreement was effectively governed by the amount of product the plaintiffs had agreed to sell; it was not an end in itself. Moreover the duration was to some extent within the plaintiffs' control in that they could shorten it by delivering albums more quickly.
(b) Although it was possible that the plaintiffs might be sued for breach of contract if they had not delivered the required number of albums after 15 years, it was a speculative and remote possibility.
(c) The duration of the Agreement was a function of success, in that it would only run the full course if the defendant exercised all its options, which would only occur if the first plaintiff continued to be successful.
(d) The final two albums required under the Agreement had been offered by the plaintiffs as a *quid pro quo* for improved financial terms.
(e) There was force in the defendant's contention that a long duration was required since it needed successes to help pay for failures.

Zang Tumb Tuum Records Ltd v Johnson (above) distinguished. ***236**

(f) Exclusivity of output during the duration of the Agreement was not objectionable *per se,* and it was reflected in the financial terms which the plaintiffs had obtained.

Lack of obligation to exploit on defendant

26. Although the 1988 Agreement reserved to the defendant the right to refrain from dealing in master recordings or records made therefrom subject to certain limited release obligations, in the circumstances it was unreal to suggest that the defendant might fail or refuse properly to exploit the first plaintiff's recordings. Its commercial interests lay in exploiting them to the full. The notion that there was a real risk that the defendant might put the recordings in a drawer was far-fetched.

Equitable apportionment

27. The allegation that the remuneration from exploitation of master recordings should be equitably apportioned between the parties was fundamentally misconceived. A recording artist and a record company were not in partnership in the sense that they were carrying on business in common. The business of the artist was essentially that of supplying master recordings while the business of the record company was essentially that of commercial exploitation of the master recordings supplied to it by many recording artists. The relationship was akin to that of producer and distributor. There was no principle or rule of law or equity which required an equitable proportion of the proceeds of exploitation.

28. In any event any such principle or rule would be unworkable in practice.

Advances

29. In considering the advances payable in respect of the last four albums under the 1988 Agreement, the provisions for advances have to be looked at as a whole. Looked at as a whole the suggestion that they were unfair, oppressive or inadequate was far removed from reality. The international stature and reputation of the first plaintiff had enabled him to negotiate improved terms over the 1984 Agreement and there was no basis for saying that he ought to have achieved better terms.

Ownership of master recordings and copyright

30. It was difficult to see how exclusivity of exploitation arising by reason of the outright sale and transfer of copyright could be classified as restraint of trade at all. The sale and transfer of

property rights was preeminently a matter of bargain and there was no public policy interest in preventing an outright sale of a property right.

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Assignability of defendant's rights

31. On the true construction of the 1988 Agreement the defendant's right of assignment was limited to companies within its group and an assignee had no wider power of assignment. The likelihood of the defendant doing so was in any event remote. Furthermore the risk of the defendant becoming insolvent so as to be unable to pay damages was a risk which was present in most commercial contracts but was extremely remote in the case of the present defendant.

Macaulay v A. Schroeder Music Publishing Co. Ltd (above) distinguished.

The defendant's right of rejection

32. On the true construction of the 1988 Agreement, the defendant was not permitted to reject master recordings if it decided, acting reasonably, that their quality was lower than previous recordings, but only if the quality of the recordings was in fact lower.

33. Such a provision was commonly to be found in recording contracts and the submission that it might be used by the defendant to sterilise the first plaintiff's output was divorced from reality.

Multiple sets and live albums

34. There was nothing objectionable in the requirement that the plaintiffs should not deliver a multiple record set or live album without the defendant's consent.

Re-recording restriction

35. Some protection against re-recording for a relatively short period after the expiry of the recording agreement was reasonable. The period of three years was not excessive in the plaintiffs' case. It was true that under the terms of the 1988 Agreement the period of restriction would be longer in relation to the first plaintiff's earlier recordings, but there was nothing inherently objectionable in that.

Audio-visual rights

36. The scheme of the 1988 Agreement in giving the defendant in effect first refusal over the video rights in an audio-visual performance at a price represented by the production costs was perfectly fair and commercial.

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Audit restrictions

37. The defendant's procedures were such that the plaintiff's were not prejudiced by their lack of access to manufacturing records under the 1988 Agreement.

Alienation of copyright

38. The restriction on assignment of the defendant's rights under the 1988 Agreement applied to all the defendant's rights, including property rights, so the defendant was not free to alienate the copyrights in the recordings.

Delayed royalty accounting

39. Delay in receipt by the plaintiffs of royalties from overseas sales due to the fact that royalties paid by overseas licensees were treated as earned when received by Sony was a common feature of recording agreements and was a factor taken into account by artists' advisers in negotiating royalty rates.

Conclusion on justification

40. Even without taking into account the pre-existing restrictions under the 1988 Agreement, the terms of the 1988 Agreement were justified.

41. If account was taken of the pre-existing restrictions the conclusion was *a fortiori.*

Affirmation

42. Affirmation was available as a defence to a restraint of trade claim made under the first limb of the *Nordenfelt* test.

43. The request for the advance for the third album made by the plaintiffs was made at a time when the plaintiffs knew that it was open to them to contend that the 1988 Agreement was unenforceable as being in restraint of trade. It was an unequivocal act giving rise to the inference that the plaintiffs had decided to allow the Agreement to continue. It made no difference that there was no contractual obligation on the plaintiffs to request the advance or that the request was made under a misapprehension as to when the advance became due. It followed that the defence of affirmation was made out unless it was defeated by the counter-equities.

44. Affirmation at common law could not be defeated by counter-equities of the type alleged by the plaintiffs in the present case, even if the factual allegations were made out. The defence of affirmation therefore succeeded.

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Acquiescence

45. Acquiescence was available as a defence to a restraint of trade claim.

Zang Tumb Tuum Records Ltd v Johnson (above) applied.

46. In contrast to affirmation, the equitable defence of acquiescence required consideration of all the circumstances of the case.

Zang Tumb Tuum Records Ltd v Johnson (above) applied.

47. Leaving aside consideration of the counter-equities, it would clearly be unfair to the defendant and unconscionable to allow the plaintiffs now to assert that the 1988 Agreement was unenforceable. In particular (a) at all material times the plaintiffs had been in receipt of expert legal advice and had been well aware of the doctrine of restraint of trade; (b) the acceleration arrangements agreed with the defendant had resulted in the payment of more than £11 million to the plaintiffs in 1988; and (c) the 1990 Agreement had effected a substantial improvement over the terms contained in the 1988 Agreement.

Zang Tumb Tuum Records Ltd v Johnson (above) distinguished.

The Counter-equities

48. The supply of edited versions of two songs to US radio stations by the defendant without having obtained the plaintiffs' consent was a breach of the 1988 Agreement, but it was a trifling breach. None of the other counter-equities alleged was made out on the facts.

49. In any event, the alleged counter-equities, being no more than a disparate series of complaints about the defendant's conduct, could have no impact on the enforceability of the 1988 Agreement.

Article 85 General Approach

50. A broad and flexible approach to the application of Article 85(1) was required. Save in the clearest cases, this necessitated a detailed investigation of the effect on competition of a particular agreement considered in its legal, economic and commercial context rather than the application of a set of *a priori* principles.

51. Although Article 85(1) was framed in wide and unqualified terms, the scope of its application was limited in some degree by three factors: (i) the 'rule of reason' , (ii) the ' de minimis rule' and (iii) the provisions of the EEC Treaty relating to intellectual property rights. ***240**

52. The 'rule of reason' aimed at achieving a balance between, on the one hand, the need to maintain free competition in the single market by striking down agreements which restricted competition and, on the other hand, the desirability of preserving agreements which, while they contained restrictions on competition, nevertheless had a pro-competitive effect overall.

Société Technique Minière v Maschinenbau Ulm (*Case 56/65) [1966] ECR 235* applied.

53. The ' de minimis rule' meant that an agreement would not be held to contravene Article 85(1) unless the Court was satisfied that it was likely to affect trade between Member States and to prevent restrict or distort competition within the Common Market to an appreciable extent.

Volk v Vervaecke (*Case 5/69) [1969] ECR 295* applied.

54. Intellectual property rights were substantially governed by the laws of Member States. The existence of those rights as opposed to their exercise was protected by Article 222 of the EEC Treaty .

Deutsche Grammophon v Metro (*Case 78/70) [1971] ECR 487* , *Coditel v Cine-Vog Films (No. 2)* (*Case 262/81) [1982] ECR 3381* and *Radio Telefis Eireann v Commission* (*Case T69/89) [1991] 4 CMLR 586* applied.

Trade between Member States

55. The question whether the jurisdictional requirement of an effect on trade between Member States was met in any particular case was as a general rule to be resolved by a consideration of the terms of the agreement in its legal, economic and commercial context. As a general rule the answer to the question depended not merely on an examination of the terms of the agreement itself but also on a detailed investigation into the relevant surrounding circumstances, including in particular the nature and operation of the relevant market.

Société Technique Minière v Maschinenbau Ulm (above), *Consten and Grundig v Commission* (*Cases 56 & 58/64) [1966] ECR 299* , *Brasserie de Haecht v Wilkin (No. 1)* (*Case 23/67) [1967] ECR 407* , *Deutsche Grammophon v Metro* (above), *Commercial Solvents v Commission* (*Cases 6 & 7/73R) [1973] ECR 223* , *Hugin v Commission* (*Case 22/78) [1979] ECR 1869* , *Nungesser v Commission* (*Case 258/78) [1982] ECR 2015* , *Coditel v Cine-Vog Films (No. 2)* (above) and *Stergios Delimitis v Henniger Brau AG* (*Case 234/89) [1991] I ECR 935* applied.

56. What was required was an effect not merely on trade between Member States generally but specifically on competition within the single market. ***241**

Consten and Grundig v Commission (above) and *Hugin v Commission* (above) applied.

57. Where the agreement related to the supply of raw material (in this case artists' services) as opposed to the production or distribution of end product (in this case pop records) it was relevant for the purposes of establishing the requisite effect on trade between Member States to look beyond the raw material market and to have regard to any effects or repercussions on competition in the market for the end product.

Petrofina v Commission (*Case T2/89) [1991] II ECR 1087* and *Commercial Solvents v Commission* (above) applied.

58. The evidence was that, except for a few cases where UK artists were signed to US record companies, the market for the services of UK recording artists in the pop field was a purely national and domestic market, limited territorially to the UK. There was no Community-wide market for the services of UK recording artists in the field of popular music. It followed that the 1988 Agreement did not affect trade between Member States at the raw material end of the chain of supply.

59. Even if this were wrong, the fact that the 1988 Agreement covered the whole of the first plaintiff's output for up to 15 years or possibly longer was not in itself sufficient to establish the requisite effect on competition in the market for the services of recording artists in the field of popular music. It was necessary (a) to place the 1988 Agreement in its legal, economic and commercial context and (b) to consider what would have been the position in relation to competition in the relevant market in the absence of the 1988 Agreement. In the present case the Court did not have the detailed factual evidence as to the relevant market which was required.

Scottish Nuclear, Nuclear Energy Agreements OJ 1991 L179/31 distinguished.

60. In order to place the 1988 Agreement in its legal context it was necessary to consider the contractual position between the plaintiffs and the defendant immediately before the 1988 Agreement. That involved taking into account the 1984 Agreement under which six albums remained to be delivered as of January 1988.

61. The Court could not accept the plaintiffs' submission that it was irrelevant whether or not the 1984 Agreement contravened Article 85(1). Given that the Court was concerned to assess the effect of the 1988 Agreement on competition in the relevant market, and that the essence of the plaintiffs' case was that the 1988 Agreement took the first plaintiff off that market for a substantial period, it was of the greatest relevance to consider whether he had already been effectively taken off that market by the 1984 Agreement. ***242**

62. In the absence of any assertion by the plaintiffs that the 1984 Agreement contravened Article 85(1), the Court was bound to proceed on the basis that it did not.

63. On that basis it was difficult to see what effect on trade between Member States the 1988 Agreement might have. Although the 1988 Agreement required the delivery of a further two albums by comparison with the 1984 Agreement, it was subject to a 15-year cap while the 1984 Agreement was not. As a result it was possible that, had the 1984 Agreement not been superseded by the 1988 Agreement, it might have continued on foot beyond the fifteenth anniversary of the 1988 Agreement. On the evidence, however, the Court was in no position to evaluate that possibility, still less what its effect on competition might be.

64. The task of placing the 1988 Agreement in its economic and commercial context required an investigation of the nature, scale and operation of the relevant markets. Yet in the instant case no such investigation had been undertaken in the evidence.

65. Even on the basis that the 1988 Agreement was to be considered free from its contractual context, the Court was not satisfied on the material before it that the 1988 Agreement had had or might in the future have an appreciable effect on trade between Member States either in the raw material market or in the end product market.

Object of the Agreement

66. The ascertainment of the object of the agreement involved an objective approach, and the subjective intentions of the parties were irrelevant.

Société Technique Minière v Maschinenbau Ulm (above) applied.

67. The object of the 1988 Agreement was to provide for the acquisition by the defendant of master recordings made by the first plaintiff in consideration of royalties, advances and other benefits payable by the defendant for the purpose of enabling the defendant to produce records derived from those master recordings and to distribute, promote and sell such records. It followed that the object of the 1988 Agreement was not anti-competitive but pro-competitive to the extent that it was directed at bringing new product onto the pop record market.

Effect of the Agreement

68. In order to determine whether an agreement has an anti-competitive effect, regard must be had to all relevant facts and circumstances including the existence of similar agreements. ***243**

69. Since the market for the first plaintiff's recording services was a national and domestic market limited to the UK the 1988 Agreement could not have an anti-competitive effect for the purposes of Article 85(1).

70. On the assumption that there was a Community-wide market for the first plaintiff's recording services, if the plaintiffs were to succeed in establishing an anti-competitive effect they had to do so by reference to the exclusivity elements of the 1988 Agreement, for the other aspects of the Agreement did not justify the conclusion that the Agreement had an anti-competitive effect.

71. So far as exclusivity of output was concerned, the mere fact that the 1988 Agreement covered all of the first plaintiff's output so long as it continued on foot could not in itself amount to an anti-competitive effect.

72. There was no basis for contending that the exclusivity of exploitation afforded to the defendant by the 1988 Agreement gave rise to an anti competitive effect. The evidence before the Court was wholly insufficient for carrying out an analysis of the market for this purpose.

73. Furthermore the 1988 Agreement was concerned with the existence of copyrights, not with their exercise. An assignment of copyright was no equivalent to a licence for the full period of copyright merely because the consideration for the assignment took the form of royalties. In the instant case the entirety of the copyright in the master records was sold to the defendant outright and there was no lesser dealing in those rights, still less any lesser dealing of a territorial nature. Accordingly Article 222 of the Treaty would in any event save the 1988 Agreement from contravening Article 85(1).

Nungesser v Commission (above) distinguished.

Additional cases referred to

Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co. Pty Ltd (1974) SASR 268 .
Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co. Ltd [1913] AC 781 .
Aylesford v Morris (1873) LR 8 Ch. App. 484 .
Bakers Bread Supply v Findlays Bakery [1963] NZLR 57 .
Barker v Stickney [1919] 1 KB 121 .
Brooks v Burns Philip Trustee (1968) 121 CLR 432 .

Evans v Heathcote [1918] 1 KB 418 .
Italian Flat Glass (Case T69/89) [1992] 5 CMLR 302 .
Mcellistrim v Ballymacelligott Co-Operative Dairy Society Ltd [1919] AC 548 .
Mitchel v Reynolds (1711) 24 ER 347 .
Multiservice Bookbinding Ltd v Marden [1979] 1 Ch. 84 . ***244**
Rannie v Irvine (1844) 7 Man & G 969 .
Standard Oil Co. of New Jersey v United States (1910) 221 US 1 .
Vancouver Malt and Sake Brewing Co v Vancouver Breweries Ltd [1934] AC 181 .

Legislation referred to

Copyright, Designs and Patents Act 1988, section 91(1) .
EEC Treaty Articles 36, 85, 222 .

Representation

Mark Cran QC , Jeremy Lever QC , Ian Mill and Pushpinder Saini , instructed by Sheridans , for the plaintiffs.
Gordon Pollock QC , David Unwin , Peter Duffy and Vernon Flynn , instructed by Clintons , for the defendants. ***247**

PART I: INTRODUCTION

In this action Mr George Michael (as he is professionally known) claims that Recording Agreements dated 4 January 1988 and entered into by his two service companies with the defendant Sony Music Entertainment (UK) Limited (then named CBS United Kingdom Limited), as subsequently varied, are void, alternatively unenforceable in so far as they remain unperformed. The two service companies are also joined as plaintiffs in the action.

The Parties

Mr Michael, who is now aged 30, has achieved worldwide fame and success in the field of popular music as an international recording artist, performer and songwriter. His success has made him by any standards an extremely wealthy man.

The defendant Sony Music Entertainment (UK) Limited ('Sony Music') is a member of the Sony Group (headed by Sony Corporation of Japan), and carries on business in the United Kingdom as a record company. The Sony Group acquired the record business of the CBS Group in January 1988 (i.e. at about the time the Recording Agreements were made). By virtue of that acquisition Sony succeeded to CBS's position as one of the select group of major record companies habitually referred to in the record industry as 'majors' .

The principal controlling company for Sony's record business is Sony Music Entertainment Inc. ('SMEI'), an American company based in New York. SMEI has two divisions, Sony Music United States ('SMU') and Sony Music International ('SMI'). As their names imply, SMU covers Sony's record business in the United States and SMI covers Sony's record business in the rest of the world (including the United Kingdom, although Sony Music is not a direct subsidiary of SMEI).

Although recording artists sign to a particular Sony company in a particular territory, their recordings are exploited internationally. Central to the relationship between Sony companies in different territories is an agreement known within Sony as the 'matrix agreement' . In effect, the matrix agreement is a two-way licence agreement allowing each Sony company to license recordings to and from a central pool. Each Sony company licenses its entire catalogue of recordings to SMI. If another Sony company wishes to exploit one or more of such recordings in another territory, it pays a royalty to SMI which in turn accounts to the company which owns the rights. Sony Music exploits its repertoire of recordings internationally under the matrix agreement, save that it licenses recordings for exploitation in Greece under a direct licensing agreement with the Sony company in Greece.

Different matrix agreements have existed from time to time. The matrix agreement currently in force is dated 1 August 1989 but has been in force since January 1986. It has been varied once, in April 1991, when the royalty rates were modified.

It is not necessary for present purposes to go into any further detail as to the Sony Group's corporate structure, or as to the relationship between members of the group.
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The Pleadings

By their Writ and Statement of Claim, Mr Michael and his two service companies seek a declaration that Recording Agreements dated 4 January 1988 and made between the service companies and the defendant Sony Music, then named CBS United Kingdom Ltd ('CBS (UK)'), as subsequently varied, together with collateral inducement letters from Mr Michael to Sony Music confirming the availability of his services under the Recording Agreements, are void, alternatively unenforceable in so far as they remain unperformed, as unreasonable restraints of trade. In addition, they seek a declaration that the agreements are void as being in contravention of Article 85 of the Treaty establishing the European Economic Community ('the EEC Treaty') in that they have the object and/or effect of preventing, restricting or distorting competition within the common market. The plaintiffs also seek consequential relief.

At an early stage in the proceedings, Mr Cran QC, for the plaintiffs, made it clear that it would not be argued before me that the agreements were void (as opposed to unenforceable in so far as unperformed) on the ground of restraint of trade, although he reserved the right to argue that point in higher courts if necessary.

The Recording Agreements themselves are in similar terms, and for present purposes they can be treated as a single agreement. Accordingly, I will hereafter refer to them collectively, and in the singular, as 'the 1988 Agreement' ; and since no separate point arises on the inducement letters, references to the 1988 Agreement should be taken to include the inducement letters, unless the contrary is stated. Further, since the service companies play no separate part in the story I shall omit further reference to them (save where reference to them is specifically required) and treat Mr Michael as being in effect the sole plaintiff.

By its Defence, Sony Music denies that the 1988 Agreement is void or unenforceable on any of the grounds put forward by Mr Michael. It also makes a number of positive allegations, and puts forward a number of positive contentions, by way of defence to both the restraint of trade claim and the Article 85 claim.

In relation to the restraint of trade claim, Sony Music contends that, as a matter of public policy, Mr Michael is in any event precluded from alleging that the 1988 Agreement is in restraint of trade. In support of that contention, Sony relies on the admitted facts (a) that the 1988 Agreement effectively replaced an earlier recording agreement made between Mr Michael and CBS (UK) in 1984 ('the 1984 Agreement'), and (b) that the 1984 Agreement was in turn concluded as part of the arrangements for the compromise of proceedings between Mr Michael and a third party in which Mr Michael was alleging that a recording agreement between himself and that third party was itself void or unenforceable as being (among other things) in restraint of trade. Sony Music contends that in such circumstances it would have been contrary to public policy for Mr Michael to have alleged that the 1984 Agreement was in restraint of trade (in that he would thereby have been seeking to raise one of the claims which the 1984 Agreement had been designed and intended to lay finally to rest); and that the same must apply in relation to the 1988 Agreement, which replaced it.

Further, as additional lines of defence to the restraint of trade claim (but not to the Article 85 claim) Sony Music makes a number of further allegations, under ***249** the general heading 'Equitable Defences' . The gist of these allegations is that Mr Michael has affirmed the 1988 Agreement, and that in the light of that affirmation and of various other matters it would be unfair to Sony Music and unconscionable to allow Mr Michael to assert that the 1988 Agreement is unenforceable, and that he is precluded on those grounds from doing so. I will refer to these further allegations collectively as Sony Music's 'equitable defences' .

By his Reply, Mr Michael contends primarily that the 'equitable defences' are not open to Sony Music as a matter of law. Subject to that primary contention, Mr Michael denies that he has affirmed the 1988 Agreement. As to the defence of unfairness and unconscionableness, Mr Michael contends (subject, once again, to his primary contention that such a defence is not in any event open to Sony Music as a matter of law) that all relevant circumstances must be taken into account in considering whether it would be unjust or unconscionable to allow him to raise the restraint of trade claim; and he goes on to allege a number of specific facts which (he contends) establish that it is not he but Sony (that is to say not merely Sony Music, but the worldwide Sony

Group of which Sony Music is a member) which has behaved unfairly and unconscionably. These factual allegations made by Mr Michael by way of reply to the 'equitable defences' have been referred to by both sides in the course of the hearing as 'counter-equities' , and I will so refer to them in this judgment.

The pleading of counter-equities by Mr Michael served to draw a Rejoinder from Sony Music, but I need not refer to the detail of that Rejoinder at this introductory stage.

The Broad Issues for Decision

Thus, stated in the broadest possible terms, the basic issues for decision are these:

A. The restraint of trade issue

Leaving aside the 'equitable defences' , is the 1988 Agreement (as varied) rendered unenforceable, in so far as it remains unperformed, by the application of the common law doctrine of restraint of trade? If so:

Leaving aside the counter-equities, do the 'equitable defences' , or either of them, serve to preclude Mr Michael from alleging that the restraint of trade doctrine applies? If so:

Do the counter-equities defeat the 'equitable defences' , so as to enable Mr Michael to allege (*ex hypothesi* successfully) that the restraint of trade doctrine applies?

B. The Article 85 issue

Does the 1988 Agreement contravene Article 85(1) of the EEC Treaty ? (It is common ground that if it does, Article 85(2) renders it automatically void.)

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The Scheme of the Judgment

In an attempt to make the judgment more manageable, I have divided it into a number of separate parts, as follows:

PART I:	INTRODUCTION
PART II:	THE FACTS
PART III:	RESTRAINT OF TRADE
PART IV:	SONY MUSIC's 'EQUITABLE DEFENCES'

A list of contents (including appendices) is to be found at the front of this judgment. [1]

References to dollars are to US dollars unless otherwise stated.

The Hearing

The hearing began on 18 October 1993 and concluded (after a number of adjournments) on 13 April 1994, Day 74 of the hearing.

In the course of the hearing I heard evidence from 16 witnesses of fact and 7 experts. A full list of witnesses, identifying the capacity of each witness and the day(s) on which each witness gave evidence, is contained in Appendix 1.

Mr Michael was represented on the restraint of trade issue by Mr Cran QC, Mr Mill and Mr Saini, and on the Article 85 issue by Mr Lever QC and Mr Saini, instructed in each case by Messrs Sheridans. No evidence was adduced by Mr Michael specifically relating to the Article 85 issue, nor were Sony Music's witnesses or experts cross-examined on that issue. In consequence, all but some eight days of the hearing were occupied by the restraint of trade issue (Mr Michael's case on that issue being conducted by Mr Cran), with Mr Lever attending in order to make opening and closing submissions on Mr Michael's behalf on the Article 85 issue.

Sony Music was represented throughout by Mr Pollock QC, Mr Unwin and Mr Flynn, with the additional assistance of Mr Duffy on the Article 85 issue, instructed by Messrs Clintons.

I am extremely grateful to all Counsel and to their instructing solicitors for the assistance they have given me; most especially to Mr Cran, Mr Lever and Mr Pollock, but not forgetting Mr Mill for the assistance he gave me in relation to the counter-equities.

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PART II: THE FACTS

Introduction to this part of the Judgment

So far as the general factual background to the dispute is concerned, despite its length and complexity (and despite the considerable amount of time taken up in hearing evidence about it) there are, in the end, relatively few areas in which there is a direct conflict of evidence. Equally,

there is little dispute as to the facts relied upon by Sony Music in support of its 'equitable defences' . As to the counter-equities, the principal area of factual dispute concerns the effort which Sony put into the marketing and promotion of Mr Michael's album 'Listen Without Prejudice - Vol. 1' (released in September 1990).

In the circumstances I propose to address the facts by first setting out (in Section A of this Part of the judgment) the general factual background to the dispute, identifying as I do so the principal areas where conflicts of evidence have arisen but without at that stage resolving such conflicts. That will, I hope, serve to place the pleaded issues, and particularly the issue of restraint of trade, in a broad factual (and contractual) context.

For the most part, the factual account set out in Section A is non-contentious: where it is otherwise, the statements of fact in Section A represent the facts as I find them. Where, in the course of Section A, evidence is referred to or quoted, such evidence is accepted save where otherwise indicated.

Then (in Section B of this Part of the judgment) I shall address those areas of the general factual background mentioned in Section A as being areas where direct conflicts of evidence have arisen, and I shall at that stage resolve such conflicts.

Before embarking on the facts, however, it is appropriate that I should make some general observations concerning the testimony of the main witnesses of fact, namely:

Mr Michael;
Mr Tony Russell (Mr Michael's Solicitor);
Mr Rob Kahane (Mr Michael's Manager); and
Mr Paul Russell (President of Sony Music Entertainment (Europe), formerly Chairman of Sony Music).

Mr Michael

Mr Michael is both intelligent and articulate, and he gave his evidence with clarity and conviction. To say that he was not overawed by the formalities of the proceedings may be something of an understatement, but his evidence was certainly none the worse for that. He was refreshingly candid, and I have no doubt at all that in giving his evidence he was doing his best to do so fairly and honestly, and to assist me to the best of his recollection and to the best of his knowledge.

That said, however, an opinion, however honestly held, is only as reliable as the facts upon which it is based - and where the facts are reported, the validity of the opinion depends (among other things) on the accuracy of the report and on the ***252** integrity and impartiality of the reporter. As Mr Michael gave his evidence, it became progressively more apparent that his views of Sony's attitudes, motives and competence derived less from first-hand experience and knowledge on his part than from reports made and views expressed to him by his closest advisers, and in particular by his manager Mr Rob Kahane.

This is not to say that Mr Michael's opinions were not his own: that would be to underestimate him. But the fact remains that his opinions were based partly on material the accuracy of which he could not know, and which he made no attempt to verify; a fact which Mr Michael unhesitatingly accepted in evidence, as can be seen from the following passage in his cross-examination:

> Q. … Is this a fair comment, that most of your complaints against CBS throughout the period of your relationship with them…are based on what you have been told by others in your entourage …
>
> A. Yes absolutely. I have relatively little contact with executives in comparison to my managers, which is normal for an artist of my type.
>
> Q. So you were wholly dependent upon the accuracy of what you were told for the justice of your conclusions?
>
> A. No. I look at what I've been told and I weigh it up in the balance with (1) chart performances, (2) exposure on video, (3) promotion, whether it be print advertising, TV advertising, and that kind of thing.

He went on to say that in this connection he had particularly in mind Mr Napier-Bell (Mr Kahane's predecessor as his manager), and subsequently Mr Kahane.

Later in Mr Michael's cross-examination, Mr Pollock put to him that despite his concerns about the promotion and marketing in the US of his album 'Listen Without Prejudice - Vol. 1' , Mr Michael had never sought a meeting with the relevant Sony executives to discuss those concerns. Mr Michael replied, somewhat tartly:

> I'm afraid that is actually what my manager is for, and I don't think that you will find an artist working in the business for ten years who goes into their record company at my level and sits with the promotional team and works out a marketing plan.

Mr Pollock then asked him whether that meant that he was too grand for that. Mr Michael replied:

> No, I'm not too grand. I'm afraid I pay a manager. You don't get respected that way anyway. You can't do it.

Mr Michael was of course at perfect liberty to adopt that approach, and it is not for me to criticise him in any way for having done so. On the other hand, with the benefit of hindsight I cannot help feeling that, had Sony US seen rather more of Mr Michael and rather less of Mr Kahane from 1990 onwards, events *might* have turned out differently.

As it is, although Mr Michael has a distinctly independent cast of mind, and no doubt regards himself as very much his own man, I have no doubt that since Mr Kahane came on the scene as his manager in 1986 Mr Michael's attitudes to and opinions of Sony, and his suspicions as to Sony's motives, owe far more to Mr Kahane's input than Mr Michael can have realised when these proceedings began.

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In opening the case, Mr Cran told me that Mr Michael was anxious that I should accept when he gave evidence that he is wholly sincere in the feelings which he has with regard to the way in which Sony has treated him. I am happy to be able to allay Mr Michael's anxiety in that regard. Although, in cross-examination, Mr Pollock quite properly probed Mr Michael's motivation in bringing this action, in the event no suggestion is made by Sony of any insincerity on the part of Michael in the complaints which he makes against Sony in this action: the issue so far as those complaints are concerned is a different and much more important one, namely whether they are justified.

Mr Tony Russell

Mr Tony Russell is a solicitor of great experience in the record industry, with a reputation as an extremely tough negotiator. In his negotiations on Mr Michael's behalf with Sony Music from Autumn 1983 onwards he certainly lived up to his reputation, as will be seen when I come to set out the facts. He fought his client's corner extremely hard, with tough (and on occasion angry) talking, and with negotiating tactics to match. I have no doubt that negotiating with him was an arduous process.

In relation to one particular aspect of the facts, namely a negotiating meeting which took place on 1 December 1987 (the details of which I shall recount in due course), Mr Pollock suggested that Mr Tony Russell was giving dishonest evidence in denying that in the course of the meeting he asserted that the 1984 Agreement was unenforceable. I acquit Mr Tony Russell of any dishonesty. On the other hand, I am satisfied that his recollection of the meeting is unsound, due to the fact that at one point in the meeting he completely lost control of his temper and indulged in an angry

and intemperate outburst, in the course of which he said things which he could not subsequently recollect.

In other respects too (particulars of which I shall give in due course) I regard his recollection of events as unreliable, due no doubt to the passage of time coupled with the pressures of litigation and the fierce loyalty which he clearly feels towards his client.

Mr Rob Kahane

I found Mr Kahane to be a thoroughly unreliable and untrustworthy witness.

In the first place, his evidence was coloured to a significant extent by his obvious and intense dislike of Sony and all its works. It may be that this dislike derives from the poor personal relationship which, regrettably, appears to exist between him and Mr Ienner, the head of the 'Columbia' label at Sony US (being the label under which Mr Michael's records are released in the US); but whatever the source of his dislike, it was a constant theme underlying his evidence.

In the second place, in giving his evidence I found him to be motivated to an unacceptable degree by self-interest and a desire to protect his own position: characteristics which he also manifested in the course of the events leading to the present dispute, as I shall relate in due course. His recollection was plainly unsound in a number of respects, but that did not always deter him from giving firm answers to questions where it appeared to him to be in his interests to do so.

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Mr Paul Russell

Mr Paul Russell possessses a very much more phlegmatic temperament than does Mr Tony Russell. He displayed considerable patience under the (entirely proper) pressures of a detailed cross-examination by Mr Cran over a number of days, and he gave his answers in a deliberate and considered way. Where he felt unsure of his recollection he did not hesitate to say so.

I am satisfied that throughout his evidence Mr Paul Russell was doing his best to give his evidence fairly and honestly and generally to assist the Court to the best of his recollection.

Section A: The General Factual Background

Early history

A1 George Michael was born on 25 June 1963, in London. His father is Greek, his mother English. In 1979, when he was still at school, he and a school-friend, Andrew Ridgeley, together with three others, formed a pop group called 'The Executive' .

A2 The Executive disbanded in about 1980, and thereafter Mr Michael and Mr Ridgeley continued writing and making demonstration recordings on their own, in the hope of attracting the interest of record companies and music publishers.

A3 Early in 1982 (by which time they were performing under the name 'Wham!') their activities attracted the interest of a young man called Mark Dean. Mr Dean had recently started his own small record company, trading as Inner Vision Record Label ('Inner Vision'), which had a licensing agreement with Sony Music (then CBS (UK)). CBS (UK) also provided financial support to Inner Vision. Under the terms of its agreement with CBS (UK), Inner Vision was obliged to incorporate CBS (UK)'s standard conditions in its agreements with artists.

The Inner Vision Agreement

A4 Negotiations then followed between Mr Michael and Mr Ridgeley (advised by a solicitor, a Mr Robert Allan) and Inner Vision (advised by Mr Rodwell of Messrs Halliwell Rodwell). These negotiations led, on 24 March 1982, to Mr Michael and Mr Ridgeley signing a recording agreement with Inner Vision ('the Inner Vision Agreement'). The Inner Vision Agreement duly incorporated CBS (UK)'s standard conditions.

A5 Under the Inner Vision Agreement, Inner Vision had the right to require up to ten albums (recordings consisting of not less than ten sides or 35 minutes continuous playing time), in consideration of advances and royalties. The advances, which were exclusive of recording costs, were to be £2,000 for the first album, £5,000 for the second, escalating to £35,000 for the tenth and last album. Royalties were 8 per cent for the United Kingdom and 6 per cent for the rest of the world, and were 'producer-inclusive' (i.e. the artists, Mr Michael and Mr Ridgeley, were responsible for paying the producer or producers of the recordings).

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The Inner Vision period

A6 Wham!'s first single, 'Wham Rap!' , was released in June 1982, followed by 'Young Guns' in October 1982. 'Wham Rap!' was re-released in January 1983, followed by another single, 'Bad Boys' , in May 1983.

A7 During April and May 1983 negotiations took place between Mr Allan (for Mr Michael and Mr Ridgeley) and Mr Rodwell (for Inner Vision) with a view to improving the financial terms of the Inner Vision Agreement, and on 19 May 1983 Mr Rodwell telexed Mr Allan with proposals for increasing the royalties payable under the Inner Vision Agreement by some 10 per cent.

A8 By May 1983, however, Mr Michael was having grave doubts about the wisdom of Wham! remaining with Inner Vision. He felt that Wham! was not being properly exploited and he considered Inner Vision to be an unprofessional outfit. Mòreover, had the negotiations between Mr Allan and Mr Rodwell led to the signing of a new agreement with Inner Vision, he would

have regarded himself as bound by such an agreement (assuming it to have been fairly negotiated), although he would have hoped to renegotiate it later. By this time, too, relations between Wham! and Mr Dean had become strained.

A9 In the event, the negotiations between Mr Allan and Mr Rodwell appear to have petered out, and in June 1983 Mr Michael and Mr Ridgeley delivered to Inner Vision the recordings for their first album.

A10 The album, which was called 'Fantastic' , was released in July 1983, followed later that month by a further single, 'Club Tropicana' .

The Inner Vision dispute

A11 By July 1983, relations between Wham! and Mr Dean had deteriorated still further, and Mr Michael, who considered that he and Mr Ridgeley had been very badly and dishonestly treated by Mr Dean, had decided that he wanted to get out of the Inner Vision Agreement and sign with a 'major' : a decision which was already in his mind when the recordings for 'Fantastic' were delivered. He felt that Wham! would be unlikely to have any success in the United States if they stayed with Inner Vision, and was looking for a legal reason to get out of the Inner Vision Agreement.

A12 Mr Michael and Mr Ridgeley accordingly instructed solicitors, Messrs Russells; the partner concerned being Mr Tony Russell. As I said earlier, Mr Tony Russell is (and was in 1983) a solicitor of considerable experience in the entertainment industry, with a particular reputation as a skilled and tough negotiator of recording agreements. He is (and was in 1983) one of a small group of lawyers specialising in this field.

A13 On 7 October 1983 Russells wrote to Inner Vision saying that they had been advised by Counsel that the Inner Vision Agreement was void, voidable, or unenforceable, on grounds of (*inter alia*) misrepresentation restraint of trade and undue influence, and purporting to terminate the Inner Vision Agreement. The letter was some 19 pages long and was settled by Counsel (Mr Cran).
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A14 In the context of the allegation of restraint of trade, the letter referred to three authorities (including the decision of the House of Lords in *Schroeder v Macaulay [1974] 1 WLR 1308*) and continued:

> We believe that the Court would declare the recording agreement [i.e. the Inner Vision Agreement] void, alternatively voidable at our Clients' option,

> alternatively unenforceable in accordance with the principles set out in those decisions.

A15 Mr Tony Russell's aim (as he told me in evidence) was to negotiate the release of Wham! from the Inner Vision Agreement and to sign Wham! direct to CBS (UK). To that end, on the same day (7 October 1983) he telephoned a Mr Oberstein (of CBS) and Mr Rodwell (Inner Vision's solicitor), notified them of the terms of the letter which was being sent to Inner Vision, and expressed the hope, off the record, that it might be possible to negotiate a new deal direct with CBS (UK), with provision for a continuing financial interest for Inner Vision. As Mr Tony Russell put it in the course of his cross-examination:

> In absolute theory it could have worked out that we would have been able to have done a deal with Inner Vision which would have then left us free to go somewhere else. I never believed that Inner Vision would be able to do a deal with us without the approval of CBS. There was no other way of achieving this. … From a very early stage the tactic that we were looking at was to achieve a release from Inner Vision which could only be brought about with CBS' approval and thereby signed to CBS.… I wanted CBS to feel comfortable that at the end of the day we would come to them.

Mr Pollock then put it to Mr Tony Russell that from an early stage it was his objective that there would be a negotiation with CBS, the end result of which would be a deal between CBS and Wham!. Mr Tony Russell replied that that was absolutely correct.

A16 It appears, however, that Mr Dean was in no mood to negotiate, for on 18 October 1983 Inner Vision issued a writ against Mr Michael and Mr Ridgeley seeking injunctions preventing them signing with anyone else, and claiming damages for breach of the Inner Vision Agreement. I will refer to these proceedings as 'the Inner Vision Action' . Mr Tony Russell was asked in cross-examination whether he really wanted the Inner Vision Action to go to trial. He replied:

> I would much prefer that it didn't go to a trial, but I accepted that there was every possibility that it would go to a trial.

A17 Inner Vision applied in the Inner Vision Action for interlocutory relief to restrain Mr Michael and Mr Ridgeley from breaching the Inner Vision Agreement pending trial, and on 11 November 1983 Harman J granted relief on that application. There is a conflict of evidence as to whether, on 2 November 1983, in the course of a telephone call to Mr Richard Rowe (a solicitor and the then Head of Business Affairs at CBS (UK)), Mr Tony Russell threatened that if CBS (UK) sided with Inner Vision in the interlocutory proceedings Wham! would not sign with CBS (UK) should Wham! succeed in the Inner Vision Action. Mr Tony Russell denies that he ***257*** made any such threat: Mr Rowe maintains that he did. I will resolve this conflict of evidence in Section B below.

A18 By this stage Mr Michael and Mr Ridgeley were becoming concerned about the risks of pressing on with the Inner Vision Action, and in particular about their potential liability for costs should they eventually lose the action. Accordingly, following the hearing before Harman J three-handed negotiations began between (1) Mr Michael and Mr Ridgeley (by Mr Tony Russell), (2) Inner Vision (by Mr Rodwell) and (3) CBS (UK) (by Mr Paul Russell, a solicitor and the then managing director of CBS (UK) - he subsequently became its Chairman and Chief Executive Officer).

A19 As between Mr Michael and Mr Ridgeley on the one hand and Inner Vision and CBS (UK) on the other, Mr Tony Russell negotiated from the position that the Inner Vision Agreement was unenforceable as being (among other things) in restraint of trade, and Mr Rodwell and Mr Paul Russell negotiated from the opposite position. As between Inner Vision on the one hand and CBS (UK) on the other, Inner Vision played on the desire of CBS (UK) that Wham! should not sign to another record company by threatening to ensure that they did just that.

A20 A further conflict of evidence has arisen as to whether on 11 November 1983, immediately following the interlocutory hearing, Mr Paul Russell made a crowing and vindictive telephone call to Mr Tony Russell. Mr Tony Russell maintains that he did (corroborated by another partner in Russells): Mr Paul Russell maintains that he did not. I will resolve this conflict also in Section B below.

A21 The negotiations which ensued were very far from amicable; the infighting was rough, the tactics in a number of respects questionable (to say the least) and the atmosphere acrimonious. However, the negotiations resulted eventually in the kind of deal which Mr Tony Russell had been seeking, that is to say a direct signing of Wham! to CBS (UK), with Inner Vision's claims being effectively bought off by CBS (UK), and the Inner Vision Action settled.

The 1984 Agreement

A22 The signing of Wham! direct to CBS (UK) was accomplished by two recording agreements dated 22 March 1984 and made with CBS(UK) by the two service companies of Mr Michael and Mr Ridgeley, together with collateral inducement letters by which they confirmed the availability of their services to CBS (UK) under the recording agreements. (As in the case of the 1988 Agreement, nothing turns for present purposes on the fact that there were two agreements rather than one; nor does any separate point arise in relation to the inducement letters. I will accordingly refer hereafter to the two agreements and the inducement letters collectively, and in the singular, as 'the 1984 Agreement' .)

A23 CBS (UK) entered into a separate settlement agreement with Inner Vision, containing the financial terms agreed between them.

A24 By this time there were eight albums remaining to be delivered under the Inner Vision Agreement. (There may be some doubt about this, depending ***258** on the true construction of the Inner Vision Agreement; but all parties proceeded on this basis, so there is no purpose in investigating whether they were strictly correct in doing so.)

A25 The 1984 Agreement was what is termed an 'eight-album deal' , in that it provided for the delivery of 'Master Recordings' for the first album during an initial contract period limited to last a maximum of three years, with options to CBS (UK) to extend the contract for up to a further seven such contract periods, with Master Recordings for a further album to be delivered during each of those periods.

A26 The expression 'Master Recording' was defined (in clause 15.01 of the 1984 Agreement) as meaning (so far as material for the purpose of this section of the judgment) 'every recording of sound alone … which is used or useful in the recording, production and/or manufacture of [records of any kind]' .

A27 By *clause 2.01* of the 1984 Agreement, Mr Michael and Mr Ridgeley agreed to sell, transfer and assign to CBS (UK) all right title and interest in Master Recordings made by them during the currency of the agreement. They thus sold transferred and assigned to CBS (UK) the entirety of their output of Master Recordings during the currency of the 1984 Agreement, together with the copyright in such Master Recordings.

A28 By *clause 4.03* of the 1984 Agreement artistic control was given to Mr Michael. This was in contrast to the Inner Vision Agreement, and was a matter of considerable importance to Mr Michael in the negotiations which led to the 1984 Agreement. Mr Tony Russell's evidence was that it dominated the early part of the negotiations.

A29 The 1984 Agreement also contained (in *clause 21.02*) what is termed in the record industry a 'leaving member option' , which provided in effect that in the event (which subsequently happened) of Wham! splitting up, CBS (UK) should have the option to require an individual member of Wham! (i.e. Mr Michael or Mr Ridgeley) to remain bound by the 1984 Agreement as if it were an agreement between CBS (UK) and such individual member.

A30 The financial terms of the 1984 Agreement represented, so far as Wham! was concerned, a very substantial improvement over those of the Inner Vision Agreement. This improvement no doubt reflected, among other things, the negotiating skill of Mr Tony Russell and the tough stance which he adopted in the negotiations. Thus, royalties under the 1984 Agreement (which were again 'producer-inclusive') were 13.5 per cent for the United Kingdom, rising to 16 per cent over the life of the Agreement; 11 per cent for the 'major territories' (the United States, Canada, Australia, Japan, and the major countries of Europe), rising to 15 per cent over the life of the agreement; and 10 per cent for the rest of the world, rising to 14 per cent over the life of the agreement.

A31 Mr Michael was happy with the 1984 Agreement. Although he considered that Wham! could have done better on the open market (i.e. had they not signed with Inner Vision, or had the Inner Vision Agreement been declared unenforceable) he regarded its terms as fairly close to what they could have obtained on the open market. He told me that he did not ***259*** regard the 1984 Agreement as unfair, that he intended to perform it, that he was perfectly happy to enter into a long-term relationship with CBS (UK), and that he thought that it would be possible to renegotiate it (i.e. to negotiate improvements in its terms) on a friendly basis in the future if circumstances warranted. As will be seen, the 1984 Agreement was in due course renegotiated: a renegotiation which is embodied in the 1988 Agreement (i.e. the agreement which is challenged in this action).

A32 As for Mr Tony Russell, he confirmed in cross-examination that at that stage he had no thought that the 1984 Agreement was not a binding agreement, and that the question of the 1984 Agreement being in restraint of trade (a doctrine with which he was fully familiar and which was very fresh in his mind, having acted for Wham! in the Inner Vision Action) did not cross his mind. I quote the next question and answer:

> Q. And you were not entering into this particular settlement on behalf of your clients with the hidden thought: 'Well, we can always break this one too if we want to because of restraint of trade'?
>
> A. No. Absolutely not.

1984 – 1986: The success of Wham!

A33 Following the signing of the 1984 Agreement, Wham! achieved substantial, and ever-increasing, success. Their next single, 'Wake me up before you go' was released in May 1984, followed in July 1984 by a solo single written and recorded by Mr Michael entitled 'Careless Whisper' . A further single, 'Freedom' , was released in October 1984. Their second album (their first under the 1984 Agreement), 'Make It Big' , was released in November 1984, and a further single, 'Last Christmas' , in December 1984.

A34 In January 1985 CBS (UK) exercised the first of its seven options under the 1984 Agreement, thus committing Wham! to delivery of a second album.

A35 Throughout most of 1985 Wham! were touring, but two further singles ('I'm Your Man' , and a re-release of 'Last Christmas') were released towards the end of the year. In April 1986 a further solo single by Mr Michael, 'A Different Corner' , was released.

Summer 1986: The break-up of Wham!

A36 The Summer of 1986 saw the break-up of Wham!, with Mr Michael and Mr Ridgeley deciding to go their separate ways. Their final concert as Wham! took place at the end of June 1986. July 1986 saw the release of an extended play record entitled 'The Edge of Heaven' and of their last album, aptly entitled 'The Final' . By the time Wham! broke up, its success had reached such proportions that both Mr Michael and Mr Ridgeley were household names in the field of international popular music, Mr Michael's fame being as both performer and songwriter.

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November 1986: The leaving member option

A37 In November 1986 Mr Michael and Mr Ridgeley gave notice to CBS (UK) of the disbandment of Wham!, as they were obliged to do under the 1984 Agreement, and on 25 November 1986 CBS (UK) exercised the leaving member option in respect of both Mr Michael and Mr Ridgeley. At this point, Mr Ridgeley drops out of the story, for the present purposes.

A38 Mr Michael told me that he has no complaint about the way CBS (UK) dealt with the Wham! recordings up to the time when Wham! split up, although he feels that thereafter CBS in the United States may have lost interest in the Wham! recordings. However, no complaint is made in this action concerning CBS/Sony's handling of the Wham! recordings.

November/December 1986: Preparing for the 1987 renegotiation

A39 At about this time (November 1986), Mr Michael and his advisers decided to approach CBS (UK) to renegotiate the 1984 Agreement (i.e. to improve the terms of the 1984 Agreement in Mr

Michael's favour). Renegotiation of recording agreements is a common practice. In most cases the renegotiation is initiated by the artist; it customarily takes place where (for example) an artist has proved to be particularly successful. There is no legal obligation on record companies to enter into a renegotiation in such circumstances, but they usually regard it as being in their long-term interest to do so. (I shall return to the practice of renegotiation later in this judgment.)

A40 Mr Michael's advisers at this stage consisted principally of Mr Tony Russell, Mr Dick Leahy (Mr Michael's music publisher, and a longstanding friend and confidant), and Mr Rob Kahane (an American at that stage employed by a concert tour booking agency in California, whom Mr Michael had agreed should become his manager worldwide). On leaving his employment with the agency at about the end of 1986, Mr Kahane went into partnership with an American lawyer, Mr Michael Lippman, under the name Lippman Kahane Entertainment. On 1 January 1987 Mr Michael entered into a management agreement with that firm.

A41 The first approach from Mr Michael's side to CBS/Sony to renegotiate the 1984 Agreement appears to have been made by Mr Kahane in November or early December 1986, when he went to see Mr Walter Yetnikoff (the then Chairman and Chief Executive Officer of CBS/Sony's record operations worldwide, who was based in New York). Mr Kahane appears to have succeeded in striking up a good relationship with Mr Yetnikoff, and on a number of occasions he made direct approaches to Mr Yetnikoff, thereby bypassing the accepted channels of communication and negotiation within CBS/Sony.

A42 It was Mr Lippman's view that Mr Michael needed an American lawyer to represent him in any renegotiation, and when this was raised by Mr Kahane with Mr Yetnikoff, Mr Yetnikoff said that if there was to be a renegotiation Mr Michael would have to use one of two named American ***261*** attorneys with whom Mr Yetnikoff had previously done business, namely Mr Allen Grubman of Grubman Indursky or Mr John Branca of Ziffren Brittenham & Branca. In the event, Mr Michael retained Mr Grubman.

A43 On 10 November 1986 Mr Michael had a meeting with Mr Tony Russell in Los Angeles, at which he told Mr Tony Russell that he wanted to be treated by CBS as one of its 'superstars' (although Mr Tony Russell's view was that, while he was an extremely successful artist, he had not yet reached the status of superstar; that the United States was where the powerbase of CBS lay, and where its superstars were signed; that the United States was also the most important market; and that accordingly he wanted to deal with Mr Yetnikoff, but he also wanted Mr Tony Russell to be involved in the renegotiation). By early December 1986 Mr Michael had decided that Mr Leahy, Mr Kahane and Mr Lippman should also be involved.

A44 On 18 December 1986 Mr Tony Russell discussed tactics with Mr Michael, Mr Leahy and Mr Grubman, and it was agreed that they should all meet in January 1987, together with Mr Lippman, and that nothing should be mentioned to CBS/Sony about a renegotiation until all their plans had been laid. Mr Grubman was contemplating that in due course meetings should take place with Mr Yetnikoff or with Mr Bob Summer (the then President of CBS/Sony Music International, also

based in New York), and it was agreed that Mr Paul Russell (of CBS (UK)) should be invited to attend such meetings, so that he should not feel he was being left out.

A45 On 19 December 1986 Mr Tony Russell wrote to Mr Grubman (who had just learnt of his appointment as Mr Michael's US Attorney) saying:

> Welcome on board! …
>
> I will explain to you briefly the history of the matter when I see you, but briefly prior to signing with CBS Records Wham! were signed to Inner Vision Records which was a label run by a man called Mark Dean which was distributed by CBS Records. We instituted proceedings against Inner Vision Records on behalf of Wham! to endeavour to extract them from their agreement with Inner Vision. The end result of a bloody six months battle was a settlement with Inner Vision whereby they released the group and the new agreements which I have sent to you herewith [i.e. the 1984 Agreement].

'I knew you were waiting (for me)'

A46 In January 1987 Mr Michael's career took a further step forward with the release of a single of a duet which he had recorded with Aretha Franklin in the Summer of 1986, 'I knew you were waiting (for me)' . This single reached number one in the charts in both the UK and the US.

The 1987 renegotiation: first phase (Feb/June 1987)

A47 On 29 January 1987 Mr Rowe telephoned Mr Tony Russell to ask him whether there was any truth in the rumours that Mr Michael was thinking of changing his legal representation, and saying that he had heard the ***262*** name of Mr Grubman mentioned in that connection. By this time, of course, Mr Grubman was already well and truly 'on board' , but Mr Tony Russell was concerned that CBS (UK) would not take kindly to the US becoming the forum for the negotiations and he felt that the matter ought to be handled sensitively.

A48 Mr Rowe's inquiry caught Mr Tony Russell unprepared. He told Mr Rowe that no decisions had been reached, but as soon as they had CBS (UK) would be the first to hear. This was a lie, as Mr Tony Russell admitted in cross-examination.

A49 On 3 February 1987 a long meeting took place in London (at Mr Tony Russell's offices) between Mr Michael, Mr Kahane, Mr Lippman, Mr Leahy, Mr Grubman and Mr Tony Russell, to discuss the proposals to be put forward on Mr Michael's behalf in the renegotiation with CBS. In the course of the meeting, Mr Tony Russell tabled a memorandum which he had prepared previously. Item 3 in the memorandum was in the following terms:

> The number of albums at present due under the [1984 Agreement] is six (although CBS could contend seven). We should discuss how many albums we are requesting CBS to commit to and how many extra albums we are prepared to offer to CBS.

The reference to offering extra albums to CBS reflects the fact that the view had been taken on Mr Michael's side that CBS would inevitably require more product as a quid pro quo for improving Mr Michael's terms. At the meeting, Mr Grubman advised that Mr Michael should be prepared to offer to deliver a further two albums to CBS in return for the improved terms which they were intending to seek.

A50 Two days later, on 5 February 1987, Mr Michael, Mr Leahy and Mr Tony Russell met Mr Paul Russell and Mr Rowe over dinner to discuss generally the method and procedure for the renegotiation. Mr Paul Russell advised Mr Michael to prepare the ground for the renegotiation by first playing some finished recordings intended for his next album to Mr Yetnikoff and to Mr Al Teller (the then President of CBS *(US)*), before embarking upon the renegotiation. Mr Tony Russell was all for getting on with the renegotiation, but Mr Michael decided that he and Mr Leahy should go and see Mr Teller to discuss their creative plans with him.

A51 On CBS's side, it was decided, following discussions between Mr Paul Russell and Mr Bob Summer, that any renegotiation should take place with CBS (UK), and that if Mr Grubman approached CBS (US) to renegotiate, he should be directed to CBS (UK). Shortly thereafter, Mr Kahane told Mr Tony Russell that he had obtained an assurance from Mr Yetnikoff that in renegotiating in the UK, Mr Michael would be treated no differently from American superstars who had negotiated their agreements in the US.

A52 In late April 1987, Mr Michael visited Mr Teller in New York and played him a number of tracks from his forthcoming solo album (which was to be entitled 'Faith'), which he was at that stage in the process of recording. Mr Teller was extremely enthusiastic about the music, and told Mr Michael ***263*** that he believed that the album would be a massive success (as in the event it proved to be). Mr Michael's objectives in meeting Mr Teller were to encourage him in the belief that he (Mr Michael) had a long term future with CBS, and to generate CBS' support for the new album. Mr Michael felt that he had achieved both objectives.

A53 At about the same time, Mr Michael also saw Mr Yetnikoff, who told him that the renegotiation would take place in London; that Mr Michael would stay signed to CBS (UK); but that Mr Michael would not be any less advantageously treated by reason of the fact that the renegotiation was to take place in the UK rather than in the US. Mr Michael was surprised and disappointed by this news, as on previous occasions Mr Yetnikoff had led him to believe that the renegotiation would take place in the US.

A54 On 30 April 1987 Mr Rowe sent Mr Paul Russell his proposals for the renegotiation, which included a proposal that CBS should have options for an additional two albums (making eight albums in all) and should commit to taking three albums.

A55 On 12 May 1987 the first round of the renegotiation took place, in the form of a meeting between (for Mr Michael) Mr Tony Russell, Mr Leahy, Mr Kahane and Mr Lippman, and (for CBS (UK)) Mr Paul Russell, Mr Rowe and Mr Sternberg (an in-house solicitor of CBS (UK), later to become Director, Legal Affairs of CBS (UK)). Mr Michael was by this time heavily involved in making the recordings for 'Faith' and took little personal part in the progress of the renegotiation, although he was kept fully informed of progress by Mr Tony Russell.

A56 Mr Tony Russell was looking to this renegotiation to set Mr Michael at the level of a superstar. As he put it in his attendance note of the meeting:

> We reiterated that from George's point of view the renegotiation was substantially one of status and therefore all that George would want to have proved to him [was] that he was being treated on [a] par with other superstars.

A57 In the course of the meeting, Mr Tony Russell put forward Mr Michael's proposals. He explained that the philosophy behind them was based on the assurance which Mr Michael had received (as reported by Mr Kahane: see para A51 above) that he would be treated in the same way as an American major artist signed to CBS (US) would be treated, and that accordingly Mr Michael should receive the same financial terms as those obtained by his American counterparts.

A58 As to the proposals themselves:

A58.1 Mr Tony Russell began by pointing out that as matters stood under the 1984 Agreement CBS (UK) was entitled to a further six albums, and he offered a further two albums (making

eight in all) with the proposal that CBS (UK) should commit to four albums, with options over the remaining four.

A58.2 As to royalties, Mr Tony Russell proposed (among other things) 22 per cent for the UK and North America (as compared with 13.5 per cent initially for the UK and 11 per cent initially for the US and Canada under the 1984 Agreement), and 19 per cent for the rest of ***264** the world (as compared with 11 per cent initially for Australia, Japan and the major countries of Europe and 10 per cent initially for the rest of the world under the 1984 Agreement).

A58.3 As to advances, Mr Tony Russell proposed a minimum advance of £3 million per album for the first four albums, with a formula for the second to fourth albums based on 75 per cent of sales of the preceding album up to a maximum advance of £4 million. He further proposed that the minimum advances should be payable as to £6 million on 2 January 1988 or (if later) delivery of the next (i.e. first) album, with the balance of £6 million being divided equally between the next three albums. Mr Tony Russell explained that he had calculated the figures for advances on the basis that 'Faith' would sell 10 million copies - an underestimate, as events turned out - with the result that on the basis of the proposed new royalty rates 'Faith' should produce in royalties an amount equal to the guaranteed minimum advances for the first four albums (i.e. CBS (UK) should be in a position to recoup the minimum advances for the first four albums out of the royalties generated by 'Faith').

A58.4 Further proposals were put forward by Mr Tony Russell in the course of the meeting, the details of which I need not set out.

A59 Mr Paul Russell, Mr Rowe and Mr Sternberg did little more at the meeting than listen to Mr Tony Russell's proposals, and it was left that Mr Tony Russell would write to Mr Paul Russell setting out his proposals, which he duly did the following day. The letter was copied to Mr Summer and to Mr Tyrrell (then Vice-President of Business Affairs at CBS Records International ('CRI'), a division of CBS (US)) for their reaction.

A60 Mr Paul Russell's view of Mr Tony Russell's proposals was that Mr Tony Russell was trying to get the best of all worlds, in that American artists signed in the US often received lower royalty rates outside the US than equivalent artists not signed in the US, whereas Mr Tony Russell was trying to obtain not merely a higher royalty rate in the US but in addition a royalty rate in the rest of the world which was higher than that of most American superstars. Mr Paul Russell felt that, as a UK-signed artist, Mr Michael already had a very good royalty rate in the UK and in the rest of the world outside the US: far better than his US-signed contemporaries.

A61 Generally, as to the financial terms proposed by Mr Tony Russell, Mr Paul Russell felt that Mr Michael had yet to prove himself as a solo artist, and that although CBS had great faith in him as a solo artist 'it would' , as he put it in paragraph 205 of his witness statement, 'be preferable to see a bit more of the apple before biting it all' . He also thought that if Mr Michael were successful he would seek a further renegotiation at some time in the future, and that CBS needed to leave some room for further movement in relation to future albums.

A62 Following the meeting of 12 May 1987, Mr Paul Russell had a series of meetings with Mr Yetnikoff, Mr Summer and Mr Tyrrell to discuss Mr Tony Russell's proposals, and each of them independently reached the conclusion that the proposals were simply unrealistic. Mr Paul Russell's view was that the kind of investment and commitment which Mr Michael ***265** was seeking from CBS went well beyond what was commercially sensible for CBS to accept, and that Mr Michael was asking CBS to act in a commercially reckless way. Further, CBS wished to limit the renegotiation so far as possible to the forthcoming album, 'Faith' , rather than undertake a full-scale renegotiation at that stage.

A63 1 June 1987 marked the release of a solo single 'I want your sex' , which achieved success (and a degree of notoriety) not only by reason of the recording itself but also by reason of the promotional video which accompanied the release. The record rapidly reached number three in the UK charts and was also a great success in the US. (The track 'I want your sex' was later included in the album 'Faith' , it being standard practice in the record industry to release a single in advance of an album in which it is to be included, so as to whet the appetite of the record-buying public for the album itself when subsequently released.)

A64 On 29 June 1987 Mr Rowe wrote to Mr Tony Russell responding to Mr Tony Russell's letter of 13 May 1987 in which Mr Tony Russell had set out his proposals for renegotiation. In the second paragraph of his letter, Mr Rowe said this:

> After considerable discussion we have focused our attention on George's next album [i.e. 'Faith'] only as we believe it is premature at this point in his career to deal with the entire agreement due to time pressure and other surrounding uncertainties. I have set out below the adjustments that we feel are appropriate to the agreement.

He then set out a number of financial adjustments the detail of which I need not rehearse, but which fell a very long way short of Mr Tony Russell's proposals. The letter concluded:

> As George's agreement was extensively negotiated in 1982 [it is common ground that he meant 1984] we would be unwilling to make any further commercial changes other than as set out herein but of course we would be willing to enter into new agreements and make any reasonable changes that you require of a non-commercial nature.

> I look forward to hearing from you once you have had an opportunity of discussing the above points.

A65 Neither Mr Paul Russell nor Mr Rowe expected CBS' counter-proposals to be acceptable to Mr Michael, and their expectation proved justified. Mr Tony Russell regarded the counter-proposals as wholly unacceptable, and Mr Kahane regarded them as 'a shot across the bow' . At that point, Mr Michael decided to leave the renegotiation in abeyance until after the release of 'Faith' .

The release of 'Faith'

A66 On 6 July 1987 Mr Michael made a personal appearance as a special guest at a sales convention organised by CBS in Vancouver, which was also attended by Mr Paul Russell and by Mr Andy Stephens (the then Head of International Marketing for CBS (UK)). Mr Stephens made a presentation ***266*** of a number of tracks from 'Faith' , which was extremely well received. As Mr Paul Russell says in his witness statement:

> The value of [Mr Michael's] appearance was enormous, both in assisting [his] cause in the negotiations and in creating huge goodwill between [him] and the various marketing and sales teams throughout the world who were set to work on his album when it was released.

A67 The title track of the album was released as a single in October 1987 and sold very well, especially in the US, where it reached number one in the charts. The album itself, 'Faith' , was released simultaneously in the UK and the US on 2 November 1987.

A68 The release of 'Faith' proved to be an outstanding commercial success, and one which finally made Mr Michael's name as an international solo artist. Sales of 'Faith' soared, to the point where by the end of 1987 some 4 million copies had been sold. By the end of 1992, more than 14 million copies of 'Faith' had been sold worldwide.

The 1987 renegotiation: second phase (Oct/Dec 1987)

A69 At about the end of October 1987 the renegotiation resumed, with CBS making it clear to Mr Grubman that CBS was contemplating a single renegotiation meeting, to be attended by both Mr Grubman and Mr Tony Russell on behalf of Mr Michael, with a memorandum of the points to be raised on Mr Michael's behalf being circulated beforehand.

A70 In the event, Mr Tony Russell prepared two memoranda listing a number of deal points. He discussed these memoranda with Mr Grubman in New York on the morning of 1 December 1987, prior to a meeting later that day with CBS.

A71 In summary, Mr Tony Russell's memoranda contained the following principal points:

A72.1 Although, given his previous offer of two additional albums (see para A58.1 above), he would have preferred CBS to commit to four albums, with options over the remaining four, nevertheless Mr Grubman's view was that CBS would only commit to three albums (to include 'Faith'), with options over the remaining five.

A72.2 As to royalty rates:

(a) Mr Grubman had asked for the equivalent of a 20 per cent royalty in the US and Canada (as compared with the current rate of 13 per cent, which would rise to 14 per cent for the next four albums and 15 per cent for the last one of the six remaining to be delivered under the 1984 Agreement). Mr Tony Russell observed: 'This clearly is one of the most major points of the renegotiation' .
(b) Mr Grubman had asked for a UK royalty rate equivalent to the US royalty rate (i.e. some 20 per cent, as compared with the current rate of 14 per cent, rising to 15 per cent for the next four albums and to 16 per cent for the last one). ***267**
(c) As to the rest of the world, Mr Grubman had indicated that the highest royalty CBS might be prepared to pay was 15 per cent, which was the rate paid to its superstars. Mr Tony Russell felt that CBS (UK) might be prepared to go to 16 per cent.
(d) Mr Michael would also expect a video royalty in the region of 20 per cent (as compared with the current rate of about 14 per cent).

A72.3 As to advances:

(a) Mr Grubman was talking of a minimum advance of $3 million for each of the first three albums, with provision for increase in the case of the second and third albums, up to a maximum of $5 million for each album. 'Obviously' , observed Mr Tony Russell, 'from a commercial point of view it is important to obtain as high an advance on signing as possible' .
(b) Mr Grubman also thought it might be possible to persuade CBS to prepay the advance due in respect of the second album up to a maximum of $2 million.
(c) Mr Tony Russell also expressed the hope that it might be possible to reach agreement with CBS that CBS would, before the end of 1988, pay all the royalties which were at that stage

in the pipeline (i.e. royalties earned but not yet reported, and accordingly not yet payable to the artist).

A72.4 Under the heading 'Master Recordings' , Mr Tony Russell wrote:

> Reversion of Master Recordings at some time after the end of the agreement (I assume that this is wishful thinking and should not be raised).

What Mr Tony Russell had in mind was the possibility that CBS might agree that the copyright in Master Recordings sold to CBS (UK) by virtue of clause 2.01 of the 1984 Agreement should revert to the artists at some time after the 1984 Agreement had run its course (since the copyright in each such Master Recording would inevitably substantially outlast the 1984 Agreement). His reference to 'wishful thinking' indicates that he had little hope that CBS would agree to such a reverter. In the event, Mr Grubman advised that it should not even be raised with CBS and it was not raised.

A72.5 As to delivery of albums, Mr Tony Russell noted that the 1984 Agreement provided for delivery of albums no less than six months nor more than fifteen months from the date of delivery of the previous album. He continued:

> It would perhaps be safer to extend the fifteen month period but once again we should decide as a matter of tactics as to whether a request for such an extension might make CBS somewhat nervous.

A72.6 Mr Tony Russell also listed a number of other detailed points, to which for present purposes I need not refer.

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A73 The meeting which took place later on 1 December 1987 was attended by (for Mr Michael) Mr Tony Russell, Mr Grubman and Mr Bob Flax (a junior partner of Mr Grubman) and (for CBS) Mr Tyrrell and Mr Rowe. There is a conflict of evidence as to whether Mr Paul Russell was also present at the meeting. His evidence, and that of Mr Tyrrell and Mr Rowe, is that he was present; Mr Tony Russell's evidence is that he was not. In addition, there is a conflict of evidence as to whether, in the course of the meeting, Mr Tony Russell asserted that the 1984 Agreement was void or unenforceable on the ground of restraint of trade. The evidence of Mr Paul Russell, Mr

Tyrrell and Mr Rowe is that he did, but Mr Tony Russell denies having done so. I will address these conflicts of evidence in Section B below.

A74 What is not in dispute is that the meeting was a long one; that at times it became extremely heated and acrimonious; and that the result was inconclusive. A further short meeting took place the following day, which was also inconclusive.

A75 On 10 December 1987 Mr Rowe circulated a 'deal memo' to 'approvers' (i.e. those persons within CBS whose approval would be required to any renegotiated deal with Mr Michael). He also sent a copy of the deal memo to Mr Flax (Mr Grubman's partner, acting for Mr Michael). The first paragraph of it was in the following terms:

> Please may I have your approval to amend our agreement with George Michael on the terms set out below. Although we will enter into new agreements with George's [service companies] the agreement will be based on the existing agreement [i.e. the 1984 Agreement] and only changed as set out herein.

A76 The deal memo then lists a number of proposed terms for the renegotiated deal. For present purposes I need only note certain of them. Thus:

Product

> An eight-album deal, with 'Faith' being the first of the eight; CBS would commit to taking three (i.e. 'Faith' plus the next two), with options over the remaining five. (This represented two additional albums over the six to which CBS (UK) was already entitled under the 1984 Agreement.)

Advances

> (a) Album 1 (i.e. 'Faith'): $5 million.
>
> (b) Album 2: $3 million.
>
> (c) Albums 3 and 4: 'An advance for each album equal to 50 per cent of the worldwide royalties or 75 per cent of US royalties, whichever is the higher, payable on the previous album, with a minimum of $2 million and a maximum of $4 million. In the event we are more than $1 million

unrecouped (including pipeline [royalties]) at the due date of album delivery, we can deduct $1 million from the album advance' . The last sentence means that if at the date when an advance falls to be made there is a balance of more than $1 million in respect of advances on previous albums which still remains to be recouped out of royalties, taking into account royalties earned but not yet accounted to Mr Michael, a *269 deduction of $1 million may be made from the current advance.

(d) Future albums (i.e. albums 4 to 8 inclusive): As under the 1984 Agreement.

Guaranteed advance payments

(i) $5 million on execution of the renegotiated agreement.

(ii) $3 million in December 1988, or (if higher) the total amount of royalties 'in the pipeline' .

(iii) $2 million in December 1988 being a prepayment of the advance for album 2, to be recoupable from royalties only from the due date (August 1989).

Album delivery schedule

Album 2 - August 1989.

Album 3 - February 1991.

Subsequent albums to be delivered every 18 months.

Detailed proposals were also set out relating to royalty rates (including a proposed reduction of 25 per cent on compact discs ('the CD reduction')), promotional videos and other matters.

A77 On receipt of a copy of Mr Rowe's deal memo, Mr Flax circulated Mr Michael's advisers with a summary, albeit an incomplete one, of its contents. Mr Tony Russell then discussed the CBS proposals with Mr Flax, Mr Kahane and Mr Lippman. It was left that Mr Tony Russell would respond to Mr Flax with his detailed comments on the proposals within the next few days.

A78 Mr Tony Russell was very dissatisfied generally with the terms offered by CBS, and in particular with the proposed royalty rate for the US, which he felt was far too low, and with the proposed CD reduction. At this stage he was seriously considering advising Mr Michael to withdraw his offer of two further albums, given that the offer was (as Mr Tony Russell saw it) predicated on the basis that Mr Michael was to be offered 'US superstar' terms. He had, however, communicated his concerns to Mr Grubman, who had agreed to go back to CBS to try to improve the terms (in particular by improving the US royalty rate and by limiting the CD reduction to 20 per cent). It was also arranged that Mr Kahane should speak direct to Mr Yetnikoff in an attempt to improve the terms offered.

A79 On 15 December 1987 Mr Tony Russell wrote to Mr Flax with his detailed comments on CBS' proposals. I need not set out the detail of his comments. At the conclusion of the letter, he said this:

> I am somewhat concerned that there are aspects relating to this negotiation of which you are not aware, and I must ask you to telephone me at 4 pm (London time) today so that I can explain these to you.

In evidence, Mr Tony Russell explained that in writing the above he had in mind that any renegotiated agreement would have to be structured in a way which took account of tax considerations, and in particular of the fact that Mr Michael was intending to spend most of 1988 touring abroad, and ***270** was accordingly planning to spend the whole of that year out of the UK, so that his earnings during that year would not attract UK income tax. That being so, in order to make the best use of the 'year out' (as it was called) from a tax point of view, it was important that Mr Michael receive as much as possible by way of advances, royalties and other payments from CBS during the 'year out' .

A80 Mr Tony Russell must also have telephoned Mr Kahane and discussed some sensitive matters with him, for on the same day (15 December 1987) Mr Tony Russell wrote to Mr Kahane, enclosing a copy of his letter to Mr Flax and saying (among other things):

> Please do not discuss with anybody at CBS the matters which we discussed during our telephone conversation as I have had various further telephone conversations with Paul Russell and Richard Rowe since which I need to explain to you. Accordingly would you please phone me about 4.45 pm (London time).

Unfortunately, neither Mr Tony Russell nor Mr Kahane can recall what matters are there referred to.

A81 Mr Flax did telephone Mr Tony Russell, but not until after Mr Tony Russell had left his office. Mr Flax accordingly telexed Mr Tony Russell saying that in any event what he needed were Mr Tony Russell's comments on the draft agreement which CBS was due to fax to Mr Flax the following day. The telex concluded:

> We obviously have to do this properly, but we are all under some pressure to expedite this.

A82 The following day Mr Tony Russell (who had by this time received a copy of the draft agreement produced by CBS) responded somewhat tersely to Mr Flax's telex, pointing out, among other things, that Mr Flax had no authority to accept any amendments without Mr Tony Russell's specific authority, and that Mr Flax had not yet responded to the points raised by Mr Tony Russell in his letter of 15 December 1987.

A83 Mr Tony Russell and his commercial partner Mr Christopher Organ spent the whole of 16 December 1987 amending the draft agreement and discussing it with Mr Leahy, Mr Kahane and Mr Grubman. On the same day Mr Flax reported to Mr Tony Russell that Mr Grubman had approached CBS in New York in an attempt to improve the terms which CBS was offering (as he had earlier undertaken to do), but that he had met with no success.

A84 By 17 December 1987 the terms set out in Mr Rowe's 'deal memo' had received the necessary approval from 'approvers' .

A85 On the same day (17 December 1987) a long meeting took place between Mr Michael, Mr Leahy, Mr Tony Russell and Mr Kahane. According to Mr Tony Russell's attendance note the meeting lasted from midday until 11.45 pm. Mr Michael recalls that in the course of the meeting Mr Tony Russell told him the terms which were on offer and that CBS were pressing hard to conclude the negotiation - that, in Mr Tony Russell's words, it was 'take it or leave it time' , in that the terms offered were CBS' final terms.

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A86 In paragraphs 41 and 42 of his witness statement Mr Michael describes his reaction in the following terms:

> My response was one of disappointment, given the expectation generated by Mr Grubman at my previous meetings with him and the success of 'Faith'. I remember being particularly disappointed by the royalty rates for the UK and the rest or Europe (where I was very successful) and by my CD rate of 75 per cent. I also remember regretting that we had offered CBS two extra albums. We had done so against the prospect of obtaining substantial

> improvements in my terms and now, having failed to get such terms, I felt that Mr Grubman had not achieved anything like that which he had forecast.
>
> However, I felt that I had little alternative but to accept CBS' offer, as I needed CBS' maximum support for my new album [i.e. 'Faith'] and I feared that I might antagonise Mr Yetnikoff and put that support at risk if I made any further demands. Their offer certainly seemed better than the alternative, which was to remain with my existing terms. It was also at the back of my mind that I would be in a position to seek further improvements in the future if 'Faith' was as successful as seemed likely.

In the result, therefore, Mr Michael decided to accept the terms offered by CBS.

A87 Paragraph 43 of Mr Michael's witness statement merits quoting in full. It reads as follows:

> As in 1984, I did not ask for, or receive, any advice as to whether my amended agreement would be 'in restraint of trade'. I had had no reason since 1984 to develop any understanding of that concept, and there was no reason now for the matter to cross my mind. In short, it did not occur to me to question the enforceability of my agreement. My dealings with CBS had by and large run smoothly. CBS had not tried to interfere artistically. My career had progressed as I and my record company had wanted it to progress.

A88 On 18 December 1987 Mr Tony Russell returned the draft documentation to Mr Flax, with his proposed amendments. A final version was then prepared, and the 1988 Agreement was signed and dated 4 January 1988. By that date 'Faith' had sold in excess of 4 million copies.

A89 In the meantime, two events had taken place which require to be mentioned for completeness. Firstly, on 29 December 1987 CBS released a further solo single by Mr Michael entitled 'Father Figure' (a track which had been included in the album 'Faith'). Secondly, as of early January 1988 Sony took over CBS, and CBS (UK) thereupon became Sony Music.

The 1988 Agreement

A90 I shall in due course consider the terms of the 1988 Agreement in detail, in the context of the arguments on the restraint of trade issue. For present purposes, it suffices to note the following points as to its terms:

- *Clause 2.01* is in the same form as clause 2.01 in the 1984 Agreement, in that it provides for the sale, transfer and assignment to Sony Music of all ***272** Master Recordings made by Mr Michael during the currency of the agreement (the expression 'Master Recordings' being defined in *clause 15.01* in the same terms as the equivalent definition in the 1984 Agreement).
- *Clause 2.02(a)* provides that Sony Music shall have the exclusive copyright in the Master Recordings.
- *Clause 2.02(b)* provides that Sony Music shall have the unlimited right to manufacture, sell and deal in records, cassette tapes and compact discs derived from the Master Recordings,

> … or to refrain from any such manufacture sale or dealing….

- *Clause 3* provides that the agreement shall continue for an 'Initial Contract Period' , with Sony Music having five consecutive options to extend the term of the agreement by a further Contract Period.
- *Clause 15.14* contains a definition of the expression 'Contract Period' as meaning, in effect, a period commencing (in the case of the Initial Contract Period) on 4 January 1988 and (in the case of a subsequent Contract Period) on the expiry of the preceding Contract Period, and expiring not later than 180 days after delivery of the 'Minimum Delivery Commitment' (an expression the meaning of which I shall explain below). Thus far, the definition follows the equivalent definition in the 1984 Agreement (also numbered 15.14). But whereas clause 15.14 of the 1984 Agreement went on to provide that no Contract Period should last longer than three years, clause 15.14 of the 1988 Agreement continues as follows:

> …but in no event shall the Term hereof last from inception for longer than fifteen (15) years by virtue of the provisions of this paragraph.

This last provision was referred to in argument as the 15-year cap, and I shall so refer to it in this judgment.

- *Clause 4.01* provides that the 'Minimum Delivery Commitment' in respect of the Initial Contract Period shall be Master Recordings sufficient to constitute three 'albums' (defined in *clause 15.18* as meaning one or more 12-inch 33⅓ rpm 'Records' - an expression which is itself defined in *clause 15.06* as including cassette tapes and compact discs - or the equivalent, sold in a single package), and during each subsequent Contract Period Master Recordings sufficient to constitute one album. The clause goes on to provide that 'Faith' is to be treated as the first album delivered pursuant to the 1988 Agreement. Thus, although the 1988 Agreement appears at first sight to be an eight-album deal, with Sony Music being committed to accept delivery of Mr Michael's next three albums and having options over the remainder, since 'Faith' had already been delivered and released it was in effect a seven-album deal, with Sony Music being committed to accept delivery of 'Faith' plus Mr Michael's next two albums and having options over a further five. Finally, the clause provides that the

Master Recordings for the second album (i.e. the next album) shall be delivered by 1 August 1989, and those for the third album by 1 February 1991. ***273**

— *Clause 4.03* gives Mr Michael artistic control, by providing that he will select the producer, the material to be recorded and the recording studio or studios, after consultation with Sony Music. This provision must, however, be read subject to *clause 5.01,* which provides that a Master Recording shall not be considered satisfactory for the purposes of the agreement unless it is technically satisfactory and

> …it embodies performances by [Mr Michael] that are at least of the quality of [Mr Michael's] prior recorded performances.

Thus, Sony Music has the right to reject a Master Recording which is sought to be delivered as part of the Minimum Delivery Commitment on grounds of either technical or artistic quality. (A certain amount of argument was directed to the latter ground for rejection, and I shall return to it later in this judgment.)

— *Clause 6* provides for the following payments by Sony Music:

— an outright payment (i.e. not recoupable out of royalties) of $1 million on signing the agreement (this was included as the result of a direct approach by Mr Kahane to Mr Yetnikoff, somewhat to the disgust of Mr Tyrrell, who was conducting the renegotiation through what he regarded as the normal channels);

— in respect of 'Faith' , recoupable advances of $1 million on signing, a further $2 million on 25 March 1988, and a further $2 million on 30 June 1988 (total $5 million);

— on 15 December 1988, a prepayment of $3 million in respect of pipeline royalties;

— in respect of the second album, an advance of $3 million on delivery of the Master Recordings, but with $2 million of that advance being prepaid (at interest) on 15 December 1988, such advance to be recoupable only from royalties payable after 1 August 1989 (subject to a proviso which is not material for present purposes);

— in respect of the third and fourth albums, a formula is provided for calculating advances based on sales of the preceding album, subject to a minimum of $2 million and a maximum of $4 million;

— in respect of the remaining four albums, a similar formula, subject in this case to a minimum of £350,000 and a maximum of £550,000 in respect of the fifth album and to a minimum of £400,000 and a maximum of £600,000 in respect of the remainder;

— the provision by Sony Music of a development fund in the sum of $80,000 (non-recoupable).

— *Clause 7* deals with royalties, which (as in the case of the 1984 Agreement and for that matter the Inner Vision Agreement) are producer-inclusive. Since, as will appear, the rates

were subsequently varied, there is no purpose in setting out here the detail of the rates which appear in the 1988 Agreement. Suffice it to say that the rates represented an improvement on the pre-existing rates (i.e. the rates applicable under the 1984 ***274** Agreement) albeit not to the extent that Mr Michael would have wished, given his view that he was entitled to 'superstar' treatment in this respect.

— *Clause 11.01* provides that if in any Contract Period Sony Music fails to release an album in the UK within 180 days after delivery of the Master Recordings, Mr Michael may by notice require such release; and if Sony Music fails to comply with that requirement, the agreement automatically terminates.

— *Clause 11.02* provides that in the event that Sony Music fails to release any album delivered in satisfaction of the Minimum Delivery Commitment in any of certain specified territories, viz. the US, Canada, Germany, Australia, France or Japan, within 60 days of release of the album in the UK, Mr Michael may request release of the album in the territory or territories concerned; and if Sony Music does not meet that request, Mr Michael may require it to 'enter into good faith negotiations with a third party' for the licensing of the rights in the album to the third party, but on that basis that a 3 per cent royalty is payable to Sony Music (i.e. a 3 per cent 'override' to Sony Music). (It is common ground in this action that the obligation to enter into good faith negotiations is unenforceable: *Walford v. Miles [1992] 2 AC 128* .)

— *Clause 13* deals with videos. For present purposes it suffices to note that *clause 13.01(f)* gives creative control of promotional videos to Mr Michael, subject to prior consultation with Sony Music. I shall return to *clause 13.02* later in this judgment.

The 1988 Agreement contains many other terms to which significance has been attached in the course of argument in this case, and to which I shall accordingly refer in due course, but the above summary is, I think, sufficient for present purposes.

A91 Mr Michael was cross-examined by Mr Pollock as to how he regarded his contractual position following the signing of the 1988 Agreement. The relevant passage from the transcript of evidence reads as follows:

> Q. At the end of the day, when that renegotiation had taken place, you I take it intended to continue to perform the contract?
>
> A. Yes.
>
> Q. You had no doubts about that?
>
> A. No.
>
> Q. You had no hesitations?

A. No.

Q. You were happy to continue with CBS for the term of that contract?

A. Yes.

…

Q. And it was not any part of your thought processes at the time of that renegotiation that you could walk away from the contract that you had with CBS?

A. No.

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Q. At that stage you were still anxious to have a long-term relationship with CBS?

A. Yes. … I don't think anxious is the right word. I think by that time I realised that I could have a good relationship with any major record company, but I was perfectly happy with CBS.

Q. And you saw it as a long-term relationship?

A. Yes. … I didn't see any reason that it shouldn't be.

1988: The 'year out'

A92 As he had planned, Mr Michael spent 1988 out of the UK, thereby rendering his income for that year free of UK income tax. For most of that year he was in any event touring and performing abroad, on what became known as 'the Faith tour' .

A93 Although by virtue of clause 6 of the 1988 Agreement (summarised above) very substantial payments were already due to be made to Mr Michael during 1988, following the signing of the 1988 Agreement a number of requests were made to Sony Music on behalf of Mr Michael to accelerate other payments due under the 1988 Agreement, so as to inflate Mr Michael's income for the 'year out' still further.

A94 Sony Music agreed to these requests, and the 1988 Agreement was varied accordingly. The principal variations were embodied in supplemental agreements dated 12 October 1988, 20

December 1988, and 21 December 1988. Sony Music alleges that by (among other things) entering into these supplemental agreements Mr Michael affirmed the 1988 Agreement. I will return to this aspect when I come to consider Sony Music's 'equitable defences' .

A95 In the event, during the 'year out' Mr Michael received from Sony Music, pursuant to the 1988 Agreement (as varied by the supplemental agreements), by way of advances and pipeline royalties, a total sum of almost £11.5 million (the exact figure given by Mr Michael's legal advisers is £11,443,449).

A96 One of the accelerated payments which Sony Music agreed to make (and duly made) during the 'year out' was an advance of $1 million due on the delivery of the next album, i.e. the 'second' album for the purposes of the 1988 Agreement. Sony Music agreed to make this payment only on terms that Mr Michael agreed not to renegotiate the 1988 Agreement (with particular reference to advances and royalties) in relation to the next album. By letter dated 20 December 1988 Mr Tony Russell agreed to this term, saying:

> It is agreed that no attempt will be made to renegotiate the recording agreement until after the release of the next album. Accordingly any renegotiation can only be based on the success of the next album and not 'anticipated' success. It is also understood on our side that you of course have the *legal* right to refuse to renegotiate. All we wish to protect on our side is the right to be able to ask you for better terms for the next album should the success of that album so warrant it. We are not in any way trying to tie your hands as to what your response will be at that time.

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A97 In the course of the year Sony Music released as singles three further tracks which had been included in the album 'Faith' , namely 'One more try' (April), 'Monkey' (June), and 'Kissing a fool' (November).

1989: A fallow year

A98 During 1989 no further recordings were delivered by Mr Michael (despite his obligation under clause 4.01 of the 1988 Agreement to deliver the recordings for the next album by 1 August 1989), and no further singles were released by Sony Music during the year.

A99 After the Faith tour concluded in November 1988, Mr Michael spent three or four months relaxing and trying to regain his energy. Then he began to write and record for his next album, to

be entitled 'Listen Without Prejudice - Vol. I' . During June and July 1989 Mr Michael undertook a short concert tour in Spain.

A100 Mr Michael continues the story in para. 50 of his witness statement:

> As the album [i.e. 'Listen Without Prejudice - Vol. I'] progressed, my confidence and direction were restored and I made decisions as to its release and promotion. For the first time in my career, my objective was actually to narrow my audience to some degree. I felt that 'Listen Without Prejudice - Vol. I', though still a pop album, was more sophisticated than 'Faith' and deserving of an adult audience. However, I was aware that my promotion of 'Faith' (and, in particular, the live performances and the videos) had further established my public image as a young man with a primarily young female audience and that this perception was likely to dissuade a more adult audience from listening to it objectively. Therefore, I decided to remove my physical image from the marketing and promotion of my records, at least for the foreseeable future, hoping that in the long term I could reach an audience with whom I was comfortable. I knew that I would have no control over the consequences of this decision, but I did not feel that I had any choice. My main worry was not the public reaction, as I felt that eventually my music would win out, but whether or not my record company would support me through this transitional period. The Americans in particular, simply by the nature of their 'hard sell' expertise and philosophy, were of concern, since my decision was likely to cause inconvenience to their traditional marketing methods.

I have quoted the above passage in full because Mr Michael's decision to change his image (a decision which he describes in his witness statement as his 'change of direction'), coupled with his apprehension as to whether Sony (and particularly Sony US) would support him in that decision, are of overriding importance to a full understanding of the story as it developed through 1990, 1991 and 1992, culminating in the issue of the writ in this action on 30 October 1992.

A101 In cross-examination, Mr Michael explained that his concern about his audience consisting primarily of young females was directed mainly at the US. When asked why he thought the change of direction was necessary, he replied as follows:

> There were two reasons for that. One was that I think that, as I have said before, I do not believe that necessarily very much of my appeal to those **277* young women or people who are attracted to me sexually was necessarily a result of the way I moved on stage or anything that was engineered. I simply believe that I was of a certain age and a certain age group find me attractive… I felt that … if I behaved perfectly naturally the audience would very likely follow me and that I would have to do something negative on camera to try and dissuade that audience, so I felt it was better just to remove the image…

A102 It is to be remembered that by virtue of clauses 4.05 and 13.01(f) of the 1988 Agreement Mr Michael was entirely free to take the decision to change direction, subject only to his first consulting with Sony Music.

A103 No indication was given to Sony US or to Sony Music at that stage that Mr Michael had decided to change direction, and the documents indicate that he did not inform his own advisers of his decision until early in 1990.

The 1990 renegotiation

A104 On 2 February 1990 Mr Tony Russell had a meeting with Mr Lippman and Mr Stephen Brackman (a partner in the firm of Gelfand Rennert Feldman & Brown, Mr Michael's accountants). They discussed the progress of the album ('Listen Without Prejudice - Vol. I'), and Mr Lippman told Mr Tony Russell that Mr Michael had completed seven tracks and was working on a further five. Mr Lippman's view was that the recordings for the album would be completed in May, with the album being released in September.

A105 The three of them also agreed that the time had arrived to approach Sony once again for a further renegotiation. So far as Mr Michael's undertaking not to seek to renegotiate it until after release of the second album was concerned, Mr Tony Russell's evidence was that until the start of this action he (Mr Tony Russell) had completely forgotten about it.

A106 A sense of déjà vu must have descended on the meeting as they discussed whether they were going to try and renegotiate in the US with Mr Yetnikoff, or whether the renegotiation would have to be in the UK with Mr Paul Russell. They came to the conclusion (subject to discussing the matter with Mr Michael) that it would be preferable for the renegotiation to take place in the US.

In the meantime, it was agreed that Mr Tony Russell should attempt to isolate five or six points on which the renegotiation would be concentrated, such points to include advances and royalties.

A107 In the course of the meeting Mr Lippman mentioned ('in passing' , according to Mr Tony Russell's attendance note) that Mr Michael may not want to appear on any more videos. Mr Tony Russell's recollection is that Mr Lippman raised the possibility somewhat tentatively, as if it was something that might come up in the future. Mr Lippman said he felt that this was a subject about which he should have a discussion with Mr Michael, and it was accordingly left that he would try to arrange a meeting with Mr Michael during the following week.

A108 According to Mr Tony Russell, Mr Michael's response to the proposal that there should be a further renegotiation was that he was looking to Sony to treat him as he deserved - that is, in line with Sony's top US artists. In those circumstances, he was happy for his advisers to attempt a simple ***278** renegotiation of the commercial terms of the 1988 Agreement, but he did not want the sort of full-scale renegotiation which had taken place in 1987.

A109 On 6 February 1990, there was a further meeting between Mr Tony Russell, Mr Lippman and Mr Brackman, which was attended by Mr Michael. The purpose of the meeting was to discuss Mr Michael's plans. According to Mr Tony Russell's attendance note, Mr Michael's plans were as follows (so far as material for present purposes):

— He was anticipating that he would complete the recordings for 'Listen Without Prejudice - Vol. I' by June 1990, and that the album would be released in September 1990.
— He had in mind to produce two albums, but was concerned that under the terms of the 1988 Agreement the two albums might count as one for the purposes of the Minimum Delivery Commitment.
— A biography of Mr Michael (which was at that stage in the course of preparation by Mr Michael and Mr Tony Parsons, a well-known writer and journalist, and which was published in about September 1990 entitled 'Bare') should come out at the same time as the album.
— He did not intend to do any touring, apart from approximately 15 to 20 concerts in the US in 1991.
— He would give only one interview to the Rolling Stone magazine.
— He would direct the first two videos, but did not intend to feature in any of them.

A110 The significance of the last of the above items was not lost on Mr Tony Russell, who appreciated that the promotional videos had played an important part in the success of 'Faith' , and that Mr Michael was clearly contemplating a very different creative approach to his next album.

A111 The meeting then turned to discussing the proposed renegotiation, with particular reference to increases in royalty rates.

A112 Mr Brackman also made an attendance note of this meeting, which is in a number of respects fuller than that of Mr Tony Russell. Thus, in relation to the forthcoming publication of the book, Mr Brackman records:

> It was noted that the final chapter of the book contained certain information which at this stage it would be wise not to let CBS have access to i.e. reference to future touring and promotion intentions.

Mr Leahy told me in cross-examination that this accorded with his understanding of the position in February 1990, as gained from discussions with Mr Michael at about that time.

A113 In relation to the proposed renegotiation, Mr Brackman's attendance note records:

> George stated that he did not want Alan Grubman to be involved in the re-negotiation. It was agreed that the re-negotiation should be kept as low key as possible, in fact the word re-negotiation should not be used. It was agreed that Michael Lippman and Rob Kahane would speak to Walter Yetnikoph [sic]. It was also agreed that this would be done as ***279** soon as possible so that the negotiation was out of the way before the book was published.

Mr Leahy's evidence, however, was that the intention was merely that as soon as recordings for the new album had been completed, they should play them to Sony and at the same time use the occasion to explain to Sony about Mr Michael's change of promotional plans (i.e. about his change of direction); and that there was no discussion about keeping Sony in the dark about what was in the book. Mr Tony Russell's evidence was to the same effect. I accept the evidence of Mr Leahy and Mr Tony Russell in this respect.

A114 On 8 February 1990 Mr Tony Russell had a discussion with Mr Lippman, primarily about whether the proposed renegotiation should take place in the US or the UK. It was left that Mr Tony Russell should meet Mr Paul Russell and explain to him that Mr Michael was not seeking 'a big set piece negotiation with all the conflict that went on last time' . Mr Tony Russell's attendance note of the discussion continues:

> It is George's wish to merely deal with the royalties and to bring them into line with what George should get, given his superstar status.

A115 The following day, 9 February 1990, Mr Kahane faxed Mr Tony Russell listing the current retail prices of vinyl, cassettes and compact discs for a superstar release in the US, and concluding:

> I hope this helps you with your work.

A116 On 12 February 1990 Mr Tony Russell went to see Mr Paul Russell (as previously agreed with Mr Lippman) for an 'off the record chat' . So far as Mr Tony Russell was concerned, one of the main purposes of the meeting was to satisfy himself that Mr Paul Russell had the necessary authority to negotiate. For his part, Mr Paul Russell plainly had a shrewd suspicion what the meeting would be about, because in advance of it he asked Mr Rowe to provide him with a copy of Mr Tony Russell's letter of 20 December 1988 containing Mr Michael's undertaking not to seek to renegotiate the 1988 Agreement until after the release of the next album, and also with details of the advances and royalties payable in respect of the next album under the provisions of the 1988 Agreement.

A117 The meeting was informal (Mr Tony Russell arrived without papers) and in the event no point was taken by Mr Paul Russell concerning the undertaking contained in Mr Tony Russell's letter of 20 December 1988. As Mr Paul Russell puts it in paragraph 251 of his witness statement:

> George Michael was now an internationally recognised solo artiste that sold albums and I was content within reason to give him whatever made him happy and I knew that CBS Records in New York would support me.

A118 At the meeting, Mr Tony Russell explained in general terms that Mr Michael wanted to increase his royalty rate under the 1988 Agreement. Mr Paul Russell recalls that Mr Tony Russell

specifically made it clear that he did not want Mr Grubman or any other US lawyer involved. It was left *280 that Mr Paul Russell would take time to consider what Mr Tony Russell had said.

A119 Mr Paul Russell was very satisfied with the meeting (in his witness statement he describes his state of mind as 'jubilant'), taking the view that Mr Tony Russell had appeared reasonable and helpful.

A120 Later that day (12 February 1990), Mr Tony Russell spoke to Mr Lippman and Mr Kahane and recounted to them what had transpired at his meeting with Mr Paul Russell. Both Mr Lippman and Mr Kahane said they were convinced that the renegotiation should take place in the UK. Mr Tony Russell's attendance note continues:

> I explained to them that this would only work if George was prepared to agree it, and was also prepared to 'stroke' Paul Russell, including entertaining him and playing him some of the product. Rob [Kahane] and Michael [Lippman] said they would try and speak to George and persuade him to take this line, and I said I would let them know the results of my meeting with George tomorrow.

A121 Mr Tony Russell spoke to Mr Michael the following day (13 February 1990) and sought his instructions to conduct the renegotiation direct with Sony Music, in the UK. Mr Michael said that if necessary he would meet Mr Paul Russell and play him some tracks, but that he would feel happier dealing with the Americans, and he wanted confirmation that Mr Yetnikoff was content for the renegotiation to take place in the UK. Mr Kahane duly gave that confirmation, and Mr Tony Russell was accordingly instructed to conduct the renegotiation with Mr Paul Russell.

A122 On 20 February 1990 Mr Tony Russell spoke to Mr Paul Russell about comparative royalty rates, and Mr Paul Russell agreed to let him have the figures for two named US 'superstars' on Sony's roster, for comparison purposes. Mr Tony Russell also arranged a lunchtime meeting for 8 March 1990, to be attended also by Mr Kahane and Mr Lippman. Mr Tony Russell then faxed Mr Kahane and Mr Lippman to tell them of the arrangement which he had made. The fax continued:

> I think it is now imperative for us to arrange the meeting between George and Paul, where George will play Paul some product, and as I have

previously expressed, I think it is essential that this meeting should take place before we meet with Paul for lunch.

A123 By way of preparation for the meeting due to take place on 8 March 1990, Mr Paul Russell spoke to Mr Summer and Mr Tyrrell about Mr Tony Russell's approach, and it was agreed that in principle Mr Michael should be placed on an equal footing so far as royalties were concerned with superstars signed to Sony in the US, and that Mr Paul Russell should respond to Mr Tony Russell by offering the average rates paid to a selection of top US signings. Mr Paul Russell also enlisted the assistance of Miss Sylvia Coleman (a solicitor and the then Legal Affairs Manager of Sony Music, later to become Director of Corporate Business Affairs and Company Secretary of Sony Music) who prepared a detailed schedule of US superstars' rates in different territories of the world. (Some time after the meeting, a copy of this schedule was sent to Mr Tony Russell.)

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A124 By 7 March 1990 (the eve of the meeting) Mr Tony Russell still had not received the comparative figures which Mr Paul Russell had promised to provide, so he went round to see Mr Paul Russell, who gave him the figures.

A125 The meeting on 8 March 1990 was attended by (for Mr Michael) Mr Tony Russell, Mr Kahane and Mr Lippman, and (for Sony Music) Mr Paul Russell and Miss Sylvia Coleman. Mr Michael's representatives informed Mr Paul Russell and Miss Coleman that they had not as yet had an opportunity to discuss details of Sony Music's offer with Mr Michael, but that they felt that as a starting point the offer was fair. They did, however, raise a number of points of detail, among them the question of the CD reduction. They said that they felt there should be no CD reduction, but Mr Paul Russell said it would be difficult for Sony Music to move on that item. They also queried the 'free goods allowance' (i.e. the extent to which a record company may supply records free to retailers, as an incentive or discount, without incurring liability to pay royalties to the artist in respect of such records). Mr Paul Russell promised to give them further information about this item, and it was left that further discussion would take place when this information had been provided and after Mr Michael's advisers had discussed the matter with him.

A126 During March, April and May 1990 further negotiations ensued about royalty rates and other financial terms of the 1988 Agreement, the details of which negotiations I need not set out. It is to be noted, however, that at no time during this stage of the negotiations was any mention made to Sony Music of any intention on Mr Michael's part to change the nature of his promotional activities in relation to future albums.

A127 By 13 June 1990 the negotiations had been substantially completed, to the point where Mr Tony Russell was in a position to write to Mr Paul Russell to inquire when he would be receiving the formal letter varying the 1988 Agreement by incorporating the renegotiated elements. On 15

June 1990 Mr Sternberg responded, explaining that Miss Coleman was on holiday and enclosing for signature two copies of the final version of the letter agreement, which she had prepared.

A128 Mr Tony Russell had a number of further points on the terms of the draft letter agreement, and he raised them with Miss Coleman, who had by now returned from holiday. There are conflicts of evidence between Mr Tony Russell and Miss Coleman concerning the final stages of these negotiations. I shall resolve these conflicts in Section B below.

A129 Still no indication had been given by Mr Michael's side of any change of plan by Mr Michael in relation to his promotional activities for the new album, delivery of the recordings for which was now imminent.

A130 On or about 27 June 1990 Mr Michael brought a number of tapes of recordings for 'Listen Without Prejudice -Vol. I' into Sony Music's offices, and played them to Mr Paul Russell and Mr Stephens. As he played the tracks on the tape machine, Mr Michael explained to Mr Paul Russell and Mr Stephens his feelings about the music.

A131 There is a conflict of evidence as to whether, during July 1990, Mr Michael's change of direction was fully explained to Mr Paul Russell. Mr Leahy gave evidence that he was present on an occasion where that ***282** occurred, and his evidence was to a certain extent corroborated by the evidence of Mr Kahane and by the evidence of Mr Michael himself. I shall address this conflict of evidence in Section B below.

A132 Early in July 1990 two senior executives from Sony US travelled to the UK to visit Mr Michael at the studios where he was recording (Sarm Studios, in Notting Hill). They were Mr Tommy Mottola (then President of Sony US, presently President and Chief Executive Officer for Sony's worldwide record operations) and Mr Don Ienner (President of the 'Columbia' label, one of the two principal labels of Sony US, the other being 'Epic'). During their visit, Mr Michael played them the tracks to be included in his next album, 'Listen Without Prejudice - Vol. I' .

A133 The evidence of Mr Michael and Mr Kahane was that on this occasion Mr Michael's decision to change direction was explained to Mr Mottola and Mr Ienner. Mr Mottola's evidence, however, was to the effect that although reference was made to Mr Michael's decision not to appear on the first promotional video for 'Listen Without Prejudice - Vol. I' , no further reference was made on that occasion to the change of direction. As I indicated above, I shall return to this aspect in section B below.

A134 On 26 July 1990 the 1990 renegotiation was finally concluded, and formal letter agreements were signed, varying the terms of the 1988 Agreement. It is not necessary for present purposes to set out the terms agreed: it is enough to say that they represented the conclusion of a renegotiation conducted by both sides on the basis that Mr Michael was to be placed on the same footing in relation to royalties and advances as US superstars signed to Sony US.

A135 Sony Music relies on the 26 July 1990 variation agreement in support of its 'equitable defences' , which I shall consider in Part IV of this judgment.

'Listen Without Prejudice - Vol. I'

A136 By early August 1990 a marketing plan for 'Listen Without Prejudice - Vol. I' had been drawn up by Sony US, and on 8 August 1990 a copy of it was faxed to Mr Kahane. The marketing plan noted that 'Listen Without Prejudice - Vol. II' was to be a dance album, to be released in June 1991. (Since, in the event, recordings for 'Listen Without Prejudice - Vol. II' have not been delivered to Sony Music, I shall hereafter refer to 'Listen Without Prejudice - Vol. I' simply as 'Listen Without Prejudice' .)

A137 In relation to the promotion of 'Listen Without Prejudice' , the marketing plan stated:

> Our approach is to give George the superstar treatment without being ostentatious.

Under the heading 'Video' , it stated:

> George has decided not to do a video for 'Praying for Time' [which was to be the first single from the album] as he prefers the music to speak for itself.

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A138 The marketing plan contained a number of detailed proposals for marketing 'Listen Without Prejudice' when released, the nature of which proposals I need not set out here. However, Mr Michael alleges, as one of the counter-equities on which he relies, (a) that the Sony Group failed to market the album properly, and (b) that its failure to do so

> …resulted from a deliberate policy decision to reduce its efforts on that Album because [Mr Michael] had declined … to appear in videos for the promotion of that Album.

Accordingly I shall have to return to the whole question of the marketing and promotion of 'Listen Without Prejudice' in Part IV of this judgment. At this stage, however, it is worth noting that in his witness statement Mr Michael says this about 'Listen Without Prejudice' :

> I expected that there would be a sharp drop in sales compared to those of 'Faith', but … I was prepared for a smaller selling album as I felt that this was the only way in which I could protect my personal life and my writing ability.

A139 On 13 August 1990, the single 'Praying for Time' was released in the UK; it was released in the US a few days later. Sony had wanted to release another single from 'Listen Without Prejudice' , entitled 'Freedom' , as the first single, on the basis that it was more representative of Mr Michael's previous style, but had on this occasion deferred to Mr Michael's wishes.

A140 Consistently with Mr Michael's change of direction, the promotional video accompanying the release of 'Praying for Time' consisted of little more than a scrolling of the lyrics of the song.

A141 On or about 17 August 1990 a marketing plan was drawn up by Sony Music relating to the marketing of Listen Without Prejudice in the UK.

A142 At about the end of August 1990, Mr Yetnikoff left Sony US. Mr Yetnikoff's departure marked the end of Mr Kahane's 'fast track' to the top of Sony US. The closeness of the relationship which had existed between Mr Kahane and Mr Yetnikoff was not repeated in the relationship between Mr Kahane and Mr Ienner, with whom Mr Kahane had dealings after Mr. Yetnikoff's departure. Indeed, although Mr Ienner has not given evidence in this case, it appears from Mr Kahane's evidence that, regrettably, a high degree of mutual antipathy exists between them.

A143 On 3 September 1990 'Listen Without Prejudice' was released in the UK; on or about 11 September 1990 it was released in the US. 'Listen Without Prejudice' was markedly less successful

in terms of sales than 'Faith' . As at 31 December 1992 'Listen Without Prejudice' had sold 5.2 million copies worldwide, as compared with a figure of 14.2 million for 'Faith' (a shortfall of some 63 per cent). In particular, as at that date sales of 'Listen Without Prejudice' in the US were some 76 per cent less than the sales of 'Faith' (1.9 million as compared with 8 million).

A144 On 12 October 1990 a meeting took place at Mr Leahy's offices attended by Mr Michael, Mr Leahy, Mr Paul Russell and Mr Stephens. This is the meeting at which, according to his evidence, Mr Paul Russell first learned of the full extent of Mr Michael's change of direction (I shall accordingly return ***284** to this in Section B below). Mr Paul Russell says in his witness statement that he and Mr Stephens encouraged Mr Michael to reconsider his decision, but that it was clear by the end of the meeting that he had finally made up his mind. Mr Paul Russell's witness statement continues:

> … I told George Michael that I respected his position, so long as he was fully aware that we would have more difficulty marketing the album (which he was). I said we would still be fully behind the album and would do everything we could to ensure that it received maximum promotion.

A145 On 15 October 1990 'Waiting for that day' , the second single from 'Listen Without Prejudice' , was released in the UK. At about the same time, the single 'Freedom' was released in the US as the second single from 'Listen Without Prejudice' . Mr Michael wanted 'Waiting for that day' to be the second single in the US, but on this occasion Sony insisted on releasing 'Freedom' .

A146 On 30 October 1990 Mr Michael wrote to Mr Stephens, referring to the meeting which had taken place on 12 October 1990 and saying:

> After our meeting a few weeks ago at Dick Leahy's office I was assured of a positive and supportive attitude from CBS Records on the current single and the promotion of the album from now on.
>
> Unfortunately the results of this newfound spirit are nowhere to be seen…
>
> Please don't tell me that you are waiting to promote the album just before Christmas because the way things are going, we will be lucky to have an album in the Top Twenty by then.

> This letter is not simply a reaction to the disappointing performance of 'Waiting for that day'. I am not writing to place all blame with CBS … It is however to inform you that I am shocked by this lack of commitment (or perhaps competence), especially having done all I could this year in response to CBS UK's apparent desire to re-establish George Michael as a UK signing.
>
> I am afraid that this will be our last correspondence for the foreseeable future, simply because regular correspondence, whether by letter or face to face, seems to have little or no effect on my situation and CBS' performance in this country. …

A147 Mr Stephens responded in a long letter dated 1 November 1990. In the course of it, he said this:

> George, whether you choose to believe it or not, a great number of people are doing everything they reasonably can but the competition, particularly at this time of year, is extremely tough and made all the more so by your decision to withdraw from the limelight … The absence of promotional videos to date has given the competition an edge. Please, please don't hand it to them on a plate.

In conclusion, Mr Stephens sought to reassure Mr Michael as to the commitment and support of Sony Music.

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Radio promotion of 'Mother's Pride'

A148 During December 1990 the single 'Freedom' was released in the UK, and the single 'Waiting for that day' was released in the US, in each case as the third single from 'Listen Without Prejudice' . On the 'B side' of the single 'Waiting for that day' , in the recording supplied to radio stations in the US, was a track entitled 'Mother's Pride' (which was not at that stage scheduled for commercial release).

A149 At that time the Gulf War was taking place, and radio stations in the US took to playing 'Mother's Pride' as background for messages of patriotic support from mothers to their sons in the Gulf. Since 'Mother's Pride' was written by Mr Michael as an anti-war song, he was very upset by this treatment of it, for which he holds Sony responsible.

A150 However, such was the popularity of 'Mother's Pride' in the US, due to its exposure on radio during December 1990 and January 1991, that in January 1991 Sony US decided actively to promote it to radio.

A151 It is alleged by Mr Michael, as one of the counter-equities, that Sony's promotion of 'Mother's Pride' constituted a 'release' of that single for the purposes of clause 4.02 of the 1988 Agreement, and that since Mr Michael's approval of such release had not been obtained, Sony Music were thereby in breach of clause 4.02 of the 1988 Agreement. I shall accordingly return to this topic in that context.

Loans by Sony Music to Kahane Entertainment Inc.

A152 In about June 1990 Mr Kahane had approached Mr Mottola, having first obtained Mr Yetnikoff's blessing, with a request for an advance of $1 million to Lippman Kahane Entertainment, to be recoupable from the commission element of Mr Michael's royalties; a request which was repeated in July 1990.

A153 Mr Paul Russell indicated to Mr Tony Russell (who was acting for Mr Kahane in the matter) that Sony Music would be prepared to make this loan, subject to Sony US underwriting it. On 19 September 1990 (by which time Mr Yetnikoff had left Sony US) Mr Tyrrell telephoned Miss Coleman and urged Sony Music to stall on the loan, as there was some doubt whether Sony US would underwrite it. However, Mr Paul Russell took the view that Sony Music was committed to make the loan and that it should proceed.

A154 By this time Mr Kahane and Mr Lippman had parted company, and Mr Kahane had formed his own company, Kahane Entertainment Inc. The request for the loan was maintained, but now the borrower was to be Kahane Entertainment Inc.

A155 In the event, Sony Music lent Kahane Entertainment Inc. $500,000 on 30 October 1990, and a further $500,000 on 27 March 1991, recoupable in each case out of royalties payable to Mr Michael's service companies under the 1988 Agreement (as varied). Collateral agreements were entered into between Sony Music and the service companies to cover the position in relation to recoupment. Mr Tony Russell acted for Kahane Entertainment Inc. in the matter of the loans.

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A156 Sony Music alleges that Mr Michael requested that these loans be made, and that by so doing, and by entering (through his service companies) into the collateral agreements providing for recoupment, he affirmed the 1988 Agreement (as varied). I will return to this allegation when I come to consider Sony Music's 'equitable defences' in Part IV of this judgment.

Sale of an interest in a video of 'The South Bank Show'

A157 By an agreement dated 30 November 1990, Mr Michael (through one of his service companies) sold to Sony Music rights to exploit the video of an edition of the television programme 'The South Bank Show' , on which Mr Michael had appeared. The agreement further provided that the copyright in the video should be owned jointly by Mr Michael and Sony Music. The agreement also expressly incorporated by reference various provisions of the 1988 Agreement. Clause 14 of the agreement provides:

> Save as varied above, all the provisions of the Agreement [a defined expression meaning the 1988 Agreement as varied] shall remain in full force and effect.

A158 Sony Music alleges that by thus confirming the 1988 Agreement (as varied), Mr Michael affirmed it.

1991 releases from 'Listen Without Prejudice'

A159 During January 1991, 'Waiting for that day' was released in the US. 'Heal the pain' was released in the UK and the US in February 1991 and 'Cowboys and Angels' in the UK and in the US in March 1991. 'Soul Free' was released in the US in April 1991.

Mr Michael's request for a transfer from 'Columbia' to 'Epic'

A160 In about April 1991, Mr Michael decided to approach Sony US for their agreement that thenceforth his records be released in the US not under the 'Columbia' label, as previously, but under Sony US's other principal label, 'Epic' . Each 'label' had its own staff, and the evidence is that although they are all part of the same company there is considerable rivalry between them. In due course Mr Mottola was asked to agree to Mr Michael being transferred from 'Columbia' to 'Epic' , but he refused.

A161 Mr Kahane's evidence was that in about February 1991 Mr Mottola had indicated to him that Sony US would be agreeable to such a transfer, but Mr Mottola denied that he at any stage encouraged Mr Kahane to believe that such a transfer could be made. In evidence in chief, Mr Mottola described the suggestion of a transfer as 'a terrible idea' .

A162 Sony US's refusal to agree to Mr Michael being transferred from 'Columbia' to 'Epic' is relied upon by Mr Michael as a counter-equity, and I shall accordingly return to it in that context. ***287**

Plans for 'Listen Without Prejudice - Vol. II'

A163 By September 1991, Mr Michael had completed the recording of a number of tracks which he intended to include in 'Listen Without Prejudice- Vol. II' , and was working on a number of further tracks. At this stage, his plan was to produce an album which consisted partly of studio recordings and partly of live performances.

A164 On 27 September 1991 Mr Kahane faxed Mr Stephens saying that they would like to release the first single from the new album some time around 1 November 1991, with the album itself being released in January or February 1992.

The Toronto Concert

A165 In October 1991, in the course of a tour in North America (referred to during the hearing as 'the October Tour'), Mr Michael gave a concert in Toronto. Mr Mottola and Mr Ienner flew in from New York to attend it. What transpired thereafter is of no relevance to the pleaded issues in the case, but it throws useful light on Mr Michael's capacity at that time to take offence at perceived slights by Sony executives, and to suspect Sony of acting deviously or from improper motives.

A166 Although the occasion is not referred to in Mr Michael's witness statement, it was specifically raised by Mr Cran in the course of Mr Michael's examination-in-chief. Mr Cran asked Mr Michael what happened when Mr Mottola and Mr Ienner came to the concert. Mr Michael answered:

> They came on a private jet and my manager was due to go back to New York with them after the show, and then when I looked for my manager at the end of the show I was told that they had left halfway through so he'd had to go with them. I was very offended by this. I felt at the time because relations were already strained between myself and Columbia in the US, I felt it was actually a fairly deliberate move, and my manager pacified me, or tried to pacify me, by telling me that Mr Mottola had informed him that he would be back to see another show, to see the whole thing, some time before the end of the tour, and I assured my manager that I didn't think that that was going to happen, and it didn't happen.

A167 Whether Mr Mottola and Mr Ienner left the concert early, or whether they stayed to the end (as it happens, I am satisfied on the evidence that they stayed until the encores) is, as I have said, a matter of no importance whatever in the context of the issues raised in this action or for that matter at all; but its very triviality throws into stark relief the intensity of Mr Michael's reaction when told that they had left the concert early. Moreover, the fact that the matter was specifically raised with him by Mr Cran in the course of his examination-in-chief indicates that it still rankles with him. In this respect, Mr Michael has demonstrated a degree of touchiness which I find surprising and which needs, in my judgment, to be borne in mind as the story continues and as Mr Michael's relationship with Sony progressively deteriorates.

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November 1991: An attempt at a further renegotiation

A168 In about early November 1991 Mr Michael, at Mr Kahane's instigation, instructed Mr Tony Russell to attempt a further renegotiation of the 1988 Agreement (as varied by the earlier renegotiation), limited to the royalty rate for compact discs.

A169 On 5 November 1991 Mr Tony Russell had a meeting with Mr Paul Russell, Mr Stephens and Miss Coleman, at which a note of Sony Music's terms for improving Mr Michael's CD royalty rate was handed to Mr Tony Russell. As a quid pro quo for the improvement which they were offering, Sony Music required a commitment from Mr Michael to provide three promotional videos for the next album, and to appear in all three.

A170 On 6 December 1991 Mr Tony Russell discussed Sony Music's offer with Mr Michael, and showed him the note of the terms which had been handed to him at the meeting on 5 November 1991. Mr Tony Russell recollects that at that meeting Mr Michael expressed the depth of his dissatisfaction with Sony. Mr Tony Russell continues, in paragraph 100 of his witness statement:

> He was totally depressed. In particular, he could not believe that, after all the discussions which he had had with all the senior executives relating to the marketing and promotion of 'Listen Without Prejudice', they now wanted him to commit contractually to three promotional videos. He expressed the view that it was clear to him that no one at Sony had listened.

A171 Mr Michael's evidence was to the same effect. In cross-examination he described Sony Music's proposal for three promotional videos as 'an unreasonable demand' , notwithstanding that it was not in fact a demand at all but a proposal put forward in response to a request by Mr Michael that his financial terms be improved still further. He continued in much the same vein:

> It wasn't a matter at that stage of saying: 'No, I will not make any more videos.' It was a matter of saying: 'I won't be bound to them contractually.' So I was very disappointed by it and I was quite shocked because I thought things had gone quite well.

A172 Given Mr Michael's reaction to Sony Music's proposal, as he expressed it himself in the passage I have just quoted, Mr Tony Russell was plainly right to describe the proposal as 'the straw that broke the camel's back' . The attempt at renegotiation thus foundered, and Mr Michael was left at that stage wishing there was some way out of the 1988 Agreement - and looking to find one.

Mr Michael takes legal advice

A173 On 6 December 1991 Mr Michael had a further meeting with Mr Tony Russell. He told Mr Tony Russell that his relationship with Sony was now such that he could not face the prospect of making another six albums for ***289*** Sony. He asked Mr Tony Russell to advise him whether there was any way in which he could bring the 1988 Agreement to an end, and Mr Tony Russell said he would seek the advice of Leading Counsel.

A174 Mr Tony Russell continues (in paragraph 101 of his witness statement):

> This was the first time that Mr Michael had sought my advice regarding the enforceability of any of his agreements with Sony, and this was the first time that I began to turn my mind to the question.

(I noted earlier that there is a conflict of evidence, which I shall resolve later in this judgment, as to whether Mr Tony Russell asserted in the course of the meeting on 1 December 1987 that the 1984 Agreement was unenforceable.)

A175 In the chronology helpfully handed in at the start of the hearing by Counsel for Mr Michael, the following entry appears against the date 14 February 1992:

> George Michael learns for the first time that it is open to him to contend that the Recording Agreements [i.e. the 1988 Agreement] are unenforceable as being in unreasonable restraint of trade. George Michael decided to continue with recording of next album.

The decision to continue working on the next album represented a complete change of mind on Mr Michael's part. The reason for this change of mind was the success of the single 'Don't let the sun go down on me' .

'Don't let the sun go down on me'

A176 On 25 November 1991 Sony Music had released a single of a live performance by Mr Michael and Mr Elton John singing Mr Elton John's song 'Don't let the sun go down on me' . The record was very successful indeed, reaching number one in the charts in fifteen territories, including the UK and the US.

A177 It is common ground that a certain amount of editing was undertaken by Sony US on the promotional singles of this recording which were delivered to radio stations in the US, and that Mr Michael's approval to this editing was not obtained. Mr Michael alleges that this amounted to a breach of clause 5.01 of the 1988 Agreement, which provides (among other things) that Sony Music shall not edit Master Recordings without Mr Michael's prior written approval; and he relies on this alleged breach as a counter-equity. A similar allegation is also made in relation to promotional singles of a track entitled 'I believe when I fall in love' . I will accordingly return to this topic when I come to consider the counter-equities in Part IV of this judgment.

A178 The success of the single 'Don't let the sun go down on me' persuaded Mr Michael that, after all, it was preferable that he should stay with Sony and continue working on his next album. As he put it in the course of his cross-examination: ***290**

> … I believed that the number one single around the world indicated a real upturn in the relationship and it was rescuable and far preferable to litigation… Obviously it was a very strong record and people responded to it very strongly, but I don't believe that a record, especially in America,

> can get to number one without record company support, and that was the strongest indication I had had, it was a number one record.

A179 As of 14 February 1992, therefore, when (according to the chronology prepared by his legal advisers for use in these proceedings: see paragraph A175 above) he was advised that it was open to him to contend that the 1988 Agreement was unenforceable on grounds of restraint of trade, Mr Michael felt that he once again had the support of Sony. Accordingly he elected to continue working on his next album (which was by then nearing completion) rather than commence proceedings alleging restraint of trade.

Payment of the advance for the third album

A180 By letter dated 20 February 1992, Mr Brackman (of Mr Michael's accountants) wrote to Mr Mark Schwartz (then Head of Business Affairs for Sony Music's 'Epic' label, being the label under which Mr Michael's records were issued in the UK) stating that Mr Michael had begun recording for the third album and asking for the $1 million minimum advance due in respect of that album.

A181 At the time, both sides proceeded on the (incorrect) basis that the minimum advance in respect of the third album fell due on commencement of recording, whereas the true position was that by virtue of clause 6.02(a) of the 1988 Agreement the advance had fallen due on the date of the agreement (4 January 1988), being the start of the Initial Contract Period.

A182 Mr Schwarz duly obtained approval from his superiors in Sony Music to pay the advance, and on 25 March 1992 a sum of £578,201.79 plus VAT (being Sony Music's calculation of the sterling equivalent of $1 million) was transferred by telegraphic transfer from Sony Music to one of Mr Michael's service companies.

A183 In early August 1992, in circumstances which I shall briefly relate below, the advance was repaid to Sony Music. However, Sony Music alleges that by requesting payment of the advance Mr Michael affirmed the 1988 Agreement. I will return to this allegation when I come to consider Sony Music's 'equitable defences' in Part IV of this judgment.

Red Hot & Dance

A184 Early in 1992, Mr Michael decided to donate three live tracks (which had been intended for 'Listen Without Prejudice - Vol. II') to an AIDS charity album to be entitled 'Red Hot & Dance' . One of the three was a track entitled 'Too Funky' .

A185 Sony were agreeable to Mr Michael donating these tracks to the album, and rather than license the tracks to another distributor it decided to release and distribute the album itself.

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A186 'Too Funky' was released by Sony in June 1992, in advance of the album. The album itself was released by Sony in July 1992.

A187 Mr Michael alleges that Sony failed to effect any sufficient or appropriate marketing or promotion of 'Too Funky' or of the album 'Red Hot & Dance' in the US, and he relies on these failures as counter-equities. I will accordingly return to this topic in that context.

'Beverley Hills 90210'

A188 In about March 1992, a Mr Azoff of Giant Records approached Mr Kahane with a proposal that a George Michael track be included in an album of the soundtrack of the popular US television show 'Beverley Hills 90210' . Mr Michael was interested in this idea, and selected a track entitled 'Fantasy' .

A189 In early April 1992 Sony US was approached for its consent to the project, but Mr Ienner was not in favour of it and consent was not forthcoming. At that stage Mr Michael did not wish to press the matter further with Sony.

A190 On 26 June 1992, however, Mr Kahane wrote to Mr Paul Russell seeking, once again, Sony's consent to the project. Thereafter, the respective secretaries of Mr Kahane and Mr Ienner communicated, with a view to arranging a meeting between Mr Kahane, Mr Mottola, Mr Ienner and Mr Paul Russell to discuss the project, but in the event no such meeting took place.

A191 Mr Michael relies on Sony's refusal to consent to the project as a counterequity, and I shall accordingly return to it in that context.

The final breakdown in relationships

A192 In early July 1992, Mr Michael decided that he wanted to leave Sony. In paragraph 90 of his witness statement he gives the reason for this decision:

> It was Sony's behaviour in relation to 'Red Hot & Dance' which finally led me to the conclusion that I could not make recordings for that company.

He continues, in the following paragraph (91):

> This conclusion was, if anything, fortified when I ascertained at about the same time that Sony had refused to license one of my recordings … to appear on an album of tracks featured on the highly popular US television programme 'Beverley Hills 90210'.

A193 At that stage, however, the album 'Red Hot & Dance' was still being marketed as a current release, and Mr Michael decided not to take any step to acquaint Sony with his decision until the album had run its course. In cross-examination, Mr Pollock put this question to Mr Michael:

> So you wanted CBS/Sony to spend the money and do their part of running the album before you told them you were thinking of walking. Is that what you are saying?

Mr Michael replied: ***292**

> Absolutely. For the purposes of the charity, absolutely, yes. I'm afraid my allegiance to the charity was rather stronger at that point than it was to Sony.

Repayment of the advance for the third album

A194 Litigation being by this time a serious possibility, Mr Tony Russell gave further thought to the question of the advance for the third album, which had been requested and paid in March 1992. He concluded that it was inappropriate in the circumstances that Mr Michael should retain the advance, but at the same time he did not want to acquaint Sony at that stage with the decision which Mr Michael had reached. As he put it in cross-examination:

> At that stage we didn't want to show our hand because Mr Michael was not going to make what I call the very final decision, although I think in his mind he had made the final decision, but I told him not to make the final decision until we had two written Opinions from … the two Leading Counsel we were going to use.

A195 Accordingly, on 3 August 1992 Mr Tony Russell faxed to Mr Brackman a draft covering letter for Mr Brackman to send to Mr Schwarz, enclosing a cheque in repayment of the advance (including the VAT).

A196 The draft letter referred to the earlier request and payment, and continued:

> Subsequently, with the approval of Sony Music, recording of that album was abandoned and the three new tracks that George had recorded … were included in the charity album Red Hot and Dance.
>
> As a consequence of the above the recording of the third album has not been commenced and therefore I think it is correct that the advance that you paid to us on the basis of such commencement should be repaid to you…

A197 There is no evidence to suggest that Sony Music had approved any abandonment by Mr Michael of the recording of the third album. In the circumstances, Mr Pollock put it to Mr Tony Russell that the letter was designed to mislead, and that the statement that Sony Music had approved an abandonment of recording for the third album was a lie. Mr Tony Russell answered:

> [The letter] was designed to mask what we had in mind to do … I don't think it was a lie, no. It didn't tell the whole truth, but I don't think it was a lie… The album that was going to be the dance album had been abandoned, but Mr Michael was going at that stage to carry on and make a new album. By the time we got to him coming in to see me in July he told me that in fact, because of the work he'd done on Red Hot and Dance, he hadn't done

> any recording for the new album and that, of course, now given his stance he wished to take - I mean clearly there wouldn't be any recording of that album. So, yes, by August he had abandoned it.

A198 On 4 August 1992 Mr Brackman wrote to Mr Schwarz in (so far as material) the terms of Mr Tony Russell's draft, enclosing a cheque in repayment of the advance and the VAT.

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A199 When Mr Schwarz received Mr Brackman's letter and the cheque, he smelt a rat. He sent a memo to Mr Paul Russell telling him what had happened, and describing the repayment as 'an historic first' . The memo concluded:

> I am the last one to look a 'gift' cheque in the mouth, but somehow I don't think this is being done because of George's sense of honour. Ideally there are tax reasons for this, but still somehow it feels like a case of 'What's wrong with this picture?'. I have in all events arranged for the banking of the cheque.

A200 Mr Schwartz's curiosity as to the true reason for the repayment of the advance led him, on 7 August 1992, to telephone Mr Brackman and ask him why the advance had been returned. This in turn led Mr Brackman to telephone Mr Tony Russell. At this point a conflict of evidence arises which I shall address in section B below.

Mr Michael's ultimatum

A201 By the end of September 1992 Mr Michael felt that the time had come to make clear his intentions to Sony. Accordingly, on 30 September 1992 Mr Leahy faxed Mr Ohga (of Sony Japan) and Mr Schulhof (Chairman and Chief Executive Officer of all Sony US operations) saying that Mr Michael had asked him 'to set up, as a matter of the utmost urgency, a meeting to discuss matters of extreme importance' . Mr Leahy then went on to suggest a number of dates for a meeting either in Japan or in New York.

A202 In cross-examination, Mr Michael explained the purpose of such a meeting as follows:

> Basically the idea of that meeting was to say I have no intention of working for Sony again, but I do not want to go into litigation and I've been with you for ten years. People would basically have believed at that point that my contract was up, so I would have left very quietly if we could have negotiated something at that point.

A203 It appears that Mr Ohga was not available on any of the suggested dates, for on 1 October 1992 Mr Leahy faxed him again, saying:

> I would advise you that George feels that it is absolutely essential that you should be present at the meeting as it is his hope that, by so doing, a situation which will become very public and acrimonious might be dealt with privately and with maximum consideration for all parties concerned. Accordingly, George asks you to personally reconsider his request for a meeting with you.

A204 Mr Ohga responded on 2 October 1992 saying:

> I find it most unusual that George is unable to communicate in advance the nature of his concern with our records management. Therefore, I would appreciate your making arrangements for a meeting at Sony Music at the earliest possible date.

A205 For his part, Mr Schulhof faxed Mr Michael direct on 2 October 1992, in conciliatory terms, expressing the hope that a meeting could be arranged ***294*** in the near future and suggesting that Mr Michael's concerns might be related to his having changed his management company (a reference, it would appear, to Mr Michael's appointment of Mr Kahane as his manager). He concluded:

> I look forward to discussing this with you more fully when we meet.

A206 Mr Michael responded in person in an undated fax referring to what he described as a deterioration in Sony's attitude over a number of years and saying that he was forced to conclude that his future lay elsewhere. He concluded as follows:

> I came into this business to make music, not software.
>
> Mr Schulhof, you do not know me. But if you did, you would realise that these thoughts are mine, and that I do not come to important decisions lightly. As far as I am concerned, the question now is not whether I leave Sony, but *how* I leave Sony. There are distinct options - a private resolution or a public fight. The object of my proposed meeting with Mr Ohga and yourself should now be to discuss those options. In closing, I must stress that, if this meeting does not take place before the end of next week by the latest, one of those options will no longer apply.

A207 Mr Michael also faxed Mr Ohga, saying that there must have been a misunderstanding as to the nature of the meeting which he was seeking. He continued:

> You have all assumed that the subjects I wish to discuss can be addressed within the music division itself. This is not the case. The truth of the matter is that my relationship with the entire Sony Music Group is irreconcilable.
>
> Sony Music is not the company that I signed to in 1982 [presumably Mr Michael meant 1984], or indeed re-signed to in 1988, and as an artist of considerable conviction I find it impossible to work with the company it has since become.
>
> Mr Ohga, it is essential you understand that my position is irreversible. The purpose of meeting with you is to prevent a very public fight, which quite

> frankly I would have thought would be very damaging to Sony Corporation as a whole, not solely to the music division.
>
> Without your intervention this fight will go ahead immediately. The decision is yours.

A208 On 7 October 1992 Mr Leahy faxed Mr Ohga in similar terms. However, no meeting ever took place.

The commencement of proceedings

A209 On 21 October 1992 Russells sent Sony Music a letter before action, alleging that the 1988 Agreement was unenforceable as an unreasonable restraint of trade, and void as being in contravention of Article 85 of the Treaty. It will be recalled that Russells (in the person principally of Mr ***295*** Tony Russell) had acted for Mr Michael in the Innervision Action and at all times thereafter, and in so doing had negotiated on his behalf:

— the 1984 Agreement,
— the 1988 Agreement,
— the supplemental agreements providing for accelerated payments during the 'year out' , and
— the July 1990 variation,

and had approached Sony Music unsuccessfully for a further renegotiation in November 1991, proceeding in each case on the basis that Mr Michael's current contractual obligations were valid and enforceable. Despite this, Russells nevertheless felt able to say, in the course of the letter before action:

> Our clients have sought our advice as to whether the UK and ROW [rest of the world] recording agreements and the inducement letters ('the Agreements') are enforceable against them. Having reviewed the Agreements we have advised our clients that the Agreements are unenforceable as against them insofar as they are unperformed, as they are in unreasonable restraint of trade…

A210 A draft Statement of Claim had in fact been served on Sony Music prior to its receiving the letter before action, so that in the event the letter before action was little more than a formality.

Accordingly, no purpose would have been served by delaying the commencement of proceedings, and the writ in this action was issued on 30 October 1992.

A211 At an early stage in his opening, Mr Cran described this action in the following terms:

> This case is not about money; it is not about the wish of somebody to benefit from being freed from a contract which he has freely entered into. It is about restraint of trade. It is about an agreement which binds George Michael for the whole of his professional career on terms which are capable of being worked to his substantial disadvantage.

A212 In the course of his cross-examination, Mr Michael explained his reason for commencing this action in the following terms:

> Q. …would you agree with me that the motives on your side for this litigation, the motives which are driving you in this litigation, have very little to do with the legal reasons which appear in the pleadings?
>
> A. Yes.
>
> Q. And that your reason for this litigation is simply that you do not get on with Sony any more?
>
> A. …My reason for wanting to part with Sony is because I don't believe that one particular area of the world which is very important to me [i.e. the US] has any belief in me or any motivation to exploit my work.

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A213 Thus, Mr Michael's motive in challenging the 1988 Agreement (as varied) under the restraint of trade doctrine, and under Article 85 of the EEC Treaty , is to rid himself of a contract which - despite renegotiations in 1988 and 1990 - he now regards as being no longer in his interest. Although certain breaches of the 1988 Agreement are alleged, those allegations are made in the context of the restraint of trade issue. As Mr Cran made clear at the start of the hearing 'the main thrust of this action is not about breaches of the agreement by Sony' .

A214 It has not been suggested, however, that the nature of Mr Michael's motive affects in any way the validity of his claims. In bringing this action he has acted with the benefit of skilled legal advice to the effect that it was open to him to contend that the 1988 Agreement (as varied) was unenforceable as an unreasonable restraint of trade (see the chronology referred to in paragraph A175 above). The question so far as restraint of trade is concerned is whether the contention is a good one.

Section B: Conflicts of Evidence

B1 In this section I address five areas of the general factual background where conflicts of evidence have arisen. Listed so far as possible chronologically, the areas in question (with, in each case, an indication of the particular conflict or conflicts of evidence) are as follows:

The Inner Vision negotiations (see paras A17 and A20 above)

— An alleged threat by Mr Tony Russell not to allow Wham! to sign direct with CBS, should Wham! succeed in the Inner Vision Action.

— An alleged telephone call by Mr Paul Russell to Mr Tony Russell, following the interlocutory hearing in the Inner Vision Action on 11 November 1983.

The meeting on 1 December 1987 (see para. A73 above)

— An alleged claim by Mr Tony Russell in the course of the meeting that the 1984 Agreement was unenforceable on grounds of restraint of trade.

The ' change of direction ' (see paras A131 and A133 above)

— In February 1990, was it the intention on Mr Michael's side to keep Sony in the dark about the 'change of direction' until the renegotiation had been completed?

— When was the 'change of direction' made known to Sony: in particular was it fully explained to Mr Mottola and Mr Ienner when they visited Sarm Studios in early July 1990?

The 1990 renegotiation (see para A128 above)

— In preparing travelling drafts of what was to become the letter agreement dated 26 July 1990, did Miss Coleman (as Mr Tony Russell maintains) depart from the terms which had been agreed? ***297**

— In his conduct of the renegotiation during its latter stages, did Mr Tony Russell (as Miss Coleman maintains) act in a 'divisive' way, by threatening to sour relations between Mr Michael and Sony?

The repayment of the third album advance (see para. A200 above)

— The reasons given to Sony Music for making the repayment. In particular: Did Mr Tony Russell (as Mr Paul Russell maintains) tell Mr Paul Russell that there was no 'hidden agenda' , and that the only reason for making the repayment was a tax reason?

B2 I will address each of these areas of conflict in turn.

The Inner Vision negotiations (November 1983)

B3 Two conflicts of evidence have arisen in relation to the negotiations which took place in November 1983 between Wham!, Inner Vision and CBS (UK). In the first place, Mr Rowe maintains that in a telephone call made to him by Mr Tony Russell on 2 November 1983 Mr Tony Russell, being angry about what he saw as a breach of promised neutrality by CBS in siding with Inner Vision in the interlocutory proceedings in the Inner Vision Action, threatened not to allow Wham! to sign direct with CBS (UK) should Wham! succeed in the Inner Vision Action. Mr Tony Russell denies making such a threat. In the second place, Mr Tony Russell maintains (and his evidence in this respect is corroborated by the evidence of his partner Mr Brian Howard) that on his return to his office following the interlocutory hearing before Harman J on 11 November 1983, he received a crowing and vindictive telephone call from Mr Paul Russell.

B4 It is to be borne in mind that the negotiations in question took place more than ten years ago, and in consequence it would not be in the least surprising should recollections differ in relation to particular aspects of those negotiations. By the same token, contemporary documentary evidence inevitably assumes greater significance.

B5 So far as the alleged threat by Mr Tony Russell is concerned, I begin with the documentary evidence. Both Mr Tony Russell and Mr Rowe made attendance notes of two telephone conversations which took place between them on 2 November 1983. Both attendance notes record Mr Tony Russell's view that in its evidence in the interlocutory proceedings (which had not at that stage been heard, the hearing took place on 11 November 1983), and in particular in an affidavit of a Mr Brooks (the then Head of the Law Department at CBS (UK)), CBS (UK) had overstepped the bounds of the neutrality which Mr Tony Russell understood to have been promised by Mr Oberstein.

B6 Mr Tony Russell's attendance note records him as warning Mr Rowe that CBS (UK) must 'draw their own conclusions should the neutrality be broken' . Mr Rowe's attendance note contains this passage:

> … I informed him that I believed it to be necessary for John Brooks' affidavit to be submitted. He stated that if this were to be the case and he qualified it by saying that I had the right to do what I wanted, but as far as he was concerned he would take whatever steps were necessary to prevent Wham ever going directly to CBS. This was a threat that I was extremely disturbed about. I then ended my telephone call with him.

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B7 Mr Rowe's attendance note goes on to record that following the conversation with Mr Tony Russell, he (Mr Rowe) discussed the matter further with Mr Brooks and they decided to ring Mr Tony Russell back in order to be absolutely clear of his position. Both Mr Rowe's attendance note and that of Mr Tony Russell refer to a second telephone conversation on that day. Mr Tony Russell's attendance note does not refer to any threat being made in the course of this conversation, but Mr Rowe's attendance note records that 'the threat of never allowing Wham to sign to CBS directly was less strongly put across' .

B8 Mr Rowe's attendance note concludes with the following paragraph:

> Question: As a potential witness it seems incorrect that Russell should be calling me in this manner and the threat which would be extensively damaging to CBS seems to suggest a serious breach of his conduct as a solicitor and I feel it is necessary to discuss this aspect with John Brooks further.

B9 The following day, 3 November 1983, Mr Rowe wrote to Mr Tony Russell saying that he was disturbed by Mr Tony Russell's telephone call, and making it clear that CBS would take whatever steps in the proceedings, including the provision of evidence, as it thought fit, 'without fear or favour' .

B10 Mr Tony Russell responded by letter dated 10 November 1983 in which he said this:

> You use the expression 'without fear or favour' in your letter. Please be assured that it was certainly not my intention to say anything which might be construed as a threat or inducement to CBS … My intention was to express disappointment at what CBS was apparently proposing to do, and to make sure that this was not a course which was being taken in ignorance of the assurances given twice to me by Mr Oberstein.

B11 Turning now to the oral evidence, in cross-examination Mr Tony Russell said he regarded CBS' action in, as he saw it, siding with Inner Vision as being 'deceitful' , and that what he had actually said in his telephone call to Mr Rowe was that:

> …they should be well aware that when Wham became aware that CBS had broken their assurance that I felt certain that the view of my clients would be that they would not want to sign with CBS. I didn't say I would stop them. That has never been my relationship with Mr Michael, that I could ever stop him doing one thing or another. I can advise him; I cannot stop him.

Mr Tony Russell agreed with Mr Pollock that in effect what he was saying was: 'When I tell my clients how awfully you've behaved they might very well not want to come near you.'

B12 Mr Rowe insisted, in the course of his cross-examination, that his attendance note of the first of the two telephone conversations was 'absolutely and categorically correct' . He told me that he had a direct recollection of the telephone call, as it had shocked him. He also said that he made few ***299** attendance notes and that he tended to make attendance notes only when he was very concerned about something.

B13 Mr Rowe was an honest and careful witness, and I accept his evidence on this aspect. I find that Mr Tony Russell did say words to the effect that if CBS (UK) broke what he regarded as its promise of neutrality by filing evidence supporting Inner Vision, the consequence could well be that Wham! would not wish to sign with CBS (UK) should they find themselves free of the Inner Vision Agreement. In effect, this accords with Mr Tony Russell's own evidence (see para B11 above).

B14 But the matter does not end there. The negotiations were being conducted in an atmosphere of acrimony and mutual suspicion, with no holds barred. In such a context, the innuendo in what Mr Tony Russell said must have been only too clear. I am in no doubt that Mr Rowe perceived it as a threat - there is no other satisfactory explanation of his contemporary attendance note to that effect.

B15 Equally, I am in no doubt that Mr Tony Russell knew and intended that it should be so perceived by Mr Rowe. It would have been naive of him to have thought otherwise, and he would certainly not regard himself as naive in such matters. He knew that CBS (UK) were anxious to sign Wham!, and that any suggestion that Wham! might be discouraged from signing with CBS (UK), or advised against doing so, would touch a raw nerve in CBS (UK). Mr Tony Russell was uttering a threat (thinly-veiled and intended to be so) to use his influence with Wham! to discourage them from signing with CBS (UK), unless CBS (UK) toed the line in the interlocutory proceedings. Put more bluntly, the effect of what he was saying to CBS (UK) was: 'If you side with Inner Vision, I'll see that you pay for it.'

B16 I turn next to the alleged vindictive telephone call made by Mr Paul Russell to Mr Tony Russell on 11 November 1983, following the interlocutory hearing before Harman J.

B17 Mr Tony Russell made no mention of this call in his witness statement; his first mention of it was in the course of his examination in chief. He described the call as not very pleasant, and Mr Paul Russell as being in a triumphant mood. According to Mr Tony Russell, Mr Paul Russell said:

> I told you not to mess with us. You've gone too far this time.

In cross-examination it was put to Mr Tony Russell that Mr Paul Russell had telephoned him merely to find out whether there was a possibility of negotiations, but Mr Tony Russell maintained his account.

B18 Mr Tony Russell's evidence in this respect was corroborated by his partner Mr Brian Howard. In examination in chief Mr Howard said that he was in Mr Tony Russell's office 'discussing the events of the day' - I think 'licking their wounds' might be more accurate - when Mr Paul Russell's call came through on the speakerphone. He continued:

> I heard Paul Russell say to Tony Russell that Russells had gone too far and taken on too much this time, that we shouldn't have messed with him and CBS, and that basically we had got what we deserved. It was a ***300*** very vindictive telephone call… This was the first major case that I was dealing with, and that's why it surprised me.

B19 Mr Paul Russell, asked in chief whether he could remember any telephone conversations with Mr Tony Russell after the interlocutory hearing, replied:

> I distinctly remember two conversations with Tony Russell. I can't recall the order in which they took place but one of them was obviously subsequent to the injunction, and one of the conversations, which was after I became aware that the injunction had been granted, I called Tony Russell to ask him what he thought the next step was going to be in the situation which

> everybody found themselves in … and that conversation led ultimately to the January negotiations… In another conversation when I heard that proceedings had been issued personally against Tony Russell, I called him up and I suggested to him that if he needed the name of a good lawyer I could recommend one.

Asked whether he had at any stage adopted a crowing attitude, Mr Paul Russell replied that if he was going to use language to intimidate somebody he might have used 'something a little bit more strident than that' .

B20 In cross-examination, Mr Paul Russell denied 'absolutely and categorically' that the alleged conversation (as described by Mr Tony Russell and Mr Howard) had taken place.

B21 I find that on 11 November 1983, following the interlocutory hearing, Mr Paul Russell telephoned Mr Tony Russell to explore the possibility of entering upon further negotiations. It was almost inevitable that he should make such an approach, as victory for Inner Vision in the interlocutory proceedings had served to place CBS (UK) in a much stronger position in negotiating with Mr Tony Russell.

B22 I further find that in the course of the telephone conversation Mr Paul Russell made some offhand comment on the fact that Wham! had lost the interlocutory round, a comment which was not well-received by Mr Tony Russell, to whom it was made, or by Mr Howard, who overheard it. I find that the comment was along the lines described by Mr Tony Russell in his evidence in chief (see paragraph B11 above). As such, it was in the same vein as Mr Paul Russell's suggestion that Mr Tony Russell needed a good lawyer (see para. B19 above): heavy-handed and, while not intended to be taken literally, not intended to be entirely lighthearted either.

B23 On the other hand, I am satisfied that had Mr Paul Russell intended to be seriously vindictive - that is to say vindictive beyond the kind of tailtwisting banter which appears to have characterised his negotiating manner towards Mr Tony Russell - he would (as he acknowledged) have made a far better job of it. The fact that he did not intend to be seriously vindictive explains why he is unable to recall the conversation in question, or the comment which he made. As for Mr Howard, it was the first major case he had been involved in at Russells, and he must have been (at that stage) unaccustomed to the kind of infighting which had been going on. He took Mr Paul Russell's comment more seriously than Mr Paul Russell intended.

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The negotiating meeting held on 1 December 1987

B24 Mr Paul Russell (who gave evidence that he was present for part of the meeting), and Mr Rowe and Mr Tyrrell (who were present throughout the meeting), have all given evidence that

in the course of the meeting Mr Tony Russell threatened to claim that the 1984 Agreement was unenforceable on grounds of restraint of trade. In addition, both Mr Rowe and Mr Tyrrell (but not Mr Paul Russell) gave evidence that in this context Mr Tony Russell made specific reference to pending proceedings in the case of *ZTT Ltd v Holly Johnson* (' *Holly Johnson* '), the hearing of which was then imminent.

B25 In *Holly Johnson* a record company ('ZTT') was seeking to enforce a 'leaving member option' against Mr Holly Johnson, the former lead singer of a group known as 'Frankie Goes To Hollywood' , which had signed a recording agreement with ZTT. By his Defence, Mr Johnson had alleged that the recording agreement, and with it the leaving member option, was unenforceable on grounds of restraint of trade, and he counterclaimed declarations to that effect. Mr Rowe and Mr Tyrrell say that in the course of the meeting on 1 December 1987 Mr Tony Russell specifically referred to this case as support for an assertion that the English courts would not enforce Mr Michael's leaving member option (a proposition which, if correct, would have meant that Mr Michael was not subject to any enforceable contractual obligations to Sony Music).

B26 It is not in dispute that the hearing of *Holly Johnson* began on about 11 January 1988 before Whitford J, and that judgment was delivered on 10 February 1988 dismissing the claim and granting relief on the counterclaim. Whitford J held the recording agreement to be unenforceable on grounds of (among other things) restraint of trade. (The case subsequently went to appeal, and the Court of Appeal affirmed the judge's decision: *[1993] EMLR 61* .) Russells acted for Mr Johnson, and briefed Mr Cran for the hearing. The partner in Russells having the conduct of the litigation was not Mr Tony Russell, although Mr Tony Russell had some involvement in the proceedings.

B27 Mr Tony Russell, however, denies absolutely that he at any stage of the meeting threatened to claim that the 1984 Agreement or the leaving member option was unenforceable, and he further denies absolutely that he at any stage of the meeting mentioned *Holly Johnson.* Mr Pollock very properly warned Mr Tony Russell that he might in due course invite me to conclude that in giving that evidence Mr Tony Russell was not telling the truth, and in the course of his closing submissions Mr Pollock duly did so.

B28 Mr Tony Russell also gave evidence that Mr Paul Russell was not present at the meeting, whereas (as indicated above) Mr Paul Russell's evidence is that he was present for part of it, and that Mr Tony Russell made the alleged threat in his presence (although Mr Paul Russell has not given evidence of any mention by Mr Tony Russell of *Holly Johnson*).

B29 I turn first to the subsidiary issue as to whether, as Mr Paul Russell maintains but as Mr Tony Russell denies, Mr Paul Russell was present for part of the meeting.

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B30 In paragraphs 221 and 222 of his witness statement, Mr Paul Russell says he was present at the meeting, and goes on to give a brief account of what happened while he was there. In examination in chief, he said he knew he had been present for part of the meeting, and he went into further

detail as to what happened at the meeting. In cross-examination, it was put to him that he was not present at the meeting, and that he was confusing an earlier meeting which he had attended in October 1987, but he insisted that he had a clear recollection of the meeting on 1 December 1987.

B31 Under further cross-examination, after he had been pressed as to his travel arrangements in November and early December 1987, he said that he remembered the meeting on 1 December 1987 extremely well. He continued:

> It was a meeting in December because I remember that Allan Grubman was there, that Tony Russell was there, that Richard Rowe was there and that Tom Tyrrell was there.

B32 It is also apparent from the account which Mr Paul Russell gives as to what happened at the meeting (an aspect which I shall address in a moment) that he is talking about the same meeting as Mr Rowe and Mr Tyrrell, and indeed as Mr Tony Russell.

B33 I accept this evidence of Mr Paul Russell, and I find that he was present for part of the meeting on 1 December 1987. Mr Tony Russell's evidence to the contrary is due to a mistaken recollection. This mistake in recollection on the part of Mr Tony Russell is understandable, since Mr Paul Russell did not play an active role in the meeting. As Mr Paul Russell said himself, he was not there to be part of the negotiation, which was in the event conducted on Sony's side mainly by Mr Rowe.

B34 I now turn to the primary conflict of evidence, relating to Mr Tony Russell's alleged threat to claim that the 1984 Agreement, and with it the leaving member option, was unenforceable on grounds of restraint of trade.

B35 I begin with the evidence of Mr Paul Russell. In paragraph 221 of his witness statement, Mr Paul Russell describes Mr Tony Russell as being 'unbelievably aggressive and unpleasant during the meeting' . Mr Paul Russell's account of what happened at the meeting takes up only two sentences of paragraph 222 of his witness statement, as follows:

> At one point Tony Russell threatened that George would walk away from the contract if CBS did not give George Michael what he required. He said that the 1984 Agreement was not binding on George Michael.

B36 In examination in chief, Mr Paul Russell said that he recalled the meeting well because Mr Tony Russell had 'a ballistic fit' , by which he meant that Mr Tony Russell had become extraordinarily upset and angry. It was, said Mr Paul Russell, extraordinary even for Mr Tony Russell. Asked by Mr Pollock what Mr Tony Russell said or did, Mr Paul Russell said:

> He had lots of files. I remember him slamming on the desk and saying: 'Well, if that's it, we're going to walk away. I'm fed up with this.' - words to that effect.

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B37 In cross-examination, Mr Paul Russell said that in the course of his outburst Mr Tony Russell had used words to the effect that he did not consider Mr Michael to be bound by the contract and that he would walk him away if he did not get what he wanted. Asked about his evidence (see the last paragraph), Mr Paul Russell said:

> Yes, it was words to that effect. I can't remember the exact words that he used, but my feeling of what he was saying was that he was about to pack up his files and leave… It was a sort of royal 'We're leaving', not a personal 'We're leaving' … My impression of it was that he was fed up with it, and he was going to leave. It was 'We're going to leave. We're going to walk away from this.'

Mr Paul Russell had experienced outbursts from Mr Tony Russell in the past, but he said he found this one particularly outrageous. On the other hand, it did not surprise him.

B38 I turn next to the evidence of Mr Rowe. In paragraph 101 of his witness statement, Mr Rowe says that Mr Leahy was also present at the meeting; and he devotes the whole of paragraph 102 to explaining Mr Leahy's relationship with Mr Michael. In examination in chief he acknowledged that Mr Leahy was not in fact present at the meeting, and that his witness statement was erroneous in this respect. In cross-examination he sought to portray this error as being in the nature of a clerical error. Plainly it was not in the nature of a clerical error, given the terms of paragraph 102: rather, it demonstrates that in this respect his recollection was faulty. So too does his evidence that he 'vaguely' recalled Mr Paul Russell attending the meeting only in order 'to sort of say hello' , when, as I have found, Mr Paul Russell was present long enough to hear Mr Tony Russell's outburst.

B39 In paragraph 103 of his witness statement, Mr Rowe refers to the meeting itself as being tense, and he says that Mr Tony Russell acted in an unpleasant way and was loud and aggressive. Later in the paragraph he says:

> At one particular point (and I cannot exactly recall at what stage this was) Tony Russell threatened that unless CBS improved its position, George Michael would walk away from his existing contract with CBS. Tony Russell said that in his view the existing contract was unenforceable and George Michael could just go if he wanted to. I do not recall Tony Russell giving any detailed reasons to support his assertions which were made very much in the heat of the moment.

B40 In examination in chief, Mr Rowe said that he recalled Mr Tony Russell becoming at one stage 'very annoyed' . He continued:

> I can't remember at which part, but certainly it was mentioned that as far as he was concerned that if he didn't get the deal that he wanted that maybe George wouldn't be locked into this agreement, and I don't quite know what the position was at the time in terms of where it was in the proceedings, but the *Holly Johnson Case* was mentioned [by Tony Russell].

B41 When pressed on this aspect in cross-examination, Mr Rowe said that he could not remember whether the trial of *Holly Johnson* had started by ***304** 1 December 1987, but he thought it was going on at the time. If he did think that, he was wrong (see para. B25 above). He said he knew

about the case from Mr Rodwell (of Halliwell Rodwell, the solicitor who had acted for Inner Vision), who had drafted the Holly Johnson recording agreement. When Mr Cran put to him that *Holly Johnson* had not been mentioned by Mr Tony Russell, and that Mr Tony Russell had not threatened to allege restraint of trade, Mr Rowe replied:

> Well I must disagree. As far as I was concerned, and to the best of my recollection, the *Holly Johnson Case* was mentioned.

B42 Next, I turn to the evidence of Mr Tyrrell. In his witness statement (para. 15), Mr Tyrrell made the same mistake as Mr Rowe in saying that Mr Leahy was present at the meeting when in fact he was not. Like Mr Rowe, Mr Tyrrell corrected this mistake in the course of his evidence in chief. In paragraph 17 of his witness statement, after referring to 'explosive discussions' , Mr Tyrrell continues:

> At one particular point (and I cannot recall exactly at what stage this was) Tony Russell threatened that unless CBS gave way, George Michael would walk away from his existing contract with CBS UK. Tony Russell said that in his view the existing contract was unenforceable and George Michael could just go if he wanted to. I do not recall Tony Russell giving any detailed reasons to support his assertions, which were made very much in the heat of anger on the part of Tony Russell.

B43 In examination-in-chief, Mr Tyrrell went into greater detail. Having referred to Mr Tony Russell becoming 'very agitated, very upset' , Mr Tyrrell said there came a point when Mr Tony Russell said:

> You don't even have a contract with George Michael so you ought to consider that when you're negotiating your offer points.

Mr Tyrrell went on to say that Mr Tony Russell did not immediately explain what he meant by that, and at that point Mr Tyrrell went across the hallway into Mr Summer's office to tell him what had happened. According to Mr Tyrrell, when he returned, Mr Grubman also left the meeting to talk to Mr Yetnikoff. Mr Tyrrell's evidence-in-chief continued:

> … Tony Russell then proceeded, pretty much directed at me, to lecture me like some sort of nasty professor, like, 'If you think that your Wham contract, and it's a contract with Wham that will hold up in an English Court, you just don't know anything about English law and English litigation. You don't have a contract with George Michael, you've got a contract with Wham and it would never hold up'. He didn't give me the details of it chapter and verse. He just said: 'You don't have a contract with George Michael'. And it was more like somebody explaining something to a law student who didn't know what he was doing… He said the leaving member provision would not be enforced in a UK Court… I recall that he mentioned a case right on point, that was the *Holly Johnson* matter; and he also mentioned that in the sense like: 'You wouldn't even know who Holly Johnson is. You don't know anything about English law or this case. You certainly don't think you have a position that you have an enforceable contract [sic]'.

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B44 In cross-examination, it was put to Mr Tyrrell that there was no 'lecture' by Mr Tony Russell, and no mention by him of *Holly Johnson,* but Mr Tyrrell maintained his account. Indeed he expanded on it somewhat by saying that Mr Tony Russell had said that if he (Mr Tyrrell) knew about *Holly Johnson* he would know that Sony would not have a chance, and would be laughed out of court if it tried to enforce the leaving member option.

B45 I turn next to Mr Tony Russell's evidence. As I explained earlier, Mr Tony Russell absolutely denies that he made the alleged threat, or referred to *Holly Johnson,* at the meeting. He was pressed on this in cross-examination, where the following passage of questions and answers followed:

> Q. They also say that at one stage you threatened to allege restraint of trade and to walk Mr Michael away from the contract. Is that true?
>
> A. Absolutely untrue.
>
> Q. You never said that?

> A. I absolutely know I didn't say that.
>
> Q. You never said that?
>
> A. Yes, I am absolutely certain.
>
> Q. Did [restraint of trade] cross your mind … in these negotiations?
>
> …
>
> A. I didn't have it in my mind at all.
>
> Q. So far as you were concerned, these were commercial negotiations, the outcome of which would leave an existing binding contract?
>
> A. That was exactly the way I was approaching it. I was trying to get the very best terms I could get for my client. The enforceability of the [1984] Agreement wasn't even in a field of vision. That wasn't what we were talking about. What we were striving to do was to get the very best - or what I was striving to do was to get the best possible terms for Mr Michael.

B46 Under further cross-examination, Mr Tony Russell said, with reference to the allegation that he threatened to allege restraint of trade:

> I think when you try and make a threat that an agreement is not enforceable with a record company you do not just use that as a bargaining counter; you have got to sort the whole thing through and have a strategy as to why you are making that allegation and whether you are prepared to live by it and live by the disruption it is going to create. I don't think anybody in a straightforward commercial negotiation comes out and makes as important an allegation as that without having thought through the consequences of making that allegation, and my own opinion is that you do not make it unless you are prepared to carry it through. It has never been my policy to threaten things which one is not then prepared to carry through and I certainly, in a commercial negotiation of this sort, would not have made that allegation without analysing where it was going to lead me.

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B47 Lastly, so far as the evidence is concerned, it is to be noted that there is no contemporary documentary evidence which throws any light on the issue. In February 1988 a memo was circulated within Sony referring to Mr Johnson's victory in *Holly Johnson.* Mr Tyrrell saw this memo and made sure that Mr Summer, Mr Rowe and Mr Paul Russell also saw it. But the existence of this memo is of no assistance in resolving the issues of fact which arise in relation to the 1 December 1987 meeting.

B48 As I said earlier (para. B13), Mr Rowe was an honest and careful witness. So too was Mr Tyrrell. I prefer the evidence of Mr Paul Russell, Mr Rowe and Mr Tyrrell on this issue to that of Mr Tony Russell.

B49 I accept the evidence of Mr Paul Russell, Mr Rowe and Mr Tyrrell as to the mood and behaviour of Mr Tony Russell. I find that in the course of the meeting Mr Tony Russell completely lost control of himself, and indulged in an angry and thoroughly intemperate outbust, such that even those, like Mr Paul Russell, who had experienced outbursts of this kind from Mr Tony Russell on other occasions were justified in regarding this one as exceptionally unpleasant.

B50 I find that in the course of his outburst Mr Tony Russell made a comment to the effect that the 1984 Agreement was unenforceable and that CBS did not have a contract with Mr Michael. I find that shortly thereafter, while Mr Tony Russell was still in a state of high emotion, he mentioned *Holly Johnson* to Mr Rowe and Mr Tyrrell, as being a case in which an artist was claiming that a leaving member option was unenforceable.

B51 On the other hand, I find that despite his comments and despite his reference to *Holly Johnson,* Mr Tony Russell was not at that stage contemplating taking the point that either the 1984 Agreement or the leaving member option which it contained was unenforceable as being in restraint of trade. From my own observation of Mr Tony Russell, it is clear to me that had he genuinely intended to allege restraint of trade he would have done so, not only orally but also in correspondence, in no uncertain terms. Had it occurred to him that, in 'striving … to get the very best possible terms for Mr Michael' , it might be to Mr Michael's advantage to allege restraint of trade at that stage, I have no doubt that he would have had no compunction whatever in taking the point (just as he showed no compunction in taking the point in October 1992).

B52 Accordingly, I accept Mr Tony Russell's evidence that at that stage it was not within his 'field of vision' seriously to raise an allegation that the 1984 Agreement was in restraint of trade.

The 'change of direction'

B53 In the course of Mr Michael's cross-examination, Mr Pollock suggested to him that at one stage it was part of his strategy to delay telling Sony of his decision to change direction until after the 1990 renegotiation had been concluded. Mr Michael denied that, and, very properly,

the suggestion was not pursued. In fairness to Mr Michael I must make it clear that I accept his evidence that that was never part of his strategy.

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B54 There is, however, a conflict of evidence as to when and in what circumstances Sony, and in particular Sony Music, were told of the change of direction, and how much they were told about it.

B55 I turn first to the evidence in relation to Sony Music. In a memorandum of a meeting held on 16 May 1990, Mr Stephens recorded, under the heading 'South Bank Show' , that CBS wanted to maximise publicity from the show,

> … especially in view of the fact that George will not be promoting the new album.

Mr Stephens did not give evidence, so it is impossible to determine precisely what he meant by that note, or how much he knew at that time of Mr Michael's future intentions in relation to promotion. But I accept the evidence of Mr Paul Russell that had Mr Stephens thought that any matter of importance was involved, he would have circulated the memorandum to Mr Paul Russell and others. As it is, there is no indication on the documents that the memorandum was circulated. I also accept Mr Paul Russell's evidence that it was at about that time (May 1990) that Mr Paul Russell gathered that there would be no video for the first single to be issued in advance of the new album.

B56 As related in Section A (para. A132), early in July 1990 Mr Mottola and Mr Ienner came over from the US and visited Mr Michael at Sarm Studios in Notting Hill, where he was recording. Mr Michael says that at that meeting his proposed change of direction was fully explained to Mr Mottola and Mr Ienner. Mr Mottola denies that, saying that the discussion was principally about the video for the first single (in the event, 'Praying For Time'). I shall come to that conflict of evidence in a moment. But so far as Sony Music is concerned, Mr Leahy in the course of his examination in chief described a meeting between Mr Michael and Mr Paul Russell and Mr Stephens, at which Mr Leahy was present, where the change of direction was fully explained by Mr Michael to Mr Paul Russell and Mr Stephens. Mr Leahy's evidence was that such a meeting took place before the meeting with the US executives at Sarm Studios. Mr Leahy's witness statement does not expressly refer to any such meeting, although with reference to a meeting with Mr Paul Russell on 12 October 1990 it does describe Mr Michael as 'reiterating' his intentions in relation to his change of direction.

B57 Mr Michael does not refer to any such meeting in his witness statement, and when first cross-examined he repeated more than once that the first time he told Sony of his change of direction was when the US executives visited Sarm Studios. He even went so far as to say that he did not remember the meeting which Mr Leahy (subsequently) described in his evidence-in-chief. However, when recalled for further cross-examination he said he did remember a meeting with Mr

Paul Russell and Mr Stephens prior to the meeting with the US executives, at which tapes were played and some discussion took place, although - and significantly, in my judgment - he did not recall doing more than playing the music to Mr Paul Russell.

B58 In cross-examination, Mr Kahane referred to a meeting with Mr Paul Russell and Mr Stephens in July 1990 but *after* the meeting with the US executives, but it is not clear whether he was giving evidence that he was ***308** present at such a meeting. In any event, as I said earlier I regard Mr Kahane as a thoroughly unreliable and untrustworthy witness whose evidence must be approached with the greatest caution. In the present instance, his evidence of a meeting taking place in July but *after* the meeting with the US executives is inconsistent with the evidence of both Mr Leahy and Mr Michael, and I reject it.

B59 On the issue whether, at a meeting between Mr Michael and Mr Paul Russell *before* the meeting with the US executives, a full explanation of Mr Michael's change of direction was given to Mr Paul Russell, I prefer the evidence of Mr Paul Russell to that of Mr Leahy. The fact that Mr Michael himself cannot recall giving such an explanation to Mr Paul Russell at any time prior to the meeting with the US executives - and that at an earlier stage in the proceedings he positively asserted that no such explanation was given to Mr Paul Russell prior to the meeting with the US executives - throws considerable doubt on the accuracy of Mr Leahy's recollection: such that I find it to be in this respect unreliable.

B60 I find that the meeting to which Mr Leahy was referring was the meeting which took place on or about 27 June 1990 (the exact date does not matter), at which Mr Michael played tapes from 'Listen Without Prejudice' to Mr Paul Russell and Mr Stephens; that there was no detailed discussion at that meeting concerning Mr Michael's change of direction; and that the understanding of Mr Paul Russell following that meeting was substantially as it had been before the meeting, namely that there would be no video for the first single from the album.

B61 It is not in dispute that a meeting took place on 12 October 1990 at Mr Leahy's office, at which Mr Michael's change of direction was fully discussed and explained. I find that that was the first time it was fully explained by Mr Michael or any of his advisers to Mr Paul Russell. Mr Michael expressed the view a number of times in the course of his evidence that Mr Paul Russell must have learned all about the change of direction from Mr Stephens, or from Sony US, long before the meeting in October 1990. However, I accept the evidence of Mr Paul Russell that shortly before the meeting on 12 October 1990 Mr Stephens had indicated to him that he felt there was going to be some total change of direction, and that the first time the change of direction was spelt out clearly to him from Mr Michael's side was at the meeting on 12 October 1990.

B62 I now turn to the meeting with the US executives at Sarm Studios in early July 1990.

B63 It is common ground that when Mr Ienner and Mr Mottola visited Mr Michael at Sarm Studios in early July 1990 they heard a number of tracks from the forthcoming album 'Listen Without Prejudice' , and that in the course of the visit and the lunch afterwards at a nearby restaurant some

discussion took place concerning Mr Michael's intentions in relation to future promotion. The issue is as to the extent to which Mr Michael's change of direction was explained to Mr Ienner and Mr Mottola. Mr Michael maintains that it was fully explained: Mr Mottola maintains that the discussion about promotion was concerned principally with the video for the first single, and that the full extent of the change of direction was not made clear.

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B64 In paragraph 59 of his witness statement, Mr Michael says that over lunch he explained to Mr Ienner and Mr Mottola his intention to remove his image from the marketing and promotion of the next album, and that he expected that there would be a sharp drop in sales compared with 'Faith' , but that he was prepared for a smaller selling album as he felt that that was the only way in which he could protect his personal life and writing ability. The paragraph continues:

> I also told them that I considered that I could have a very long term career if I was allowed to develop it as I felt necessary but that, if I had to continue along the same lines as before, my career would not last much longer. I further explained that a long term career with a constant level of quality would ultimately be more beneficial for all parties concerned. (I remember that I suggested - and they agreed - that if I made albums over a period of 20 years, each of which sold 5 million copies, we would all be happy.) I expressed the hope that they would understand that I was trying to protect my ability to write and perform music which people would enjoy and that they would help to protect all our long term interests.

B65 As regards videos, Mr Michael says (in paragraphs 61 and 62 of his witness statement) that he told Mr Ienner and Mr Mottola that he would not make videos in which he appeared; that there was some discussion about the video for the first single from 'Listen Without Prejudice' - entitled 'Praying For Time' - in the course of which Mr Ienner or Mr Mottola suggested that the video should merely display the lyrics from the track; and that Mr Ienner and Mr Mottola reassured him that they were interested in his long-term career prospects and that they would support him through the transitional period when he would lose his younger audience.

B66 In cross-examination, Mr Michael said that he had not told anyone in Sony about the change of direction prior to this visit because he had a feeling that Sony were not going to be pleased with his decision; and that he gained the impression that Mr Ienner and Mr Mottola, while not liking his decision, were prepared to live with it. He went on to say, however, that he was sceptical because Mr Ienner and Mr Mottola had not raised any objection. He continued:

> If I'd received a more worried approach and then we'd discussed it, it would have been one thing - but they just kind of accepted it all in a … 'Let's all be friends' manner, and I know more about the way that the American company works than that to totally believe that things were going to be that easy.

B67 Three points are of significance in the evidence of Mr Michael to which I have just referred. In the first place, it is clear that Mr Michael was at that stage still thinking in terms of a long-term relationship with Sony (on his own evidence he referred to making albums over a period of 20 years). In the second place, he was plainly sensitive to the fact that his decision to change direction was one which Sony would find very difficult to swallow. He was expecting Mr Ienner and Mr Mottola to object, and they did not do so. This suggests that they had not at that stage fully appreciated the full extent of the change of direction. In the third place, his reference to what he knew about Sony US must have been coloured by hindsight (and ***310** by what he was told by Mr Kahane) since as of July 1990 it is hard to see what grounds he could have had for thinking that Sony US might not live up to its promises of support.

B68 The whole tenor of Mr Michael's evidence in this respect is consistent with his realising that his change of direction would be unpopular with Sony as being contrary to their commercial interests, at least in the short term, since it would inevitably result in a drop in sales of his records; and with his desire to sugar the pill by presenting his change of direction in as attractive a light as possible so far as Sony was concerned.

B69 Mr Kahane, in his witness statement, says that in the course of the visit Mr Michael explained that he wanted Sony to focus on the music and not on his image as a sex symbol, which meant withdrawing his image from artwork and videos. In paragraph 44 of his witness statement he says this:

> The meeting was extremely friendly. Both Mr Ienner and Mr Mottola said they were very supportive of what he was doing and of his approach for the future. They frequently expressed their love for the music, using phrases such as 'phenomenal' and 'fantastic'. Mr Michael went away from this

> meeting feeling that he had explained his approach and that they would support him.

B70 In examination-in-chief Mr Kahane described Mr Ienner and Mr Mottola as being 'unbelievably enthusiastic' about the music. He continued:

> It was quite evident from the launch that they were going to throw all their support behind George. In my mind the situation was very clear, that here was a superstar who had sold all these albums. He played them the music they wanted to hear, and they were going to throw their backs into it, especially since they were two people who had never worked with George before.

Mr Kahane went on to say that he thought at the time that Mr Ienner and Mr Mottola were sincere in their expressions of support for Mr Michael.

B71 Mr Mottola does not mention the visit to Sarm Studios in his witness statement. In examination-in-chief he said that so far as promotion and marketing were concerned the only discussion which he recalled concerned the first video. He recalled Mr Ienner coming up with the idea that the video should roll the lyrics of the song. In cross-examination, Mr Mottola said that he did not recall Mr Michael explaining that he wanted to remove his image from the marketing and promotion of the album; that he did not recall any talk about sales of the album, nor did he recall Mr Michael saying that there would be a sharp drop in sales. Mr Mottola said that the conversation was concerned more with Mr Michael's musical transition than with the specifics of marketing and promotion. In re-examination, Mr Mottola said this:

> It was a general discussion about the music that we had just heard … [and] … about the immediate video … which was the first video and the first single about to be released probably three or four weeks after that meeting.

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B72 Mr Mottola was a truthful witness, who gave his evidence thoughtfully and fairly, and I accept his evidence without qualification. His evidence that the first Sony US knew of the change of direction was that there would be no video for the first single from the forthcoming album is corroborated by the evidence of Mr Fred Ehrlich (General Manager of Columbia Records, a division of Sony US). I regard Mr Ehrlich as a truthful and reliable witness, and I accept his evidence in this respect.

B73 In his witness statement and in his oral evidence, Mr Kahane made a number of allegations against Mr Mottola which I do not propose to repeat, but which were designed to establish that the evidence of Mr Mottola is not to be relied upon. In particular, in paragraph 37 of his witness statement Mr Kahane gives an account of a meeting with Mr Mottola in the course of which (according to Mr Kahane) Mr Mottola behaved in a corrupt and dishonest way. In cross-examination Mr Kahane confirmed that he was alleging corrupt behaviour by Mr Mottola, and said that he was very shocked by such behaviour. Asked why he had not told Mr Tony Russell about Mr Mottola's behaviour, Mr Kahane replied:

> When something like this happens you just … you know, it scared me. I didn't really want to make it public. I mean, he's a scary guy … I wouldn't want to put something like this in writing, I'm afraid. I said I wasn't sure if I spoke with Tony Russell about it, and I'm not sure he would have put it down either. I mean, we've all seen The Godfather.

B74 Mr Mottola strongly denied that he had behaved in the manner suggested, and said he was outraged by Mr Kahane's evidence. I am not in the least surprised. I wholly reject Mr Kahane's account of the alleged meeting, and I find that Mr Mottola did not behave in the manner alleged. Moreover, the manner in which, and the terms in which, Mr Kahane sought to support his account when giving oral evidence (as exemplified in the passage which I have quoted) reinforces my view that Mr Kahane is not a trustworthy witness.

B75 I bear in mind that Mr Tony Russell gave evidence that over lunch in Los Angeles in June 1991 Mr Kahane gave him a similar account of Mr Mottola's behaviour some eighteen months earlier, describing Mr Mottola as 'a very scary person to deal with' . However, the fact that Mr Kahane apparently felt able to make these allegations about Mr Mottola to Mr Tony Russell does not make them any more credible. I accept Mr Mottola's evidence, and I am satisfied that they are false allegations.

B76 Returning to the visit to Sarm Studios, I find:

— that Mr Michael was fully aware that his decision to change direction would be unpopular with Sony;
— that he was concerned to sugar the pill so far as he could, by presenting his change of direction in its best, and (so far as Sony was concerned) least controversial light;
— that although in the course of the visit there were some general references to future marketing and promotion, the only specific discussion related to the video for 'Praying For Time' ; ***312**
— that although Mr Michael genuinely felt that he had satisfactorily explained the full extent of the change of direction, neither Mr Ienner nor Mr Mottola were in fact made aware of its full extent or significance or its likely impact on future sales of Mr Michael's albums;
— that Mr Ienner's and Mr Mottola's expressions of support for Mr Michael were entirely genuine and were at the time accepted by Mr Michael as such;
— that at the time Mr Michael was content with the support he had received from Mr Ienner and Mr Mottola, and had no qualms about continuing a successful a long-term relationship with Sony.

The 1990 renegotiation

B77 The negotiation of the final terms of what eventually became the letter agreement dated 26 July 1990 took place between Mr Tony Russell and Miss Coleman. The negotiations were difficult, and according to Mr Tony Russell from time to time they became heated. According to Mr Tony Russell there came a point in about mid-June 1990 at which the negotiations were no longer conducted in 'friendly and civilised manner' : by which he must mean that they were thenceforth conducted in an unfriendly and uncivilised manner.

B78 In his witness statement Mr Tony Russell makes a number of complaints in relation to the way in which Miss Coleman conducted the negotiations, in particular the complaint that she tried to slip terms which had not been previously agreed with Mr Tony Russell into travelling drafts of the agreement. Mr Tony Russell enlarged on these complaints in cross-examination.

B79 In paragraphs 39 and 40 of her witness statement, Miss Coleman says this:

> During the latter part of negotiations with Tony Russell, I became extremely concerned about his conduct and the manner in which the negotiation was being conducted. He was pushing for final points on the drafts to be fully agreed in his favour, and was threatening me that if I did not so agree, he would advise his client that we were being uncooperative and not acting in the spirit of the negotiation. I was extremely concerned at this behaviour because I felt that throughout the negotiations the UK company had acted with the utmost good faith and we had genuinely endeavoured to see that George Michael received full superstar status. It was unfair of Tony Russell

> to expect that he could successfully achieve every single point he was seeking especially if the result would be to give George Michael more than other Sony superstar acts.
>
> Discussions became increasingly heated in the week commencing 2 July 1990 as Tony Russell was about to go on holiday at the start of the following week and clearly wanted to tell his client that all points had been resolved in George Michael's favour. On Friday 6 July we had a final telephone conversation in which he showed a totally unjustified and unacceptable level of anger at the points I was making and acted in a manner which I had never encountered in my entire working life.
>
> Again he repeated his threats to involve George Michael and again I felt it was extremely unfair and that he was setting up a conflict between his client and ourselves which was not there.

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B80 On 9 July 1990, Miss Coleman wrote an internal file note in the following terms:

> This is a note for the file to advise that during the latter part of these negotiations Tony Russell has been extremely abusive and divisive. He has reconstructed facts and incorrectly remembered conversations. He has tried to cause bad feeling between CBS and George Michael and we should ensure that in future we do not negotiate any points on the telephone. We should always request him to come into CBS and there should be two people present at all meetings with full notes taken.

B81 Asked in cross-examination what she meant by 'divisive' , Miss Coleman replied:

> I felt I was being threatened, that he was going to approach his client and advise his client that Sony were being deliberately obstructive in the negotiations, and I was very concerned because I had had the initial conversations with Paul Russell when we first started the negotiations on this deal, and I was very conscious that Paul Russell had gone into these negotiations with the utmost good faith. He had actually said to me at

> the time that he wanted to ensure that George Michael was treated as a superstar, and I knew that he had done everything he could to achieve that, and I felt it was extremely unfair. And that's why I used the word 'divisive', that at this stage Tony Russell was, I felt, threatening me to go back to his client and basically advise his client that Sony were acting in bad faith. I felt it was totally and utterly contrary to the spirit into which Sony had entered these negotiations.

B82 Mr Cran then put to Miss Coleman that she had considerably overreacted, and that it was 'probably a case of six of one and half a dozen of the other' . Miss Coleman replied:

> Absolutely not. I had never previously written a file note to this effect, and I've never since written a file note to this effect, or ever since felt that I had any cause to do so.

B83 I found Miss Coleman to be a most impressive witness in every respect. I am fully satisfied that she was telling the truth to the best of her recollection, and that her recollection was accurate. She gave her evidence with courtesy, moderation and fairness. I accept her evidence without question or qualification, and where it differs from the evidence of Mr Tony Russell I have no hesitation in preferring her evidence to that of Mr Tony Russell.

B84 I find that there was nothing underhand, unfriendly or uncivilised in the way in which Miss Coleman handled the negotiations with Mr Tony Russell. On the contrary, I find that she acted throughout with fairness and restraint, and in complete good faith. By contrast, the negotiating tactics of Mr Tony Russell, as described by Miss Coleman (a description which I accept as accurate), and in particular his threat to sour relations between Mr Michael and Sony, were all too reminiscent of the tactics he had employed in the Inner Vision negotiations. I am satisfied that Miss Coleman had every reason to describe Mr Tony Russell as 'divisive' in her file note dated 6 July 1990.

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Repayment of the advance for the third album

B85 In paragraphs 312 and 313 of his witness statement, Mr Paul Russell says this:

> Although George Michael's accountants had apparently given some ostensible reason for the repayment, I would normally have expected Tony Russell to have called me to ask for my co-operation. I told Mark Schwarz to call the accountants to explore the position. He did so and told me that they had maintained that tax reasons were behind the return.
>
> I therefore made the point of speaking to Tony Russell on the subject and asked him specifically whether there was some hidden agenda, because I found it hard to believe that any artists would just return one advance payment out of the blue. Tony Russell assured me that the repayment was only to do with George Michael's tax position.

B86 In examination in chief, Mr Paul Russell said he remembered the conversation absolutely. He described the telephone call as follows:

> So I called Tony Russell and I told him that I didn't want the money back I would like him to keep it. He said: 'You've got to have it back. It has to do with George's tax.' I then said: 'Tony, are you telling me that there's no hidden agenda here?' He said: 'I am telling you there is no hidden agenda.' I said: 'So I can take this money back and I don't have to worry about anything?' and he said: 'You do not have to worry.'

B87 In cross-examination, Mr Tony Russell denied that any such conversation took place between him and Mr Paul Russell. He said that Mr Paul Russell never telephoned him about the repayment.

B88 There is no direct assistance to be gained from the documents in resolving this conflict of evidence between Mr Paul Russell and Mr Tony Russell. There is, however, some indirect assistance to be gained. In a file note made by Mr Brackman, he records the fact that Mr Schwarz had called him on 7 August 1992 to ask why the money had been returned, and that he (Mr Brackman) had explained that it was felt to be wrong to retain the money as Mr Michael had no contractual right to it (this being, I assume, on the footing that Mr Michael had 'abandoned the album'). The note continues:

> I also stated that we were embarking upon an income/tax deferral strategy for George and therefore this also fitted in with this strategy

The note concludes:

> I called up Tony Russell after the call to discuss the position. Tony wishes me to call back Mark Schwarz and confirm that we do not want to have the money returned to us as:
>
> (a) Tony objects to keeping the money because it is contractually incorrect and
> (b) The income deferral point.

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Written at the foot of the note, in Mr Brackman's handwriting, are the words: 'This was duly done. Mark Schwarz accepted the position.' , followed by his signature.

B89 In oral evidence, Mr Brackman said he had no independent recollection of the events in question, apart from his file note.

B90 Cross-examined about the file note, Mr Tony Russell said that the 'income deferral point' was an invention of Mr Brackman's which Mr Brackman had not previously discussed with him, and he denied that he asked Mr Brackman to mention the point to Mr Schwarz. He did not, however, ask Mr Brackman to withdraw the point. His evidence continued:

> We had a discussion where I said: 'You can hardly go back now and withdraw that because it will make you look ridiculous and it will only increase their concern.

B91 It is quite clear that Mr Tony Russell was looking for some way of returning the advance to Sony without raising Sony's suspicions that Mr Michael was about to announce his intention of breaking with Sony, on the basis that to retain the money might damage Mr Michael's cause once his intention was made known. The method which he had lighted upon in the draft letter which he had provided to Mr Brackman, and which Mr Brackman had duly sent, was to say that recording of the third album has been abandoned with the approval of Sony Music. This was untrue, since all that had happened was that Mr Michael, once he had decided to break with Sony, had done no more recording (see Mr Tony Russell's evidence, quoted in paragraph A197 above).

B92 Given that Mr Tony Rusell had already drafted a false explanation for Mr Brackman to provide to Mr Schwarz, there is no reason to conclude that he would have baulked at giving a further false explanation to Mr Paul Russell.

B93 Moreover, although Mr Brackman professed to have no independent recollection of his conversation with Mr Tony Russell, I can see no reason why, in a contemporaneous file note, he should have made a fundamental error in recording what Mr Tony Russell said to him. The indorsement 'This was duly done' clearly indicates that his understanding at the time was that he was doing what Mr Tony Russell had asked him to do.

B94 In the circumstances, I have no hesitation in preferring the evidence of Mr Paul Russell on this issue to that of Mr Tony Russell and I find that a conversation took place between them to the effect described by Mr Paul Russell, in the course of which Mr Tony Russell assured Mr Paul Russell that there was no 'hidden agenda' behind the return of the advance for the third album, an assurance which Mr Tony Russell knew to be false.

B95 Finally on this aspect, I accept the evidence of Mr Brackman that Mr Michael knew nothing at the time about the return of the advance. It follows that he could have known nothing of the devices being employed on his behalf to conceal from Sony the true reason for its return.

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PART III: THE RESTRAINT OF TRADE ISSUE

Introduction to this Part of the Judgment

In this Part of the judgment, I address the restraint of trade issue without taking account of Sony Music's 'equitable defences' . Those defences will be considered in Part IV.

In addressing the restraint of trade issue, I shall first consider the nature of the doctrine of restraint of trade and the general principles governing its application, in accordance with the authorities. I shall then summarise Mr Michael's pleaded case in relation to restraint of trade. Next, I shall turn to the question of the application of the doctrine of restraint of trade to the 1988 Agreement, considering firstly whether the 1988 Agreement is an agreement to which the doctrine applies; and secondly, if the doctrine does apply, whether its application leads to the conclusion that (subject

always to Sony Music's 'equitable defences') the 1988 Agreement is unenforceable in so far as it remains unperformed.

The Doctrine of Restraint of Trade

At the outset, a distinction must be drawn between the common law jurisdiction to declare a contract unenforceable as a restraint of trade (that being the jurisdiction which is invoked in this case) and the equitable jurisdiction to grant relief in certain circumstances against unfair and unconscionable bargains (a jurisdiction which is not invoked in this case).

Both jurisdictions are based on public policy, there being no other justification for the court intervening where contractual obligations have been assumed voluntarily. However, although both jurisdictions may be rooted in a single broad public policy, the position has now been reached on the authorities (as I read them) where differing public policy considerations - or differing aspects of a single broad public policy - apply to each jurisdiction.

In the case of the equitable jurisdiction to relieve against unfair and unconscionable bargains, the particular public policy consideration is that of preventing unfair advantage being taken of the weak and vulnerable. Thus, the authorities establish that the court will interfere in exceptional cases 'where as a matter of common fairness it [is] not right that the strong should be allowed to push the weak to the wall' (per Dillon LJ in *Alec Lobb Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173* (' *Alec Lobb* ') at p.183E–F). Equity treats such cases as cases of fraud. In the words of Lord Selborne in *Aylesford v Morris (1873) LR 8 Ch. App. 484* , 490-1 (a case in which a young nobleman, entitled to a large property on the death of his father, had fallen into the hands of an unscrupulous moneylender): ***317**

> Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable.

Under the equitable jurisdiction, the plaintiff must establish that the defendant has obtained an unfair advantage by acting in a morally reprehensible way: that is what is meant by 'unconscionable' . As Browne-Wilkinson J (as he then was) put it in *Multiservice Bookbinding Ltd v Marden [1979] 1 Ch. 84* , (' *Multiservice Bookbinding* ') at p.110F:

> '[T]he plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable: it is not enough to show that, in the eyes of the court, it was unreasonable. In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.
>
> The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited: the court can and should intervene where a bargain has been procured by unfair means.

In *Alec Lobb* Dillon LJ, after citing the passage from Lord Selborne's judgment in *Aylesford v Morris* quoted above, said (at p.182H–183B):

> The whole emphasis is on extortion, or undue advantage taken of weakness, an unconscientious use of the power arising out of the inequality of the parties' circumstances, and on unconscientious use of power which the court might in certain circumstances be entitled to infer from a particular - and in these days notorious - relationship unless the contract is proved to have been in fact fair, just and reasonable …
>
> I agree with the judgment of Browne-Wilkinson J in *Multiservice Bookbinding* which sets out that to establish that a term is unfair and unconscionable it is not enough to show that it is, objectively, unreasonable.

See also Dunn LJ at ibid. p.188H.

By contrast, in the case of the common law jurisdiction to declare a contract unenforceable as a restraint of trade, the particular public policy consideration is that of free trade. The test to be applied, where the contract is one which attracts the doctrine of restraint of trade, is a test of

reasonableness: the court does not have to be satisfied that the defendant has behaved in a morally reprehensible way. As Lord Macnaghten put it in the well-known passage from his speech in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd [1894] AC 535* (' *Nordenfelt* ') at p.565:

> The true view at the present time I think is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to ****318*** the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

In certain cases the two jurisdictions may overlap. This will occur, for example, in the case of an unconscionable bargain where the unfair advantage obtained by the defendant takes the form of a restraint of trade imposed on the plaintiff. In such a case, once it is determined that the contract is one which must be justified as being 'fair, just and reasonable' , the test of fairness to be applied to the restraint of trade is the *Nordenfelt* test: see *Macaulay (formerly Instone) v A. Schroeder Music Publishing Co. Ltd. [1974] AC 1308* (' *Schroeder* ') at p.1315H per Lord Diplock.

In *Schroeder* , the plaintiff claimed that his music publishing agreement was 'oppressive and therefore void as being contrary to public policy and was an unreasonable restraint of trade and that the plaintiff was not bound by it' (see the report of the case in the Court of Appeal: *[1974] 1 All ER 171h*). It appears, therefore, that the plaintiff's primary claim (that the agreement was void) was a claim under the equitable jurisdiction, and that his alternative claim (that the agreement was unenforceable) was a claim under the common law jurisdiction.

Plowman J at first instance declared that the agreement was 'contrary to public policy and void' (see the report of the case in the House of Lords: *[1974] 1 WLR 1308* , 1309D), thereby upholding the plaintiff's primary claim; and he dismissed the defendant's claim for specific performance (see *[1974] 1 All ER 172g* –h). The defendant appealed to the Court of Appeal.

The Court of Appeal decided that the agreement was unenforceable as an unreasonable restraint of trade (*[1974] 1 All ER 181e*), and on that footing dismissed the defendant's appeal. The Court of Appeal did not in terms address the plaintiff's claim that the agreement was void, notwithstanding that that was the claim which was reflected in Plowman J's declaration. It may be that this claim was not maintained by the plaintiff in the Court of Appeal (the parties' arguments not being reported). The defendant appealed to the House of Lords.

The House of Lords dismissed the defendant's appeal. In the House of Lords only Lord Reid and Lord Diplock delivered speeches. Lord Reid founded his decision on the doctrine of restraint of trade and on the principles set out in relation to that doctrine by the House of Lords in *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269* (' *Esso* '); Lord Diplock, agreeing with Lord Reid's conclusion, said that the public policy which the court was implementing was not freedom of trade but 'the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable' ; and Lord Simon of Glaisdale agreed with both speeches.

The full passage from Lord Diplock's speech (*1315E–H*) is as follows:

> It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose ****319*** bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.
>
> So I would hold that the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: 'Was the bargain fair?' The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of

> the promisee and commensurate with the benefits secured to the promisor under the contract.

The fact that Lord Simon of Glaisdale was able to agree with the speeches of both Lord Reid and Lord Diplock establishes that there was no inconsistency between the two speeches; and since in his speech Lord Reid said that he did not intend to restate the principles set out in *Esso,* or to modify what he said himself in *Esso* (p.1310A), it follows that Lord Diplock was saying nothing inconsistent with the principles set out in *Esso.* In *Esso,* the public policy underlying the doctrine of restraint of trade is clearly identified as freedom of trade (see Lord Reid at p.294G, citing *Nordenfelt,* Lord Morris of Borth y Gest at p.305D, Lord Hodson at p.317D, citing Magna Carta, Lord Pearce at p.324E, and Lord Wilberforce at pp.340E–341B). The conclusion therefore follows that in referring to the public policy of protecting the weak against being forced by the strong to enter into unconscionable bargains Lord Diplock was referring to the public policy underlying the equitable jurisdiction to relieve against unconscionable bargains (cf. the reference by Dillon LJ in *Alec Lobb* , in the passage quoted above, to the strong being allowed to push the weak to the wall).

Similarities notwithstanding, however, as I read the authorities the two jurisdictions have over time developed in different ways and are not, at least as of today, to be regarded as being a single homogeneous jurisdiction. Thus, in *Alec Lobb* both Dillon LJ and Dunn LJ treated the two jurisdictions separately (Waller LJ's judgment being confined to the restraint of trade aspects of the case).

Nor should one lose sight of the fact that the equitable jurisdiction to relieve against unconscionable bargains is directed at certain kinds of morally reprehensible conduct affecting the conscience of the defendant, which equity regards as fraud; whereas the common law doctrine of restraint of trade is not concerned with the conscience of the covenantee, nor (as I read the authorities) does its application require proof of morally reprehensible conduct on the part of the defendant.

I turn, then, to the common law doctrine of restraint of trade, and to the principles which, as of today, govern its application.

In the course of this hearing I have been referred to a very large number of authorities on the nature and application of the doctrine of restraint of trade over a period of more than 250 years, starting with Lord Macclesfield's judgment in ***320** *Mitchel v Reynolds (1711) 24 ER 347* and including eight decisions of the House of Lords and one of the Privy Council. Each succeeding authority generally contains an analysis of the earlier authorities. But if one thing is clear on the authorities, it is that the doctrine of restraint of trade is not an absolute doctrine. As public policy has changed and developed over time, so also has the doctrine itself and the approach of the courts in applying it. Capacity for change is, as it seems to me, of the nature of the doctrine.

The authorities do, however, establish a number of general principles governing the application of the doctrine in today's conditions; principles which I have to apply in this case. Accordingly, it is to those general principles that I must first turn.

The two most recent decisions of the House of Lords to which I have been referred are *Esso* (in 1968) and *Schroeder* (in 1974). I was also referred to *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co. Pty Ltd [1975] AC 561* (' Amoco '), a decision of the Privy Council on the question of severance. The judgment of the Board, delivered by Lord Cross of Chelsea, contains *obiter dicta* on the relevance of the consideration paid for a restraint of trade. I shall refer to such dicta when I consider the question of consideration. Subject to that, the judgment in Amoco contains no discussion of the general principles governing the application of the doctrine.

In *Schroeder* Lord Reid (as noted above) expressly endorsed the principles set out in *Esso,* and Viscount Dilhorne and Lord Simon of Glaisdale expressly agreed with his speech (Lord Diplock expressing agreement with his analysis of the contract in question and with his conclusion that it was unenforceable, and Lord Kilbrandon expressing agreement with his conclusion). Thus, the House of Lords in *Schroeder* endorsed the principles set out in *Esso.* I therefore turn first to *Esso.*

I take *Esso* to be authority for the following general principles (page references being to the report of *Esso* unless otherwise stated).

A Public policy implications

A1 The 'rule of reason'

A1
A1.1 'The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason' (Lord Wilberforce p.331G), taking into account 'the wider aspects of commerce … as well as the narrower aspect of the contract as between the parties' (Lord Pearce p.330B): 'its application ought to depend less on legal niceties or theoretical possibilities than on the practical effect of a restraint in hampering that freedom which it is the policy of the law to protect' (Lord Reid p.298A–B).

A1.2 I take this to be an overriding principle, which underlies and is reflected in all the other statements of principle in *Esso.*

A2 Freedom of trade and freedom of contract

A2
A2.1 In applying the doctrine of restraint of trade, the courts recognise that there is also a public interest in freedom of contract (that is to say, in parties being free to enter into any lawful contract they wish).

*321

A2.2 As Lord Shaw put it in *Herbert Morris v Saxelby [1916] 1 AC 688* , 716 (quoted by Lord Morris of Borth y Gest in *Esso* at p. *306C–D*):

> In cases [of restraint of trade], as I have pointed out, there are two freedoms to be considered - one the freedom of trade and the other the freedom of contract: and to that I will now again venture to add that it is a mistake to think that public interest is only concerned with one; it is concerned with both.

A2.3 Thus, while in general 'the law recognises that there is freedom to enter into any contract that can lawfully be made … [and] that if business contracts are fairly made by parties who are on equal terms such parties should know their business best … [nevertheless] the law, in some circumstances, reserves a right to say that a contract is in restraint of trade and that to be enforceable it must pass a test of reasonableness' (Lord Morris of Borth y Gest p.304G–305C).

A2.4 Public policy will give priority to the principle which makes certain restraints of trade unenforceable where it is reasonably necessary to do so in order to ensure and preserve freedom of trade (Lord Morris of Borth y Gest p.305D).

A2.5 'The rule relating to restraint of trade is bound to be a compromise, as are all rules imposed for freedom's sake. The law fetters traders by a particular inability to limit their freedom of trade so that it may protect the general freedom of trade and the good of the community. And, since the rule must be a compromise, it is difficult to define its limits on any logical basis' (Lord Pearce p.324E).

B The application of the doctrine of restraint of trade

B1 The two-stage approach

B1

B1.1 The court's approach to the application of the doctrine of restraint of trade to a particular contract falls into two stages. The first stage is to determine whether the contract is one which attracts the doctrine of restraint of trade at all: for not every contract which is 'in restraint of trade' (using that expression 'in a broad popular sense' to mean 'any contract which limits the free exercise of trade or business' : per Lord Wilberforce at p.331D) will attract the doctrine. If it is concluded that the contract is one which attracts the doctrine - that is to say, if it is 'in restraint of trade' , using that expression this time 'as a term of art covering those contracts which are to be

regarded as offending a rule of public policy' (ibid.) - the second stage is to determine whether it satisfies the *Nordenfelt* test.

B1.2 In *Esso,* four of their Lordships accepted that not every contract which is (in ordinary parlance) in restraint of trade, will attract the doctrine. Thus:

— Lord Reid (p.294A–B), after quoting Lord Parker's dictum in A–G *of the Commonwealth of Australia v Adelaide Steamship Co. Ltd [1913] AC 781* (' *Adelaide* ') at p.784 to the effect that any contract which involves a derogation from an individual's right to trade freely is a contract in restraint of trade, said: ***322**

> But that cannot have been intended as a definition: all contracts in restraint of trade involve such a derogation but not all contracts involving such a derogation are contracts in restraint of trade.

(It follows from the nature of the 'derogation' to which he is referring - that is to say, a derogation from an individual's right to trade freely - that in that passage Lord Reid is using the expression 'restraint of trade' in the two different senses to which I referred above. The first time he uses the expression, he is using it in its ordinary popular sense. The second time he uses it, he is using it as a term of art to describe contracts which attract the doctrine of restraint of trade.)

— Lord Morris of Borth y Gest said (p.306D–G):

> The inquiry is raised as to what are the circumstances in which the doctrine applies. In particular in the present case the question arises whether it can be said that the solus agreements by their terms involve a restraint of trade. If they do, then it is contended by Esso that the doctrine or principle of restraint of trade never has application to a restraint which is imposed upon the trading use to be made of a particular piece of land.
>
> A review of the authorities shows that in some groups of cases there has been no assertion that the doctrine or principle of restraint of trade applies. It is said, therefore, that there are classes of cases in which the doctrine does not apply, and attempt is made to define those groups of cases in which alone the doctrine does apply. For my part, I doubt whether it is possible or desirable to record any very rigid classification of groups of cases. Nor do I think that any firm inference can be deduced

> from the circumstance that in respect of certain groups of cases no one has claimed that the doctrine applies or has sought to invoke it.

Later in his speech, Lord Morris of Borth y Gest referred to passages from the judgment of Diplock LJ (as he then was) in *Petrofina (Great Britain) Ltd v Martin [1966] Ch. 146* ,169 (' *Petrofina* ') to the same effect as the dictum of Lord Parker in *Adelaide* , and continued:

> These are helpful expositions, provided they are used rationally and not too literally. Thus, if A made a contract under which he willingly agreed to serve B on reasonable terms for a few years and to give his whole working time to B, it would be surprising indeed if it were sought to describe the contract as being in restraint of trade. In fact such a contract would very likely be for the advancement of trade. Yet counsel for Harper's did not shrink from the assertion that every contract of personal service is a contract in restraint of trade. I cannot think that either authority or logic requires acceptance of so extreme a view.

— Lord Pearce said (p.324F–325B):

> The court's right to interfere with contracts in restraint of trade (by withholding its enforcement, which is the ultimate sanction of contracts and to which the parties are normally entitled) has been put in very wide words. Those words, though adequate and appropriate to the particular cases in which they were uttered, were not directed towards an exact demarcation of the line where the court will have a right to investigate whether a bargain is reasonable and will decline to enforce it if it is not. ***323** The famous passages from the opinion of Lord Macnaghten in the *Nordenfelt* case *[1894] A.C. 535* , 574 and the opinion of Lord Parker of Waddington in the *Adelaide Steamship* case *[1913] A.C. 781* , 793 are not expressly limited in any way. Since any man who sells the whole, or even a substantial part, of his services, his output, his custom or his commercial loyalty to one party is thereby restraining himself from selling them to other persons, it might be argued that the court can investigate the reasonableness of any such contract and allow the contracting party to resile subsequently from any bargain which it considers an unreasonable restraint upon his liberty of trade with others.

> But so wide a power of potential investigation would allow to would-be recalcitrants a wide field of chicanery and delaying tactics in the courts. Where, then, should one draw the line?

— and, finally, Lord Wilberforce said (pp. 331B–333C):

> The doctrine of restraint of trade (a convenient, if imprecise, expression which I continue to use) is one which has throughout the history of its subject-matter been expressed with considerable generality, if not ambiguity. The best-known formulations, those of Lord Macnaghten in *Nordenfelt* … and of Lord Parker of Waddington in *Adelaide* … adapted and used by Diplock L.J. in the Court of Appeal in *Petrofina* …, speak generally of all restraints of trade without any attempt at a definition. Often we find the words 'restraint of trade' in a single passage used indifferently to denote, on the one hand, in a broad popular sense, any contract which limits the free exercise of trade or business, and, on the other hand, as a term of art covering those contracts which are to be regarded as offending a rule of public policy. Often, in reported cases, we find that instead of segregating two questions, (i) whether the contract is in restraint of trade, (ii) whether, if so, it is 'reasonable', the courts have fused the two by asking whether the contract is in 'undue restraint of trade' or by a compound finding that it is not satisfied that this contract is really in restraint of trade at all but, if it is, it is reasonable. A well-known text-book describes contracts in restraint of trade as those which 'unreasonably restrict' the rights of a person to carry on his trade or profession. There is no need to regret these tendencies: indeed, to do so, when consideration of this subject has passed through such notable minds from Lord Macclesfield onwards, would indicate a failure to understand its nature. The common law has often (if sometimes unconsciously) thrived on ambiguity and it would be mistaken, even if it were possible, to try to crystallise the rules of this, or any, aspect of public policy into neat propositions. The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason.
>
> The use of this expression justifies re-statement of its classic exposition by White C.J. in *Standard Oil Co. of New Jersey v United States (1910) 221 U.S. 1* . Speaking of the statutory words 'every contract in restraint of trade' (Sherman Act, 1890), admittedly taken from the common law,

almost contemporaneous with Lord Macnaghten's formula and just as wide, he said [p.63]:

…as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its **324* nature or effect causes it to be a restraint of trade within the intendment of the Act…

And he goes on to say that to hold to the contrary would involve either holding that the statute would be destructive of all right to contract or agree or combine in any respect whatsoever, or that, the 'light of reason' being excluded, enforcement of the statute was impossible because of its uncertainty. The right course was to leave it to be determined by the light of reason whether any particular act or contract was within the contemplation of the statute. One still finds much enlightenment in these words.

This does not mean that the question whether a given agreement is in restraint of trade, in either sense of these words, is nothing more than a question of fact to be individually decided in each case. It is not to be supposed, or encouraged, that a bare allegation that a contract limits a trader's freedom of action exposes a party suing on it to the burden of justification. There will always be certain general categories of contracts as to which it can be said, with some degree of certainty, that the 'doctrine' does or does not apply to them. Positively, there are likely to be certain sensitive areas as to which the law will require in every case the test of reasonableness to be passed: such an area has long been and still is that of contracts between employer and employee as regards the period after the employment has ceased. Negatively, and it is this that concerns us here, there will be types of contract as to which the law should be prepared to say with some confidence that they do not enter into the field of restraint of trade at all.

How, then, can such contracts be defined or at least identified?

…

Some … limitation upon the meaning in legal practice of 'restraints of trade' must surely have been present to the minds of Lord Macnaghten and Lord Parker. They cannot have meant to say that any contract which in whatever way restricts a man's liberty to trade was (either historically

> under the common law, or at the time of which they were speaking) prima facie unenforceable and must be shown to be reasonable. They must have been well aware that areas existed and always had existed, in which limitations of this liberty were not only defensible, but were not seriously open to the charge of restraining trade. Their language, they would surely have said, must be interpreted in relation to commercial practice and common sense.

B1.3 Only Lord Hodson took a different view. He concluded (p.320A–B) that there was no practical way of 'hedging about' the right of a party to attack a contract as being in restraint of trade.

B2 The first stage: 'Where, then, should one draw the line?' (Lord Pearce, p.325B)

B2
B2.1 Lord Reid, after observing that Lord Macnaghten in *Nordenfelt* had in mind only the two classes of case to be found in the early authorities (that is to say master and servant cases and cases where a purchaser of the goodwill of a business takes a covenant from the vendor not to comptete) said (p.295E): ***325**

> It is much too late now to say that this rather anomalous doctrine of restraint of trade can be confined to the two classes of case to which it was originally applied. But cases outside these two classes afford little guidance as to the circumstances in which it should be applied.

B2.2 Lord Morris of Borth y Gest, in a passage quoted above (para. B1.2), said (p.306F) that he doubted whether it was 'possible or desirable to record any very rigid classification of groups of cases' .

B2.3 Lord Pearce, having posed the question 'Where, then, should one draw the line?' , did not in terms answer it. He did, however, recognise a distinction between on the one hand a contract for the promotion of trade and on the other hand a contract in restraint of it. He went on (p. *327E–F*):

> Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered

> by the courts, and those contracts which merely regulate the normal commercial relations between the parties and are, therefore, free from [the] doctrine.

Later in his speech, he elaborated on this point when he said (p. *328D–F*):

> The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation. Sole agencies are a normal and necessary incident of commerce and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies. So, too, in the case of a film-star who may tie herself to a company in order to obtain from them the benefits of stardom (*Gaumont-British Picture Corporation Ltd v Alexander* [1936] 2 A.E.R. 1686). See, too, *Warner Brothers Pictures Incorporated v Nelson [1937] 1 K.B. 209* . And partners habitually fetter themselves to one another.
>
> When a contract only ties the parties during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises. So, too, if *during* the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade. In that case the rationale of *Young v Timmins 1 Cr. & J. 331* comes into play and the question whether it is reasonable arises.
>
> The difficult question in this case, as in the case of *Servais Bouchard 20 T.L.R. 574* , is whether a contract regulating commercial dealings between the parties has by its restraints exceeded the normal negative ties incidental

> to a positive commercial transaction and has thus brought itself within the sphere to which the doctrine of restraint applies.

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B2.4 Lord Wilberforce, having posed the question as to how contracts which attract the doctrine of restraint of trade can be defined or at least identified, continued (p.332G):

> No exhaustive test can be stated - probably no precise non-exhaustive test. But the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong prima force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time, or, regarding the matter from the point of view of trade, that the trade in question has assumed such a form that for its health or expansion it requires a degree of regulation. Absolute exemption for restriction or regulation is never obtained: circumstances, social or economic, may have altered, since they obtained acceptance, in such a way as to call for a fresh examination: there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category: but the court must be persuaded of this before it calls upon the relevant party to justify a contract of this kind.

He continued (p.333F):

> Any attempt to trace historically the development of the common law attitude towards 'restraints' of different kinds would be out of place here, and generalisations as to it are hazardous. But a few examples of comparatively modern origin show how some such rule of action, however imperfectly I have expressed it in words, has been operated. In some cases the process can be seen whereby a type of contract, initially regarded with

> suspicion, has later come to be accepted as not, or no longer, calling for justification.

Lord Wilberforce then goes on to give, as examples, the brewery cases (tied houses), covenants in leases or conveyances of land restricting trade, non-competition covenants taken on the sale of a business (one of the original categories of restraint of trade cases referred to by Lord Reid), exclusivity contracts and contracts of sole agency which have become 'part of the accepted pattern or structure of a trade' - on the footing that such contracts are to be taken as 'encouraging or strengthening trade, rather than limiting trade' (p.336B) - and, possibly (p.336F):

> … certain contracts of employment, with restrictions appropriate to their character, against undertaking other work during their currency …

Lord Wilberforce concluded (so far as this point is concerned)(p.336G):

> These illustrations are sufficient to show that the courts are not lacking in tools which enable them to select from the whole range of those contracts, which in one way or another limit freedom in trading, segments of current and recognisably normal contracts which are not currently ***327** liable to be subjected to the necessity of justification by reasonableness. Such contracts may even be listed, provisionally, in categories (see Gare, *The Law Relating to Covenants in Restraint of Trade* (1935); Cheshire & Fifoot, *Law of Contract,* 6th ed. (1964), pp.324, 329 et seq.) but the classification must remain fluid and the categories can never be closed.

B2.5 Fluidity of classification thus being one of the hallmarks of the doctrine of restraint of trade in this respect, it is not entirely easy to discern what yardstick or test is to be applied in (to adapt Lord Wilberforce's words) selecting from the whole range of contracts which are, in ordinary parlance, in restraint of trade those contracts which are 'currently liable to be subjected to the necessity of justification by reasonableness' . On the other hand, it is significant, in my judgment, that Lord Reid, Lord Morris of Borth y Gest, Lord Pearce and Lord Wilberforce all approach the question

'Where is the line to be drawn?' by considering which contracts (being contracts in restraint of trade in ordinary parlance) do *not* attract the doctrine of restraint of trade, rather than by considering which of such contracts *do* attract the doctrine.

B2.6 That being so, it follows, in my judgment, that the right approach for the court, once it is satisfied that the contract before it is a contract which is (in ordinary parlance) in restraint of trade, is to consider whether in all the circumstances sufficient grounds exist for *excluding* that contract from the application of the doctrine: as Lord Wilberforce put it, 'to dispense [the contract] from the necessity of justification' (p.332G). If no sufficient grounds exist, the contract attracts the doctrine.

B2.7 As to what constitutes sufficient grounds for this purpose, this raises once again the question where the line is to be drawn between those contracts in restraint of trade (giving that expression its ordinary meaning) which attract the doctrine and those which do not. Lord Reid said (p.298G):

> I would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade.

And, as noted above, Lord Morris of Borth y Gest said (p.306F):

> For my part, I doubt whether it is possible or desirable to record any very rigid classification of groups of cases.

B2.8 Accordingly, on the authority of *Esso* it would be a wrong approach in this case to attempt answer the question whether the 1988 Agreement is a contract which attracts the doctrine, so that its terms require to be justified under the *Nordenfelt* test, by reference to any kind of formula applicable in all cases. Yet this appears to me to be no more than a reflection of the fact the doctrine itself is not of its nature susceptible of that degree of analysis. *Esso* establishes that the doctrine is not to be applied in a mechanistic or formalistic way. Such an approach would, as it seems to me, be the antithesis of the approach required by the 'rule of reason' .

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B3 The second stage: justification

B3
B3.1 The test to be applied, once it has been determined that the contract is one which attracts the doctrine of restraint of trade, is the *Nordenfelt* test.

B3.2 Lord Reid (p.299F) and Lord Wilberforce (p.330G) expressly endorsed the *Nordenfelt* test. Lord Reid said (p.299F):

> It is now generally accepted that a provision in a contract which is to be regarded as in restraint of trade must be justified if it is to be enforceable, and that the law on this matter was correctly stated by Lord Macnaghten in the *Nordenfelt* case.

Lord Reid then quoted the passage from Lord Macnaghten's speech in which the test is propounded, and continued (p.300A):

> So in every case it is necessary to consider first whether the restraint went farther than to afford adequate protection to the party in whose favour it was granted, secondly whether it can be justified as being in the interests of the party restrained, and, thirdly, whether it must be held contrary to the public interest.

Taking the passage in context, when Lord Reid said 'in every case' , he plainly meant every case where the contract attracts the doctrine of restraint of trade.

B3.3 See also Lord Morris of Borth y Gest at p.311G, Lord Hodson at p.319G, Lord Pearce at p.322A and Lord Wilberforce at p.337A–B.

B4 The application of the Nordenfelt test

B4
B4.1 There are two limbs to the *Nordenfelt* test: reasonableness as between the parties and reasonableness in the public interest. The onus of establishing that the contract is reasonable as between the parties is on the proponent of the contract, while the onus of establishing that, although

reasonable as between the parties, it is nevertheless contrary to public policy lies on the party challenging the contract (see Lord Hodson p.319D–E, citing *Herbert Morris Ltd v Saxelby [1916] 1 AC 688* , at 700 and 707–8).

B4.2 Both limbs, however, rest on public policy. Thus, Lord Wilberforce, after noting that *Esso* had been fought exclusively on the first limb, said (p.340E–341E):

> The first limb itself rests on considerations of public policy: it must do so in order to justify releasing the parties from obligations they have voluntarily accepted. But in relation to many agreements containing restrictions, there may well be wider issues affecting the interests of the public than those which relate merely to the interests of the parties; these may have been the subject of inquiry as in this case under statutory powers (Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948) or the subject of a finding by another court (Restrictive Trade Practices Act, 1956) or may be investigated by the court itself. In the present case no separate considerations in this wider field have emerged which are inconsistent with the validity of the Mustow Green solus agreement - on the contrary such as have appeared tend to support it, but I venture to think it important that the vitality of the second limb, or as I would ***329*** prefer to put it of the wider aspects of a single public policy rule, should continue to be recognised.

Lord Pearce made the same point when he said (p.324D):

> There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable?

B4.3 I take the second limb first. As was the case in *Esso,* the instant case has been fought exclusively on the first limb of the *Nordenfelt* test. No such wider aspects of public policy as Lord Wilberforce referred to have been pleaded or otherwise relied upon in the instant case. It is accordingly unnecessary for present purposes to give any further consideration to the second limb.

B4.4 I turn now to the first limb. By its very nature, the application of the first limb of the *Nordenfelt* test must depend on the particular facts and circumstances of each case. However, certain general guidelines are, in my judgment, to be derived from *Esso* in relation to its application which are of relevance in the context of the arguments in the instant case. Thus:

B4.5 *The relevance of the consideration for the restraint*

B4.5.1 Lord Reid (p.300B–C), Lord Hodson (p.318E–F) and Lord Pearce (p.323E) all expressly accepted that the consideration for the restraint was relevant to the question of the reasonableness of the restraint (that is to say the reasonableness of the restraint as between the parties, under the first limb of the *Nordenfelt* test - there being, as Lord Wilberforce observed in the passage quoted above, no issue raised under the second limb). In relation to consideration, Lord Pearce said this (p.323F):

> [The courts] must also have regard to the consideration. It is clear that the question of the consideration weighed with Lord Macnaghten in the *Nordenfelt* case. And although the court may not be able to weigh the details of the advantages and disadvantages with great nicety it must appreciate the consideration at least in its more general aspects. Without such guidance they cannot hope to arrive at a sensible and up-to-date conclusion on what is reasonable.

B4.5.2 In *Amoco,* Lord Cross of Chelsea (delivering the judgment of the Privy Council) said *obiter* (*ibid.* p.579G):

> The fact that a covenantor has obtained and will continue to enjoy benefits under the relevant agreement which formed part of the consideration for the covenant which he claims to be unenforceable is no doubt pro tanto a reason for holding that the covenant is not in unreasonable restraint of trade.

B4.5.3 In argument in the instant case, Mr Cran submitted that a party cannot buy a restraint: that is to say, a restraint cannot (he submitted) be justified by reference to the amount which the party benefitting from it pays for it. ***330*** By way of example, Mr Cran pointed to the authorities

which establish that a bare covenant against competition is unenforceable. Mr Cran submitted that consideration was relevant only to the extent that an inadequate consideration would weigh in the balance in favour of the restraint being unenforceable: in other words, that it could operate only as a negative factor, tending to negative justification.

B4.5.4 In my judgment, however, that submission is not in accordance with the authorities. As I read the passages in *Esso* referred to above, in applying the first limb of the *Nordenfelt* test the size of the consideration may be a positive factor tending to justify the restraint. If the consideration for the restraint is so substantial that by any objective standard it is in the interests of the party receiving the consideration to subject himself to the restraint, then that must in my judgment be a factor pointing in the direction of justification. Without bringing that factor into account the courts could not, in my judgment (and paraphrasing Lord Pearce), hope to arrive at a sensible and up-to-date conclusion on what is reasonable as between the parties, for the purposes of the first limb of the *Nordenfelt* test. The dictum in *Amoco* supports this conclusion.

B4.5.5 On the other hand, it is undoubtedly the case that there are some types of restraint which will be unenforceable no matter how large the consideration for them. As Mr Cran said, one example of such a restraint is a bare covenant against competition. As I read the authorities, however, that is a restraint which is unenforceable not under the first but under the second limb of the *Nordenfelt* test, in that however much it may be in the interests of the party restrained to accept the restraint, it is nevertheless contrary to the wider public interest that he should be bound by it. Thus, in *McEllistrim v Ballymacelligott Co-op. etc Dairy Society Ltd [1919] AC 548* (' *McEllistrim* ') at p.564 Lord Birkenhead LC said:

> And it has been laid down by your Lordships over and over again that in this class of case the covenantee is not entitled to be protected against competition *per se* .

See also *Vancouver Malt and Sake Brewing Co. v Vancouver Breweries Ltd [1934] AC 181* , 190.

B4.6 *Inequality of bargaining power*

B4.6.1 Since inequality of bargaining power features prominently in the Statement of Claim in the instant case, it is desirable to establish what relevance inequality of bargaining power (if established as a fact) can have in the context of the application of the first limb of the *Nordenfelt* test.

B4.6.2 There are a number of express references in *Esso* to the relative bargaining power of the parties. Thus, at p.300C–G Lord Reid said:

> Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself. But there may well be cases where, although the party to be restrained has deliberately accepted the main terms of the contract, he has been at a disadvantage as regards other terms: for example where a set of conditions has been incorporated ***331*** which has not been the subject of negotiation - there the court may have greater freedom to hold them unreasonable.
>
> I think that in some cases where the court has held that a restraint was not in the interests of the parties it would have been more correct to hold that the restraint was against the public interest… [I]n cases where a party, who is in no way at a disadvantage in bargaining, chooses to take a calculated risk, I see no reason why the court should say that he has acted against his own interests: but it can say that the restraint might well produce a situation which would be contrary to the public interest.

Similarly Lord Morris of Borth y Gest at p.305B:

> The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best. If there has been no irregularity, the law does not mend or amend contracts merely for the relief of those for whom things have not turned out well. But when all this is fully recognised yet the law, in some circumstances, reserves a right to say that a contract is in restraint of trade and that to be enforceable it must pass a test of reasonableness.

Similarly also Lord Pearce, at p.323A–324B:

> It is important that the court, in weighing the question of reasonableness, should give full weight to commercial practices and to the generality of contracts made freely by parties bargaining on equal terms. Undue interference, though imposed on the ground of promoting freedom of trade, may in the result hamper and restrict the honest trader and, on a wider view, injure trade more than it helps it. If a man wishes to tie himself for his own good commercial reasons to a particular supplier or customer it may be no kindness to him to subject his contract to the arbitrary rule that the courts will always reserve to him a right to go back on his bargain if the court thinks fit. For such a reservation prevents the honest man from getting full value for the tie which he intends, in spite of any reservation imposed by the courts, to honour. And it may enable a less honest man to keep the fruits of a bargain from which he afterwards resiles. It may be in this respect similar to imposing on a trader the fetters of infancy; and many an upstanding infant who wishes to trade or buy a house or motorcar has found difficulty and frustration in the rule which the court has imposed for his protection. Where there are no circumstances of oppression, the court should tread warily in substituting its own views for those of current commerce generally and the contracting parties in particular. For that reason, I consider that the courts require on such a matter full guidance from evidence of all the surrounding circumstances and of relevant commercial practice.
>
> …
>
> The onus is on the party asserting the contract to show the reasonableness of the restraint… When the court sees its way clearly, no question of onus arises. In a doubtful case where the court does *not* see its way clearly and the question of onus does arise, there may be a danger in preferring the guidance of a general rule, founded on grounds of public policy many generations ago, to the guidance given by free and competent parties contracting at arm's length in the management of their own affairs. Therefore, when free and competent parties agree and the ***332** background provides some commercial justification on both sides for their bargain, and there is no injury to the community, I think that the onus should be easily discharged.

B4.6.3 Lord Wilberforce touched indirectly on the question of bargaining power when he referred at p.333A–B (in the passage quoted in paragraph B2.4 above) to 'contracts … moulded under

the pressures of negotiation, competition and public opinion' as being susceptible of (provisional) exemption from the application of the doctrine. And in the same context, when considering the terms of one of the agreements in issue in *Esso* he said (p.337G):

> Finally the agreement is not of a character which, by the pressure of negotiation and competition, has passed into acceptance or into a balance of interest between the parties or between the parties and their customers; the solus system is both too recent and too variable for this to be said.

B4.6.4 As I understand these references, they establish that while the Court is in general slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves in electing to enter into the contract, that consideration will carry less weight, and may (depending on the particular facts) carry no weight at all, where the evidence establishes that the contracting parties were negotiating on other than equal terms.

B4.6.5 Later in his speech, when considering the particular contracts in issue in *Esso,* Lord Morris of Borth y Gest said (p.313D–E):

> From a business point of view Harper's were not being unwise in entering into a solus agreement of only a few years' duration: but, whether they were or not, they freely entered into it and it was their decision to repose a measure of confidence in Esso.

(See also Lord Reid's reference (p.303C) to the covenantor choosing to rely on the commercial probity and good sense of the covenantee.)

B4.6.6 Thus, inequality of bargaining power may (depending on the facts of the particular case) be relevant to negative an argument to the effect that the covenantor cannot complain that the terms of the contract are capable of being worked unreasonably against him, since in entering into the contract he chose to repose a measure of confidence in the covenantee.

B4.6.7 Apart from those two specific instances, there is nothing in *Esso* to suggest that inequality of bargaining power is, of itself, relevant to the application of the doctrine of restraint of trade. However, as Lord Diplock said in *Macaulay* (p.1316G–H):

> The fact that the appellants' bargaining power vis-à-vis the respondent was strong enough to enable them to adopt this take-it-or-leave-it attitude raises no presumption that they used it to drive an unconscionable bargain with him, but in the field of restraint of trade it calls for vigilance on the part of the court to see that they did not.

(For the reasons given above, Lord Diplock must, in my judgment, be taken to be using the word 'unconscionable' as meaning objectively unreasonable, in accordance with the *Nordenfelt* test.)

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B4.7 *Standard forms of contract*

B4.7.1 In *Schroeder,* Lord Diplock distinguished between two different types of standard form of contract, as follows (p.1316C–G):

> Standard forms of contract are of two kinds. The first, of very ancient origin, are those which set out the terms upon which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.
>
> The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been

> dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'

B4.7.2 As to the first kind of standard form of contract described by Lord Diplock, I take him to be referring generally to the those contracts which, in the words of Lord Wilberforce (*Esso* p.333A), 'may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations' . Lord Diplock's observation (*Schroeder* p.1316D–E) that

> [i]f fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable

is on all fours with Lord Wilberforce's observation (*Esso* p.333C–D) that

> …there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category: but the court must be persuaded of this before it calls upon the relevant party to justify a contract of this kind.

B4.7.3 In referring to the second kind of standard form of contract (where a standard form is adopted on a take-it-or-leave-it basis, not because it falls within Lord Wilberforce's 'accepted category' but because the other party ***334** effectively has no choice), Lord Diplock is moving to the other extreme by pointing out that the fact that a contract is in standard form will not of itself suffice to bring the contract within his first category, so that its terms are presumed to be reasonable: indeed that it may, depending on the circumstances, be an indicator (albeit not a presumption) in the opposite direction.

B4.7.4 There are two other types of contract falling between the two extremes described by Lord Diplock, which are perhaps not correctly called standard forms of contract but the existence of which requires to be recognised in the instant case.

B4.7.5 In the first place, I have in mind a contract which is based on a standard form, or which contains a number of standard form clauses, but which is nevertheless open to some degree of negotiation. This kind of contract will typically be found where a large commercial organisation entering into a great number of transactions of a similar kind in the course of its business has, in the interests of uniformity and efficiency, adopted a particular form of contract, or particular forms of clauses for inclusion in its contracts. In such circumstances, there may come a point in the negotiations at which the organisation will say 'Take it or leave it' , on the basis that it is not prepared to agree to any further departure from its standard form of contract or from its standard form clauses. But such a contract does not fall within Lord Diplock's second category. After all, in any negotiation there may come a point when the party offering the contract will say: 'I'm not prepared to go any further to meet your requirements: take it or leave it' . Indeed, it could be said that one of the aims of negotiation is to ensure that the other party reaches that position.

B4.7.6 Similarly, a commercial organisation may choose to adopt a particular structure for its contracts, while being prepared to negotiate detailed terms within that structure. To take an example from the record industry, a record company may be willing to negotiate royalty rates with an artist, on the basis that the agreement is to provide for royalties rather than a share or profit; but it may not be willing to offer the artist any kind of profit-sharing arrangement.

B4.8 *Post-contractual restraints*

B4.8.1 A distinction is drawn in *Esso* between restraints which operate during the continuance of a contract, and restraints which operate after the contract has come to an end.

B4.8.2 Thus, Lord Pearce said (p.328F):

> The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation…
>
> When a contract only ties the parties during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no ***335*** restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of

> either party after its determination, it is a restraint of trade, and the question of reasonableness arises. So, too, if *during* the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade. In that case the rationale of *Young v Timmins 1 Cr. & J. 331* comes into play and the question whether it is reasonable arises.
>
> The difficult question in this case … is whether a contract regulating commercial dealings between the parties has by its restraints exceeded the normal negative ties incidental to a positive commercial transaction and has thus brought itself within the sphere to which the doctrine of restraint applies.

See also Lord Wilberforce at p. *332E–F.*

B4.8.3 So while the mere fact that the operation of a restraint is limited to the period of the contract may not suffice to justify the restraint, it is, as I understand the position, a factor to be brought into account on the side of justification (the weight to be attached to that factor depending, of course, on the facts and circumstances of the particular case).

B4.9 *Surrounding circumstances*

B4.9.1 In *Esso* Lord Hodson said (p. *319D–F*):

> It has been authoritatively said that the onus of establishing that an agreement is reasonable as between the parties is upon the person who puts forward the agreement, while the onus of establishing that it is contrary to the public interest, being reasonable between the parties, is on the person so alleging: see *Herbert Morris Ltd v Saxelby [1916] 1 A.C. 688* , *per* Lord Atkinson [p.700] and Lord Parker [pp.707–708]. The reason for the distinction may be obscure, but it will seldom arise since once the agreement is before the court it is open to the scrutiny of the court *in all its surrounding circumstances* as a question of law.' (My emphasis.)

See also Lord Pearce at p.323E.

B4.9.2 As I see it, to recognise the existence of limits on the court's ability to inquire into and to take account of the background against which the contract was made and the circumstances in which it was negotiated would be to deny the 'rule of reason' referred to by Lord Wilberforce. What weight (if any) is to be attached to any particular factor or circumstances will of course depend on the facts of each particular case, but a blinkered approach would to my mind be entirely inconsistent with the approach required by the 'rule of reason' .

B4.9.3 Nor is the scope of the investigation to be limited to the factual background. In my judgment, the contractual background (if any) must also be relevant. Thus, in *Alec Lobb* Dillon LJ expressly took account of the fact that the garage owner was already subject to a pre-existing tie under a previous contract with the petrol company, and in measuring the extent of the restraint imposed by the new contract he brought that factor into account. Thus, at *[1985] 1 WLR 180C* – D he said: ***336**

> In the circumstances of this case, and not least because at the time of the grant of the lease and lease-back the company was subject to a valid tie for a term of three to four years, I can see no real significance in the difference between a tie for five years and the term of seven years to the first break under the lease-back.

B4.9.4 Also, Dunn LJ in *Alec Lobb* (*ibid.* p.186A–B) lists among the factors relied on by the petrol company the fact that the garage company was already bound to buy its petrol from the petrol company for a number of years. Plainly, Dunn LJ must have taken that factor into account in finding that the restraint was reasonable.

B4.10 *The plaintiff's motives in challenging the contract*

The motives of the plaintiff in alleging that the contract is unenforceable are not material to the question whether the terms of the contract are reasonable as between the parties, for the purposes of the *Nordenfelt* test. As Lord Reid put it in *Schroeder* (*ibid.* p.1309H):

> It is not disputed that the validity of the agreement must be determined as at the date when it was signed and it is therefore unnecessary to deal with the reasons why the respondent now wishes to be freed from it.

Mr Michael's Pleaded Case on Restraint of Trade

As it stood at the commencement of the hearing, the Statement of Claim, after pleading (in paragraphs 4 to 16) the contractual history, including the 1984 Agreement, pleaded (in paragraph 17) that in the negotiation of the 1988 Agreement there was

> a substantial imbalance in the parties' respective bargaining positions in favour of Sony Music, by reason of the fact that Sony Music retained at the material time the benefit of its contractual options [under the 1984 Agreement].

Consistently with that pleading, Mr Cran opened the case on the footing that in the negotiation of both the 1988 Agreement and the 1984 Agreement Mr Michael was 'a supplicant' by reason of pre-existing contractual constraints - the constraints in relation to the negotiation of the 1988 Agreement being the provisions of the 1984 Agreement, and the constraints in relation to the negotiation of the 1984 Agreement being the provisions of the Inner Vision Agreement. Thus Mr Cran said:

> It matters not at all that Mr Michael was ably represented by his solicitors and an American lawyer experienced in this field if one is in the position, as one is in all these cases, of the record company or the employer saying: 'These are the terms which I want and I will negotiate where I wish to negotiate, but your position is that you are still bound by the contract'. And that is the position we have in this case… in relation to the renegotiations in 1984, and again in 1988 and again in 1990. One is in the position throughout of a supplicant. The fact that one has a vigorous and experienced

> negotiator [negotiating] on one's behalf does not change one's position as a supplicant… The origin of Sony's superior bargaining position goes right back to the time when Inner Vision get a ten album deal in 1982.

Similarly Mr Cran said: ***337**

> … we will ask your Lordship to find in due course that there is a very great deal of room for improvement in the terms of this agreement … but in a renegotiation position, where the agreement is already binding, the artist is constantly in the position of a supplicant.

In putting the case that way, Mr Cran was of necessity accepting that the 1984 Agreement was an enforceable agreement; otherwise there would, by definition, have been no pre-existing contractual constraints on Mr Michael when it came to negotiating the 1988 Agreement. Indeed, he appeared expressly to recognise this when he said:

> We do not see how it can be relevant for your Lordship to inquire into the reasonableness of [the 1984 Agreement]. All that one needs to know is that the agreement was enforceable and was in force at that time.

However, after further discussion Mr Cran took time to consider the point. This led in due course to his applying for leave (which I granted without objection from Mr Pollock) to amend the Statement of Claim to make clear that Mr Michael put forward no positive case at all as to the enforceability or otherwise of the 1984 Agreement. Thus, a new paragraph 16A now pleads in terms that Mr Michael does not admit that the 1984 Agreement was enforceable, and a new paragraph 17D reads as follows:

> For the avoidance of doubt, the Plaintiffs make no positive case that either the Inner Vision Agreement or [the 1984 Agreement] were unenforceable

> as being in restraint of trade, since it is contended that it is not relevant to the issues in this action that that question be determined.

In addition to clarifying that aspect of Mr Michael's case, however, the amendments in effect replead the contractual history in support of a contention (in new paragraph 17B) that, whether or not Mr Michael's obligations under the Inner Vision Agreement or the 1984 Agreement were enforceable obligations, Mr Michael:

> …was not free of assumed or asserted contractual obligations, which at all material times it was in the power of Sony Music to release, when the [1984 Agreement] and the [1988 Agreement] were negotiated and concluded. Accordingly, the negotiation of those agreements was undertaken in circumstances of unequal bargaining power.

As I understand that paragraph, Mr Michael's (amended) case in relation to inequality of bargaining power is that there was inequality of bargaining power because at all material times he assumed (*rightly or wrongly*) that he was bound by the 1984 Agreement: that is to say, there was inequality of bargaining power because he believed that there was inequality of bargaining power.

Finally, so far as inequality of bargaining power is concerned, it is pleaded by amendment (paragraph 17C) that:

> [e]xcept for the amount of advances against royalties which they offer to new recording artists in order to induce them to enter into recording agreements, it is not (and was not at any material time) the practice of the major recording companies substantially to compete with one another in the terms of their standard recording agreements, or in their royalty rates, or in their requirement for at least 6 albums. By reason of this lack of competition, the Plaintiffs were further in a situation of unequal bargaining power in the negotiation of both the [1984 Agreement] and the [1988 Agreement]. For the avoidance of doubt, the Plaintiffs make no positive case that the lack of competition aforesaid is the product of ***338** any

> formal or informal agreement between the major recording companies to that end.

So, following the amendments, Mr Michael's case in relation to the contractual history leading to the 1988 Agreement is that the contractual history supports the allegation of inequality of bargaining power not because the earlier agreements were enforceable (as to which no positive case is made) but because - and this is in any event common ground - in the negotiations leading to the 1988 Agreement Mr Michael proceeded on the basis that the 1984 Agreement was enforceable, whether it was in truth enforceable or not. And the allegation of inequality of bargaining power is sought to be further supported by the allegation of lack of competition between major record companies.

Paragraph 18 of the Statement of Claim is an extensive paragraph which addresses the terms of the 1988 Agreement and makes a large number of detailed allegations in respect of particular clauses in the 1988 Agreement, all of which allegations I shall consider below. For present purposes (and save in one respect) it is enough that I list the headings under which the various allegations are made, so as to indicate in general terms the nature of Mr Michael's case in relation to the terms of the 1988 Agreement. The headings are:

(A) Duration.

(B) Ownership of the Master Recordings and of copyright therein.

(C) The lack of any obligation on Sony Music to exploit the Master Recordings.

(D) Remuneration receivable by the Service Companies.

(E) The Assignability of Sony Music's Rights.

(F) Sony Music's Control over the Artist and the Service Companies.

The one specific allegation made in paragraph 18 to which I should refer at this stage, since it gave rise to a need for expert accountancy evidence on each side, is the allegation in paragraph 18(xiv) that:

> The royalty payments due to the Service Companies under the terms of the [1988 Agreement] result in a seriously inequitable apportionment of the

> proceeds of the exploitation of the Master Recordings in favour of the Sony Music Group.

Not surprisingly, the plaintiffs were asked for Further and Better Particulars as to (among other things) what they meant by 'proceeds' , and what they would consider to be an equitable apportionment of such proceeds. The plaintiffs duly gave particulars to the effect that by 'proceeds' was meant gross receipts less direct costs (but not bringing into account overheads or other indirect costs) and that:

> [a]n equitable apportionment would be one in which the respective receipts of the Plaintiffs and the Sony Music Group, after deduction of [direct costs], are approximately equal.

I shall refer to this allegation hereafter as 'the equitable apportionment allegation' .

Paragraph 19 of the Statement of Claim pleads that 'in the premises' the 1988 Agreement is in restraint of trade and unenforceable in so far as it remains unperformed; and paragraphs 20 and 21 make similar allegations in relation to the inducement letters.

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The Application of the Doctrine of Restraint of Trade in this Case

The first stage: does the 1988 Agreement attract the doctrine?

Mr Cran's submissions

It is part of Mr Michael's pleaded case that the circumstances in which the Inner Vision Agreement and the 1984 Agreement were made are relevant in assessing the reasonableness of the restrictions contained in the 1988 Agreement: that is to say, at stage two of the two-stage approach to the application of the doctrine of restraint of trade. At this first stage, however, Mr Cran's submissions are based on the nature and terms of the 1988 Agreement, without reference to the prior history.

Mr Cran submits that the 1988 Agreement is in the nature of an exclusive supply agreement, under which Mr Michael has contracted to supply to Sony Music his entire output of Master Recordings (and Mr Cran draws attention to the width of the definition of that expression in clause

15.01) during the continuance of the agreement; an obligation which is not limited to those Master Recordings which constitute the 'Minimum Delivery Commitment' under clause 4.01. He stresses the unique nature of the recordings, the need for mutual confidence between artist and record company, and the fact that for effective exploitation, input is required from both artist and record company. He points out that the 1988 Agreement cannot be compared with an agreement for the sale of goods at a fixed price, since the artist is dependent for remuneration on proper and effective exploitation of his recordings by the record company.

As to the duration of the 1988 Agreement, Mr Cran submits that its likely duration would be longer than 15 years, despite the contractual time limit of 15 years contained in clause 15.14. He points to what he characterises as a lack of reciprocity as between Sony Music's right (in effect) to terminate the agreement at the end of each contract period on the one hand, and the lack of any comparable right for Mr Michael on the other. He submits that the assignment of the copyright in the Master Recordings for the full term of the copyright (being 50 years from first release) will give Sony Music a hold over Mr Michael after the 1988 Agreement has come to an end.

As to the restrictive features of the 1988 Agreement, Mr Cran lists principally Mr Michael's inability to supply any third party with Master Recordings during the continuance of the agreement; the control given to the record company by clause 5.01 of the 1988 Agreement (this submission involves a contention as to the true construction of clause 5.01 which I shall consider later); and the restrictive nature of clauses 5.02, 8.01 and 12.02 (the submission in relation to clause 8.01 involving a contention as to the intended form of that clause, which I shall also consider later).

Further features of the 1988 Agreement which Mr Cran characterises as oppressive include: the limited nature of Sony Music's obligations in relation to the release of albums forming part of the Minimum Delivery Commitment; the lack ***340** of any obligations on Sony Music to release an album which does not form part of the Minimum Delivery Commitment in any of the major territories; the lack of any release obligations in relation to other recordings. Mr Cran compares these features with the positive obligation on Mr Michael to deliver the Minimum Delivery Commitment (8 albums) to Sony Music.

The above summary of Mr Cran's submissions on the first stage of the two-stage approach is not intended to be exhaustive.

Mr Pollock's submissions

Mr Pollock submits that one has to start with what he describes as the unchallenged validity of the 1984 Agreement. The 1984 Agreement, he says, constituted the inception of the legal contractual relationship between Mr Michael and Sony Music (then CBS (UK)), and it controlled everything that followed. But for the coincidence that in 1987 Mr Michael desired to substitute new service companies, he says, there need have been no new contract in 1988; there could instead have been the kind of variation agreement which was entered into in July 1990. Mr Pollock submits that the 1988 Agreement served no purpose save as a convenient formal substitute for an existing

contract, and that the 1988 Agreement must be treated as the continuation of an already established relationship.

Turning, against that background, to the first stage of the two-stage approach for the application of the doctrine of restraint of trade, Mr Pollock submits that there needs to be some feature in the context within which the 1984 Agreement was made, or some peculiar characteristic of the 1984 Agreement itself, which attracts the operation of the doctrine and triggers the requirement of justification.

As regards the context in which the 1984 Agreement was made, Mr Pollock submits that there were no features in the manner in which the 1984 Agreement was made which could attract the doctrine: there was no oppression, no misuse of bargaining power, and no compulsion on Mr Michael to enter into any contract with Sony/CBS. On the contrary, says Mr Pollock, the impetus for the 1984 Agreement came from Mr Michael, who was not only willing but 'perfectly happy' to enter into a contract with CBS/Sony. The negotiations were genuine negotiations with concessions being made on each side, and in which Mr Michael was advised and represented by a leading lawyer and negotiator.

As regards the 1984 Agreement itself, Mr Pollock submits that it fell squarely within the parameters of the type of contract which was usual in the business; that there was nothing unconscionable about it; and that the enforcement of its terms would not cause hardship to Mr Michael or prevent his creative output from being released to the public.

As a separate argument, Mr Pollock submits that as a matter of public policy it is not open to Mr Michael to plead that the 1988 Agreement is in restraint of trade, given that the 1984 Agreement was itself entered into as part of the arrangements for the compromise of the Inner Vision Action, in which Mr Michael was alleging that his existing agreement (the Inner Vision Agreement) was in restraint of trade. I will consider this argument (which I shall call 'the public policy argument'), and Mr Cran's response to it, separately below.

As in the case of Mr Cran's submissions, the above summary of Mr Pollock's submissions is not intended to be exhaustive.

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Conclusions (leaving aside the public policy argument)

I agree with Mr Pollock that it would be wholly unrealistic to treat the 1988 Agreement as if it were a new agreement, ignoring the fact that it was a renegotiation of a pre-existing agreement. I regard it as *nihil ad rem* that the documentation was drafted in such a way that the 1984 Agreement came to an end on the making of the 1988 Agreement, and was replaced by the 1988 Agreement. To treat that as a factor of any weight in this context would be to allow form to triumph over substance. I cannot think that the application of the doctrine of restraint of trade requires the Court to proceed on so artificial and unreal a basis.

I further agree with him that in the absence of any allegation that the 1984 Agreement is unenforceable - and Mr Cran has expressly eschewed such an allegation - I must regard it as enforceable.

On principle it would seem to me that, faced with an agreement which was intended by the parties to be binding, the validity and enforceability of which has not been subsequently challenged, and which is not of such a nature that the Court might on its own initiative decide not to recognise or to enforce it, the Court has no choice but to proceed on the basis that the agreement is binding and enforceable - as the parties themselves did in this case when they renegotiated its terms in 1988 and again in 1990.

In any event, the authorities establish that this is the approach which I must adopt. Thus, in *Petrofina,* Diplock LJ said (p. 180B):

> The point that a contract is unenforceable as being in restraint of trade is not one that the court is entitled to take proprio motu unless it is raised on the pleadings: see *North Western Salt Co v Electrolytic [1914] AC 461* .

In the *N.W.Salt Case* itself (at pp.476/7), Lord Moulton said this:

> Lurking beneath the argument for the defendants was the idea that the public good is a matter of such supreme importance that Courts should not require proof in due form and in accordance with the recognized requirements of our legal procedure of any charge of illegality or offence against the rules of public policy. But our judicial procedure is based on the principle that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the Court, and it would indeed be strange to hold that this wholesome rule should be relaxed when he is charged with something so grave as acting against the common weal. Such a proposition partakes of the absurdity of the rule in criminal proceedings that prevailed in England centuries ago, namely, that, because felony was so very wicked, persons accused of it should not be allowed the assistance of counsel. Happily, we have shaken ourselves free from all such notions…
>
> One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders

> an agreement illegal on grounds which nothing could cure. In such a case the Court would act upon it. But this is no exception to the general rule. Amendments of the pleadings and permission given to the plaintiff to call evidence would *ex hypothesi* be useless in such a case, because the fact is conclusive of the illegality. But no such case is before us here. It is evident that had the issue been raised on the pleadings, it would have entitled the plaintiffs to call further evidence of various kinds, and such evidence might have negatived any inference that the parties were concerned in creating of supporting a hurtful combination in restraint of trade.

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But does the mere fact that I have to regard the 1984 Agreement as an enforceable agreement mean that its renegotiated version, the 1988 Agreement, is (to adapt Lord Wilberforce's words in *Esso*) dispensed from the necessity of justification under the doctrine of restraint of trade? In my judgment, the answer is No. A renegotiation of an existing contract may produce a set of obligations which so far exceed, or which are so different in nature from, the obligations imposed under the original contract that it would make no sense to conclude that because the original contract was enforceable *ergo* the renegotiated version does not require to be justified under the doctrine of restraint of trade. In the instant case, it is contended that the renegotiation was nothing like as extensive as that; but the process of comparing the new obligations with the old seems to me to be appropriate to the second stage of the two-stage approach (i.e. the justification stage) rather than to the first stage (cf. *Alec Lobb*).

As to the circumstances in which the 1984 Agreement and the 1988 Agreement were negotiated, I agree with Mr Pollock that there was no oppression or misuse of bargaining power on the part of Sony Music, nor was there any compulsion on Mr Michael to enter into either agreement. Yet if my earlier analysis of the authorities (and in particular Lord Diplock's speech in *Schroeder*) is right, it is not a pre-requisite for the application of the doctrine of restraint of trade that any such element be present.

As to the terms of the respective agreements, it is beyond doubt that they contain restraints of trade, using that expression in the broad popular sense referred to by Lord Wilberforce in *Esso.*

As to whether they are also 'in restraint of trade' , using that expression this time as a term of art to mean contracts which attract the doctrine of restraint of trade, on the authority of *Esso* I find myself unable to say that an agreement of the general type with which I am concerned (whether I take for this purpose the 1984 Agreement or the 1988 Agreement) is dispensed from the necessity of justification under the doctrine of restraint of trade. In particular, it does not seem to me that, as of today, it can be said that recording agreements of this type have 'passed into the accepted and normal currency of commercial or contractual … relations' by assuming 'a form which satisfies the test of public policy' (Lord Wilberforce in *Esso* p.333A-B).

Moreover, quite apart from the similarities between the plaintiff's music publishing agreement in *Schroeder* and recording agreements of the kind now under consideration, the Court of Appeal in *Holly Johnson* found a recording agreement of the same general type as the 1984 Agreement and the 1988 Agreement to be unenforceable as a restraint of trade.

Accordingly, since I cannot discover sufficient grounds for excluding the 1988 Agreement from the application of the doctrine, it follows that (subject always to the public policy argument, which I shall address below) the 1988 Agreement attracts the doctrine of restraint of trade, and its provisions require to be justified by reference to the *Nordenfelt* test.

The public policy argument

Mr Pollock's public policy argument runs as follows:

1. There is a public policy in favour of settlement of disputes in litigation.

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2. There is a public policy in favour of the disposal of disputes whether by way of judicial or arbitral decision or by way of settlement *inter partes* being treated as final.

3. There is a public interest in resisting the re-opening or re-litigating of issues apparently resolved by judgment, award or *inter partes* settlement.

4. As a reformulation of points 1–3, where disputes have arisen and those disputes have been disposed of by means of an *inter partes* settlement, public policy favours giving effect to that settlement and to refusing to allow a party thereto to resurrect issues whether identical or similar to those which the settlement had been intended to lay to rest.

5. In the instant case it is common ground that:

— there was a dispute and pending litigation as to whether the Inner Vision Agreement was unenforceable as being in restraint of trade;
— that dispute and that litigation was disposed of by means of a tripartite set of agreements whereby (i) the Inner Vision Agreement was discharged, (ii) the Inner Vision Action was brought to an end, (iii) Mr Michael and Mr Ridgeley entered into the 1984 Agreement, and (iv) Sony Music/CBS (UK) entered into a contract with Inner Vision to dispose of Inner Vision's rights both in relation to Wham! and under its pre-existing agreement with Sony Music/CBS (UK).

6. In the premises, on the authority principally of *Binder v Alachouzos [1972] 2 QB 151* (' *Binder* ') and *Colchester Borough Council v Smith [1992] Ch. 421* (' *Colchester* '), the Court

should not entertain Mr Michael's plea that the 1988 Agreement is unenforceable as a restraint of trade.

In *Binder,* the defendant had borrowed from the plaintiff. The plaintiff sued to recover the loan and the defendant pleaded the Moneylenders Acts . On the eve of the trial, a compromise agreement was made. The compromise agreement recited that the parties had been advised by solicitors and counsel, and contained an admission by the defendant that the Moneylenders Acts did not apply to the loan transaction, coupled with an obligation on the defendant to repay the loan by instalments. The compromise agreement also contained an express provision to the effect that in any action on the agreement by the plaintiff it should not be open to the defendant to plead the Moneylenders Acts. The defendant failed to keep up the instalments, and the plaintiff sued on the compromise agreement. In that action, the defendant sought to contend that the compromise agreement was itself unlawful by virtue of the Moneylenders Acts. The Master entered summary judgment for the plaintiff, and the defendant's appeal failed at first instance.

In the Court of Appeal, Lord Denning concluded his judgment as follows (at p.158E-F):

> In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised be competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened. I agree with the Judge below that this agreement of compromise was binding and I would dismiss the appeal.

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Phillimore LJ said (at p.159D-F):

> Speaking for myself, I think it is entirely plain that this was a bona fide compromise, and that there is nothing in the evidence here which could make this court say with any confidence that these were moneylending transactions, illegal transactions; and accordingly, as it seems to me, here the court is faced with a bona fide compromise of what was a question of

> fact… The court ought to be very slow to look behind an agreement reached in such circumstances as these …

Roskill LJ said (at p.160C-D):

> In my judgment it is the law of this country that where there is a bona fide compromise of an existing dispute and that compromise includes a compromise of what … is basically an issue of fact, namely whether or not there has in fact been unlawful moneylending, especially where the compromise has been reached under the advice of counsel and solicitors, that that compromise is enforceable against the party seeking subsequently to repudiate it. Any other course would cause very great difficulty in the administration of justice.

In *Colchester* a compromise agreement was entered into between the Council and an occupier of land owned by the Council who had asserted that he had acquired title to the land by adverse possession. Under the terms of the compromise agreement, the Council agreed to grant the occupier a lease of the land, and the occupier acknowledged that he had not acquired title by adverse possession. In subsequent proceedings by the Council for possession, the occupier was held to be estopped from claiming title by adverse possession. The Court of Appeal dismissed the occupier's appeal.

Dillon LJ concluded his judgment as follows (at p.435B-C):

> In my judgment this was a bona fide compromise of a dispute and [the occupier], who had the advice of solicitors and signed the agreement through them, is estopped by the terms of the agreement he made from going behind it and litigating the antecedent dispute. That is as the judge held, and whether it be labelled estoppel by agreement or estoppel by convention is a matter of indifference…

Butler-Sloss LJ said (at p.435E-F):

> Where parties to a dispute reach a compromise which brings that dispute to an end and avoids the need for litigation or further litigation, such a compromise is a valuable part of the resolution of disputes within the machinery of the administration of justice. The compromise has to be genuine, entered into freely by all parties to it without concealment of essential information or undue advantage taken by one party of another party, and preferably with the assistance of lawyers. Consequently, an agreement to compromise an action or dispute which may lead to litigation is binding and enforceable against the party seeking subsequently to repudiate it.

Mr Cran's response to Mr Pollock's public policy argument is, in summary, to the following effect.

Mr Cran accepts the first four of Mr Pollock's propositions as set out above.

As to *Binder,* Mr Cran points out that in that case there was an express obligation on the defendant not to rely on the Moneylenders Acts, and that the issue sought to be reopened was the very issue which had been the subject of the compromise agreement. By contrast, says Mr Cran, there is no express provision in the 1984 Agreement to the effect that Mr Michael would not allege that that agreement, or ***345** any renegotiated version of it, was unenforceable as being in restraint of trade; and in the instant case Mr Michael is not seeking to reopen the issue as to whether the Inner Vision Agreement was unenforceable as a restraint of trade, rather he is seeking to pursue a different cause of action, relating to the 1988 Agreement. Mr Cran submits that the dispute in relation to the Inner Vision Agreement was resolved with finality and no attempt is being made to revive it.

As to the statements of Roskill LJ (in *Binder*) and of Butler-Sloss LJ (in *Colchester*) concerning the administration of justice, Mr Cran submits that such statements amount to no more than a statement of public interest in the enforcement of compromise agreements. There is, points out Mr Cran, no term of the agreements entered into in 1984 by which Mr Michael promised not to contend that the new agreement into which he was entering (i.e. the 1984 Agreement) was in restraint of trade.

Mr Cran also submits that the 1984 Agreement is different in a number of fundamental respects from the Inner Vision Agreement.

Finally, Mr Cran submits that it would, on the facts, be very unfair to Mr Michael to give effect to any such public policy as that which Mr Pollock seeks to invoke, since the Inner Vision negotiations

were not 'free' negotiations so far as Mr Michael was concerned, in that the risks for Wham! of proceeding with the litigation were clearly substantial.

Conclusions on the public policy argument

In my judgment, Mr Pollock's public policy argument is correct.

The compromise of the Inner Vision Action, of which the 1984 Agreement formed a central part, was entirely genuine and bona fide . Each of the three parties to the negotiations which led to the compromise had their own separate interests to pursue, and they pursued them with vigour, if not rancour. Each party was separately advised. In Mr Tony Russell, Mr Michael had the benefit of one of the most experienced advisers and toughest negotiators in the business.

The compromise was freely entered into in the sense that no party was under any improper pressure to accept its terms. Mr Michael did not have to enter into an agreement with Sony Music/CBS (UK) - as Mr Tony Russell recognised when he made his threat to Mr Rowe (as to which, see Part II Section B paras B13-B15) - but he was looking to do so. That, too, was Mr Tony Russell's aim. As to Mr Cran's submission that the negotiations were not 'free' , of course it is correct that Wham! had to take into account the possibility that they might lose the Inner Vision Action if it went trial, but that is of the nature of negotiations for the compromise of a pending claim.

There was no concealment of essential information in the course of the negotiations, nor was any undue advantage taken of any party by any other party.

In these circumstances, it seems to me that the instant case falls fair and square within the terms of the public policy invoked by Mr Pollock and identified in *Binder* and in *Colchester*.

There is a clear public interest in upholding genuine and proper compromises; and Mr Michael is seeking to have a central part of this particular compromise declared unenforceable. Moreover, Mr Cran's assertion that 'the dispute on the [Inner Vision Agreement] was resolved with finality, and no attempt has been ****346*** made to revive it' (I quote from the plaintiffs' closing written submissions page 217) does not bear examination. If a central plank of the compromise of the Inner Vision Action is found to be unenforceable, I do not see how it could any longer be said that the Inner Vision Action was resolved with finality. An issue which is sought to be compromised by an agreement which turns out to be unenforceable cannot be said to have been resolved with finality.

It is correct that in alleging that the 1988 Agreement is in restraint of trade Mr Michael is founding on a different cause of action from that which he was asserting in the Inner Vision Action, when he alleged that the Inner Vision Agreement was in restraint of trade. But that is inevitable in cases where a restraint of trade issue is compromised by the substitution of another agreement.

Moreover, it is to be noted that most of the principal complaints made by Michael in relation to the Inner Vision Agreement in the letter before action dated 7 October 1983 are repeated, albeit

not in precisely the same terms, in the letter before action dated 21 October 1992. Thus, in each case Mr Michael complains of the length of the term of the agreement, the exploitation obligations of the record company, and the royalty rates (although whereas in relation to the Inner Vision Agreement the complaint was that they were 'extremely low' , the complaint in relation to the 1988 Agreement is that they 'result in a manifestly unfair apportionment of the proceeds derived from the exploitation of the Master Recordings').

A further consideration is that in the Inner Vision Action Mr Michael was taking the opportunity presented by the doctrine of restraint of trade to rid himself of his existing recording agreement not so as to be free of fetters to a record company but with a view to signing with Sony Music/CBS (UK). He was looking, in other words, to substitute one restraint for another. I am not suggesting that he was acting in any way improperly in doing that, but there are as it seems to me powerful public policy reasons why, having done it, he should not be allowed to take advantage of the availability of the restraint of trade doctrine once again to seek to rid himself of the substituted restraint.

But the overriding consideration, as it seems to me, is that if it be open to a plaintiff to challenge a compromise of a restraint of trade issue by alleging that the compromise is itself in restraint of trade, then it seems to me to follow that a restraint of trade issue could never be compromised by the substitution of a new agreement. Unless the parties are able to compromise the issue in some way which does not involve the substitution of a new agreement, they will have no option but to litigate the issue to judgment, whether they like it or not. As Roskill LJ said in *Binder,* in a passage immediately following the passage which I quoted earlier (at p.160D-F):

> One example will suffice: subject to the sanction of the court, a liquidator is entitled to compromise a dispute with debtors or supposed debtors of the company of which he is liquidator. What is he to do if he is met by the debt or supposed debt arose from unlawful moneylending? Must he refuse to compromise? What is the court to do? Must the court refuse to sanction a compromise because it can always be reopened later? Is the court to investigate the whole matter, or can it look at the matter broadly and see whether or not a bona fide compromise should be arrived at or has been arrived at? In such a case it seems to me clear that the court should encourage and when appropriate enforce any bona fide compromise arrived at, especially one arrived at under legal advice.

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It seems to me that Roskill LJ's words are also apt in the instant case.

I therefore conclude that in the circumstances it is not open to Mr Michael to allege that the 1988 Agreement is in restraint of trade, that the 1988 Agreement accordingly does not attract the doctrine of restraint of trade, and that its terms do not require to be justified under that doctrine.

I am fortified in the conclusion which I have reached by a consideration of the way in which the renegotiations proceeded in 1987 and in 1990. Thus, as I have found, the negotiations leading to the 1988 Agreement took place in good faith and on the footing that the 1984 Agreement was enforceable. The same situation obtained in the 1990 renegotiation, which took place on the footing that the 1988 Agreement was an enforceable agreement. As a result of the 1987 renegotiation and the 1990 renegotiation, Mr Michael obtained substantial commercial benefits. The fact that the terms renegotiated in 1987 and 1990 represented an improvement over his then current terms is demonstrated by the fact that Mr Michael elected to accept them.

It may be that these last factors are not material to the scope or application of the public policy in favour of upholding compromises - and lest that should be so, I have not brought them into account in reaching my conclusion. They do, however, serve to demonstrate, in my judgment, that the application of that public policy in this case produces a just result.

The second stage: justification

The conclusion which I have reached on the public policy argument makes it strictly unnecessary for me to consider the restraint of trade issue any further. However, in case my conclusion on the public policy argument is wrong I shall proceed to consider the remaining questions which arise on the restraint of trade issue on the footing that the 1988 Agreement attracts the doctrine of restraint of trade, and that accordingly its provisions require to be justified under the *Nordenfelt* test.

Preliminary points

Before turning to the detailed terms of the 1988 Agreement, certain general topics which featured in the arguments in this case must first be addressed, as follows:

1. The nature of the market.
2. The nature of artists' recording contracts.
3. The practice of renegotiation.
4. Inequality of bargaining power.
5. The possibility of the 1988 Agreement operating unfairly against Mr Michael.

6. The 1988 Agreement: a 'standard form of contract' ?

7. The impact of the 1984 Agreement.

To the extent that what follows contains statements of fact, it represents my findings on the evidence in this case: to the extent that it contains comment or expressions of opinion, it is derived from the expert evidence which I have received in this case (including the BPI Statistical Handbook 1993, as revised).

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1. The nature of the market

1.

1.1 The development of recorded music:

1.1.1 In the latter part of the 19th century, the nearest equivalents to recorded music were piano rolls and pianolas, which activated a specially adapted piano. The first recordings were made in about 1877, initially on cylinders but a few years later on discs. The long-playing record came onto the market in about 1948. Records reproducing stereophonic sound were introduced in the 1960s, soon followed by tape cartridges and cassettes. In the 1980s compact discs were launched, and more recently digital compact cassettes and mini-discs.

1.1.2 Contemporary technology is such that the consumer may soon be able to acquire interactive devices, allowing the listener to perform certain functions, including altering the presentation of the sound or the visual imagery.

1.2 The distinction between classical and 'pop' :

1.2.1 The difference between these two types of music is well-known to everybody and calls for no elaboration. Pop is not to be confused with jazz, which forms a separate market.

1.2.2 There are also significant differences between the markets for classical recordings and pop recordings. In the case of the pop market, the emphasis is on new compositions and new productions, styles and sounds. In the case of the classical market, the great majority of the product on the market consists of recordings of known (and in many cases very well-known) compositions.

1.2.3 The investment required in marketing pop records is higher than its equivalent in the case of classical records, and the potential return is also higher.

1.3 Since the advent of the Beatles in the early 1960s the pop record industry has expanded to become a major worldwide industry in which the UK and the US play central roles. A UK artist,

such as Mr Michael, is unlikely to be successful in overseas markets, and particularly in the US, unless he has first achieved success in the UK market.

1.4 The demand for pop records is to a high degree fickle and unpredictable, and there is virtually no 'brand loyalty' in the sense that a customer will prefer one label to another. Fashions tend to change with bewildering rapidity, and a product which is in high demand one month may suffer a catastrophic fall in demand the next.

1.5 As a consequence, talent-spotting has a high priority with every record company, large and small. Each major has its own 'A & R' (Artists and Repertoire) department, whose task it is to identify, from the very large number of aspiring pop artists who send in demonstration tapes or who perform at 'gigs' , those whose recordings may prove to be a commercial success. The failure rate is, inevitably, high, and it is ironic that one of Mr Michael's complaints about the way in which the industry operates is that the majors sign too many artists and flood the market with too much product. On the positive side, however, where the A & R man gets it right, the ***349** rewards for the record company (and for that matter for the artist) will in all probability be very substantial.

1.6 While most of the would-be pop artists striving to catch the attention of a record company will be liable to have their efforts rejected out of hand, where an artist is thought to have talent and the potential for commercial success, there will as a general rule be competition among record companies (and not just the majors) to sign that artist.

1.7 The competition will manifest itself not merely in the financial terms of the contract which the record company is prepared to offer the artist, but also in the relationship which the record company, through its A & R department, has managed to build up with the artist. As Mr Morris (Sony Music's industry expert) said:

> Its … relationships and what the company is good at, what its reputation is … what you think you can do for the act, and how far you are able to support the act… And then of course it comes to the hard cash business of how large the advance is and what the various many other conditions of the contract may be - the term of the contract, the product commitment and the commitment by the company on making videos, or whatever it may be. There will be many points of competition. It's very fierce competition to get artists to sign to you. I've often been disappointed. We thought we had got there and they'll walk away to another company for some reason or other.

And Mr Morris said further:

> Once a record company is known to be after some new talent, I can assure you that somehow by magic other record companies know, and they are on the trail as well … There may be many other artists that are signed not in the face of competition, but largely there is competition.

1.8 Although I am not suggesting that this is typical, I heard evidence of one case in the early 1980s where a record company sent out invitations to a party to celebrate the signing of a recording contract with a particular artist, only to discover that in the meantime the artist had signed to a rival company.

1.9 As Mr Connelly (Mr Michael's industry expert) put it in his first report:

> The UK is a very competitive market for talent and the majors have bid each other up to higher and higher levels of new artist signing advances.

1.10 Turning from the signing of artists to the other end of the chain of supply, that is to say to the marketing and promoting of pop recordings, competition between record companies in the marketplace is intense. Although, as the BPI statistics show, the five majors (that is to say Sony, EMI, Warner Brothers, Polygram, and BMG) dominate the market in terms of volume of product sold, it would be a mistake to suppose that the majors are not at the sharp end of competition. They compete vigorously with each other and with the 'independents' (that is to say, smaller record companies which form the next largest category of record companies after the majors).

1.11 Nor should it be supposed that majors arrive on the record market suddenly and without warning, like some Pallas Athene springing from the ***350*** head of Zeus, fully accoutred. Majors are majors because of (among other things) the level of investment they have made and the goodwill and expertise they have built up over a number of years.

2. The nature of artists' recording contracts

2.

2.1 Recording contracts made by different record companies and different artists will tend to follow a similar pattern and deal with particular aspects of the relationship between them in similar ways. As Mr Lee (Mr Michael's legal expert) said in re-examination:

> If you're talking about a record company, you have to have an obligation [on the artist] to deliver records one way or another. You have to have a method of payment and you have to have a method of dealing with exclusivity, and over a number of years a course of dealing will arise and people will adopt methods of dealing with those issues which have been tried before, whether or not they may be objectively the best solutions …
>
> I think what tends to happen, and how changes evolve, is perhaps in two ways. One: a new difficulty appears and people have to address it. It appears in practice and it may have been inherent in the contract all the time, but it will appear in practice. The other is that artists who have more influence are able to extract concessions, and then the record companies become familiar with those concessions and it becomes easier for people with less influence perhaps to persuade them to accept them in their case as well.

2.2 Also of significance in this connection is the fact that, at least in recent years, the negotiation of recording agreements has tended to become concentrated in the hands of a small group of professionals who have become experts in this field. As I said earlier, Mr Tony Russell is certainly to be numbered among them. These professionals may act for record companies and for artists, and the expertise and experience which they gain in the process is undoubtedly a factor tending towards similarity between the forms of contract negotiated with different record companies.

2.3 The methods adopted in the industry to deal with problems of the kind referred to by Mr Lee in the passage from his evidence quoted above are not static: however, changes tend to be gradual. There is also (as Mr Lee agreed) a fairly good flow of information within the worldwide market.

2.4 Although as a generality it is true to say that a superstar has greater negotiating strength vis a vis a record company than most established artists, and that most established artists have greater negotiating strength than new artists negotiating their first recording agreement, it is risky to make assumptions about negotiating strength in individual cases.

2.5 In the context of established artists, Mr Lee said:

> I would find it difficult to find a direct comparison with George Michael, for example, because he sold an extraordinary number of records in an extraordinarily short period of time, and, whatever one is negotiating for an artist it is difficult to find reasonable comparisons and one has to draw on whatever information is available.

2.6 In the case of a new artists, Mr Lee said that in his experience the most **351* common variables were royalties, advances and video arrangements, of which by far the most significant was advances. On the other hand, Mr Kennedy (Sony Music's legal expert) said that he had evolved a checklist of 70 points.

2.7 Clearly it is unsafe to make detailed comparisons between one deal and another without knowing something of the context in which the negotiations which led to that deal took place and of the course which the negotiations themselves took. As Mr Lee acknowledged in re-examination, 'Every negotiation is different' .

3. The practice of renegotiation

3.
3.1 Renegotiation of a recording contract after an artist has had a successful album is commonplace. The record company is not contractually obliged to enter into any renegotiation, but in doing so it is not acting out of altruism. It has a continuing interest in maintaining a good relationship with the artist and in keeping the artist motivated. In addition, the record company may be looking for something in return, e.g. options on further albums. Thus, in the instant case, in the 1987 renegotiation which led to the 1988 Agreement, Mr Tony Russell rightly concluded that in order to achieve a significant improvement in Mr Michael's terms he would have to offer additional product.

3.2 Although in the negotiation of a recording agreement the artists will generally be advised that he should assume that he will be 'stuck' with the terms of his recording agreement, nevertheless the practice of renegotiation is well known, and an experienced adviser (such as Mr Tony Russell) will know that if his client has a successful album a renegotiation will almost certainly be on the cards.

3.3 In a renegotiation an artist cannot expect to be treated in exactly the same way as he would be if he were negotiating on the open market free from any contractual ties. There is bound to be a degree of discount to reflect the fact that the artist is already bound by an existing recording agreement.

What form that discount will take, and how great it will be, will depend on the circumstances of the particular renegotiation.

3.4 Renegotiation will also tend to occur as a recording agreement approaches its end, since record companies not unnaturally seek to avoid a situation in which the benefit of their investment and effort passes to a competitor and they will accordingly look for further options: i.e. an extension of the existing recording agreement.

4. Inequality of bargaining power

4.
4.1 Notwithstanding the prominence of the plea of inequality of bargaining power in the Statement of Claim, as the case has progressed the importance of the plea to Mr Michael's case has diminished. Thus, in his closing submissions Mr Cran acknowledged (see plaintiffs' closing submissions page 120) that on the authorities inequality of bargaining power is not of itself of importance in assessing whether the terms of a contract are unfairly onerous to a covenantor or whether the restrictions are unnecessary or capable of enforcement in an oppressive manner, although equality of bargaining power might be a countervailing factor. Nevertheless, the ***352** allegation of inequality of bargaining power remains part of Mr Michael's case, and I must accordingly address it.

4.2 As I pointed out when considering Mr Michael's pleaded case on restraint of trade, the inequality of bargaining power relied upon in the amended pleading is said to arise from two factors. The first is that at all material times Mr Michael assumed that he was bound by an existing contract (he 'was not free of assumed … contractual obligations'). The second is the alleged factor that majors do not substantially compete with each other 'in the terms of their standard contracts, or in their royalty rates or in their requirement for at least 6 albums' . I will consider each of these in turn.

4.3 At the outset, however, it is desirable to put the concept of 'inequality of bargaining power' in a commercial context. In *Alec Lobb,* Dillon LJ, after holding that the mere existence of an inequality of bargaining power did not amount to unconscionability, so as to require the stronger party to justify the terms of the bargain, continued (at p.183C):

> Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. Any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him.

> So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor …

4.4 Nor is it as if Mr Michael were relying on an *actual* inequality of bargaining power (he cannot do that, since he does not wish to assert that the 1984 Agreement was enforceable). Instead, he relies, in effect, on his state of mind in either believing the 1984 Agreement to be enforceable, or (if he did not have such a belief) in electing to negotiate on the basis that it was enforceable: for present purposes it matters not which.

4.5 In my judgment, however, Mr Michael's state of mind cannot affect the objective existence or otherwise of inequality of bargaining power. If the 1984 Agreement was binding, then in renegotiating its terms in 1987 Mr Michael was in the position of any other recording artist renegotiating the terms of his recording agreemeent: he was negotiating against the background of an existing binding contract. In such circumstances there was by definition inequality of bargaining power. Alternatively, if the 1984 Agreement was not enforceable, then (whether he recognised it or not) Mr Michael was in fact free of contract in 1987. In such circumstances, there was no material inequality of bargaining power. If anything, the boot was on the other foot, in that as a successful artist free of contract, Mr Michael was in a very strong negotiating position indeed.

4.6 As it is, I have already concluded that I must regard the 1984 Agreement as an enforceable agreement, as the parties themselves at all material times regarded it. It follows that if there was inequality of bargaining power in the negotiations leading to the 1988 Agreement, such inequality arising purely, and for that matter inevitably, from the fact that the parties were renegotiating the terms of an existing enforceable agreement.

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4.7 But the fact that on a renegotiation there is inequality of bargaining power does not, in my judgment, carry the matter any further so far as the allegation that the 1988 Agreement is in restraint of trade is concerned. Inequality of bargaining power is, after all, of the nature of a renegotiation.

4.8 As to the negotiations which led to the 1984 Agreement (i.e. the Inner Vision negotiations), I have already referred, in the context of the public policy argument, to the fact that the negotiations were genuine negotiations in which each of the three parties concerned (Wham!, Inner Vision and Sony Music/CBS (UK)) pursued their own separate interests. Mr Michael alleges that there was inequality of bargaining power at that stage. In this respect, the Statement of Claim pleads as follows:

> …At all times Inner Vision and Sony Music contended that the Inner Vision Agreement remained in full force and effect, and [Mr Michael] and Mr Ridgeley were uncertain as to the strength of their contentions, and feared

> a long drawn out legal battle which might irretrievably damage their career and involve them in crippling expense.
>
> Further, it was the objective of [Mr Michael] and Mr Ridgeley to achieve a recording contract with one of the 5 major recording companies, and in all the circumstances Sony Music was the only such company which could cause Inner Vision to agree to compromise the litigation.
>
> In the premises, there was a substantial imbalance in the parties' bargaining power in the negotiations leading up to the [1984 Agreement]…

4.9 It is the fact that Mr Michael's objective was to sign to a major (he did not mind which), and it is also the fact that from Mr Michael's point of view Sony Music was the obvious major to choose, given that Sony Music was likely to be in a position to exert some influence over Inner Vision. But to my mind that does not amount to an inequality of bargaining power. Mr Michael (advised by Mr Tony Russell) knew the kind of recording contract which a major would offer him, being a contract which, if he proved to be a success, would be likely to last for the greater part if not the whole of his working life as a recording artist - and in the process make him very rich. That was the kind of deal he was looking for. Of course, had he asked Sony Music/CBS (UK) (or for that matter any other major) for a significantly different kind of deal - say, for a three-album deal - he knew full well that the answer would have been No. For such a deal he would have had to approach one of the independents. But he did not consider doing that, because he wished to sign to a major.

4.10 Nor is it as if the existence of the Inner Vision Action served to create an inequality of bargaining power as between Mr Michael and Sony Music/CBS (UK). Mr Michael's objective was to rid himself of the Inner Vision Agreement and sign direct to Sony Music/CBS. His strategy to achieve that objective (a perfectly proper strategy) was to assert that the Inner Vision Agreement was unenforceable, thereby facing Sony Music/CBS (UK) with the possibility (which he knew it was anxious to avoid) of losing Wham! to another record company, and from that position to negotiate a direct signing of Wham! to Sony Music/CBS (UK), with Sony Music/CBS (UK) reaching a financial settlement with Inner Vision which would remove Inner Vision from the picture so far as Wham! was ***354** concerned. The strategy was successful. In such circumstances it seems to me unreal to suggest that the possibility that Mr Michael might lose the Inner Vision Action somehow operated to place him at a disadvantage in negotiating the detailed terms of 1984 Agreement with Sony Music/CBS (UK).

4.11 In any event, none of the parties to the Inner Vision negotiations could know what the outcome would be if the Inner Vision Action proceeded to trial. If the Inner Vision Agreement were found to be unenforceable, then Mr Michael would by definition have been in a position to negotiate with any of the majors on the open market. So each of the parties to the negotiations had, of necessity, to take a view as to the likely outcome of the Inner Vision Action if it proceeded to

trial; and their respective views on that matter no doubt influenced to some extent their respective negotiating stances. This is of the essence of any negotiations for the compromise of a claim. In the circumstances, I am quite unable to conclude that there was any degree of inequality of bargaining power in the Inner Vision negotiations.

4.12 As to the second factor relied on by Mr Michael to support the allegation of inequality of bargaining power, the evidence demonstrates that similarities between contracts or clauses offered by different majors is not the result of any lack of competition between them but is the direct consequence of the fact (to which I referred earlier) that the negotiation of recording agreements tends to be concentrated in the hands of a relatively small band of experienced professionals.

4.13 Equally, I am satisfied that comparability between the financial rewards offered to artists by different majors reflects the action of market forces. That is to say, far from demonstrating a lack of competition between the majors, it is the product of competition.

5. The possibility of the 1988 Agreement operating unfairly against Mr Michael

5.
5.1 In *Schroeder,* Lord Reid said (p.1314G–H):

> Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that time of the common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally, the doctrine of restraint of trade has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, they must be justified before they can be enforced.

5.2 Underlying a number of the detailed complaints which Mr Michael makes in relation to the 1988 Agreement (complaints which I shall address below) is the proposition that the provisions in question are reasonably capable of working unfairly against Mr Michael.

5.3 In *Nordenfelt,* it was contended that as Mr Nordenfelt had put it out of his power to continue to earn his living in the munitions business he might become a burden on the State. In relation to this contention, Lord Macnaghten said (at p.574): ***355**

> My Lords, this seems to me to be very far-fetched. Mr Nordenfelt received over £200,000 for what he sold. He may have got rid of the money. I do not know how that is. But even so, I would answer the argument in the words of Tindal CJ: 'If the contract is a reasonable one at the time it is entered into we are not bound to look out for improbable and extravagant contingencies in order to make it void': *Rannie v Irvine (1844) 7 Man. & G. 969* at p.976.

5.4 In *Rannie v Irvine,* the assignor of a lease of a baker's shop and of the goodwill of the business covenanted that he would not during the term of the lease solicit the custom of any of the then customers of the business without the consent of the assignee. On the assignee suing for breach of the covenant, the assignor contended that it was void as a restraint of trade. In support of that contention, the assignor argued that if customers of the business moved elsewhere, the covenant would still prevent the assignor supplying them with bread. It was with reference to that argument that Tindal CJ made the observation quoted by Lord Macnaghten. Coltman J said (at p.977):

> It is true remote and improbable cases may be put in which inconvenience might result from such a contract; but we ought not to indulge in such suppositions, but rather confine ourselves to looking at what is likely to occur.

Maule J said (at p.978):

> The possibility that some such extravagant case may occur will not make a restriction unreasonable that is otherwise reasonable and just.

Erle J said (at p.978):

> Extreme cases may by suggested, in which inconvenience might result from such a contract; but so far as principle is concerned, I think the plaintiff [assignee] is entitled to our judgment.

5.5 Mr Cran naturally accepts these statements of principle, and disavows any attempt to conjure up remote, improbable or extravagant possibilities in support of his argument that the 1988 Agreement is capable of working unfairly against Mr Michael. Nevertheless, I think it desirable to set these statements in a contemporary context, in which commercial agreements tend to be very much more detailed and more complex than equivalent agreements entered into at the time of *Nordenfelt,* one hundred years ago.

5.6 Recording agreements were unknown in 1894. Indeed, it is only in the last 20 years or so that recording agreements have evolved into their present complex and voluminous form. In his witness statement, Mr Lee traces the development of recording agreements as follows:

> Until the early sixties contracts appear to have been simple documents, although I have to admit that my knowledge of these contracts is limited and there is little published material analysing them. Advances were non-existent or token, royalties were often expressed as 1d or 2d per record (reduced overseas) and there was no obligation to record or release records. The whole contract would often be expressed on one ***356** page compared with the contracts now prepared which often exceed 40 pages… With the increase in sales of pop records in the 1950s and 1960s greater attention was paid to the form of contracts. Record companies wanted to ensure that they acquired all possible rights in recordings and realised the benefit to them of long term relationships with artists. Contracts became more precise, explicit and voluminous during the 1970s.

5.7 Where, as in this case, an artist negotiating a recording agreement is advised by experienced and skilled lawyers, he will try his best to ensure that, within reason, the terms of the agreement protect him so far as possible against unfairness in the operation of the agreement by the record company. But it seems to me that if the resulting agreement is to be expected to contain anything approaching absolute protection for the artist in this respect (assuming it is possible to achieve that

degree of protection), the parties are in danger of stultifying the underlying commercial purpose of the transaction. A recording agreement which sets out to legislate for every contingency is likely to become so unwieldy as to be of little practical use. Moreover, where success for both artist and record company requires an active contribution from each - as is certainly the case with recording agreements - there are bound to be opportunities for the record company, or for the artist for that matter, to perform less efficiently than perhaps they might otherwise have done, without thereby committing a breach of contract. These factors need to be borne in mind, in my judgment, when it is contended that a recording agreement is reasonably capable of being enforced unfairly against the artist.

5.8 Further, in identifying aspects of a commercial contract which are capable of being enforced unfairly against him, a plaintiff may (depending on the circumstances) be doing little more than inviting the court to improve the terms of his bargain. In argument, Mr Pollock when addressing this point quoted most aptly from the Rubaiyat of Omar Khayyam. I can do no better than to reproduce the quotation:

> Ah Love! could thou and I with Fate conspire To grasp this sorry Scheme of Things entire, Would we not shatter it to bits - and then Re-mould it nearer to the Heart's Desire! (*Rubaiyat of Omar Khayyam,* Fitzgerald, 1st edn (1859)).

The doctrine of restraint of trade is not, it seems to me, to be used for that purpose.

5.9 As Lord Pearce said in *Esso,* in a passage which I quoted earlier (p. 330A–B):

> … in a doctrine based on the wide ground of public policy the wider aspects of commerce must always be considered as well as the narrower aspect of the contract as between the parties.

Yet at many points during Mr Cran's argument on the detailed terms of the 1988 Agreement I could not escape the feeling that what he was in effect inviting the Court to do was to judge the 1988 Agreement by reference to ***357** some absolute and perfect form of recording contract, in which all contingencies are covered and all loopholes closed. Whether or not it be possible to devise such

a form of recording contract, to adopt such an approach would, in my judgment, be to 'ignore the wider aspects of commerce' .

6. The 1988 Agreement: a 'standard form of contract'?

6.
6.1 I referred earlier in this Part of the judgment to contracts, or particular clauses in contracts, which are based upon a standard form of wording, but which are negotiable up to a point; and also to contracts which adhere to a standard structure, but the details of which are negotiable within that structure.

6.2 The 1988 Agreement falls to some extent into both these categories. Its structure is inherited from the 1984 Agreement, which in turn adopted a standard structure to be found in recording agreements offered by Sony Music/CBS (UK) (and for that matter by other majors) at that time. As to the form of the contractual provisions which it contains, whether such provisions were inserted in the 1984 Agreement and reproduced in the 1988 Agreement or whether they were inserted in the 1988 Agreement for the first time as a result of the renegotiation, they are in general based upon standard forms used by Sony Music/CBS (UK) at the material time.

6.3 Mr Rowe described in evidence how he had available to him, in the negotiation of a recording agreement, various standard forms of particular contractual provisions. He would start by offering the version of the clause most favourable to Sony Music, and would then fall back on the remaining versions according to the degree of pressure exerted by the artist's advisers. He described this as: 'a process of pushing and what I can give away' . Mr Cran described it in rather more exotic terms as 'Salome dropping her veils' .

6.4 It is also the case that there is a substantial degree of similarity between Sony Music's standard forms and those of other majors. However, as I said earlier, this is not due to a lack of competition between the majors (as alleged by Mr Michael): rather, it is the result of market forces, coupled with the fact that the negotiation of recording contracts tends to be concentrated in the hands of a relatively small group of professionals who have become expert in that field.

6.5 At the other end of the scale, however, it is clear that a significant degree of negotiation took place between Mr Michael and Sony Music/CBS (UK) both in the negotiations leading to the 1984 Agreement and in the 1987 renegotiation leading to the 1988 Agreement. It is unnecessary for present purposes to trace to the progress of the negotiations in relation to each aspect of the respective agreements: it is sufficient that I should merely refer to the helpful schedule handed up by Counsel for Sony Music entitled: 'The Negotiation of the Clauses pleaded in paragraph 18 of the Statement of Claim' .

7. The impact of the 1984 Agreement

7.
7.1 I have already concluded (a) that I must regard the 1984 Agreement as an enforceable agreement, and (b) that I cannot ignore the fact that the 1988 **358* Agreement was the product of a renegotiation of the 1984 Agreement, and as such contained improved terms for Mr Michael.

7.2 In these circumstances the question arises whether, in assessing the restrictive nature of the 1988 Agreement for the purposes of the doctrine of restraint of trade, I am to have regard to the restrictions which already existed under the 1984 Agreement.

7.3 Mr Cran submitted that the right approach in relation to justification is first to consider whether the terms of the 1988 Agreement go further than reasonably necessary to protect the legitimate interests of Sony Music. That process, says Mr Cran, can be carried out entirely without reference to the enforceability of the 1984 Agreement; up to that point the 1984 Agreement is merely a relevant or background circumstance. The next stage is to consider from Mr Michael's point of view whether the terms of the 1988 Agreement are oppressive; and once again, says Mr Cran, the 1984 Agreement plays no part. Should the Court depart from that approach, however, and consider following the approach apparently adopted by the Court of Appeal (and especially by Dillon LJ) in *Alec Lobb,* then Mr Cran was constrained to submit that in taking account of the existing tie Dillon LJ was proceeding contrary to principle, and that neither Dunn LJ nor Waller LJ adopted a similar approach.

7.4 As I indicated earlier (see paragraph B4.9.3 in the discussion of the principles set out in *Esso*), I cannot accept those submissions of Mr Cran. In the first place, as I read his judgment in *Alec Lobb,* Dunn LJ was also clearly taking account of the existing tie. In the second place, even if I were in a position to approach the question free from authority (which, as I read *Alec Lobb,* I am not), I would have regarded that approach as in accordance with principle rather than contrary to principle.

7.5 Mr Cran further submits that I do not have the material before me to conclude that the 1984 Agreement was an enforceable agreement, and that it defies common sense to proceed on that basis. But Mr Michael has chosen not to allege that the 1984 Agreement was unenforceable. Moreover, the Statement of Claim as it stood at the commencement of the hearing pleaded the 1984 Agreement as an enforceable agreement, and sought rely on it as the basis for an allegation of inequality of bargaining power. See also Diplock LJ in *Petrofina* at p.180B, cited earlier.

7.6 In my judgment, on the authority of *Alec Lobb* it follows that, when considering 'the cumulative effect of the restrictions contained [in the 1988 Agreement]' (see Lord Reid in *Schroeder* at p.1310B–C), I must bring into account the existing (enforceable) restrictions imposed by the 1984 Agreement.

7.7 Mr Cran made submissions as to the effect of the restrictions contained in the 1988 Agreement on the footing that (contrary to his contentions) the restrictions contained in the 1984 Agreement are to be treated as having been enforceable, and that they are to be brought into account in

assessing the effect of the restrictions contained in the 1988 Agreement. I shall consider these submissions below.

7.8 Finally in relation to the impact of the 1984 Agreement, I must record that on Day 70 of the hearing, in the course of his closing submissions, Mr Cran ***359*** indicated that he wished to submit that the 1984 Agreement was unenforceable as a restraint of trade. This was in stark contrast to his observation in the course of his opening that:

> …all that one needs to know is that the [1984 Agreement] was enforceable and was in force at the time [i.e. at the time of the renegotiation leading to the 1988 Agreement].

7.9 In the event, I ruled that such a submission was not open to him on the pleadings as they stood (and particularly in the light of the amendments made to the Statement of Claim in the course of his opening, to which I have already referred). Having considered the position in the light of that ruling, Mr Cran made no application to amend the pleadings.

7.10 In any event, I have to observe that an amendment to allege that the 1984 Agreement was unenforceable (if such an amendment were allowed) would have stood oddly with that part of Mr Cran's closing submissions (see plaintiffs' closing submissions pp.203r–203y) which seeks to make the point — based principally on Mr Lee's report - that had Mr Michael been free of contract in 1987, and thus able to negotiate on the open market, he would have achieved substantially better terms than he in fact obtained in the 1988 Agreement. The paradox is that if the 1984 Agreement was unenforceable (as Mr Cran on Day 70 wished to assert), then the consequence follows that, although Mr Michael did not realise it, he was in fact free of contract and on the open market in 1987. But, since no application was in the event made to amend the pleadings in order to raise such an allegation, that point remains (fortunately, perhaps) academic.

The terms of the 1988 Agreement

I turn now to Mr Cran's arguments on the detailed terms of the 1988 Agreement. I begin by reminding myself of two statements of principle:

1. Lord Macnaghten in *Nordenfelt* at p.565, quoted earlier in this Part of the judgment (the *Nordenfelt* test).

2. Lord Parker in *Herbert Morris v Saxelby [1916] AC 688* , 707:

> It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and secondly it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the interests of the public.
>
> With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects ***360** himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing.

In *Schroeder* Lord Reid and Lord Diplock expressed the *Nordenfelt* test in their own words. Lord Reid said (at p.1310B):

> Then if there is room for justification, has that party proved justification - normally by showing that the restrictions were no more than what was reasonably required to protect his legitimate interests.

Lord Diplock said (at p.1315H):

> The test of fairness is, no doubt, whether the restrictions are … reasonably necessary for the protection of the legitimate interests of the promisee …

I also recognise that in applying the *Nordenfelt* test I must be wary of becoming too bogged down in the *minutiae* of the 1988 Agreement, since I have to read the 1988 Agreement as a whole and 'consider the cumulative effect of the restrictions contained therein' (see Lord Reid in *Schroeder* p.1310B–C).

The expert witnesses

At this point I would like to express my great gratitude to all the expert witness who gave evidence about the terms of the 1988 Agreement, for the assistance they have given me. They were:

For Mr Michael: Mr Lee, Mr Connelly and Mr Ravden.
For Sony Music: Mr Morris, Mr Kennedy and Mr Tweedale.

The fact that particular passages of their evidence may not be expressly referred to in this judgment does not mean that I have not taken such passages into account or that I have not been assisted by them. It would be neither desirable nor practicable for me to attempt to rehearse all the expert evidence on each aspect of the 1988 Agreement.

This comment applies particularly to the financial experts, Mr Ravden and Mr Tweedale, since on the approach which I think it right to adopt in relation to the financial provisions of the 1988 Agreement much of the financial detail on which they and their assistants clearly worked so hard becomes only marginally relevant to my conclusion.

I turn, then, to the 1988 Agreement.

Sony Music's 'legitimate interests'

In relation to the long-term nature of the 1988 Agreement Mr Pollock identified twelve interests of Sony Music which he submitted were 'legitimate interests' for the purposes of the *Nordenfelt* test. They were as follows:

i. The desire to sell as many records as possible.

ii. The desire to ensure that there is an even and adequate flow of product.

iii. The desire to be able to plan ahead.

iv. The desire to have available proven successful product for as long as possible.

v. The desire and need to be able to compete on equal terms in an *361 international environment against other record companies which have long term signings.

vi. The desire to be known for continued high calibre releases by long term successful artists in order to maintain a reputation with consumers, dealers and new unsigned artists.

vii. The desire to maintain morale and enthusiasm amongst employees.

viii. The desire and need to recover the investment made in a particular artist.

ix. The desire to make a profit on that investment.

x. The need to have available sufficient product to finance (a) losses on unsuccessful product, and (b) the fixed costs of the infrastructure (including overheads).

xi. The desire to accumulate property rights as an asset.

xii. The desire to have a supply of successful product in the future at reasonable and predictable prices.

Although Mr Pollock listed the above interests in the context of the arguments relating to the duration of the 1988 Agreement, they effectively underlie the whole of his argument on justification.

All the above 'legitimate interests' seem to me to be sensible aspirations for any record company - although some have a more direct bearing on the question of the justification of the 1988 Agreement than others. For example, maintaining the morale and enthusiasm of employees is a laudable objective for any employer in any field, but it can have relatively little bearing on the question of justification of the 1988 Agreement. On the other hand the need to recover investment, and the ability to plan ahead and to compete in an international environment have a much more direct bearing on that question. But it would in my judgment be wrong to dismiss any of the interests listed above as 'non-legitimate' for the purposes of the doctrine of restraint of trade. In my judgment, that would be a much too formalistic approach to the application of the doctrine of restraint of trade. The important question for present purposes is whether the restrictions in the 1988 Agreement go beyond the provision of 'adequate protection' for those interests.

Mr Cran does not accept that a desire to sell as many records as possible is a legitimate commercial interest of Sony Music (see plaintiffs' closing submissions page 151). He submits that if profit-

motive were a 'legitimate interest' for the purposes of the doctrine of restraint of trade, then every commercial agreement would be justifiable by reference to that interest. In my judgment, that submission confuses the identification of the promisee's 'legitimate interests' with the question whether the restrictions go further than what is 'reasonably required to protect those interests' (per Lord Reid in *Schroeder* p.1310B). Moreover, Lord Diplock in *Petrofina* expressly recognised the petrol company's interest in selling as much petrol as possible, when he said (at p.188E):

> The interests of the appellants in selling as large a quantity of their petroleum products as they can is one which they have a right to have protected.

Lastly on this point, it does seem to me that Mr Cran's submission that for the purposes of the doctrine of restraint of trade I have to ignore the underlying commercial motive of Sony Music (i.e. the desire to sell as many records as possible) is wholly contrary to the 'rule of reason' approach which I described earlier, and which in my judment I am bound to adopt in this case.

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Exclusivity

In opening the case, Mr Cran said that exclusivity was 'at the heart of the agreement' .

I bear in mind, however, that in *Esso* Lord Pearce said (p.328E):

> Sole agencies are a normal and necessary incident of commerce and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies. So, too, in the case of film-star who may tie herself to a company in order to obtain from them the benefits of stardom…

See also Lord Wilberforce in *Esso* at p.336A–B:

> The line of thought that restrictions may in some contexts be imposed, and upheld, where they have become part of the accepted pattern or structure of

> a trade, as encouraging or strengthening trade, rather than limiting trade, is I think behind the courts' acceptance of exclusivity contracts and contracts of sole agency.

So although I have concluded that the 1988 Agreement has to be justified under the *Nordenfelt* test, I must nevertheless approach the 1988 Agreement on the basis that the exclusivity elements of it are not *per se* objectionable. Whether they are justified will depend on an examination of the 1988 Agreement as a whole.

The exclusivity elements of the 1988 Agreement are of two different kinds. The first kind of exclusivity is that which arises from the fact that all Master Recordings (as defined in clause 15.01) produced by Mr Michael while the 1988 Agreement remains on foot belong to Sony Music: this kind of exclusivity may be described as exclusivity of output. Sony Music has bought Mr Michael's entire output of Master Recordings during the continuance of the 1988 Agreement. In this respect, the 1988 Agreement resembles an exclusive supply agreement under which a distributor purchases the entire output of a manufacturer over a limited period, renewable at the option of the distributor. By selling his entire output of Master Recordings during the continuance of the 1988 Agreement to Sony Music, Mr Michael has put it out of his power to sell Master Recordings to anyone else so long as the 1988 Agreement remains on foot.

The second kind of exclusivity is that which attaches to each Master Recording when produced, by reason of the fact that the property in the Master Recording itself and all copyright in it also passes to Sony Music under the 1988 Agreement: this second kind of exclusivity may be described as exclusivity of exploitation. By selling the copyright in each Master Recording to Sony Music outright, Mr Michael has put it out of his power to license anyone else to exploit that Master Recording - and that will of course apply not merely while the 1988 Agreement remains on foot but during the whole of the copyright period in relation to each Master Recording (50 years from first release).

Both kinds of exclusivity have this in common, that by disposing absolutely of particular assets or rights to Sony Music, Mr Michael has put it out of his power to dispose of such assets or rights to anyone else. But subject to that, in the context of restraint of trade and of the 1988 Agreement different considerations apply to each kind of exclusivity. Thus, exclusivity of output is directly linked to (and to a certain extent governs) the duration of the 1988 Agreement, whereas exclusivity of exploitation exists independently of the 1988 Agreement and will continue during the remainder of the copyright period once the 1988 Agreement has run its course.

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Accordingly, exclusivity of output needs to be considered in the context of the arguments in relation to the duration of the 1988 Agreement, while exclusivity of exploitation needs to be considered

in the context of the arguments in relation to the transfer of the ownership of and copyright in the Master Recordings.

Duration

In *Schroeder,* Lord Reid described the term of the agreement as 'a factor of great importance' (p.1312G); and it was the critical factor in the judgment of the Court of Appeal in *Holly Johnson.*

In the 1988 Agreement the duration of the agreement is effectively governed by the amount of product which Mr Michael has agreed to sell: duration is not an end in itself. Moreover, the duration of the 1988 Agreement is to some extent within Mr Michael's own control, in that it is open to him to shorten the duration of the agreement by delivering albums more speedily.

As to the time required for delivery of an album, the evidence is that a record company ideally wants an album every 18 months to two years (i.e. as an average gap between albums delivered pursuant to a recording agreement); and that a three-year gap between albums is long, though not necessarily unusual for an artist of Mr Michael's status. It was suggested that extra time must be allowed in this case to cover the contingency that Sony Music might elect to release a 'Greatest Hits Album' (a compilation of successful tracks from earlier albums) pursuant to clause 4.04 of the 1988 Agreement, since such an album should not be released too close to the release of a new album. But if one assumes a threeyear gap between new albums produced by Mr Michael (a reasonable assumption in this case) I am satisfied that a Greatest Hits album could be fitted into the release programme without the need for additional time. If one were to assume a shorter delivery time for new albums, then it might be prudent to add up to a year to the prospective duration of the agreement; but such an assumption would not in any event be justified in this case.

The overall maximum duration of 15 years (clause 15.14) operates as a limit in the event that the Minimum Delivery Commitment has not been complied with timeously as contemplated by the agreement. The evidence is that a 'cap' of some kind is not uncommon; but it is less common to find a cap on the overall duration of a recording agreement rather than a limit on the length of individual contract periods. Mr Lee had never heard of a cap on the overall duration expiring in circumstances where an artist had not delivered the required number of albums. In relation to time limits on individual contract periods, neither Mr Lee nor Mr Kennedy knew of an artist being sued in such a case, though both had heard of threatened litigation.

Mr Cran submits that in reality if Mr Michael has not complied with the Minimum Delivery Commitment by the time the 15-year maximum period has expired, he will have to carry on and deliver the outstanding albums or face a claim for damages for breach of contract. Of course I cannot rule out such possibilities. But in the context of the doctrine of restraint of trade these possibilities seem to me to relatively remote and speculative. I accept that some account must be taken of them in making an overall assesssment of the restrictions contained in the 1988

Agreement, but I must also bear in mind that the length of time needed for delivery of Master Recordings for a new album is a matter largely within Mr Michael's own control.

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In considering duration, it has also to be borne in mind that the term of the 1988 Agreement is divided between the Initial Contract Period - the period allowed for delivery of the three albums which (subject to clause 5.01, which I shall consider later) Sony Music is obliged to accept, and in respect of which it is obliged to pay royalties and advances - and the five ensuing contract periods, each covering one album, which will only come into effect at Sony Music's option.

The current practice of the recording industry in this respect, according to the expert evidence, is that in the case of a new artist a record company will normally only commit itself to taking one album - no doubt a prudent step, where the market is unpredictable and the artist unproven - with options over at least five more. At the other end of the scale, the deal available to an established artist who is free of contract will depend on the negotiating strength of that particular artist. Four-album deals are common for established artists, but such an artist may nevertheless choose to sign up for more than the minimum number of albums he could have achieved given his negotiating strength. Thus Mr Lee in cross-examination:

> Q. Where an artist has moved up the ladder and is negotiating from a position of much greater strength then the artist can obtain a much greater commitment?
>
> A. That's right. There are occasions, as I think I mentioned this morning, where an artist is in such demand - he's an artist who comes up on infrequent occasions - where even in their first contract they will have perhaps two albums guaranteed rather than on an option basis, but that's rare.
>
> Q. Is this because there's a bidding war going on for some particularly hot prospect?
>
> A. That's right.
>
> Q. That position reflects perfectly straightforward commercial or economic reality, doesn't it? i.e. with the new and unknown artists the record company can have no idea whether the artist is going to be successful and it would therefore be foolish for them to commit to more than one?
>
> A. Looking at it solely from the record company' point of view, that's obviously the desirable position.

> Q. And the reason they are willing to commit to more albums in the case of an established artist is because they can feel much more certain that the artist will continue to sell?
>
> A. Yes.

The fact that in the 1988 Agreement Sony Music committed to three albums (although it must be remembered that one of them was 'Faith' , which was already a substantial commercial success by the time the 1988 Agreement was signed) reflects the fact that by that time Mr Michael was an established artist, with a proven record of commercial success. Compare in this respect the 1984 Agreement, under which Sony Music committed to one album. In the 1987 renegotiation Mr Tony Russell had proposed that Sony Music commit to four albums (see Part II paragraph A58.1).

Moreover, I accept the evidence of Mr Morris (paras 24 and 25 of his report) that 'considerable investments of money, time, people and energy are called for to produce a successful artist and then to foster and maintain his or her career' , and that 'only with the security of long term exclusive contracts does it become commercially viable for major record companies to make the necessary investments *365 in artists' . This does not mean, of course, that recording agreements may be of limitless duration. What it does mean, in my judgment, is that in making an overall assessment of the restrictions contained in the 1988 Agreement it is necessary to bring into account the degree of input, in terms of both money and effort, which Sony Music needed to bring to the project in order to render it successful and profitable both for itself and for Mr Michael.

It may be, of course, that an artist is so successful on his first album that, with hindsight, a long term deal may not have been necessary in order to protect the record company's investment; but that cannot be known at the negotiating stage. Equally, even an established artist may have an unsuccessful album.

Moreover, once its investment has begun to bear fruit the record company must have a reasonable opportunity to reap the harvest. If a record company were obliged to part with an asset in which it had made a substantial investment once the investment had been recovered and the asset had begun to show a return, then the commercial attraction to a record company of any recording agreement would be drastically diminished: and that in turn would no doubt be reflected in the financial terms offered to aspiring artists. In my judgment, this is another factor of which I must take account in the instant case.

The fact that as a general rule Sony Music 'drops' artists who have not become profitable after some three albums is hardly surprising, and only serves reinforce its legitimate desire to capitalise on its successes. No doubt in an ideal world a record company will only sign successful artists, but no A & R man could claim that degree of prescience.

As to Mr Michael's complaint of 'lack of reciprocity' (in the sense that while Sony Music may in effect terminate the 1988 Agreement by declining to exercise its next option, Mr Michael has no equivalent right), it is necessary to place this complaint in the context of the situation which existed when the 1988 Agreement was signed. Given that Sony Music will only 'drop' Mr Michael where it has concluded that it is in its commercial interests to do so, and given the substantial degree of commercial success which Mr Michael had already achieved by the time the 1988 Agreement was signed, the prospects of Sony Music wishing at some time in the future to 'drop' him were virtually non-existent and could not have entered into anyone's thinking at the time.

It must also be borne in mind that if one is postulating that the 1988 Agreement runs its full course, that is to say that it remains on foot until 4 January 2003, one is also assuming that Mr Michael has remained a successful recording artist over the entire period - otherwise Sony Music would not have exercised all its options. As Mr Pollock put it in argument:

> The duration is the function of success. If the artist is unsuccessful, it is likely that the record company will decline to exercise an option, and the relationship will terminate. It is only if the artist is actually successful that the contract will continue for its full length. Thus if an artist does remain bound for the length of his contract, it will be virtually inevitable that the relationship will have been a commercially successful one from both sides.

Thus, it cannot sensibly be suggested that if the 1988 Agreement runs its full course Mr Michael will thereby suffer financial or commercial hardship of any kind: indeed, the opposite is likely to be the case.

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A further factor to be borne in mind when considering the question of the duration of the 1988 Agreement is the fact that an established artist (particularly one as outstandingly successful as Mr Michael) who comes onto the market free of contract - as, for example, where his original recording contract has expired - will be in a position to, in effect, auction his services and thereby obtain even greater financial rewards than those which provided for under his erstwhile recording contract. Mr Pollock described this in argument, perhaps somewhat brutally, as the artist going from being excessively overpaid to being grossly excessively overpaid.

Mr Michael was asked in cross-examination whether he took the view that pop artists of his level were excessively overpaid. Mr Michael replied:

> No, I don't know that I have ever said excessively overpaid. I have said that it is extraordinary the amount of money that is actually… - it's out of proportion, out of perspective, the amount of money that entertainers are paid, and it is very hard actually to come to terms with.

Mr Cran cautioned me against being influenced too much by the large sums of money involved in this case. I accept the caution. Nevertheless, it seems to me that Mr Pollock has a point.

Mr Cran submits that the restrictive nature of the 1988 Agreement - and principally its duration - should outrage the Court. I confess that I find it impossible to be outraged at the prospect of Mr Michael being denied the opportunity, once he has achieved success under the provisions of his existing recording agreement, to capitalise on that success in the open market by commanding even greater financial returns than he has so far enjoyed. As a general rule, it seems to me that in the case of an established pop recording artist - who by definition must have received very great financial returns for his artistic endeavour - 'outrage' does not come into the picture.

A further factor to be borne in mind, as it seems to me, is that the final two albums in respect of which Sony Music has an option under the 1988 Agreement were added as a result of the 1987 renegotiation as a *quid pro quo* for substantial improvements in Mr Michael's financial terms. It will be recalled that Mr Tony Russell rightly concluded that if Mr Michael's financial terms were to be materially improved, he would have to offer more product.

One of the principal grounds put forward by Sony Music as justification for potentially long-term contracts - that is to say long-term contracts where an artist proves successful - is the need for the fruits of the successes to be available to cover the cost of the failures. However, Mr Lee could see no reason why Mr Michael should be, as he put it, 'penalised for his record company's inability to invest successfully in other artists' (see paragraph 3.12.2 of his report). Mr Lee goes on to suggest that such costs or losses could be passed on to the consumer in the same way as, in other industries, the research and development costs of the manufacturer are reflected in the price of the end product to the consumer.

Apart from the fact that I can see no public policy interest in producing a situation in which the price of the end product to the consumer is bound to rise, it seems to me to be only commercial sense that the record company should attempt to cover the cost of its failures with its successes.

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I bear in mind in this connection that in *Holly Johnson* a similar contention was put forward on behalf of the record company, in respect of which Dillon LJ said (*ibid.* p.74) that the argument fed on itself and led logically to the conclusion that every recording agreement should last for the

whole lifetime of the artist, and that it did not justify anything like such a long and one-sided term as that provided by the recording agreement in question in that case. However, I do not take Dillon LJ to be laying down any general principle in this respect. On the evidence I have heard in this case, I have come to the conclusion that there is force in Sony Music's contention, and that a record company's need for successes to help pay for failures is a factor which I should bring into account when considering the duration of the 1988 Agreement.

So far as exclusivity of output during the continuance of the 1988 Agreement is concerned, I bear in mind in particular (a) that exclusivity of output is not *per se* objectionable (there being no absolute prohibition on a supplier of goods or services selling his entire output over a specified period: see Lord Pearce and Lord Wilberforce in *Esso* in the passages quoted above); and (b) that were Mr Michael to reserve the right to sell Master Recordings to other record companies while still contracted to Sony Music under the 1988 Agreement, the reservation of that right would (assuming Sony Music were prepared to contract at all on that basis) doubtless be reflected in very much less favourable financial terms for Mr Michael.

It will be recalled that one element of the 'test of fairness' formulated by Lord Diplock in *Schroeder* is that the restrictions should be 'commensurate with the benefits secured to the promisor under the contract' (*ibid.* p.1315H). In the instant case, Mr Michael's financial terms under the 1988 Agreement reflected, among other things, Sony Music's entitlement to exclusivity of output of Master Recordings during the continuance of the agreement.

Lastly so far as duration is concerned, as I observed earlier in this judgment, the 1984 Agreement contained no 'cap' on its duration: the 15-year 'cap' appeared for the first time in the 1988 Agreement. In the circumstances it is possible that had the 1984 Agreement been allowed to run its course - i.e. had it not been superseded by the 1988 Agreement - it might have continued beyond 4 January 2003 (being the fifteenth anniversary of the 1988 Agreement).

Exploitation

Mr Michael's principal complaint so far as exploitation is concerned is the lack of exploitation obligations on Sony Music. Mr Cran points out that clause 2.02(b) of the 1988 Agreement expressly reserves to Sony Music the right to refrain from manufacture of, or the sale of or dealing in, the Master Recordings or records made therefrom, subject only to limited release obligations in respect of certain Master Recordings.

Sony Music's release obligations under the 1988 Agreement are, in summary, as follows:

> Albums forming part of the Minimum Delivery Commitment:

(a) Singles: a positive obligation under clause 4.02 to release three singles in each of the UK and the US (breach of which obligation would give Mr Michael a right to terminate the agreement: see clause 22.02).

(b) Albums in the UK: no positive obligation to release in the UK, but under clause 11.01 Mr Michael may give notice requiring release; and if release does not occur in accordance with the notice, the agreement terminates.

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(c) Albums in the major territories: clause 11.02 provides that if an album is not released in the major territories, Mr Michael may require Sony Music to enter into good faith negotiations with a third party for a licence of the rights to the album, on terms that Sony Music retains a 3 per cent override.

(d) Albums elsewhere: no release obligations.

Albums not forming part of the Minimum Delivery Commitment (i.e. extra albums):

(a) As above.

(b) As above.

(c) No release obligation in any of the major territories.

(d) As above.

The current practice in the record industry in relation to release obligations is, in summary, as follows.

A new artist is unlikely to persuade a record company to enter into a positive commitment to release his records. Such a commitment might be achieved on a renegotiation, but Mr Kennedy thought it would be low down in most artist's list of points to be achieved and that a positive commitment was not necessarily even advantageous. On the other hand an established artist free of contract ought to succeed in achieving a positive commitment to release in specified territories.

Where there is no positive commitment to release, there may be terms (such as clause 11 in the 1984 and 1988 Agreements) which provide for certain consequences to follow from non-release.

Mr Kennedy's view was that the particular provisions in clauses 11.01 and 11.02 are as good as are to be found (see para. 54 of his report).

As to release overseas, release in the US is almost inevitable given the obligation (in clause 4.02) to release three singles. As to the provision (albeit unenforceable) for negotiations with a third party licensee(see clause 11.02), Mr Kennedy could foresee no difficulty in finding a third party licensee, and had not known a clause in this form to provide practical problems. Mr Lee agreed that there would be no difficulty in finding a licensee while Mr Michael was a superstar, but considered that the position might be different if his career slipped. Mr Kennedy and Mr Lee agreed that an override of 3 per cent is normal in such circumstances.

So far as subsequent exploitation after first release is concerned, it is rare for a record company to accept any positive obligation to that effect. On the other hand one sometimes finds a provision for reverter of copyright in a recording which is deleted from a record company's catalogue, indicating that the record company is not going to exploit it further.

As to reverter of copyright generally, some provision is usual where the artist has some negotiating power (e.g. where he has already achieved a measure of success). Over recent years, provisions for reverter of copyright have become more common, although anyone other than an established artist may have to pay for the reversion.

It is possible to conceive of circumstances in which a mere release obligation without more may not prove to be of any substantial benefit to the artist, since the record company may be able to go through the motions of releasing an ***369** album or a single simply in order to avoid breaching the recording agreement, but without properly supporting the release and without any intention to exploit it thereafter. Nor is this an entirely theoretical exercise, since examples can be found where this has happened.

Turning to the instant case, by January 1988 Mr Michael was already a very successful recording artist indeed. The enormous success of 'Faith' during the three months immediately preceding the 1988 Agreement left no room for doubt about that in anyone's mind. Mr Michael's own assessment of his status at that stage in his career was that he was already in the superstar category. As for Mr Tony Russell, although he felt that Mr Michael had not yet quite achieved those heights, it will be recalled that in his attendance note of the meeting with Sony on 12 May 1987, that is to say even before the release of 'Faith' , he recorded that:

> We reiterated that from George's point of view the renegotiation was substantially one of status and therefore all George would want to have

> proved to him [was] that he was being treated on [a] par with other superstars.

At the time, Sony thought these claims excessive (although some three years later - in the 1990 renegotiation - it agreed to place Mr Michael on a par financially with selected US superstars). But the fact that in the 1988 Agreement it was prepared to make substantial improvements in Mr Michael's financial terms demonstrates how good a prospect Mr Michael was seen to be at that stage. He could hardly have been regarded otherwise, with 'Faith' having already sold some 4 million copies by the time the 1988 Agreement came to be signed.

Against that background, it seems to me unreal to suggest that Sony Music might fail or refuse properly to exploit Mr Michael's recordings. Sony Music's commercial interests lay in exploiting Mr Michael's recordings to the full: indeed, in the 1987 renegotiation they were about to stipulate for two further albums when forestalled by Mr Tony Russell's offer to that effect. The notion that, as matters stood on 4 January 1988, there was a real risk that Sony Music might in effect 'put [Mr Michael's recordings] in a drawer and leave them there' (see Lord Reid in *Schroeder* at p.1313D) is in my judgment far-fetched; or, to use the language of Lord Macnaghten in *Nordenfelt* (p.574), 'improbable and extravagant' . To recognise the existence of such a risk, given the particular circumstances of the instant case, would in my judgment involve an unacceptable distortion of commercial reality, and would be contrary to the 'rule of reason' .

Remuneration

Although a considerable amount of time was spent investigating the structure and effect of the financial terms of the 1988 Agreement, I propose to deal with this aspect relatively shortly.

It is not alleged that the consideration for the sale and transfer of the Master Recordings and the rights attaching to them was so inadequate as to render the 1988 Agreement in any sense unconscionable: it would be difficult to do so given the level of Mr Michael's financial return. He has already become an extremely wealthy man by reason of the 1988 Agreement, and if the 1988 Agreement runs its full course (and if he fulfils the Minimumn Delivery Commitment) he will in all probability become a great deal wealthier.

Complaint is, however, made that the consideration under the 1988 Agreement was inadequate in that the royalty rates were much less than those which ***370** Mr Michael could have achieved 'on the open market' (plaintiffs' written submissions p.124). Both Mr Kennedy and Mr Lee agreed that the royalty rates achieved by Mr Michael in the 1987 renegotiation were lower than those which he could have expected to achieve on the open market - i.e. had he been in a position to negotiate on the basis that he was free of contract. However, as I pointed out earlier, a comparison with open market rates presupposes that Mr Michael was not on the open market - i.e. that he was already

bound by the 1984 Agreement (an assertion which, somewhat paradoxically, Mr Cran does not wish to make). But if he was already bound by the 1984 Agreement, it is no surprise that on a renegotiation he could not achieve terms as favourable as those which he could have achieved on the open market. And even if one leaves aside the vexed question of the enforceability of the 1984 Agreement, the fact remains that both Mr Michael and Sony Music were negotiating on the basis that the 1984 Agreement was enforceable.

Nor is it suggested that Mr Tony Russell was in the least confused by the complex royalty structure contained in the 1988 Agreement, or by the various deductions for which provision is made in what I may call the 'small print' of the 1988 Agreement. As I have said many times, he is an expert in the field, and he knew his way around the provisions of the 1984 Agreement no less well as Sony Music. Moreover, it is common ground that at no stage in the 1987 renegotiation did Mr Tony Russell seek a profit-sharing arrangement: he accepted that the renegotiation would have to be undertaken in the context of the existing royalty structure created by the 1984 Agreement.

I accordingly leave on one side Mr Cran's complaints about the form of the 1988 Agreement, which (however merited they may be as a matter of drafting) seem to me to have nothing to do with the application of the doctrine of restraint of trade, and I turn to the one point of principle which has been raised in relation to remuneration, which is the point raised by what I earlier described as the 'equitable apportionment allegation' .

The equitable apportionment allegation is that the 1988 Agreement, as renegotiated in 1990, results in:

> … a seriously inequitable apportionment of the proceeds of exploitation of the Master Recordings in favour of the Sony Music Group.

An 'equitable apportionment' for this purpose is said to be:

> … one in which the respective receipts of the Plaintiffs and the Sony Music Group, after deduction of [direct costs], are approximately equal.

What this allegation amounts to, as I understand it, is that the 1988 Agreement ought to have provided for equal profit-sharing - albeit equal profit-sharing achieved through the royalty

structure. Moreover, Mr Michael's case is that in calculating the 'profit' for this purpose Sony may not bring indirect costs into account.

In my judgment the equitable apportionment allegation is fundamentally misconceived, and would in any event be unworkable in practice.

Although the relationship between recording artist and record company pursuant to a recording agreement may loosely be described as a partnership, in the sense that each must actively co-operate in the venture if it is to be a commercial success, one must not take the analogy of partnership too far. In particular, recording artist and record company are not in partnership in the sense that they ***371** are carrying on a business in common. The business of the artist is essentially that of supplying Master Recordings to the record company pursuant to the recording agreement for commercial exploitation by the record company. The business of the record company is essentially that of commercial exploitation of Master Recordings supplied to it. Moreover, the business of the record company is not limited to exploiting the Master Recordings supplied by any one particular recording artist: its business is that of exploiting the Master Recordings of all the many recording artists who have entered into recording agreements with it. In this sense, the relationship between recording artist and record company is akin to that of producer and distributor.

No doubt this is a considerable over-simplification, but it does serve to demonstrate, in my judgment, that there can be no principle or rule of law or equity to the effect that where a recording artist enters into a recording agreement with a record company under which the recording artist is entitled to royalties, 'fairness' requires that the financial return of the recording artist should represent an 'equitable apportionment of the proceeds of exploitation' in the hands of the record company (assuming for the moment that it is possible to ascertain what that would be).

Of course, if recording artist and record company negotiate a profit-sharing agreement, well and good (although this rarely occurs). But in the instant case the parties negotiated on the basis of the royalty structure created by the 1984 Agreement. Mr Tony Russell never asked for a profit-sharing agreement, because he knew very well that Sony Music would not be prepared to offer one. Equally, although it might in theory be possible to negotiate royalty rates by reference to the anticipated net receipts of the record company from exploiting the Master Recordings the subject of the recording agreement, or even to negotiate a sliding scale of royalty rates linked to anticipated or hoped for levels of success in the future, the 1987 renegotiation did not in fact proceed along those lines.

Were there to be such a principle or rule as that for which Mr Michael appears to be contending, the repercussions of it would *prima facie* be very wide indeed. Presumably the principle or rule is not to be limited to recording agreements. *Prima facie,* it would apply to every distribution agreement. Nor can I see any logical reason why it should not also apply to contracts of employment. If Mr Michael is to be entitled to a share of Sony Music's return from exploiting his services, why should not the same apply to Sony Music's own employees?

Nor can I see any justification for a 50/50 split (even allowing for the word 'approximately'). In his closing submissions, Mr Cran was somewhat coy about adopting a basis of equality, notwithstanding that that was what was pleaded in the Further and Better Particulars of the equitable apportionment allegation. Thus, he submits as follows (plaintiff's written submissions p.140b):

> It is not the function of the Court to prescribe reasonable remuneration… If the Court is satisfied that the remuneration is seriously inequitable, it follows in our submission that it is unreasonable… It is not necessary for the Plaintiffs to establish what precisely could be equitable remuneration: it is sufficient if they establish that it is inequitable, meaning unfair or unreasonable.

I find myself at a loss in addressing the question whether the apportionment effected by the 1988 Agreement (assuming it can be calculated) is 'seriously inequitable' without knowing what Mr Michael says would have been an equitable apportionment. But in any event, the truth is that it is impossible to fasten ***372** on any test or measure which will yield an answer to the question what the apportionment should be. So far as I can see, the allegation of approximate equality merely reflects the impossibility of alleging any other basis of apportionment.

In any event, any principle or rule of 'equitable apportionment' (if it existed, which it does not) would be unworkable in practice, in the context of a recording agreement in the form of the 1988 Agreement.

The royalty structure contained in the 1988 Agreement (and derived, in turn, from the 1984 Agreement) is of a standard kind, and is very complex. A party setting out to negotiate the financial details within that structure so as to produce a particular apportionment of the 'proceeds of exploitation' would be faced with an impossible task. Thus, quite apart from the fact that the basic royalty is itself the product of a number of factors (e.g. the definition of the royalty base price, the provisions for packaging deductions or container charges, and the CD reduction), there are in addition a number of special deductions to be taken into account (e.g. in relation to club operations, performance income, television advertising, compilations, and free goods). But the difficulties to be encountered in matching the artist's prospective return against a specified share of the prospective 'proceeds of exploitation' in the hands of the record company are nothing as compared with the difficulty of (a) determining how the 'proceeds of exploitation' are to be calculated in any particular case, and (b) assessing what those proceeds are likely to amount to in the future, so as to fix the yardstick against which the artist's prospective royalty return is to be measured.

In the instant case I heard a great deal of expert evidence from the financial experts, Mr Ravden and Mr Tweedale, as to what costs should and what costs should not be brought into account on either side in attempting a comparison between the respective return of Mr Michael and of Sony Music from the work undertaken by each pursuant to the 1988 Agreement. In particular, much debate took place as to whether Sony Music was entitled to bring into account for the purposes of this calculation indirect costs (including overheads), and if so, how such costs were to be apportioned. I mean no disrespect at all to either of the financial experts when I say that all this evidence only served to convince me that the entire exercise is fundamentally flawed, and that the struggle for the answer only demonstrates the fallacious nature of the question.

Were it to be appropriate to perform any such calculation in the instant case, then it seems to me that account would somehow have to be taken of Sony Music's indirect costs of exploitation of Mr Michael's records, since such costs are genuine costs of running Sony Music's business and some part of them must be treated as attributable to Mr Michael's records. Accordingly, some kind of apportionment would have to be made. However, as I hope I have made clear, in my judgment it is not appropriate to attempt such an exercise.

I turn next to advances. Mr Michael alleges that the advances payable in respect of the last four albums under the 1988 Agreement are 'very limited' , having regard in particular to the size of the advances for the first four albums, and to:

> the international stature and reputation of [Mr Michael] at the date of execution of [the 1988 Agreement].

As to the first of those two factors, in my judgment the provisions for advances contained in the 1988 Agreement must be looked at as a whole. And it will be **373* recalled that as a result of the acceleration arrangements agreed by Sony Music in relation to Mr Michael's 'year out' in 1988 Mr Michael was paid a total of over £11 million during that year. The notion that the Court should conclude that the provisions for advances, looked at as a whole, were unfair, oppressive or in any way inadequate seems to me to be so far removed from reality that I find difficulty in comprehending it.

As to the second factor, the 'international stature and reputation of Mr Michael' in January 1988 is plainly relevant to any assessment of the restrictive effect of the 1988 Agreement. But, as is implicitly recognised in the plea itself, Mr Michael's proven success as a solo recording artist served to strengthen his negotiating position, even in the context of a renegotiation. If Mr Tony Russell could not obtain better advances for the last four albums, it is hard to think that any other negotiator could have done better. In the circumstances, I cannot see any basis on which the Court could say that Mr Michael ought to have achieved better terms in this respect.

In any event, as I observed earlier, it is not the Court's function to rewrite the contract; and one matter which is beyond dispute is that the financial terms of the 1988 Agreement represented a substantial improvement over the equivalent terms in the 1984 Agreement.

Accordingly, Mr Michael's complaints in relation to the advances payable in respect of the last four albums are in my judgment without substance.

Finally, under the heading of remuneration, I turn to the complaint that an artist depends on the practice of renegotiation to obtain 'reasonable remuneration' (plaintiffs' written submissions p.73).

As I explained earlier in this judgment, renegotiation is a common practice and every artist who has an experienced adviser will know that if he proves to be successful a renegotiation of his recording agreement will be on the cards. This is a factor which will be taken into account in the negotiation of the terms of the recording agreement. Moreover, although in theory it might be open to an artist to negotiate on a once-for-all basis, with the possibility of renegotiation being expressly excluded, there is nothing to suggest that Mr Tony Russell would have wished to negotiate on that basis. Nor does it lie in Mr Michael's mouth to suggest such a possibility, given that Mr Tony Russell's undertaking in his letter dated 20 December 1988 not to seek a further renegotiation until after the release of the next album did not prevent a renegotiation taking place in 1990, before the release of the next album.

Ownership of Master Recordings and Copyright

Mr Lee and Mr Kennedy agreed that a new artist will almost invariably have to part with copyright in his Master Recordings for the full copyright term, and that this position would be unlikely to change on a renegotiation. An established artist, on the other hand, might be able to negotiate a licence for a limited term. If a licence were granted for less than the full copyright term, that would be likely to be reflected in the financial provisions of the recording agreement. Had Mr Michael been free of contract in 1987, he might, according to Mr Lee, have achieved a licence for a period expiring some five to ten years after the 1988 Agreement had come to an end.

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I find difficulty in seeing how exclusivity of exploitation arising by reason of the outright sale and transfer of copyright can be classified as a restraint of trade at all. I agree with Mr Pollock that the sale and transfer of property rights is preeminently a matter of bargain. The proposition that there is some public policy interest in preventing an outright sale of a property right seems to me to be self-evidently unsustainable. If there be any competition in this respect between freedom of trade and freedom of contract (cf. Lord Shaw in *Herbert Morris v Saxelby* (above) at p.716), then in my judgment freedom of contract should prevail.

Nor can I see anything oppressive in the fact that the record company retains the copyright for the full copyright period, with no provision for reverter. It was suggested by Mr Cran that once a recording becomes part of a record company's 'back catalogue' it is unlikely to be exploited

any further, and that in those circumstances there can be no good reason for the record company retaining the copyright. I am satisfied on the evidence, however, that Sony Music is concerned to exploit its back catalogue wherever there is a reasonable prospect of making a profit by doing so, and that it regards its back catalogue as a potentially valuable and exploitable asset. It is only when a recording is deleted from the catalogue altogether that it becomes effectively dead material so far as Sony Music is concerned, and in such circumstances if the artist wishes to reacquire the copyright he is unlikely to encounter any difficulty.

Assignability of Sony Music's rights

Clause 17.01 of the 1988 Agreement is in the following terms (so far as material):

> Company may assign its rights hereunder in whole or in part to any subsidiary, affiliate or controlling corporation or to any Person owning or acquiring a substantial portion of the shares or assets of Company and such rights may be assigned by any assignee thereof provided however that any such assignment shall not relieve Company of any of its obligations hereunder…

In *Schroeder* the music publishing agreement contained, in clause 16, an unrestricted power for the publisher to assign. Lord Reid said of this clause (p.1313B-C):

> Clause 16 appears to me to be important. There may sometimes be room for an argument that although on a strict literal interpretation restrictions could be enforced oppressively one is entitled to have regard to the fact that a large organisation could not afford to act oppressively without damaging the goodwill of its business. But the power to assign leaves no room for that argument. We cannot assume that an assignee would always act reasonably.

Mr Cran submits that the instant case is on all fours with *Schroeder* so far as the provision for assignment is concerned. He submits that under clause 17.01 of the 1988 Agreement Sony Music is free to assign to any third party by the simple device of assigning first to another member of the Sony Group, who will then be in a position to assign outside the group. He submits that there

is plenty of scope for the oppressive operation of its rights by an assignee to the detriment of Mr Michael (plaintiffs' written submissions p.171). He further submits that an assignment pursuant to clause 17.01 need not carry with it the burden of any concomitant obligation on the assignee to account to Mr Michael for royalties, with the result that if, subsequent to an assigment, Sony Music were to become insolvent, Mr Michael would be left with only a worthless claim for damages.

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Mr Pollock submits in the first place that on its true construction clause 17.01 does not enable an assignee within the group to assign on outside the group: the consequences of such a construction would, he says, be bizarre. Moreover, he submits that in practice it is inconceivable that Sony Music or any assignee of Sony music (being a member of the Sony Group) would contemplate assignment outside the group.

As to the possible insolvency of Sony Music, Mr Pollock submits that any assignment would necessarily take effect subject to clause 22.02 of the 1988 Agreement, which provides that on the insolvency of Sony Music Mr Michael is entitled forthwith to terminate the agreement, whereupon all rights in and to the Master Recordings forthwith revert to him. But in any event, submits Mr Pollock, the insolvency of a co-contractor is a risk inherent in every commercial contract, and does not involve a restraint of trade.

In my judgment, on the true construction of clause 17.01 the provision that 'such rights may be assigned by any assignee thereof' means no more than that the provisions of clause 17.01 are to apply to any assignee from Sony Music as they apply to Sony Music, so that an assignee from Sony Music will stand in Sony Music's shoes so far as assignment is concerned, and will have no wider power to assign than Sony Music itself had. To construe clause 17.01 so as to give an assignee from Sony Music a wider power of assignment than Sony Music itself had would in my judgment be to deny the clause any commercial sense.

As to insolvency, I agree with Mr Pollock that this is a risk which is likely to be present to a greater or less degree in most commercial contracts. That said, however, the risk of Sony Music becoming insolvent must be extremely remote - and there is no evidence that the possibility of its becoming insolvent entered into the thinking of Mr Michael or of Mr Tony Russell in the 1987 renegotiation.

In any event, even if I am wrong in my conclusion as to the true construction of clause 17.01, in practical terms there is nothing to suggest that Sony Music, or any other member of the Sony Group, might at some stage contemplate assigning the benefit of the 1988 Agreement outside the Sony Group, and it is hard to conceive of circumstances in which such a step might be considered. All in all, I would regard such a risk as 'remote and improbable' .

Finally, if, contrary to everything I have just said, the benefit of the 1988 Agreement were at some stage in the future to be validly assigned to a third party outside the Sony Group, there is no reason to assume that such an assignee would not seek to exploit Mr Michael's recordings to the full, and every reason to assume that it would. Why else would it have taken an assigment in the first place?

Sony Music's right of rejection (clause 5.01)

Clause 5.01 provides as follows (so far as material):

> … A Master Recording will not be considered satisfactory under this agreement unless it is technically satisfactory for Company's manufacture and sale of Phonograph Records, and it embodies performances by the Artist that are at least of the quality of the Artist's prior recorded performances…

Mr Cran submits that on the true construction of this clause the decision whether a recording embodies a performance by Mr Michael which is at least of the quality of his prior recorded performances is one for Sony Music, acting reasonably, **376* and that given the subjective nature of such a decision the scope for challenging it is of necessity very small. Therefore, submits Mr Cran, clause 5.01 offers a clear opportunity for Sony Music, should it wish to do so, to use the quality requirement as a pretext for rejecting Master Recordings and thereby emasculating its release obligations even further. He submits that this in turn 'could result in a total sterilisation of [Mr Michael's] recorded output for a very lengthy period of time, or even for the remainder of his professional career' .

These submissions of Mr Cran seem to me to be far-fetched.

In the first place, I am satisfied that there is nothing unusual about the terms of clause 5.01, and that some such provision is commonly to be found in recording contracts. In the course of argument, Mr Cran produced what he submitted was an improved version of the clause. It may be an improvement, but, as I remarked earlier, my function in the instant case is not to 're-mould' the 1988 Agreement.

In the second place, I disagree with Mr Cran's construction of the clause. In my judgment the decision as to the quality of Mr Michael's Master Recordings is not one for Sony Music. If Sony Music seeks to exercise its power of rejection on the ground of lack of requisite quality, and if Mr Michael disputes that the power has been properly exercised, then, for better of worse, the dispute may have to be resolved by a court or an arbitrator or by whatever other means the parties may choose. But the dispute in such circumstances would not be whether Sony Music had acted reasonably in concluding that the particular Master Recording lacked the requisite quality, but whether the conclusion was right.

In the third place, Mr Cran's submission that Sony Music may use clause 5.01 to sterilise Mr Michael's output for the remainder of his professional career seems to me to be wholly divorced from reality.

Multiple sets or 'live' albums (clause 5.02)

Clause 5.02 provides as follows:

> You will not deliver to Company a multiple record set or 'live' Album in reduction of the Minimum Delivery Commitment without Company's prior written consent, which Company may withold in its absolute discretion.

Although clause 5.02 is not pleaded as a restriction (nor did Mr Cran so characterise it in opening), in his closing submissions Mr Cran submitted that this clause is a serious restriction in so far as it prevents multi-set or 'live' albums from counting towards the Minimum Delivery Commitment (see plaintiffs' written submissions p.52). He submits that 'it is particularly hard to see why a multi-set album should not count towards the [Minimum Delivery Commitment]' (*ibid.*).

For my part, I can see nothing objectionable about clause 5.02. It seems to me entirely reasonable that Sony Music should have some control over the type of album to which is is committing itself, and in my judgment clause 5.02 provides a sensible, but certainly not excessive, degree of control in this respect.

Joint recordings (clause 8.01)

Clause 8.01 deals with the royalty rate applicable to 'Joint Recordings' - an expression defined in clause 15.20 as meaning, in effect, any Master Recording embodying Mr Michael's performance together with that of some other artist to whom Sony Music is obliged to pay royalties. The clause begins: ***377**

> In respect of Joint Recordings (which can only be made with your prior written approval)…

Mr Cran submits that the word 'your' must be a mistake for 'our' , and on that basis he submits that the requirement for Sony Music's prior written approval is restrictive.

There is, however, no claim for rectification before the Court, and I must therefore take the clause as I find it. In any event, there is no context in the 1988 Agreement for the substitution of the word 'our' . Throughout the 1988 Agreement Sony Music is referred to as 'Company' , and its consent is referred to in similar terms (see, e.g., the reference in clause 5.02 to 'Company's prior written consent'). The word 'our' does not occur anywhere in the 1988 Agreement. On the other hand, Mr Michael is frequently referred to as 'you' (see, e.g., clauses 1.01, 2.01, 2.02(a), 2.02(c), 2.02(d), 2.02(e), 3.02, 4.01 (which also includes the word 'your'), 4.03, 5.01, 5.02, 6.01, 6.02(a) (which refers to 'your prior written consent'), 6.03, 7.01, 7.02, 7.03, 7.04, 7.05, 7.08, 7.09, 8.02, 8.03, 8.04, 8.05, 8.06, 8.07, 9.01, 9.02, 9.03, 9.04, 10.01, 10.02, 10.03, 10.04, 11.01, 11.02, 12.01, 14.01 ('Subject to your approval') et cetera).

In my judgment, therefore, Mr Cran's submission in relation to clause 8.01 fails *in limine.*

Restrictions operating after the 1988 Agreement has come to an end

Mr Cran submits firstly that in practice the 1988 Agreement will operate to give Sony Music a 'hold' over Mr Michael even after the agreement itself has come to an end, principally by reason of the fact that Sony Music will retain the copyright, combined with the absence of any exploitation obligation after first release and the lack of any incentive for further exploitation after the end of the term (such as would be provided, for example, by an obligation to pay further advances at intervals during the remainder of the copyright period). He points out that although Mr Michael would be entitled to royalties from exploitation after the end of the term of the 1988 Agreement, the royalty rates would remain at their original level.

Secondly, he relies on the re-recording restriction in clause 12.02 of the 1988 Agreement as an oppressive and restrictive feature of the agreement.

As to Mr Cran's first submission, I have already dealt with the transfer of copyright. If, once the 1988 Agreement has run its course, Mr Michael has a commercial incentive to enter into a further agreement with Sony Music, I cannot regard that possibility as amounting to a restrictive feature of the 1988 Agreement for the purposes of the doctrine of restraint of trade.

I turn, then, to Mr Cran's submission in relation to clause 12.02. Clause 12.02 provides as follows (so far as material):

> The Artist will not perform any composition recorded in the Master Recordings for any Person other than Company, for the purpose of making

> Phonograph Records or Master Recordings, during the period commencing on the date of this Agreement and ending five (5) years after the date of first release of such Master Recording if released during the term or three (3) years after the date of expiration of the term of this Agreement, whichever is the later…

Mr Cran submits (plaintiffs' written submissions p.78a) that this clause bites unnecessarily on recordings issued more than four years previously.

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The evidence is that a clause in these terms is usual in recording agreements. Mr Kennedy says (para. 112 of his report) that an artist would normally expect such a clause to be included.

It seems to me that some protection against re-recording for a relatively short period after the expiry of the recording agreement is reasonable, and I would not regard a period of three years as being in any way excessive in Mr Michael's case. It is true that under the terms of clause 12.02 the period of the restriction will be longer in relation to Mr Michael's earlier recordings, but I can see nothing inherently objectionable in that.

Audio-visual performances (clause 13.02)

Clause 13.02 lays down a procedure whereby Sony Music has the option of paying the production costs of an audio-visual performance by Mr Michael. If it elects to do so the rights in the performance belong jointly to Sony Music and Mr Michael and Sony Music is granted exclusive worldwide video rights in the performance. If it elects not to do so, the rights in the performance (including video rights) vest in Mr Michael absolutely.

Mr Cran submits that the lack of video rights (if Sony Music elects to pay the costs of the performance) is restrictive in that third party financiers are likely to deterred from investing in, for example, a film, if the video rights in the performance are not available for exploitation (see also Mr Lee's report).

In my judgment, in framing his submissions on clause 13.02 Mr Cran is searching too assiduously for possible scenarios in which the 1988 Agreement may operate restrictively. The scheme provided by clause 13.02 seems to me to be perfectly fair and commercial in giving Sony Music, in effect, first refusal over the video rights in an audio-visual performance at a price represented by the production costs of the performance. Moreover, the clause was drafted by Mr Tony Russell.

Audit restrictions (clause 9.04)

Under clause 9.03 Mr Michael has the right, in effect, to audit Sony Music's royalty statements. Clause 9.04, however contains the following provision:

> … Notwithstanding the foregoing, Company shall have no obligation to furnish you with manufacturing records, save that Company will permit you to inspect its records known at present as 'GD 31' (which shows inventory stock movements)…

Mr Cran submitted that without access to manufacturing records the right of audit was of little use. Whether or not that may be a legitimate complaint in other cases, I am satisfied by the evidence of Mr Corbett that in the instant case Sony Music's procedures are such that Mr Michael is not prejudiced by lack of access to manufacturing records.

Mr Corbett also pointed out that there is an element of confidentiality attaching to the manufacturing records relating to recordings of other artists, and he stressed the risk of that confidentiality being breached if Mr Michael were to be allowed access to manufacturing records. Mr Cran submits that Mr Corbett's evidence on this point is not credible (plaintiff's written submissions p.137). I found Mr Corbett to be an honest and careful witness, and I accept his evidence.

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Alienation of copyrights

Mr Cran submits that property rights in Master Recordings transferred by clause 2.01 of the 1988 Agreement, of which Sony Music is exclusive owner (see clause 2.02(a)), may be disposed of by Sony Music to any third party, since clause 17.01 (the assignment clause) does not, he submits, cover such rights. Further, he submits that on a sale of such rights the purchaser may not be subject to any obligation to pay royalties, since it is open to Sony Music to transfer the rights free of any charge or other obligation in respect of royalties. Were that to happen, submits Mr Cran, the reverter provision in clause 22.02 would be worthless and Mr Michael would be left with an unsecured claim against Sony Music (cf. *Barker v Stickney [1919] 1 KB 121*). He further submits that it is possible that Sony Music might sell the rights for a lump sum, rather than in consideration of a royalty override, with the consequence that Sony Music would have no further interest in ensuring that the rights were properly exploited.

In the first place, in my judgment Mr Cran has built this particular house upon the sand, since I see no reason to give the expression 'its rights hereunder' in clause 17.01 a restrictive meaning, so as to exclude property rights. As I read clause 17.01 it is of general application and covers all rights to which Sony Music becomes entitled under the 1988 Agreement, including property rights.

But in the second place, if I am wrong in my construction of clause 17.01, Mr Cran's argument in this respect seems to me to be another example of his searching too assiduously for possible permutations of events in the future in which the provisions of the 1988 Agreement might be said to operate to Mr Michael's prejudice. I regard the argument as far-fetched, in the sense in which Lord Macnaghten used that expression in *Nordenfelt* (p.574).

Delayed royalty accounting

Mr Michael's complaint under this head is that royalties paid to Sony Music by overseas licensees will, so far as Mr Michael is concerned, be treated as earned when they are received by Sony Music, nothwithstanding that the sale which generated the royalty took place some time earlier. Receipt of royalties by Mr Michael in respect of overseas sales is thereby be delayed.

The evidence is, however, that this is a common feature of recording agreements (see, e.g., para 10.2 of Mr Lee's report), and as such it is a factor to be taken into account by those advising an artist in the negotiation of royalty rates.

Artistic control

From Mr Michael's point of view, one of the benefits of the 1984 Agreement (which is also to be found in the 1988 Agreement: see in particular clauses 4.02 and 4.03) is that it reserved to him a very wide measure of artistic control. It will be recalled that this was an important element in the negotiations leading to the 1984 Agreement: Mr Tony Russell's evidence was that it dominated the early part of the negotiations.

The extent of the artistic control reserved to Mr Michael was such that he was free to take a decision to 'change direction' in a manner which he realised would lead to a drop in the sales of 'Listen Without Prejudice' as compared with 'Faith' .

Moreover, once Master Recordings have been delivered, clause 5.01 provides that Sony Music may not edit, mix, re-mix or otherwise alter them without ***380** Mr Michael's prior written consent and clause 7.14(b) provides that Sony Music shall not release any Master Recordings on 'so-called premium records' without Mr Michael's prior written consent.

Comparison with 'the open market'

Part of Mr Cran's closing submissions (see plaintiffs' written submissions pp.203r-x) was directed to a comparison between Mr Michael's financial terms under the 1988 Agreement and the terms which he could have expected to have obtained 'on the open market' . As I observed earlier, however, it does not seem to me appropriate to undertake such a comparison, given that both Mr

Michael and Sony Music negotiated the 1988 Agreement on the basis that Mr Michael was not free of contract (i.e. that he was bound by the 1984 Agreement).

Conclusion on the issue of justification

As I have been invited to do by Mr Cran, I shall state my conclusion in relation to justification firstly on the basis that no account is to be taken of any pre-existing restrictions on Mr Michael arising under the 1984 Agreement (being the basis contended for by Mr Cran, which I regard as wrong in principle and contrary to the decision of the Court of Appeal in *Alec Lobb*); and secondly on the alternative basis that account is to be taken of pre-existing restrictions imposed by the 1984 Agreement (being what I regard as the correct basis, as reflected in *Alec Lobb*).

1. Leaving out of account any pre-existing restrictions on Mr Michael by reason of the 1984 Agreement:

Taking all the above factors into account, reading the 1988 Agreement as a whole, and considering the cumulative effect of the restrictions which it contains - and doing so in the context of the surrounding circumstances as they were when it was signed - I conclude that its terms are justified.

To put it another way (paraphrasing Lord Diplock in *Schroeder* at p.1315H): taking all the provisions of the 1988 Agreement into consideration I find that the restrictions contained in it are both reasonably necessary for the protection of the legitimate interests of Sony Music and commensurate with the benefits secured to Mr Michael under it.

2. Taking account of pre-existing restrictions on Mr Michael imposed by the 1984 Agreement:

It follows from my conclusion that the terms of the 1988 Agreement are justified even without taking account of pre-existing restrictions that if account is taken of such restrictions the conclusion is *a fortiori.*

Indeed, if it be right - as I have concluded that it is - (a) to treat the 1984 Agreement as enforceable, and (b) to take account of the (*ex hypothesi*) enforceable restrictions which it contained in assessing the effect of the restrictions in the 1988 Agreement, then to my mind it becomes quite impossible to conclude that the restrictions in the 1988 Agreement are not justified, given that the 1988 Agreement reproduced substantially all the restrictive elements in the 1984 Agreement, and that the additional requirement of two further albums is offset by the inclusion of the 15-year 'cap' which may have operated to reduce the overall period of Mr Michael's commitment to Sony Music. With all respect to him, Mr Cran's submissions to the contrary do not bear examination.

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In stating my conclusions in relation to justification it is, I think, appropriate that I should add a word of caution. By the nature of the doctrine of restraint of trade (as explained in *Esso*) it is

dangerous to attempt to extrapolate by reference to the decision in a particular case, or to apply a decision on one set of facts to cases with different facts. Were the doctrine of restraint of trade capable of being applied in such a straightforward manner both the hearing of this case and this judgment would have been a good deal shorter.

As to the facts of the instant case, it should be borne in mind in particular that the 1988 Agreement was a renegotiation of an earlier agreement; that by January 1988 Mr Michael was already an established artist who had just achieved enormous commercial success as a solo artist with his album 'Faith' ; that Mr Michael's aim in the renegotiation was to achieve parity 'with other superstars' ; and that the essence of the renegotiation, as embodied in the 1988 Agreement, was a substantial improvement in Mr Michael's financial terms in exchange for additional product.

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PART IV: SONY MUSIC's 'EQUITABLE DEFENCES'

By paragraph 77 of its Defence, Sony Music pleads that by reason of a number of specific matters alleged in the preceding three paragraphs (paras 74–76) it would be unjust to Sony Music and unconscionable if the 1988 Agreement were now to be treated as unenforceable or void, and that Mr Michael is precluded from so contending by virtue of his 'affirmation, waiver and/or acquiescence' . These paragraphs of Sony Music's Defence are material only if I am wrong in my conclusions (a) on the public policy argument, and (b) on the question of justification for the purposes of the *Nordenfelt* test. I accordingly address these paragraphs on the assumption that both those conclusions are wrong.

The specific matters alleged in paragraphs 74 to 76 of Sony Music's Defence as the basis of the general allegations of unfairness, unconscionableness and 'affirmation, waiver and/or acquiescence' are as follows:

— that at all material times Mr Michael had (and had access to) expert legal advice from Russells [this is admitted];
— that Mr Michael has at all material times been well aware of the doctrine of restraint of trade [this is also admitted];
— that Mr Michael affirmed the 1988 Agreement by:

(1) entering into the acceleration arrangements in 1988 and the variation agreement in July 1990;
(2) requesting the advance for the third album in March 1992;
(3) requesting Sony Music to make the loans to Kahane Entertainment Inc. and entering into agreements relating to the repayment of such loans out of royalties;
(4) confirming (through one of his service companies) the terms of the 1988 Agreement in the agreement dated 30 November 1990 relating to the video of an edition of 'The South Bank Show' ;

— as to the loans to Kahane Entertainment Inc.:

> that such loans were made by Sony Music on the basis that they would be repaid by Sony Music retaining part of the royalties which would otherwise be payable to Mr Michael;
> that Sony Music would not have made such loans save on the footing that the 1988 Agreement was and would remain valid and enforceable; and
> that a balance of £196,000 remains outstanding in respect of such loans which is unlikely to be recouped if no more recordings are delivered pursuant to the 1988 Agreement, and which will not be recouped if Sony Music is not entitled further to exploit recordings already delivered.

Although paragraphs 74 to 77 of Sony Music's Defence appear under the heading 'Equitable Defences' , it is to be observed that one of the defences consists of an allegation of affirmation at common law, i.e. an unequivocal election to treat the 1988 Agreement as continuing (see *Chitty on Contracts* 26th edn Vol. 1 para. 1702). For the purpose of distinguishing between the allegation of affirmation at common law on the one hand and the equitable aspects of the defence of ***383** 'affirmation, waiver and/or estoppel' on the other, I will hereafter refer to the allegation of affirmation at common law as 'affirmation' and to the equitable aspects generally as 'acquiescence' .

It is conceded by Sony Music that affirmation and acquiescence are not available as defences to the claim under Article 85 of the EEC Treaty . Hence they need only be considered in the context of the restraint of trade issue.

I turn next to Mr Michael's Reply.

As to affirmation, Mr Michael admits the acceleration arrangements, the July 1990 variation agreement, and the agreement relating to the video of 'The South Bank Show' ; asserts that there was no contractual requirement on Mr Michael to request the advance for the third album, and that the request was in any event made under a misapprehension (as indeed it was) that the advance only became payable when recording of the third album began; admits the loans to Kahane Entertainment Inc. and the agreements relating to them, but denies that Mr Michael requested the loans and denies the alleged basis on which Sony Music agreed to make the loans; and in any event denies that any of the matters relied on by Sony Music constituted affirmation. As to the outstanding balance of the loans to Kahane Entertainment Inc., Mr Michael undertakes that if he succeeds in this action the outstanding balance will forthwith be repaid to Sony Music.

As to acquiescence, subject to a general denial Mr Michael contends (para. 37) that the Court should have regard to 'all relevant circumstances' in considering whether Mr Michael is precluded by acquiescence from asserting that the 1988 Agreement is unenforceable as an unreasonable restraint of trade.

Mr Michael then contends that the defences of affirmation and acquiescence should in any event fail 'in the light of the fact that the Sony Music Group has conducted its activities under and pursuant to the [1988 Agreement] in a manner which has operated unfairly against, and to the

detriment of, [Mr Michael]' . A number of matters are then particularised, being the counter-equities to which I referred in the introduction to this judgment.

In argument, Mr Cran prefaced his submissions on Sony Music's defences of affirmation and acquiescence with a general submission that as a matter of law such defences are not available as defences to a restraint of trade claim. I turn first, therefore, to that submission.

It is conceded by Mr Pollock that defences of affirmation and acquiescence will not be available where the agreement in question is unreasonable under the second limb of the *Nordenfelt* test, that is to say on wider grounds of public policy. Mr Pollock submits, however, that there is no reason in principle why such defences should not be available in cases (such as the instant case) which are fought exclusively on the first limb of the *Nordenfelt* test (that is to say with reference to the interests of the parties).

Mr Cran submits that the distinction which Mr Pollock draws between cases under the first limb of the *Nordenfelt* test and cases under its second limb is based on the fallacy that an agreement which is unenforceable only under the first limb is not contrary to public policy. Mr Cran submits that the public policy element which is present in both limbs of the *Nordenfelt* test must override defences arising from particular dealings between the parties. Mr Cran also referred me to various authorities as affording indirect assistance on this question (viz. *Evans v Heathcote [1918] 1 KB 418* , *Amoco Australia v Rocca (1974) 7 SASR 268* , *Brooks v Burns Philp Trustee [1968] 121 CLR 432* and *Bakers Bread Supply v Findlays Bakery [1963] NZLR 57*).

I do not find any assistance in the above authorities on the question whether defences of affirmation and acquiescence are available as a defences to a claim of restraint of trade. It is material, however, that a defence of a similar nature to Sony Music's defence of acquiescence was raised by the record company in *Holly Johnson* as a defence to the artist's counterclaim of restraint of trade. The defence was described as one of 'waiver' .

Whitford J dealt with this defence at first instance in the following terms (pp.34G–36D of the transcript of his judgment):

> So far as the recording contract is concerned, the only question is whether, as Mr Bateson submitted, Mr Johnson has waived his right to object. Though the plaintiffs at a very late stage were allowed by me to put in a very extensive amendment to their Reply and Defence to Counterclaim raising the question of waiver, at the end of the day the way that Mr Bateson put it was that it would be unconscionable to allow Mr Johnson to take the point of unreasonable restraint, having regard to the fact that the issue having been raised in July 1985 in a letter sent by Mr Johnson's solicitors, … it

> was followed by negotiations, and the recording of the second album went ahead.
>
> What I understand to be suggested was that these events would necessarily carry with them the implication that although this objection had been made on these grounds it was either not going to be pursued or that Mr Johnson, and no doubt other members of the group, had acted in such a way that ZTT were entitled to come to the conclusion that the ground of objection had been abandoned…
>
> There is absolutely nothing to suggest that the objections, which were originally made, had at any stage been withdrawn. The negotiations were going forward. The second album was being recorded in, no doubt, the hope that some compromise arrangement might be arrived at. There is no suggestion that these objections were specifically withdrawn…
>
> No doubt there were these negotiations over a considerable period but after the original complaint there was nothing amounting to an affirmation of the contract…

In the Court of Appeal, Dillon LJ addressed the question of 'waiver' as follows (p.76):

> The point was taken for the first time by amendment of the Reply and Defence to Counterclaim at the trial. Leading Counsel then appearing for the plaintiffs put the point on the basis that it would be unjust to the plaintiffs and unconscionable to allow the defendant to resurrect the claim that the recording agreement and publishing agreement were unenforceable on grounds of unreasonable restraint of trade as was done by the defendant's new solicitor's letter of 23 July 1987, in view of all that had happened since the point was first raised by solicitors for the group in 1985. This the judge rejected on the facts.
>
> In this court, Mr Carr seeks to put the point more widely. He submits that it is enough for the plaintiffs if, after the point had been raised by the group's solicitors and the defendant was therefore aware of it, the group had 'affirmed' the agreements, that is treated them as still in operation. As to that, the judge said at one point in his judgment that 'after the original complaint there was nothing amounting to an affirmation of the contract'. I think he must have meant that in ***385*** the context of the way the point was

> being put to him by counsel, viz. that it would be unjust or [unconscionable] to allow the defendant to take the point.
>
> In my judgment, if there is to be a defence along these lines, whether it be termed waiver, or laches or estoppel or whatever, to a claim that a contract is unenforceable because it is in unreasonable restraint of trade, it must be a defence on equitable grounds in the light of all the circumstances of the case - not a defence by mere rule of thumb that the point was not finally and irrevocably insisted on at the earliest possible moment.

Later in his judgment, after rehearsing the facts, Dillon LJ concluded (p.79/80):

> On the facts there was nothing at any time which could be described as an unequivocal representation by or on behalf of the defendant that he had decided not to proceed with his claim of unreasonable restraint of trade.

Thus, as I read the judgment of Dillon LJ in *Holly Johnson,* where equitable defences of the nature of waiver, laches or estoppel are relied upon as defences to a restraint of trade claim, the court will examine all the circumstances of the case in order to determine whether it would be unjust or unconscionable to allow the claim to be made: the mere fact that the claim is not made at 'the earliest possible moment' will not suffice to establish injustice or unconscionableness for this purpose. In the event, on the facts in *Holly Johnson* the defence of 'waiver' failed because in all the circumstances of that case there was nothing unjust or unconscionable in allowing the artist to allege restraint of trade.

I have not overlooked the fact that Dillon LJ prefaced his observations about the defence of 'waiver' by saying ' *if* there is be a defence on these general lines …' . In context, however, it seems to me that what Dillon LJ was saying was that if a defence along these general lines is raised, in considering it the court will have regard to all the circumstances of the case: I do not understand him to be suggesting that such a defence may not be available under any circumstances, as a matter of law. Had he taken that view, it would not have been necessary for him to go on to consider the particular facts of the case or to reach the conclusion that there was no representation by the artist to the effect that he had decided not to proceed with the claim of restraint of trade.

Moreover, it seems clear that the term 'waiver' as used to describe the defence which the record company was putting forward in *Holly Johnson* connoted waiver in a general equitable sense (thus

Dillon LJ: '… whether it be termed waiver, or laches or estoppel or whatever …'), as opposed to waiver in the form of affirmation in the common law sense (see para. 1702 of *Chitty* (above)). The distinction is drawn by Dillon LJ in the passage from his judgment quoted above, where he says, with reference to the judge's reference to 'affirmation' : 'I think he must have meant that in the context of the way the point was being put to him by Counsel, viz. that it would be unjust or [unconscionable] to allow the defendant to take the point' .

As I read Dillon LJ's judgment in *Holly Johnson,* therefore, (a) it does not directly address the question whether a defence of affirmation in the common law sense is available as a defence to a restraint of trade claim (although it gives no indication that it may not be available), but (b) it is authority for the proposition that a general equitable defence such as Sony Music's defence of acquiescence in the instant case is available as a defence to a claim of restraint of trade.

So far as the defence of acquiescence is concerned, therefore, on the authority of *Holly Johnson* I conclude that such a defence is available as a defence to a restraint of trade claim.

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Turning then to the defence of affirmation, in the absence of direct authority I have to approach the question as one of principle.

Affirmation generally appears in a pleading as a defence to a claim that a contract has been discharged by breach, that is to say in cases where the plaintiff is faced with a choice between either (a) accepting the defendant's breach of contract as a repudiation and treating the contract as discharged on that ground, or (b) allowing the contract to continue. However, I can see no distinction in principle between on the one hand a case in which a contracting party is faced with a choice whether or not to bring the contract to an end by accepting the other party's breach as a repudiation, and on the other hand a case in which a contracting party is faced with a choice whether or not to bring the contract to an end by claiming that it is unenforceable. If affirmation is available as a defence in the former case, I can see no reason in principle why as a general rule it should not be available also in the latter.

As to the public policy considerations which underlie the doctrine of restraint of trade, it is to be borne in mind that (at least in cases falling under the first limb of the *Nordenfelt* test) it is not for the Court to initiate an allegation of restraint of trade ' *proprio motu* ' (see per Lord Diplock in *Petrofina* p.180B). That being so, I can see no reason in principle why special defences arising from the surrounding circumstances - what I may describe as in personam defences - should not run in such cases against a restraint of trade claim.

I therefore conclude that it is open to Sony Music to allege affirmation in this case.

On that basis, I turn to the further questions (a) whether, leaving aside the counter-equities, the defences of affirmation and acquiescence, or either of them, are made out on the facts of the case;

and (b) if so, whether such defences are nevertheless defeated by the counter-equities or some of them.

Affirmation

As to the requirements of affirmation, it is well established that a contracting party will not be held to have affirmed the contract unless (*inter alia*) he has knowledge of his legal right to choose between the alternatives open to him (see *Chitty* (above) para. 1702). In the instant case, Mr Michael learnt on 14 February 1992 that it was open to him to contend that the 1988 Agreement was unenforceable as being an unreasonable restraint of trade. Accordingly, in my judgment, no affirmation can have occurred before that date. That straightaway rules out three of the four specific matters relied on as constituting affirmation, leaving only the request for the advance for the third album.

It will be recalled that the request for the advance for the third album was made by Mr Brackman in his letter dated 20 February 1992 to Mr Schwarz of Sony Music - a letter which had been drafted by Mr Tony Russell.

In my judgment that request has all the necessary characteristics of affirmation. It was made at a time when Mr Michael had full knowledge of the alternatives open to him (i.e. whether to claim that the 1988 Agreement was unenforceable as an unreasonable restraint of trade or whether to allow it to continue), and it was an unequivocal act giving rise to the inference that he had decided to allow the agreement to continue. I cannot see that it makes any difference that there was no contractual obligation on Mr Michael to request payment of the advance, or that the request was made under a misapprehension that the advance had only ***387** become payable on commencement of recording for the third album, whereas under the terms of the clause 6.02(a) of the 1988 Agreement the advance had become payable at the commencement of the Initial Contract Period, i.e. on 4 January 1988.

It follows, in my judgment, that Sony Music's defence of affirmation is made out, save to the extent that it is defeated by one or more of the counter-equities.

Mr Pollock submits, however, that on principle an affirmation is not capable of being defeated by counter-equities. Once again, there appears to be no direct authority on the question whether counter-equities of the kind pleaded in this case can serve to defeat a defence of affirmation, and on that basis I have to approach this question too as one of principle.

In my judgment, affirmation is not of its nature susceptible to counter-equities of this kind, even on the assumption that all relevant factual allegations are made out. Either Mr Michael affirmed the 1988 Agreement, or he did not. If he did, and if I am right in my conclusion that affirmation is available as a defence to a restraint of trade claim, then (as it seems to me) the consequences will follow notwithstanding the counter-equities.

I therefore conclude that Sony Music's defence of affirmation succeeds, and that it is not in any event open to Mr Michael, having affirmed the 1988 Agreement by requesting the advance for the third album, now to claim that the 1988 Agreement is unenforceable as an unreasonable restraint of trade.

Acquiescence

It is clear from the judgment of Dillon LJ in *Holly Johnson* that, in contrast to affirmation, this defence requires a consideration of all the circumstances of the case.

I begin by considering the defence of acquiescence in the absence of the counter-equities; that is to say by considering whether, on the facts relied on by Sony Music in paragraphs 74 to 76 inclusive of its Defence (to the extent that such facts are made out), it would be unfair and/or unconscionable to allow Mr Michael now to claim that the 1988 Agreement is unenforceable as an unreasonable restraint of trade. Only if the answer to that question is Yes will it be necessary to consider the impact (if any) of the counter-equities.

Of the factual allegations relied on by Sony Music (as set out above) the only ones that are disputed are the allegation that Mr Michael requested Sony Music to make the loans to Kahane Entertainment Inc., and the allegation that Sony Music would not have made the loans save on the footing that the 1988 Agreement was and would remain enforceable. The allegation in relation to the outstanding balance of the loans has been effectively neutralised by Mr Michael's undertaking to repay that outstanding balance should he win the case.

I turn next, therefore, to the disputed factual allegations in relation to the loans to Kahane Entertainment Inc.

It is common ground that on 30 October 1990 Sony Music lent $500,000 to Kahane Entertainment Inc., and that on 27 March 1991 it lent Kahane Entertainment a further $500,000. Mr Michael avers (para. 36.3 of his Reply) that Kahane Entertainment Inc. requested the loans, and he denies that he made such a request. Sony Music pleads (by way of Further and Better Particulars) that in relation to the first of the two loans Mr Michael's request is to be implied (a) from the fact that it was inherent in the proposal for the loan that it would be ***388** recouped out of Mr Michael's royalties, and (b) from the terms of the resulting agreements. In relation to the second of the two loans, Sony Music pleads that the loan was requested by Mr Tony Russell in a telephone call to Miss Coleman on or about 25 February 1991, and once again it relies on the terms of the resulting agreements.

So far as the first of the two loans is concerned, there is no direct evidence that Mr Michael requested the loan, and the fact that he was agreeable to providing Sony Music with security for it does not raise an implication that he requested it. I find that Mr Michael did not request the first loan.

So far as the second of the two loans is concerned, an internal memorandum of Miss Coleman dated 25 February 1991 establishes that on or shortly before that date Mr Tony Russell telephoned her to request a further loan of $500,000 to Kahane Entertainment Inc. (being, in effect, the second tranche of the loan of $1 million which had originally been requested). However, Mr Tony Russell was at that time acting not only for Mr Michael but also for Kahane Entertainment Inc. in the matter of the loans, and I find that he made that request on behalf of Kahane Entertainment Inc.

Accordingly, I find that Sony Music's allegation that 'each of [the] loans was made at the request of the Plaintiffs' is not made out in relation to either of the two loans.

As to Sony Music's allegation that it would not have agreed to make the loans save on the basis that the 1988 Agreement was and would remain enforceable, it was put to Mr Tony Russell in cross-examination that the loans were made by Sony Music on the basis of the subsistence of the 1988 Agreement. Mr Tony Russell replied:

> I think that must have been the basis of it. It was that it was an ongoing agreement and that there would be more product. I don't think anybody had specifically thought about it, but if you look at it in retrospect it makes sense.

Mr Tony Russell was then asked whether at the time everybody assumed that the 1988 Agreement was an enforceable agreement, and he confirmed that that was correct. (See also para. 39 of Mr Tyrrell's witness statement).

It is in any event inconceivable that Sony Music would have made loans to Kahane Entertainment Inc. secured against Mr Michael's entitlement to royalties under the 1988 Agreement had it thought for a moment that the validity or enforceability of the 1988 Agreement was susceptible of challenge.

Accordingly, I find that Sony Music would not have made the loans to Kahane Entertainment Inc., or either of them, save on the basis that the 1988 Agreement was and would remain enforceable.

The remaining facts on which Sony Music relies in support of its defence of acquiescence are not disputed.

I turn then to the question whether, leaving aside the counter-equities, Sony Music's defence of acquiescence is made out.

In my judgment, leaving aside for the moment all consideration of the counter-equities, it would clearly be unfair to Sony Music, and unconscionable, to allow Mr Michael now to assert that the 1988 Agreement is unenforceable as an unreasonable restraint of trade. In reaching this conclusion I bear in mind in particular (a) the fact that at all material times Mr Michael has been in receipt of expert advice from Mr Tony Russell and has been well aware of the doctrine of restraint of trade, (b) the acceleration arrangements agreed by Sony Music during 1988, as ***389** a result of which Mr Michael was paid more than £11 million by way of advances and pipeline royalties during that year, and (c) the lengthy renegotiation in 1990, initiated by Mr Michael and culminating in the variation agreement dated 26 July 1990 which was designed to place Mr Michael's financial terms on a par with selected US superstars and which by any standard effected a substantial improvement over the terms contained in the 1988 Agreement. In these respects the facts of the instant case are far removed from the facts in *Holly Johnson.*

Accordingly I conclude that Sony Music's defence of acquiescence is made out, subject only to the question of the counter-equities.

Finally, therefore, I turn to the counter-equities.

The Counter-equities

I have already observed that the counter-equities only become relevant on the basis that, in their absence, it would be unfair to Sony Music, and/or unconscionable, for Mr Michael now to assert that the 1988 Agreement is unenforceable. The question, therefore, is whether the counter-equities serve to turn a claim which would otherwise be unfair and/or unconscionable into one in respect of which the Court should grant relief.

As his primary submission so far as the counter-equities are concerned, Mr Pollock submits that to have any relevance to the defence of acquiescence a counter-equity must relate in some material way to the issue of the enforceability of the 1988 Agreement, and/or to the facts relied on by Sony Music in support of its defence of acquiescence; whereas, he submits, the counter-equities pleaded by Mr Michael, even if made out on the facts, are no more than a disparate series of complaints set against the background of the parties' relationship. I shall return to this primary submission after I have set out the facts relevant to each of the counter-equities.

In the second place, Mr Pollock submits that in any event, the counter-equities are not made out on the facts.

I turn first to the pleaded allegations in relation to the counter-equities, to the extent that such allegations are still maintained (certain of such allegations having been abandoned in the course of the hearing).

In paragraph 37.2(ii) of the Reply, Mr Michael alleges that 'the Sony Music Group' (a defined expression meaning collectively all the members of the international Sony Group of companies,

including Sony Music, carrying on Sony's record business: see paragraph 3.3 of the Statement of Claim) has conducted its affairs under and pursuant to the 1988 Agreement in a manner which has operated unfairly against him and to his detriment. A number of instances are then particularised. Those which are still maintained are as follows (in the order in which they appear in the Reply):

A. Sony's alleged failure to effect 'any sufficient or appropriate' marketing and promotion of 'Listen Without Prejudice' in the US - a failure which is alleged to have resulted from 'a deliberate policy decision to reduce its efforts on that album because [Mr Michael] had declined … to appear in videos for the promotion of that album' ; ***390**

B. Sony's failure to effect 'any sufficient or appropriate' marketing and promotion of the album 'Red Hot & Dance' - and the single from it, entitled 'Too Funky' - in the US;

C. Sony's refusal to permit 'Fantasy' to be included in an album of the sound-track of 'Beverley Hills 90210' ;

D. Sony's refusal to agree to Mr Michael's request to be transferred from the 'Columbia' label to the 'Epic' label in the US, 'despite prior agreement in about February 1991 to such a transfer should [Mr Michael] so request' ;

E. the release of the single 'Mother's Pride' in the US (which is alleged also to be in breach of clause 4.02 of the 1988 Agreement); and

F. the release by Sony of edited recordings for radio play of 'Don't let the sun go down on me' and 'I believe when I fall in love' (which is alleged also to be in breach of clause 5.01 of the 1988 Agreement).

I will consider each of these pleaded instances of alleged unfair behaviour by Sony in turn.

A. 'Listen Without Prejudice'

A1 There are two limbs to Mr Michael's case in relation to 'Listen Without Prejudice' . The first limb (and clearly the most serious in the context of the general allegation of unfair behaviour by Sony) is the allegation of a 'deliberate policy decision' by Sony to reduce its efforts to market and promote the album because, broadly speaking, of Mr Michael's change of direction. This raises a pure issue of fact. The second limb is the allegation that the marketing and promotion which was in fact carried out in relation to the album was not 'sufficient or appropriate' . This requires a qualitative judgment as to what level of marketing and promotion would have been 'sufficient or appropriate' in the circumstances.

A2 By way of Further and Better Particulars of the allegation of a 'deliberate policy decision' , Mr Michael pleads that he believes the-decision to have been taken by Mr Mottola and Mr Ienner 'in or about the summer of 1990' ; that is to say at the outset of the marketing campaign, before the release of the album. In the course of the evidence, however, the allegation appeared to change to an allegation that a decision to kill the album or to let it die was taken in late 1990 or early 1991, that is to say some time *after* the release of the album.

A3 Similarly, although I had initially understood the second limb of Mr Michael's complaint to be, in effect, that Sony's marketing and promotion was below the norm for an album such as 'Listen Without Prejudice' (that being at least consistent with the allegation of a decision to 'reduce its efforts' on the album), in the course of the evidence the complaint appeared to change to a complaint that in order to redress the expected effect of Mr Michael's change of direction (that is to say, 'a sharp drop in sales compared to those of "Faith"' : see para. 59 of Mr Michael's witness statement), Sony's marketing and promotion of the album ought to have been pitched *above* the norm.

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A4 I turn next to the evidence in relation to these allegations. For Sony, I heard evidence from:

— Mr Ehrlich (the General Manager of Columbia Records, a division of Sony US: see paragraph B79 above);
— Mr Jay Krugman (Vice-President, East Coast Marketing Department, Columbia Records); and
— Mr Burt Baumgartner (Senior Vice-President, Promotions Department, Columbia Records);

all of whom were cross-examined on their witness statements. In addition, I was referred to a number of internal Sony documents and schedules.

A5 I also heard evidence from Mr Mottola in relation to the allegation of a 'deliberate policy decision' . Although Mr Mottola had ultimate responsibility for the marketing and promotion of 'Listen Without Prejudice' , he told me (and I accept) that he had no knowledge of the detailed steps taken and expenditure incurred, as these were 'delegated areas' .

A6 I turn to the first limb of Mr Michael's case in relation to 'Listen Without Prejudice' : the allegation of a deliberate policy decision. This is a serious allegation, and in his closing submissions on this aspect of the case Mr Mill (who conducted this part of the case on behalf of Mr Michael) very properly made it absolutely clear that the allegation was that in this respect Sony acted 'for other than *bona fide* reasons' (see the plaintiffs' closing written submissions p.230): in other words, that Sony acted in bad faith.

A7 In evidence, each of Mr Ehrlich, Mr Krugman, Mr Baumgartner and Mr Mottola denied all knowledge of any policy decision by Sony either in the terms of the pleaded allegation (that is to say a decision taken before the release of the album to reduce their efforts to market and/or promote it), or in the form of a decision taken some time after the release of the album either to kill it off or to let it die.

A8 Mr Michael was not in a position to adduce any direct evidence of any such decision having been taken; rather, his case was based on inferences drawn from his perception of Sony's attitude and that of its senior executives (a perception which derived mainly from Mr Kahane) and from the available facts and figures in relation to the performance of 'Listen Without Prejudice' in the US and to the marketing and promotion campaign actually conducted by Sony in the US.

A9 As to the promotion and marketing campaign actually conducted by Sony in the US, I accept without qualification the evidence of Mr Ehrlich, Mr Krugman and Mr Baumgartner, all of whom

were honest and reliable witnesses, and of the Sony documents and records which were placed in evidence. Where the evidence of Mr Kahane conflicts with such evidence, I have no hesitation in rejecting the evidence of Mr Kahane.

A10 As to Mr Michael's perception of Sony's attitude and that of its senior executives, in paragraph 65 of his witness statement Mr Michael refers to the departure of Mr Yetnikoff and says that he found this disappointing as he had regarded him as an ally, and that he had not forged a similar relationship with Mr Mottola or Mr Ienner, who took over Mr Yetnikoff's responsibility for Mr Michael's career in the US. He continues: ***392**

> It rapidly became apparent that they were not going to be allies, as Mr Yetnikoff had been. Notwithstanding their professed support for my career decisions, Mr Mottola and Mr Ienner failed to cause Sony in America to 'get behind' my new album in the way or to the extent that was clearly needed.

A11 Mr Michael goes on to give a number of particular instances of this, which I need not rehearse here. Then, in paragraph 67 of his witness statement he says this:

> I gained the very strong impression that the album had been 'killed' in order to teach me a lesson, namely that Sony USA had no time for an artist who would rarely appear in his own videos, regardless of his history with the company.

A12 In paragraph 68 of his witness statement, Mr Michael says (very significantly in my judgment):

> I left Rob Kahane to fight most of my battles with Sony US.

A13 In examination-in-chief, asked why he had formed the view that Sony had killed off the album to teach him a lesson, he said:

> I was given the impression very strongly, not only by the lack of performance of the album in the US but also by verbal [communications] that went on between Mr Ienner and my manager Mr Kahane that Mr Ienner felt that if he showed me what could happen without a video in the States … I would be scared into changing my mind for the next album and I would provide him with the marketing tools he was used to.

A14 In the course of Mr Michael's cross-examination, he was asked whether he was alleging that Sony acted out of spite. He replied:

> Yes. I am afraid that the relationship with Mr Ienner and things that I was hearing back from Mr Kahane indicated very strongly that there was a degree of … I was very definitely given the impression that I was a difficult British artist who took himself too seriously and therefore I needed to be brought back into line … That was the constant impression that was being given by Mr Kahane of his correspondence with Mr Ienner.

A15 As I said earlier, I fully accept that Mr Michael genuinely held, and holds, these views. It is, however, significant that they are based in very large measure on what he was hearing at the time from Mr Kahane.

A16 I turn, therefore, to the evidence of Mr Kahane.

A17 As I also made clear earlier, I found Mr Kahane to be a thoroughly untrustworthy witness. Moreover, as he gave his evidence it became increasingly clear to me that both in his dealings with Sony US, and in his reports to Mr Michael about the marketing and promotion of 'Listen Without Prejudice' , his actions were not motivated solely by a desire to act in Mr Michael's best interests. By the end of his evidence, I was left in no doubt that his advice to Mr Michael during 1991 and 1992 was coloured to a significant extent by his own financial difficulties at that time.

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A18 As to Mr Kahane's financial difficulties, I referred in Section A above (paras A152–A156) to the two loans of $500,000 each made by Sony to his company Kahane Entertainment Inc. in October 1990 and March 1991. Miss Coleman told me in examination-in-chief that Mr Kahane had called her on several occasions during the loan negotiations chasing her for payment of the money. Asked what impression Mr Kahane gave her during those conversations in relation to his need for the loans, Miss Coleman answered:

> He put us under extreme pressure. I can recall one particular conversation when he actually telephoned me without even saying hello or extending any sort of common courtesies. He just said to me: 'Where's my fucking money?', which I thought was actually very bad form.

A19 Miss Coleman was not cross-examined on that evidence, which had not been put to Mr Kahane. I am, however, entirely satisfied that Miss Coleman was telling the truth and that her recollection was accurate. The fact that Mr Kahane spoke to Miss Coleman in those terms not only provides a useful illustration of the manner in which he felt able to approach Sony (in a situation, moreover, where Sony had agreed to give him financial assistance): it also establishes the urgency of his need for such financial assistance.

A20 Further, in cross-examination Mr Kahane agreed that in Autumn 1991 he was in serious financial difficulties and that he 'desperately needed' Mr Michael to obtain an advance of $4–5 million on his next album so that he (Mr Kahane) could receive his commission on that advance. Thus, on 27 November 1991 Mr Kahane faxed Mr Tony Russell in the following terms:

> In light of our recent conversation with George Michael, I must immediately discuss some type of new plan to expedite funds for Kahane Entertainment. If there should be any delays in George Michael's future plans, I will be in deep trouble.
>
> There are two possible options:
>
> (1) I get a loan directly from CBS without George Michael as guarantor. (Which I believe is a long shot.)
> (2) Have George give me a personal loan against future income.
>
> As my financial problems are immediate, I do not have the luxury of time to wait for George's decision on which route he decides to take. I am

> requesting, as a follow-up to our conversation yesterday that you approach George on my behalf to set up terms for a personal loan…

A21 Mr Kahane was also prepared to lie to Mr Tony Russell in an attempt to achieve further advances for Mr Michael, on which he (Mr Kahane) would be entitled to commission. Thus, on 2 December 1991 Mr Kahane faxed Mr Tony Russell as follows:

> Please call me in the morning as George has not decided *for sure* that he will be releasing his next album, entitled 'Extended Plaything', in March/April 1992. He has explained to me artistic reasons as to why he wants it now.
>
> George would like you to pursue the audit [a reference to an audit claim made by Mr Michael against Sony Music] and carry on with Sony 'business as usual'. He wants to table the negotiation for the time being.

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> Please pass this information on to Sony and also start the wheels in motion for my £400,000 advance.

A22 Asked about this letter in cross-examination, Mr Kahane professed not to be able to remember to what exactly it referred to. I am satisfied that Mr Kahane's memory was a great deal better than he was prepared to admit.

A23 Mr Michael, recalled for further cross-examination, told me that Mr Kahane was not accurately setting out his views and intentions at that time. He told me that 'Extended Plaything' was not in any event an album but an EP. He continued:

> He's still looking for his 400 grand because he's calling it an album, whereas in fact there's no way even if I delivered it to them that I could have asked for an album commitment, because it was only like four tracks.

Mr Michael went on to confirm that he had not authorised Mr Kahane to instruct Mr Tony Russell to pursue the audit and to carry on with Sony on a business-as-usual basis. Mr Pollock then asked Mr Michael whether Mr Kahane was putting forward falsehoods to Mr Tony Russell. Mr Michael replied:

> I'm afraid there's no other way of looking at it. Mr Kahane says he doesn't remember, but I'm afraid there is no other way of looking at it. He needed the money. Even if I had agreed to it as I said, there's no way we would have been entitled to our advance on $4 million because it wasn't an album: it was an EP idea that I thought about for some time.

A24 It is clear, therefore, that Mr Kahane's desire during this period to negotiate further advances for Mr Michael was prompted to a material extent by the prospect of the commission which he would himself receive in respect of those advances. Moreover, if further advances could not be obtained from Sony, then it was in Mr Kahane's interest (as Mr Kahane well realised) that Mr Michael should break with Sony and enter into a fresh recording agreement - providing for higher advances - with another record company.

A25 These considerations, coupled no doubt with his personal antipathy towards Mr Ienner (an antipathy which he took no pains to conceal when giving evidence) led Mr Kahane to adopt a thoroughly hostile attitude towards Sony. This in turn led him to complain continually to Sony US about its marketing and promotion of Mr Michael's records (notwithstanding that he well understood the effects of Mr Michael's change of direction on the future marketing and promotion of his records), while at the same time sowing in Mr Michael's mind the notion that Sony was acting in bad faith and spitefully towards him by feeding him with exaggerated and misleading reports concerning Sony's competence and the degree of support which Sony was giving to 'Listen Without Prejudice' .

A26 It is noteworthy also that Mr Kahane disagreed with Mr Michael's decision to change direction. This gave rise to a degree of tension between Mr Kahane and Mr Michael, as Mr Michael accepted in evidence; although Mr Kahane never voiced his disagreement to Mr Michael.

A27 As to the reports which Mr Kahane gave Mr Michael about Sony, a striking example of Mr Kahane misleading Mr Michael about Sony (although it ***395*** does not concern 'Listen Without Prejudice') was his description of the marketing plan for the charity album 'Red Hot & Dance' as 'a complete joke' , whereas he accepted in evidence that 'as a plan it was very good' . He attempted to explain away this inconsistency in evidence, but his attempts were thoroughly unconvincing.

A28 I am satisfied that the reports which Mr Kahane gave Mr Michael about the marketing and promotion of 'Listen Without Prejudice' by Sony US were no more reliable than the evidence he gave in this Court; and that a large measure of the responsibility for Mr Michael's belief that Sony US have acted in bad faith must rest on Mr Kahane's shoulders.

A29 As it is, Mr Michael's belief that Sony US decided to kill off 'Listen Without Prejudice' to teach him a lesson has (as I find) no foundation in fact. Apart from the obvious consideration that it is extremely unlikely that any commercial organisation would set out to damage its own interests by taking such a decision, I accept the evidence of Mr Mottola that no such decision was ever taken, and the evidence of Mr Ehrlich and Mr Krugman that they were not aware of any such decision having been taken and that they do not believe that any such decision was taken.

A30 In his closing submissions, Mr Mill accepted that although Mr Krugman need not have been told of a decision to 'kill' the album, Mr Ehrlich would have known of it (see plaintiffs' written submissions page 231). Mr Mill accordingly invited me to conclude that Mr Ehrlich was not telling the truth when he said that he was not aware of any such decision. Far from concluding that he was lying, I am fully satisfied that Mr Ehrlich's evidence was truthful.

A31 As I observed earlier, Mr Michael's case on this issue is based on inference: as it must be, given the absence of any direct evidence to support it. Thus, in his closing submissions Mr Mill sought to construct an elaborate theory, based on inferences to be drawn (as he submitted) from what he alleged to be inadequacies in the marketing and promotion campaign. I would in any event be reluctant to find bad faith on the basis of inference, and would only be prepared to do so if the circumstantial evidence were so cogent as to outweigh the direct testimony of those whose good faith is challenged. But this is far from being such a case. The evidence as to the effort in fact made by Sony, and the expenditure which it incurred, in the marketing and promotion of 'Listen Without Prejudice' goes nowhere towards raising the kind of inferences urged by Mr Mill.

A32 Accordingly I find that there is no substance in Mr Michael's allegation of a 'deliberate policy decision' by Sony either to reduce its efforts to market and promote 'Listen Without Prejudice' or to kill off the album, or to let it die, once it had been released.

A33 I turn, therefore, to the second limb of Mr Michael's case in relation to 'Listen Without Prejudice' , viz. the allegation that the marketing and promotion campaign conducted by Sony was neither 'sufficient' nor 'appropriate' .

A34 Two preliminary points must be made about this allegation. In the first place, it is not alleged (because it could not be alleged) that by reason of Sony US's failure to conduct a sufficient and appropriate marketing and ***396*** promotion campaign, Sony Music was in breach of the 1988 Agreement. In the second place, I cannot see how a failure by Sony to conduct a sufficient and appropriate campaign (not being a failure resulting from any 'deliberate policy decision') could, even if established on the facts, raise any kind of counter-equity against Sony Music.

A35 In the event, however, I find that the allegation is not made out on the facts. Sony spent $1.72 million on promoting and marketing 'Listen Without Prejudice' in the US, as compared with $3.27 million for 'Faith' . Sales of 'Listen Without Prejudice' and 'Faith' in the US were 1.9 million and 8 million respectively, giving a spend per unit of $0.90c for 'Listen Without Prejudice' as compared with $0.41c for 'Faith' .

A36 Complaint is made by Mr Michael (supported by Mr Kahane) that Sony's marketing campaign stopped too early (from January to April 1990 the total spend was only some $165,370). But if the public are not buying an album, a record company cannot go on indefinitely spending more and more on marketing. And the fact is that, whatever its intrinsic merit, 'Listen Without Prejudice' did not prove nearly as popular with the public as 'Faith' had been - as Mr Michael had himself foreseen.

A37 If 'Listen Without Prejudice' had 'had legs' , to use Mr Morris's expression, it would have kept going. Unfortunately, however, both radio stations and retail stores in the US found that the album did not work for them. As Mr Kahane himself said, in notes for discussion with Mr Michael in September/October 1991:

> Radio and Retail need to become George Michael believers once again. They are *not* right now, and will not be enthusiastic without an *awareness campaign* … Retail and Radio have already warned me that they will not support a record of George Michael like they did on Faith because LWP ['Listen Without Prejudice'] did not work for them. 'Give us LWP Vol. 2 and we will not buy it'.

A38 As it is, in mid-February 1991 Sony were still considering whether to embark on a substantial TV advertising campaign (see Sony's internal memo at F1222). Mr Ehrlich wrote a note on that memo asking Mr Krugman to consider whether the proposed expenditure would be justified in terms of additional sales: this was a normal and proper approach to evaluating the proposed campaign (as well as being entirely inconsistent with any decision having been taken to allow the album to die).

A39 More than $46,000 was spent in April 1991 on running a test campaign in San Francisco. This campaign was conducted at Mr Kahane's request, and he had no criticism to make of the way in which it was set up. In the event, the campaign did not succeed in generating enough sales to justify the cost.

A40 Moreover, account must be taken of the effect on the promotion and marketing of 'Listen Without Prejudice' of Mr Michael's change of direction. Mr Michael himself realised that this

would have a depressive effect on sales, and that it would be likely to meet with objection from Sony (see para. 50 of his witness statement). The fact that Mr Michael felt that this was the only way in which he could protect his personal life and his writing ability (see para. 59 of Mr Michael's witness statement) would not, as he realised, necessarily serve to commend the change of direction to Sony. In ***397** the event, Sony did not object to the change of direction. On the contrary, Mr Paul Russell told Mr Michael that he respected his position, that Sony would have more difficulty marketing the album, but that Sony would do everything it could to ensure that the album received maximum promotion (see Mr Paul Russell's witness statement para. 270).

A41 In these circumstances, the suggestion (which appeared to be made in the course of evidence) that Sony acted unfairly by failing to put a greater effort than normal into the marketing and promotion of 'Listen Without Prejudice' in order to, in effect, compensate for the marketing disadvantage resulting from the change of direction, seems to me itself to be unfair. Mr Michael expected that the consequence of his change of direction would be a loss of sales. He cannot blame Sony for the fact that he was right.

A42 I received a report from Mr Brad Hunt, who was called on Mr Michael's behalf as an expert witness on the counter-equities aspect of the case, and in particular on the issue of the marketing of 'Listen Without Prejudice' , and I also heard oral evidence from Mr Hunt. I regret to have to say that I derived no assistance at all from Mr Hunt's report or from his oral evidence. I found his report to be superficial, and to contain a number of errors of fact. For example:

– In paragraph 5 he gave the wrong date for the release of 'Praying for Time' .
– In paragraph 11 he wrongly stated that there was no in-store campaign.
– In paragraph 12 he wrongly stated that there was to be no TV advertising before the release.

Moreover, the first part of his report entirely ignored the evidence in the witness statements of the Sony witnesses. I found Mr Hunt's explanation that he had ignored this evidence because it was not contained in affidavits, and because the expenditure had not been vouched by reference to the original invoices, to be wholly unconvincing. In cross-examination, Mr Hunt demonstrated a lack of grasp of the factual subject-matter, coupled with an evident lack of expertise in the matters about which he was giving evidence. For example, his suggestion that Sony should have carried out a 8-week fly-posting campaign in 15 major cities in the US, involving placing some 200-250,000 posters at a cost of about $250,000, was patently absurd - as I think he probably realised.

A43 I now turn to the specific complaints pleaded in relation to the marketing and promotion of 'Listen Without Prejudice' in the Further and Better Particulars of the Statement of Claim.

A44 *Lack of an awareness campaign of the same size as the campaign organised for Mariah Carey*

A44.1 Mariah Carey is a highly successful recording artist whose first album was released at about the same time as 'Listen Without Prejudice' . An 'awareness campaign' was mounted by Sony in order to introduce her to the industry.

A44.2 The comparison with George Michael is a false one, since by 1990 Mr Michael needed no introduction: he had already achieved worldwide fame. An awareness campaign for George Michael could not have been justified.

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A44.3 So far as comparative size is concerned, Sony in fact spent more on advertising for 'Listen Without Prejudice' 'out of the box' (i.e. on release) than it did for Mariah Carey's debut album. In neither case was there a substantial TV campaign before release, but this was in accordance with Sony's normal practice. The marketing plan for 'Listen Without Prejudice' did, however, provide for 'in-store promotion' by means of streamers and 'point of purchase materials' (e.g. T-shirts etc.). Sony's fly-posting campaign was similar to that for 'Faith' .

A44.4 In all the circumstances, I conclude that this complaint has no substance whatever.

A45 *Not running all the print advertising shown in the marketing plan*

This complaint appears to be based on the fallacy that because an item appears in a marketing plan, there is an obligation to put it into effect. The fact is that a marketing plan is continually being reviewed and revised. I cannot regard this complaint as having any substance, given the total amount spent on all forms of marketing and promotion of 'Listen Without Prejudice' (some $1.72 million).

A46 *Failure to target the ' Urban ' (i.e. black) market*

A46.1 Any attempt to target the urban market has to take into account whether a particular record (be it a single or an album) is likely to appeal to that market. Sony's Urban Department were concerned that 'Praying for Time' was not the best track to take to urban radio. But the department did put together a specific campaign for the second single, 'Freedom' .

A46.2 In the circumstances, I can only conclude that if 'Listen Without Prejudice' was less successful in the urban market than 'Faith' , the reason was that the urban market preferred 'Faith' .

A47 *Inadequate level of expenditure*

A47.1 The pleading in this respect reads as follows:

> In purely financial terms, the Sony Music Group should have committed itself to an initial spend of not less than $1 in direct label costs (excluding co-operative advertising) for each anticipated unit of sale in the United States of America, of which 50 per cent should have been expended on marketing and promotion prior to the Album's release. It is clear from the marketing plan … that (even if it had been fully acted upon, which it was not) the Sony Music Group had committed itself to spending far less on the Album than should have been the case.

A47.2 On Mr Michael's behalf, at least two different 'rules of thumb' of supposedly general application were put forward in the course of the hearing for the purpose of determining what Sony ought to have spent on the marketing and promotion of 'Listen Without Prejudice' . One is contained in the pleading quoted above. The other was put forward by Mr Kahane, and was to the effect that $1 million should have been spent up to the end of the first two weeks after the initial launch of the album, representing 25 per cent of a total projected spend of $4 million.

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A47.3 The fact is that there is no such thing as a 'rule of thumb' which can be applied generally in order to set levels of marketing and promotion expenditure. The circumstances of release vary too much for that. But in any event I accept the evidence of Mr Ehrlich that Sony does not operate any such rule in relation to any of its artists. Its policy is to spend what it regards as appropriate in the particular case.

A48 *Premature release of* ' *Freedom* '

At one stage in the course of the evidence, it was suggested on behalf of Mr Michael that 'Freedom' had been released in the US too soon after the release of 'Praying for Time' . This complaint is not pleaded; but in any event I am satisfied on the evidence of Mr Baumgartner and Mr Ehrlich that there is no substance in it.

B. 'Red Hot & Dance' and 'Too Funky'

B1 In the case of the album 'Red Hot & Dance' and the single 'Too Funky' there is no pleaded allegation of bad faith against Sony US: the only pleaded allegation is that Sony failed to effect 'any sufficient or appropriate marketing or promotion' of the album or the single in the US.

B2 In his closing submissions, Mr Mill put Mr Michael's case in relation to 'Red Hot & Dance' and 'Too Funky' in somewhat different terms, viz. that Mr Michael's complaint is that he entrusted

the release of 'Red Hot & Dance' and 'Too Funky' to Sony (in the place of Warners, as had been originally proposed) on the basis of assurances – principally from Mr Stephens – that Sony would give the release its full support; and that in the event Sony betrayed his trust by failing to commit sufficient resources to exploitation and thereby profited substantially from the release (see plaintiffs' written submissions page 240). In consequence, Mr Mill submitted, 'Red Hot & Dance' and 'Too Funky' did not receive the level of support from Sony US which it deserved and which both Mr Michael and the charity were entitled to expect (see plaintiffs' written submissions page 245).

B3 It was also suggested that Sony took advantage of the fact that a fixed budget was agreed for marketing and promotion costs by reducing its actual costs below the budgeted level and thereby inflating its own return on the album.

B4 In so far as Mr Michael's case in relation to the marketing and promotion of 'Red Hot & Dance' and 'Too Funky' , as formulated by Mr Mill in his closing submissions, involves implications that Sony acted in bad faith, or otherwise improperly or from improper motives, I reject it entirely. I am satisfied, and I find, that in relation to 'Red Hot & Dance' and 'Too Funky' Sony acted in good faith and was guilty of no impropriety.

B5 In any event, it would have been understandable had Sony been disappointed at having three George Michael tracks included in a charity album rather than in the new George Michael album delivery of which Sony had been led to believe was imminent. Thus, on 3 March 1991 Mr Kahane had told Mr Stephens that Mr Michael was 'still working on the album' , although this was not in fact true. Moreover, the initial advance in respect ***400*** of the third album had at that stage been requested and paid, on the basis that recording for the third album had commenced.

B6 After the conclusion of the oral evidence in these proceedings Messrs Sheridans (Mr Michael's solicitors) gave notice that it would be contended on behalf of Mr Michael that Mr Krugman deliberately sought to mislead the charity in relation to the commitment of and expenditure incurred by Sony on the marketing and promotion of the album (an allegation which had been made to Mr Krugman in the course of his cross-examination, and which he had denied). Mr Pollock having objected, I ruled that such a contention was not open to Mr Michael since it amounted to an additional 'counter-equity' , and one which involved an allegation of deceit, which had not been pleaded. However, since Mr Krugman's credit has been put in issue, I should make it clear that I accept his denial of an intention to mislead the charity in relation to the marketing and promotion of 'Red Hot & Dance' and 'Too Funky' .

B7 As in the case of the marketing and promotion of 'Listen Without Prejudice' , I cannot see what relevance Sony's marketing and promotion of 'Red Hot & Dance' and 'Too Funky' in the US can have in the context of counter-equities affecting Sony Music's defence of acquiescence; but in any event I find that the allegation that the marketing and promotion campaign was neither sufficient nor appropriate is not made out on the facts.

B8 As to what was in fact done, and what was in fact spent, by Sony on the marketing and promotion of 'Red Hot & Dance' and 'Too Funky' , once again I accept the evidence of Mr Ehrlich, Mr Krugman and Mr Baumgartner and of the Sony internal documents.

B9 I find that Sony put considerable effort into the marketing and promotion of both the album and the single, which were initially successful. I accept the evidence of Mr Krugman that thereafter it was difficult to sustain sales in the absence of any further single (all were agreed that neither of the other George Michael tracks on the album should be released as a single) or of any further video.

B10 As for the remaining tracks on the album, most of them had previously been released in the US, and radio stations in the US showed absolutely no interest in any of them.

B11 The fact that no more than some 240,000 copies of the album were sold in the US reflected the fact that, apart from Mr Michael's three new tracks, the album was a compilation of a disparate selection of re-released tracks by a number of different artists.

B12 I can find nothing either insufficient or inappropriate in the marketing and promotion campaign conducted by Sony in the US in relation either to the album or to the single.

C. 'Beverley Hills 90210'

C1 Mr Michael does not criticise Sony for not giving consent in April 1992 for the inclusion of 'Fantasy' in the album of the soundtrack from the show; ***401** indeed Mr Michael himself felt at that point that the timing might be wrong, as being too near the release of 'Red Hot & Dance' . (In fact, in April 1992 there was no refusal as such by Sony; it was left open to Mr Kahane to press the matter if he thought fit. In the event, Mr Kahane did not do so.)

C2 Mr Michael contends, however, that there was a subsequent refusal by Sony in about July 1992, reflected in the fact that although an attempt was made to arrange a meeting between Mr Kahane and Sony to discuss the matter, no such meeting ever took place (see para. A190 above).

C3 Even if this complaint were made out on the facts, it could not in my judgment raise any kind of equity against Sony, least of all an equity affecting in some way Sony Music's defence of acquiescence. In the event, it is not made out on the facts.

C4 In paragraph 91 of his witness statement, Mr Michael says this about a refusal by Sony in about July 1992:

> Mr Kahane told me that it appeared likely that approval would be given. Subsequently (in about July 1992) he told me that Sony had decided not to give their own consent.

C5 In cross-examination, Mr Michael agreed that Mr Kahane had not given him any reason for Sony's refusal to consent, and that he had simply believed what Mr Kahane told him.

C6 Mr Kahane is unspecific in his witness statement, saying merely that he had assumed that Sony's consent would be forthcoming, that he was disappointed and annoyed when he was told that permission would not be granted, and that he could not recall being given any reason for Sony's refusal.

C7 In examination-in-chief, Mr Kahane confirmed that there came a time after April 1992 when Mr Michael was once again keen for the 'Fantasy' track to be included in the soundtrack album. Asked when this occurred, he replied:

> I don't want to guess. I don't know. It was some time in 1992, that's all I remember.

Asked whether Sony consistently refused to give consent, he said Yes. In cross-examination, he said that Sony cancelled the proposed meeting.

C8 Mr Paul Russell's evidence about the proposed meeting was that he had told Mr Kahane the previous week that he would be in New York and that the matter could be discussed then. In the event, according to Mr Paul Russell, he had to leave at lunchtime on the day in question, so he told Mr Kahane that their meeting would have to be in the morning. He said that he invited Mr Kahane to telephone him to let him know when he would be coming, but he never heard from him. He said that he would have been happy to discuss the matter with Mr Kahane.

C9 I accept the evidence of Mr Paul Russell, and I find that although Mr Kahane was invited to come to a meeting to discuss the matter, Mr Kahane decided not to take up the invitation. Mr

Kahane's report to Mr Michael in **402* July 1992 that Sony had once again refused consent was (as he well knew) untrue.

C10 Accordingly, Mr Michael's allegation that in July 1992 Sony refused consent to the inclusion of 'Fantasy' in the album of the soundtrack from the programme 'Beverley Hills 90210' is not made out.

D. The requested transfer from 'Columbia' to 'Epic'

D1 Mr Michael pleads that Sony refused to accede to his request for a transfer 'despite prior agreement in about February 1991 to such a transfer should [Mr Michael] so request' . It being common ground that the request was refused by Sony, the issue is whether Sony had previously agreed to allow the transfer should Mr Michael request it.

D2 In paragraph 56 of his witness statement, Mr Kahane gives an account of a meeting with Mr Mottola in February 1991, in the course of which Mr Mottola assured Mr Kahane that if Mr Michael wanted to transfer from Columbia to Epic he would approve the transfer. Mr Mottola denies that he gave any such assurance.

D3 In cross-examination, Mr Kahane maintained his account. According to Mr Kahane, Mr Mottola said:

> Listen, if it doesn't work out [a reference to relations between Mr Kahane and Mr Ienner] or if you can't work it out I'll move you over and I'll deal with Donny [Ienner] on it.

According to Mr Kahane, he then asked Mr Mottola to give him his word that he would not change his mind, and Mr Mottola said:

> Don't worry, I'll take care of it.

D4 In examination-in-chief, Mr Mottola said that he had not at any stage encouraged Mr Kahane to believe that he would agree to a transfer to 'Epic' , and that his view was that it was a terrible

idea. In cross-examination he said that he had no knowledge of any specific meeting having been arranged with Mr Kahane to discuss the request.

D5 Included in the documents is a fax dated 1 May 1991 from Mr Kahane to Mr Mottola referring to the request for a transfer and continuing:

> On two occasions I have spoken with you in person about this situation, and each time emphasized the seriousness of the problem. You conveyed to me at both meetings that you would support a move to … Epic as, in your own words, 'they could do a very good job and if that's what you want, I'll take care of it.'

Mr Mottola denied having received this fax, and pointed out that the number to which it was to be transmitted (as shown on the fax itself) was the number of his telephone line and not his fax line. The original fax was then produced, which bears a mark indicating that it was transmitted.

D6 It was suggested to Mr Kahane in cross-examination that Mr Mottola was never intended to receive the fax, which was designed as a piece of window **403* dressing. I am not satisfied that the fax was intended to deceive: I find that Mr Mottola's telephone number was included on the fax in error, but that in any event Mr Mottola never personally saw the fax.

D7 On the other hand, I accept the evidence of Mr Mottola that he never gave Mr Kahane any reason to believe that he (Mr Mottola) would agree to Mr Michael transferring to Epic, and that his own view was that such a transfer would be a very bad idea. I reject the evidence to the contrary of Mr Kahane.

D8 Mr Kahane also said in evidence that Mr Paul Russell told him he would 'do whatever it would take' to make the change. Mr Paul Russell's evidence was that although he personally was against the change he was content to leave it to the Americans to decide. I accept Mr Paul Russell's evidence and reject entirely that of Mr Kahane.

D9 In any event, had Sony given a final refusal to the request for a transfer, I am satisfied on the evidence (and particularly on the evidence of Mr Mottola) that such a refusal would not have been in the least unreasonable. As Mr Mottola put it in examination-in-chief when asked why he thought a transfer was 'a terrible idea' :

> We are a company with anywhere from three to four hundred artists on our roster and if we began to transfer artists from label to label we would have complete and utter business chaos. Every time there was a complaint, we might have to have a transfer to another label.

To similar effect was the evidence of Mr Ehrlich:

> … in the last ten or fifteen years there hasn't been a move between labels, Columbia and Epic, and it's a horrible precedent to set. So we don't want to have artists transferring labels because they're not happy. In addition, it's not great morale for the people at Columbia records when you have someone who has worked on the project for so long and then gets transferred to a different record company.

Mr Ehrlich went on to describe a transfer to another label as 'the absolute last resort … It should never be recommended' . I accept this evidence of Mr Mottola and Mr Ehrlich.

E. 'Mother's Pride'

E1 It is now accepted on behalf of Mr Michael (see plaintiffs' written submissions page 246) that ultimately Sony US did not release 'Mother's Pride' for sale to the public, notwithstanding that it had earlier indicated that it might do so. Accordingly, no question of a breach of clause 4.02 of the 1988 Agreement now arises.

E2 Mr Michael's complaint in relation to 'Mother's Pride' is that Mr Baumgartner (who was responsible for radio promotion) ought not to have included it on the 'CD Pro' (the promotional compact disc) provided to radio stations in the US. Mr Kahane described this as a 'grossly negligent' decision (albeit he does not contend that it was made in bad faith), and claims that it effectively killed the album.

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E3 The true position in this respect is as follows:

E3.1 A note of the proposal to include 'Mother's Pride' as the B-side of 'Waiting for that Day' in the CD pro to be delivered to radio was sent to Mr Kahane for approval and was cleared. Mr Kahane said that he was not aware of this. If that be right, Sony cannot be blamed for it. Moreover, Mr Kahane reported to Mr Michael on 2 January 1991 that radio stations were playing 'Mother's Pride' and were 'getting incredible response' – so it would appear that Mr Kahane saw nothing wrong at that stage in the radio exposure which 'Mother's Pride' was receiving.

E3.2 Mr Baumgartner decided to send 'Mother's Pride' to radio because, given the exposure it was receiving, he took the view that had he not done so he would lose all credibility, and radio would think him 'an idiot' . This was entirely understandable, in the circumstances.

E4 I am satisfied that in relation to 'Mother's Pride' Mr Baumgartner and his staff acted reasonably and in good faith, and that there is no substance in Mr Michael's complaint.

F. 'Don't Let the Sun Go Down on Me' and 'I believe when I fall in love'

F1 It is common ground that the versions of these songs supplied to radio were edited by Sony, without Mr Michael's prior written consent. Mr Michael alleges that his prior consent was required by clause 5.01 of the 1988 Agreement.

F2 The reason why edited versions were supplied to radio was that both tracks were long and would inevitably be edited by the radio stations, and Sony considered it preferable to have a single edited version, properly made.

F3 Clause 5.01 provides, so far as material:

> Company shall not have the right to edit … or otherwise alter any Master Recording hereunder without your prior written consent.

In my judgment, that provision covers the editing of tracks supplied to radio, with the result that the editing of these two tracks without Mr Michael's written consent having been first obtained constituted a breach of clause 5.01.

F4 That said, I am at a loss to understand on what basis that breach can be said to create any equity against Sony Music. At worst, it is trifling.

In the light of my conclusions in relation to each of the alleged counter-equities, it follows that they do not, taken singly or together, have the effect of altering the balance of unfairness and unconscionableness in any way. The position remains that it is unfair to Sony Music, and unconscionable, for Mr Michael now to assert that the 1988 Agreement is unenforceable. Accordingly, Sony Music's defence of acquiescence succeeds.

Had it been necessary for me to do so, I would in any event have accepted Mr Pollock's general submission that the alleged counter-equities, being no more than a disparate series of complaints, could have no impact on the question of the enforceability of the 1988 Agreement or on the defence of acquiescence.

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PART V: THE ARTICLE 85 ISSUE

Introduction to this Part of the Judgment

In paragraph 25 of the Statement of Claim Mr Michael alleges that the 1988 Agreement is prohibited by Article 85(1) of the EEC Treaty ('the Treaty'), and is automatically void pursuant to the provisions of Article 85(2) thereof. It is common ground that if the 1988 Agreement is prohibited by Article 85(1) it is rendered void by Article 85(2).

Article 85 of the Treaty is in the following terms:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> – any agreement or category of agreements between undertakings;
> – any decision or category of decisions by associations of undertakings;
> – any concerted practice or category of concerted practices;
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

No issue arises under Article 85(3) .

For convenience of reference, relevant provisions of the Treaty are set out in Appendix 2.
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The evidence on the Article 85 issue

As I observed in the introduction to this judgment, no factual or expert evidence was adduced on Mr Michael's behalf specifically in relation to the Article 85 issue, nor were any of Sony Music's witnesses cross-examined specifically in relation to that issue. The entirety of the cross-examination of Sony Music's witnesses was conducted by Mr Cran QC, and was directed to the restraint of trade issue and to Sony Music's 'equitable defences' .

It is, however, the contention of Mr Lever QC (who appeared for the plaintiffs on the Article 85 issue) that the evidence adduced on the restraint of trade issue and in relation to Sony Music's 'equitable defences' is sufficient to justify the conclusion that the 1988 Agreement contravenes Article 85(1).

The lack of evidence specifically directed to the Article 85 issue does, however, mean that the evidence relied upon by Mr Lever in support of his arguments on that issue necessarily consists of passages of evidence adduced in a different context and for a different purpose, and given by witnesses who were not directing, and who had not been invited to direct, their minds to the Article

85 issue. This is in itself unfortunate, not least because had they been asked to direct their minds and their evidence to the Article 85 issue they might, for all I know, have been able to provide further assistance by giving evidence relating specifically to that issue.

Moreover, it was not until Mr Lever's closing speech that he identified 'the market for the services of recording artists in the field of popular music' as being the relevant market for the purposes of Mr Michael's allegation that the 1988 Agreement is anti-competitive in object and/or effect. As Mr Pollock QC observed in the course of his closing submissions on the Article 85 issue, the fact that the relevant market was not identified before the evidence was called meant that there was no opportunity for the parties to adduce and test evidence which might go towards elucidating the nature and characteristics of that market: nor did the Court have the opportunity to hear such evidence.

Since in the event the evidence specifically relied upon by Mr Michael on the Article 85 issue forms a very small part of the totality of the evidence in this case, and since most of it consists of extracts from the reports of the expert witnesses and the witness statement of Mr Paul Russell, I have thought it convenient for reference purposes to reproduce in Appendix 3 [2] the principal extracts relied upon, together with a passage from the cross-examination of Mr Paul Russell which was also specifically relied upon by Mr Lever. Reference was also made by both Mr Lever and Mr Pollock in the course of argument to the decision of the Merger Task Force on the acquisition of Virgin Music by Thorn/EMI (May 1992) ('the Merger Decision'), and accordingly I have also included the relevant paragraphs of the Merger Decision in the Appendix.

Mr Lever also referred to the BPI Statistical Handbook 1993 (as updated by a News Release dated 14 February 1994), the contents of which it is impracticable to attempt to summarise. The same applies to various general allusions to the evidence on the restraint of trade issue which Mr Lever made in the course of his submissions.

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The authorities

A list of authorities referred to in the course of argument on the Article 85 issue is contained in Appendix 4. The list is not exhaustive: in particular, it does not include authorities referred to in written submissions which were not cited in detail in the course of the oral hearing.

The arguments of the parties

Summaries of the arguments of Mr Lever and Mr Pollock on the Article 85 issue are set out in Appendix 5 and Appendix 6 respectively [3] .

I recognise that no summary can adequately reflect the extensive and detailed nature of the arguments, still less the thoroughness and skill with which they were presented and deployed over

several days of hearing. On the other hand, no sensible purpose would have been served by my attempting to set out in full in this judgment all the submissions made to me on the Article 85 issue.

The scheme of this Part of the judgment

This Part of the judgment is divided into the following sections:

A. The general approach to the application of Article 85(1).

B. The various elements of Article 85(1).

C. The application of Article 85(1) in the instant case.

A. The General Approach to the Application of Article 85(1)

A1 Both sides have stressed the need for a broad and flexible approach to the question of the application of Article 85(1), and it is apparent from the European authorities cited to me in this case that such is the general approach of the European Courts.

A2 Consistently with this approach, in considering the effect of a particular agreement, decision or practice on competition within the single market the European Courts have also demonstrated a concern with substance as opposed to form (see, e.g., *Nungesser,* a case which I shall consider in greater detail later in this judgment).

A3 As to the European authorities themselves, in general terms the body of case-law on the application of the competition rules (at least as exemplified by the cases cited in the instant case) reflects the perception of the European Courts from time to time as to the effect on competition of a particular agreement, decision or concerted practice considered in its legal, economic and commercial context, rather than the application of a set of *a priori* principles. In this respect, the approach of the European courts to the application of the competition rules is directly comparable to that of the English courts to the application of the doctrine of restraint of trade (see generally Part III above).

A4 The broad approach to the competition rules described above is reflected in the fact that where a particular agreement is under challenge the European courts have in general found it necessary, save in the clearest ***408** cases (as to which, see Bellamy & Child para. 2-098), to undertake a thorough and detailed investigation and analysis of the surrounding facts as the basis for a consideration of the question whether the agreement contravenes the competition rules (see, e.g., *Brasserie de Haecht, Deutsche Grammophon, Commercial Solvents, Hugin, Nungesser, Coditel II* and *Delimitis*).

A5 Although Article 85(1) is framed in wide and unqualified terms, there are three important factors which have the effect of limiting in some degree the scope for its application. Those factors are:

(i) the so-called 'rule of reason' (see para. A6 below);
(ii) the ' de minimis rule' (see para. A7 below); and
(iii) the provisions of the Treaty relating to intellectual property rights (see para. A8 below).

A6 The 'rule of reason'

A6
A6.1 The 'rule of reason' - so called by the Advocate-General in his Opinion in *Technique Minière* (see *ibid.* page 257) - is aimed, as I understand it, at achieving a balance between on the one hand the need to maintain free competition in the single market by striking down agreements, decisions or practices which contain restrictions on competition, and on the other hand the desirability of preserving agreements, decisions or practices which, while they contain restrictions on competition, nevertheless have a pro-competitive effect overall.

A6.2 The 'rule of reason' has a direct parallel in the approach of the Courts of the United States in applying anti-trust laws. See, for example, the passage from the judgment of White CJ in *Standard Oil Co. of New Jersey v United States (1910) 221 US 1* , cited by Lord Wilberforce in *Esso* at 331G, where, referring to the words 'every contract in restraint of trade' in the Sherman Act 1890 , White CJ said:

> … as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade *within the intendment of the Act* … (Emphasis supplied.)

A6.3 The 'rule of reason' also has a direct parallel with the approach of the English courts in applying the doctrine of restraint of trade (see generally Part III above, and in particular Lord Wilberforce in *Esso* at p.331B–G).

A6.4 In *Technique Minière* a preliminary ruling was sought from the European Court of Justice under Article 177 of the Treaty as to (*inter alia*) the interpretation to be given to Article

85(1) of the Treaty with regard to exclusive distribution agreements possessing certain specified characteristics (in particular, containing no restriction on parallel imports). The factual background to the application for the preliminary ruling was that Technique Minière (a French company) had been granted the exclusive right to sell in **409* France certain machines manufactured by Maschinenbau Ulm (a German company). Technique Minière refused to pay for the machines on the ground that the agreement granting the exclusive right was contrary to Article 85(1).

A6.5 In his Opinion (at pp.256/7 of the report of *Technique Minière*), the Advocate-General noted the contention of Technique Minière that the mere recital of the relevant characteristics of the agreement sufficed to establish that the agreement contravened Article 85(1), and the contrary contentions of Maschinenbau Ulm and of the EC Commission to the effect that the agreement should be examined in the wider context of its practical consequences in relation to competition, and that before the agreement could be held to be contrary to Article 85(1) it must be established that it constituted a significant interference with competition. The Advocate-General continued:

> Nor is it possible to object as against the Commission and Maschinenbau Ulm, as Technique Minière attempts to do, that the introduction of such a 'rule of reason' (let us give it this name) brings with it the risk of divergencies in the development of the law in the various Member States and even within one and the same state, because of the fact that its application is often confided to the national court. For is it not the case that Article 177 of the Treaty (and the present reference exemplifies this) gives us an excellent means of preventing these risks from arising through the progressive elaboration of interpretative criteria by the European Court of Justice? … However, it is certain that it will not be easy adequately to define the principle which I have just put forward. Nor will it be easy to show how far the national court may go in overlooking minor interferences with competition.

The Advocate-General accordingly advised that in applying Article 85(1):

> … the required standard must be a *real* interference with the conditions of competition. Either this interference must actually exist, or there must be concrete facts indicating that it will take place.

A6.6 The ruling of the European Court of Justice was in accordance with the Advocate-General's advice, in that it ruled that the requirement in Article 85(1) that an agreement should be 'incompatible with the common market' meant that:

> … it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

The ruling on this question concluded as follows:

> Therefore, in order to decide whether an agreement containing an 'exclusive right of sale' is to be considered as prohibited by reason of its object or its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the ***410*** disputed agreement, or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.

A6.7 The test of incompatibility with the common market, as enunciated by the European Court of Justice in *Technique Minière* in the passage quoted above, has been applied by the European Courts consistently in subsequent cases (although I accept Mr Lever's caution against applying it in a rigid or formalistic way, as if the test were itself to be found in the terms of the Treaty).

A6.8 The decision in *Technique Minière* is also of significance in the instant case as affording an early example of a case in which the European Court of Justice rejected the argument that the agreement under challenge was *of its nature* in contravention of the Article (an approach sometimes described as a ' *per se* ' approach) in favour of a wider approach involving a consideration of the surrounding facts. Moreover it is to be noted that this wider approach was expressed to be

appropriate not merely in relation to anti-competitive effect but also in relation to anti-competitive *object* ('… by reason of its object or effect…').

A7 The 'de minimis rule'

A7 It is common ground that an agreement will not be held to contravene Article 85(1) unless the court is satisfied that is it likely to affect trade between Member States, and to prevent restrict or distort competition within the common market, *to an appreciable extent.* This follows from the decision of the European Court of Justice in *Volk v Vervaecke,* where the European Court of Justice held that [p. 302]:

> … an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.

A8 Intellectual property rights

A8 The scope of Article 85(1) is further restricted by the provisions of the Treaty relating to intellectual property rights (including copyrights). As it is put in Bellamy & Child (paras 8-001/002):

> … there is an obvious tension between, on the one hand, systems that confer legal monopolies and, on the other hand, systems that are intended to ensure free competition… Most systems of competition law find difficulty in deciding how far intellectual property rights may legitimately be exercised or licensed, without placing unjustifiable restrictions on free competitive activity.
>
> These difficulties arise in an acute form in the Community. In addition to the general difficulty of the operation of a system of intellectual property rights within a system of competition law, the EEC faces the additional task of establishing a single market among Member States. The purpose ***411** of the Single Market is to reproduce the conditions of one national market on a Community-wide scale. However, at the time of writing [July 1993] intellectual property rights are substantially governed by the laws

> of each Member State. Hence, as a matter of national law, the owner of an intellectual property right in one Member State may, in certain circumstances, prevent the importation of products lawfully marketed in another Member State by suing for infringement of his right under national law, thereby obstructing the free movement of goods across frontiers. The problem is further compounded by Article 222 of the Treaty which provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'.

This aspect of European competition law, which is of particular significance in the instant case, is considered further in section C below.

A9 Of their nature, the competition rules require that where a particular agreement decision or concerted practice is said to contravene the rules, the particular aspect of 'competition' which is said to be affected must be identified. As the Court of First Instance said in *Italian Flat Glass* (p. 342 para. 159):

> The Court considers … that the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anti-competitive behaviour.

(See also *Hugin* p. 1895 para. 5.)

A10 Further, the effect of an agreement on competition for the purposes of Article 85(1) is to be judged by reference to the competition which would occur in its absence (see *Petrofina* p.1158 para. 222, Halsbury para. 19.39 and Bellamy & Child para. 2-101 first sentence (a sentence on which Mr Lever specifically relied: see p.36 para. 2.67 of his second set of written submissions)).

A11 Mr Lever submitted that the availability of exemption under Article 85(3), and the decisions of the European courts as to whether exemption should be granted under Article 85(3) in particular cases, indicate that Article 85(1) has a wide application. He further submitted that, construing Article 85(1) in context, the terms of Article 85(3) point to a wide construction of Article 85(1).

A12 So far as the practical application of Article 85(1) is concerned, in my judgment decisions under Article 85(3) afford little useful guidance as to the general scope of Article 85(1).

A13 As to the construction of Article 85(1), while of course I accept that Article 85(1) must be construed in the context of the Treaty as a whole, and in particular in the context of the competition rules as a whole, I do not find particular assistance in carrying out that task from the terms of Article 85(3). As a matter of construction, Article 85(1) is in wide terms: in so far as there are limits on or qualifications to its application in practice, those limitations or qualifications appear to me to derive not so much from the construction of Article 85(1) as from the three factors to which I referred above, viz. the 'rule of reason' , the de minimis rule, and the provisions of the Treaty relating to intellectual property rights.

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A14 Burden of proof

A14 It is common ground that the burden lies on Mr Michael to establish that the 1988 Agreement contravenes Article 85(1).

A15 Standard of proof

A15 Although Mr Lever did not specifically address Mr Pollock's submission that a higher than normal standard of proof applies in cases under the competition rules (see Appendix 6, para. A2), I propose, without ruling on Mr Pollock's submission, to apply the normal standard.

B. The Various Elements of Article 85(1)

B1 '…agreements between undertakings…'

B1 It is common ground that Mr Michael's service companies and Sony Music are each 'undertakings' for the purposes of Article 85(1). Mr Michael has not alleged that the relevant 'undertaking' on Sony's side is not Sony Music but the worldwide Sony Group, although Mr Lever relies on the fact that Sony Music is a member of the Sony Group.

B2 '… which may affect trade between Member States…'

B2

B2.1 This requirement overlaps with the further requirement of anti-competitive effect to the extent that an agreement which has the requisite anti-competitive effect will by definition 'affect trade between Member States' . But that does not mean that the requirement of an effect on trade between Member States is to be treated as subsumed in the requirement of anti-competitive effect, nor (as the European authorities demonstrate) have the European courts treated it in that way.

B2.2 As Mr Lever accepted, the requirement of an effect on trade between Member States is an important preliminary requirement in that it founds the jurisdiction for the application of Article

85(1). He further submits, however, that it is a requirement which is very easily satisfied. I shall consider this submission below.

B2.3 As I read the European authorities, the requirement of an effect on trade between Member States is particularly susceptible to the application of the 'rule of reason' . Thus, for example, in *Consten and Grundig* the European Court of Justice said this [p.341:

> The concept of an agreement 'which may affect trade between Member States' is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under the prohibition of Community law contained in Article 85; otherwise it escapes the prohibition.
>
> In this connection, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or ***413** potential, to freedom of trade between Member States in a manner which might harm the objectives of a single market between States. Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may 'affect' such trade in the abovementioned manner.

B2.4 Adopting the approach of the European Court of Justice in *Consten and Grundig,* it must follow, in my judgment, that there can be no rule of thumb, of ' *per se* ' approach, the application or adoption of which will determine the question whether the requisite element of an effect on trade between Member States is present in any particular case. The European authorities establish, as I read them, that the question whether the jurisdictional requirement of an effect on trade between Member States is met in any particular case is as a general rule to be resolved by a consideration of the terms of the relevant agreement *in its legal, economic and commercial context* (see, e.g., *Technique Minière, Consten and Grundig, Brasserie de Haecht, Deutsche Grammophon, Commercial Solvents, Hugin, Nungesser, Coditel II* and *Delimitis*). In some cases the question will be more easily answered than in others. But however easy or difficult the question, as a general rule the answer to it will depend not merely upon an examination of the terms of the agreement itself, but also upon a detailed investigation into the relevant surrounding facts and circumstances, including in particular the nature and operation of the relevant market or markets.

B2.5 It follows, in my judgment, that Mr Lever's broad submission that the requirement of an effect on trade is one that is very easily satisfied is not a proposition that can safely be accepted.

Each case must be considered on its merits, and (save in the clearest cases) in the light of detailed evidence concerning the relevant background circumstances.

B2.6 Nor can I accept Mr Lever's submission that 'almost every agreement of economic significance affects trade between Member States … it just has to have some significance at Community level' . That submission is in my judgment too widely framed. The 'rule of reason' requires, in my judgment, that in order to meet the requirement of an effect on trade it is necessary that the agreement should have appreciable significance at Community level not just generally but *specifically in relation to competition in the single market.* If Mr Lever's submission were right, the requirement of an effect on trade would become otiose since the only question would be whether the agreement in question had an anti-competitive object or effect. Yet *Consten and Grundig* shows that the requirement of an effect of trade does constitute a separate and discrete requirement.

B2.7 The conclusion that what is required is an effect not merely on trade between Member States generally but on competition within the single market is also borne out by the following passage from the judgment of the European Court of Justice in *Hugin* [p. 1899, para. 17]:

> The interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers *any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a* ****414*** *manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market.* On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order. (My emphasis.)

B2.8 I referred earlier to the need to identify the relevant market or markets which are said to be affected (see para. A9 above, and *Italian Flat Glass*). The authorities also establish, as I read them, that where (as in the instant case) the agreement which is said to contravene the competition rules relates to the supply of raw material (in this case artists' services) - as opposed to the production or distribution of an end product (in this case, pop records) - it is relevant for the purposes of establishing the requisite effect on trade between Member States to look beyond the raw material market and to have regard also to any effects or repercussions of the agreement in question on

competition in the market for the end product (see *Petrofina, Commercial Solvents,* and Bellamy & Child para. 2–131).

B2.9 In the instant case, therefore, in considering whether the 1988 Agreement has the requisite effect on trade between Member States it is relevant to have regard to any actual or potential repercussions of the 1988 Agreement on competition in the market for pop records, if and to the extent that the evidence establishes that there are any.

B3 '… which have as their object … the prevention restriction or distortion of competition within the common market…'

B3

B3.1 It is common ground that the ascertainment of the 'object' of an agreement for the purposes of Article 85(1) involves an objective approach, and that subjective intent is irrelevant (see *Technique Minière,* Bellamy & Child para. 2–097 and Vaughan para. 19.45).

B3.2 'In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the context in which the agreement is to be applied.' (See Halsbury para. 19.40.)

B3.3 'Generally speaking, if the obvious consequence of the agreement is to restrict or distort competition, as a matter of law that is its object for the purposes of Article 85(1), even if the parties claim that such was not their intention, or if the agreement has other objects.' (Bellamy & Child para. 2–097)

B3.4 Although in *Consten and Grundig* the European Court of Justice said [p.342]:

> … there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention restriction or distortion of competition,

it appears that in practice this principle has been applied only where on the facts it is plain and obvious, adopting an objective approach, that the provisions of the agreement in question are directed at achieving an ***415*** anti-competitive effect within the meaning of Article 85(1) (see Bellamy & Child para. 2–099 and footnote 86).

B3.5 Although in the context of the requirement of an effect on trade between Member States it is material to have regard to any repercussions on competition in the market for the end product (i.e. in this case pop records), the relevant market for the purposes of considering whether the 1988 Agreement is anti-competitive by reason either of its object or of its effect is limited to the 'raw material' market: i.e. 'the market for the services of recording artists in the field of popular music' , as identified by Mr Lever in the course of his closing submissions.

B4 '… which have as their … effect the prevention restriction or distortion of competition within the common market …'

B4 In order to determine whether an agreement has an anti-competitive effect regard must be had to all relevant facts and circumstances, including the existence of similar agreements (see Halsbury para. 19.40). Thus, for example, in the network distribution cases (e.g. *Brasserie de Haecht* and *Delimitis*) the European Court conducted a detailed investigation and analysis of the nature, scale and operation of the relevant market.

C. The Application of Article 85 in the Instant Case

C1 In applying Article 85(1) to the 1988 Agreement I propose to follow and to adopt what I perceive to be the general approach of the European Courts, as described in section A above.

C2 Effect on trade between Member States

C2

C2.1 Mr Lever's primary submission on this aspect of the case is that the 1988 Agreement (i) has the requisite effect on the 'raw material' market in so far as it prevents Mr Michael from producing recordings for other record companies in other Member States, and (ii) has the requisite effect on the 'end-product' market in that it affects the flow of trade in records of Mr Michael's work, since trade in his records is undertaken by Sony and not by some other record company: *ergo,* he submits, the 1988 Agreement has the requisite actual or potential effect on trade between Member States. Mr Lever then goes on to submit that such actual or potential effects are appreciable (i.e. are not *de minimis*), given (a) the size and status of Sony Music and the Sony Group, (b) the fact that Mr Michael is (and was in January 1988) a highly successful recording artist, whose records have achieved substantial sales, and (c) the fact the 1988 Agreement forms part of a 'network of similar agreements' (i.e. agreements between other recording artists and other 'majors').

C2.2 I turn first to the 'raw material' market. As indicated above, the market which Mr Lever identifies as the relevant 'raw material' market is the market for the services of recording artists in the field of pop music. Moreover, it is an essential feature of Mr Michael's case on the Article 85 issue that this market should be Community-wide market, and not merely a national or domestic

market, since it is common ground that a national or domestic market does not attract Article 85 (see, e.g., *Hugin* p.1899 para. 17, quoted in para. B2.7 above).

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C2.3 Yet, paradoxically, on the restraint of trade issue Mr Cran relied strongly on the lack of any evidence to indicate that UK recording artists such as Mr Michael sign with non-UK record companies (let alone with record companies in other Member States). Thus, in the course of his closing address Mr Cran said:

> The UK companies are dealing with UK artists. The foreign companies are dealing with foreign artists. … it is not practicable to suppose the somebody without a UK operation is going significantly to be able to sign up UK artists and develop them within the UK. Of course it is possible in the odd case that somebody will be signed up in the UK and then developed as a Los Angeles artist, but in practice one is dealing with UK artists, with UK clubs and UK followers and, in practice, they are going to need a UK presence.

See also para. 16.6.2 of Mr Cran's closing written submissions (p.145), where he says:

> Additionally, there is no evidence that UK artists sign with foreign record companies (except for Rolling Stones and Rob Halford with Sony US, and The Stone Roses with Geffen).

C2.3 It is indeed the case that the evidence before me is to the effect that the market for the services of *UK* recording artists in the pop field (that being the market on which Mr Michael ventured in 1982 and again in 1984) is a purely national and domestic market, limited territorially to the UK. This is to be contrasted with the international nature of the 'end-product' market, viz. the pop record market (see Part III above, under the heading 'The Second Stage: Justification').

C2.4 As I said in Section A above, it is unfortunate that the Article 85 issue was not specifically addressed in evidence. On the evidence before me, however, I can only conclude that there is no Community-wide market for the services of *UK* recording artists in the field of popular music, since, as Mr Cran pointed out, only in exceptional cases will UK recording artists sign to a non-UK record company. Thus so far as Mr Michael was concerned, in 1982 and again in 1984, the relevant market for his services was the UK market, consisting of UK record companies.

C2.5 It follows that for the purposes of Article 85(1) the 1988 Agreement does not affect trade between Member States at the 'raw material' end of the chain of supply, that is to say in the market for Mr Michael's recording services.

C2.6 That conclusion is enough to dispose of Mr Michael's case in relation to the 'raw material' market, but in case the conclusion is wrong, and in the interests of completeness, I shall proceed as if I were satisfied on the evidence that at all material times there has been a *Community-wide* market for Mr Michael's recording services.

C2.7 It is of course correct that the 1988 Agreement prevents Mr Michael producing Master Recordings for other record companies for so long as it remains on foot. As discussed in Part III above, that is because by virtue of ***417** clauses 2.01 and 2.02(a) of the 1988 Agreement Mr Michael has sold all Master Recordings produced by him during the currency of the 1988 Agreement, together with all rights (including copyrights) in those Master Recordings, to Sony Music.

C2.8 Thus, leaving aside for the moment Mr Lever's reliance on a 'network of similar agreements' , the question arises: Does the fact that Mr Michael's entire output of Master Recordings during the currency of the 1988 Agreement (which may last as long as 15 years and possibly longer) has been bought by Sony Music suffice in itself to demonstrate an effect on trade between Member States within the meaning and for the purposes of Article 85?

C2.9 Given the general approach which I have decided to adopt, the burden is on Mr Michael to establish that (to paraphrase the test formulated in *Technique Minière*) it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the 1988 Agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. In this context, the expression 'pattern of trade' is in my judgment synonymous with 'competition' ; and for present purposes the relevant trade is trade in the services of recording artists in the field of popular music (and, as I said earlier, I am for this purpose assuming the existence of a Community-wide market for the recording services of UK artists).

C2.10 In my judgment, the fact that the 1988 Agreement covers the whole of Mr Michael's output of Master Recordings during a period which may last 15 years and possibly longer is not *in itself* (i.e. *per se*) sufficient to establish the requisite effect on competition in the market for the services of recording artists in the field of popular music. Consistently with the authorities to which I referred earlier, it is necessary (a) to place the 1988 Agreement in its legal, economic and commercial context, and (b) to consider what would have been the position in relation to competition in the relevant market in the absence of the 1988 Agreement.

C2.11 In this connection, the plaintiffs relied heavily on the decision of the EC Commission in *Scottish Nuclear* (a case under Article 85(3)), and in particular on para. 23 of the decision, which reads as follows:

> The agreement restricts competition in three ways:
>
> — the requirement that nuclear electricity be sold exclusively to Scottish Power and Hydro-Electric limits Scottish Nuclear's market. Scottish Nuclear is not permitted to supply electricity to any other parties unless the contract has been terminated …

> I agree with Mr Pollock, however, that the facts of *Scottish Nuclear* are far removed from the facts of this case, and that it would be simplistic to draw a parallel for present purposes between the market for the production supply and distribution of electricity (being the relevant market in *Scottish Nuclear*) on the one hand and the markets for recording artists' services and for pop records (being the relevant markets in this case) on the other, without at the very least having undertaken the kind of detailed factual investigation and analysis of the latter markets to which I referred earlier. In this connection it is material to note that in *Scottish Nuclear* the EC ***418** Commission had the benefit of detailed evidence as to the relevant market (see, for instance, section C of the decision on pp.32/33), the like of which is not available to me in the instant case.

C2.12 Moreover, it is in my judgment material to bear in mind that in *Scottish Nuclear* the EC Commission was considering an application for negative clearance under Article 85(3): clearance which, in the event, the EC Commission gave (albeit for a limited period). Accordingly, to apply the dicta quoted above to a case under Article 85(1) would in itself involve taking such dicta out of context.

C2.13 Lastly, so far as *Scottish Nuclear* is concerned, even if the EC Commission's dicta were otherwise applicable to the instant case, the need to take into account the legal context of the 1988 Agreement, and in particular the legal position in relation to the 1984 Agreement, effectively undermines the premise that it was the 1988 Agreement which had the effect of rendering Mr Michael's recording services unavailable to other recording companies.

C2.14 Thus, in order to place the 1988 Agreement in its *legal* context - and, for that matter, in order to consider what the position would have been in its absence - it is necessary to consider the contractual position as between Mr Michael and Sony Music immediately before the 1988 Agreement was concluded. That in turn involves taking into account the contractual history, and in particular 1984 Agreement (under which, according to its terms, as of January 1988 six albums remained to be delivered).

C2.15 But in relation to the 1984 Agreement Mr Michael is, as it seems to me, in an insuperable difficulty (a difficulty to which I have already referred in the context of the restraint of trade issue) in that he has elected not to put forward any positive case as to the validity or enforceability (or otherwise) of the 1984 Agreement under English law, nor has he asserted that the 1984 Agreement contravened Article 85(1). In my judgment this is a fundamental flaw which affects the entirety of Mr Lever's argument on the Article 85 issue.

C2.16 Mr Lever's submission so far as the 1984 Agreement is concerned is that it does not matter whether the 1984 Agreement was or was not valid or enforceable, and that it is sufficient for present purposes that since 4 January 1988 it is the 1988 Agreement which alone has served to keep Mr Michael off the market for the production of Master Recordings.

C2.17 I cannot accept that submission. Given that what the Court is concerned to do (as I understand it) is to assess the effect of the 1988 Agreement on competition in the relevant market, and that the essence of Mr Michael's case in this respect is that the 1988 Agreement served to take Mr Michael off that market for a substantial period (indeed possibly the whole of his professional life), it must be of the greatest relevance to consider whether Mr Michael had already been effectively taken off that market in 1984, by virtue of the 1984 Agreement.

C2.18 Similarly, I cannot see how the Court can begin to assess what the position on the relevant market would have been in the absence of the 1988 Agreement without forming a view as to the legal effect of the 1984 Agreement. In effect, by eschewing any positive case in relation to the 1984 Agreement, Mr Lever is inviting the Court to wrench the 1988 ***419** Agreement out of its legal context. Such an approach appears to me to be completely inconsistent with the European authorities, and also, for that matter, with the commercial reality of the instant case.

C2.19 In my judgment, the existence or otherwise of pre-existing contractual provisions having the effect of limiting Mr Michael's ability to trade on the relevant market must be of central relevance to Mr Lever's submission that, applying the 'before' and 'after' test which is implicit in the requirement that the Court consider what the position would have been in the absence of the 1988 Agreement, the 1988 Agreement had the requisite effect on trade in that market. To ignore pre-existing contractual constraints on competition would in my judgment be to adopt a thoroughly artificial and unreal approach to any assessment of the effect of the 1988 Agreement on such competition.

C2.20 Moreover, in the absence of any assertion by Mr Michael that the 1984 Agreement contravened Article 85(1), I take the view (for broadly the same reasons as those which I gave in the context of the restraint of trade issue) that I am bound to proceed on the basis that it did not do so. It is not for the Court to raise and to adjudicate upon an issue of Community law which Mr Michael has not himself raised, and which Mr Lever submits (albeit wrongly, in my judgment) is irrelevant to his case.

C2.21 Treating the 1984 Agreement, therefore, as an enforceable agreement under English law and one which did not contravene Article 85(1), it becomes difficult to see what effect on competition in the relevant market the 1988 Agreement could have.

C2.22 Mr Lever at one stage suggested that even if the 1984 Agreement were a valid and enforceable agreement (a proposition which he did not accept, although, as I have already indicated, he did not contend otherwise), the Court could nevertheless take account of the additional restrictions contained in the 1988 Agreement, over and above those contained in the 1984 Agreement (cf. *Alec Lobb,* in the context of the restraint of trade issue); and that even on that basis the 1988 Agreement could be seen to contravene Article 85(1). In support of this submission Mr Lever relied principally on the fact that the 1988 Agreement was an eight-album deal (i.e. 'Faith' plus a further seven) whereas under the provisions of the 1984 Agreement only six further albums remained to be delivered by the time the 1988 Agreement was signed.

C2.23 Mr Lever did not develop this submission, but in any event it seems to me to give rise to a number of difficulties, not least the fact (to which I referred earlier in the context of the restraint of trade issue) that the 15-year cap contained in the definition of 'Contract Period' in paragraph 15.14 of the 1988 Agreement finds no equivalent in the 1984 Agreement. As a result it is possible that, had the 1984 Agreement not been superseded by the 1988 Agreement, it might have continued on foot beyond 4 January 2003 (the fifteenth anniversary of the 1988 Agreement). Put at its highest from Mr Michael's point of view, it appears that there is a possibility that the 1988 Agreement may last longer than the 1984 Agreement would have done. But I am in no position on the evidence to attempt to evaluate that possibility, still less to assess what effect (if any) it may have on competition in the relevant market. Apart from anything else, such an assessment would, ***420** as it seems to me, involve peering into the crystal ball in an attempt to forecast competitive conditions in the relevant market from about the year 2000 onwards: a process which I am neither qualified nor equipped (in terms of expert evidence) to undertake. In this connection I bear in mind in particular paragraph 29 of the Merger Decision, which is in the following terms:

> The market(s) for recorded music is characterised by certain specified features, including the heterogeneous nature and short life cycle of its products, the constant change in consumer preferences, based to some extent on changes in fashion, and the significance of individual articles or hit records to a record company's profitability rather than the development of brand loyalty to individual record labels on the part of the ultimate consumer.

C2.24 So far as the legal context of the 1988 Agreement is concerned, therefore, I conclude:

(a) that the task of placing the 1988 Agreement in its legal context (a task which in my judgment I have to undertake, for reasons set out earlier) necessarily requires that I take a view as to the validity and/or enforceability or otherwise of the 1984 Agreement;
(b) that since the plaintiffs have elected not to challenge the validity or enforceability of the 1984 Agreement, I must proceed on the basis that it was valid and enforceable and that it accordingly took effect according to its terms and remained on foot until it was superseded by the 1988 Agreement; and
(c) that on that basis I am not satisfied that the 1988 Agreement affects or may affect trade between Member States within the meaning or for the purposes of Article 85(1), and that accordingly the preliminary jurisdictional requirement is not fulfilled in this case.

C2.25 The conclusion which I have just expressed makes it strictly unnecessary to consider the Article 85 issue any further. For completeness, however, I propose to consider all the remaining questions raised in argument on the Article 85 issue.

C2.26 I turn next, therefore, to the *economic* and *commercial* context in which, on the approach which I have adopted, the 1988 Agreement must be placed for the purpose of considering its actual or potential effect on competition in the relevant market (and at this stage I am still concerned only with the 'raw material' market, that is to say the Community-wide market for the services of recording artists in the field of popular music - assuming, contrary to the conclusion reached in paragraph C2.4 above, that the existence of such a Community-wide market is established on the evidence).

C2.27 In my judgment, the task of placing the 1988 Agreement in its economic and commercial context requires (*inter alia*) an investigation of the nature, scale and operation of the relevant market or markets. Yet in the instant case no such investigation has been undertaken in evidence: indeed, as I observed earlier, the available evidence does not even establish the existence of a Community-wide 'raw material' market for Mr Michael's recording services.

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C2.28 Turning next to the question of 'appreciable effect on trade' for the purposes of Article 85(1), Mr Lever relied on three factors as establishing such an effect:

(1) *The size and status of Sony Music*

This factor is in my judgment irrelevant to the question whether the 1988 Agreement had the requisite effect on the 'raw material' market. The actual or potential effect of the 1988 Agreement on that market cannot, in my judgment, depend to any material degree on whether the contracting record company happened to be Sony Music, another 'major' , a large independent, or a small independent (or, for that matter, a small independent with a licensing agreement or a pressing and distribution agreement with a larger independent or a 'major').

(2) *The status of Mr Michael as a successful recording artist*

(i) Mr Lever seeks to rely on the undoubted fact that Mr Michael is (and was in January 1988) a highly successful recording artist whose records have (and had in January 1988) achieved substantial sales. The difficulty which he faces in this respect, however, is that if it be the case that Mr Michael was effectively bound by the 1984 Agreement, then his successful status in 1988 becomes irrelevant to a consideration of the effect of the 1988 Agreement: one would have to go back to his status in 1984 (or, if the Innervision Agreement was valid and enforceable, to 1982) as being the last time he was 'on the market' in the sense of being free of contract.

(ii) In the event, it follows from my earlier conclusion that for present purposes I have to treat the 1984 Agreement as valid and enforceable (see para. C2.19 above) that Mr Michael was not free of contract when the 1988 Agreement was concluded and that his status as a highly successful recording artist in January 1988 is accordingly irrelevant to the question of the effect of the 1988 Agreement on trade in the market for his recording services.

(3) *The ' network of similar agreements '*

(i) Mr Michael relies on the accepted fact that other recording artists are signed to other 'majors' under agreements which take a generally similar form to that of the 1988 Agreement (see generally the discussion in Part III above). In my judgment, however, the authorities (see in particular *Delimitis*) establish that what the European courts are particularly on the lookout for, in cases where a network or pattern of similar agreements exist, is the possibility of access to the relevant market by other would-be competitors being thereby appreciably restricted or impeded (see also Bellamy & Child para. 2–077). In the instant case there is no evidence of any barriers to access to the market for the services of pop recording artists. Such evidence as there is points to the contrary conclusion (see, e.g., para. 34 of the Merger Decision). Moreover I referred earlier to the paradox that one of the complaints made on behalf of Mr Michael in the instant case is that the 'majors' are in general too ready to sign unknown and untried artists, with the result that far too much product is launched onto the pop record market. ***422**

(ii) In the second place, the 'network of similar agreements' on which Mr Lever relies would appear (on such evidence as there is) to consist principally of agreements under which recording artists who were relatively unknown when the agreements were originally made have subsequently become successful by virtue of those agreements. This, however, is inconsistent with Mr Lever's reliance on Mr Michael's status as a successful recording artist. Thus, Mr Lee (Mr Michael's own legal expert) gave evidence to the effect that successful artists free of contract do not usually enter into long term agreements with their respective record companies. That being the position on the evidence, in my judgment it is not open to Mr Lever to rely on a 'network of similar agreements' relating to *successful* recording artists. Nor, for that matter, can the relevant market be defined so as to limit it to *successful* recording artists.

C2.29 Accordingly, even on the basis that the 1988 Agreement is to be considered free from its contractual context (so that Mr Michael is to be regarded as free of contract in January 1988), I am still not satisfied on the material before me that the 1988 Agreement has had, or may in the

future have, an appreciable effect on trade between Member States in the (assumed) Community-wide 'raw material' market.

C2.30 I turn now to the 'end-product' market, i.e. the market for pop records.

C2.31 In my judgment the mere fact that by virtue of the 1988 Agreement it is Sony Music, and not some other record company, that has control of the production and distribution of records derived from Mr Michael's Master Recordings does not give rise to an effect on trade in those records or in pop records generally between Member States for the purposes of Article 85(1).

C2.32 Before a conclusion can be reached that the 1988 Agreement has such an effect, it is in my judgment necessary at the very least to examine in some detail Sony Music's arrangements for distribution of the end-product within the Community (cf. *Commercial Solvents*). Yet no such inquiry has been undertaken on Mr Michael's behalf, and as a result there is very little evidence about Sony Music's distribution arrangements within the Community, or for that matter elsewhere. Nor is any complaint levelled against Sony Music in relation to the distribution of records derived from Mr Michael's Master Recordings: it is not, for example, suggested that one territory within the Community is given preference over another, or that restrictions are sought to be imposed on parallel imports.

C2.33 I conclude, therefore, that even on the footing (which I consider to be wrong: see para. C2.13 above) that the 1988 Agreement is to be considered without regard to its contractual context - and, in particular, without regard to the 1984 Agreement - the material before me does not establish that the 1988 Agreement has the requisite effect on trade in the context of the market for pop records.

C2.34 It follows that, for all the reaons which I have attempted to express, the preliminary jurisdictional requirement of an effect on trade between Member States has not been met in this case.

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C2.35 As I indicated earlier, however, I shall proceed on the assumption that the requirement of an effect on trade has been met, and on that basis I turn to the further elements of Article 85(1).

C3 The 'object' of the 1988 Agreement

C3

C3.1 In my judgment the object of the 1988 Agreement, objectively ascertained, is to provide for the acquisition by Sony Music of Master Recordings made by Mr Michael, in consideration of royalties advances and other benefits receivable by Mr Michael, for the purpose of enabling Sony Music to produce records derived from those Master Recordings for sale to the public, and to distribute, promote and market such records.

C3.2 If that formulation of the object of the 1988 Agreement be correct, it must follow, in my judgment, that the object of the 1988 Agreement is not anti-competitive and does not contravene

Article 85(1). Indeed, as I see it such an object is positively pro-competitive in the sense and to the extent that it is directed at bringing new product onto the pop record market. In commercial terms, that is its raison d'être . Without sales of records, there will be no royalties for Mr Michael and no profit for Sony Music.

C3.3 I cannot accept Mr Lever's submission that the objects of the 1988 Agreement include (a) giving Sony Music the right to refrain from exploiting Mr Michael's Master Recordings, and (b) ensuring (subject only to limited release obligations) that no one else, including Mr Michael, has an opportunity to do so. In my judgment, to attribute such objects to the 1988 Agreement is to distort commercial reality in an attempt to force the 1988 Agreement within the scope of Article 85(1).

C4 The 'effect' of the 1988 Agreement

C4

C4.1 Mr Lever submitted (as indeed he was bound to do, given the lack of evidential material on the Article 85 issue) that no such detailed investigation and analysis as was carried out by the European Courts in the network distribution cases (e.g. *Brasserie de Haecht* and *Delimitis*) is necessary in the instant case, on the ground that since the work of successful recording artists is inherently highly differentiated, the fact that by virtue of similar agreements the 'majors' have (as Mr Lever put it in para. 2.36 of his second set of written submissions):

> … secure access to a substantial proportion of the output of successful recording artists as raw material *self-evidently* has the effect of preventing, restricting or distorting competition. (Emphasis supplied.)

C4.2 In the first place I do not accept the logic of that proposition. It does not seem to me necessarily to follow that because successful artists are usually signed up to 'majors' under agreements which take a similar form to the 1988 Agreement, *ergo* the existence of those similar agreements has an anti-competitive effect.

C4.3 In the second place, Mr Lever's approach in this respect seems to me to be just the kind of *per se* approach against which (as I read the authorities) the European courts have set their face. I can see no ground whatever in this ****424*** case for departing from what I take to be the correct general approach of considering all relevant facts and circumstances (see para. C2.27 above).

C4.4 Since, as I observed earlier, the requirement of anti-competitive effect overlaps with the preliminary jurisdictional requirement of an effect on trade between Member States, much of what is contained in paragraph C2 above applies also in this connection.

C4.5 In particular, my conclusion (para. C2.4 above) that on the evidence before me the market for Mr Michael's recording services is a national and domestic market, limited to the UK, is in my judgment equally fatal to Mr Michael's case that the 1988 Agreement has an anti-competitive effect for the purposes of Article 85(1). However, in the interests of completeness I will once again proceed as if the evidence established that the market for Mr Michael's recording services has at all material times been Community-wide. What follows is based on that assumption.

C4.6 At the heart of Mr Michael's case on this aspect of Article 85(1) are the elements of exclusivity which are created by, or which derive directly from, the 1988 Agreement. Other aspects of the 1988 Agreement were relied on by Mr Lever in argument (in particular the re-recording restriction in clause 12.02 of the 1988 Agreement), but in my judgment if Mr Michael is to succeed in establishing an anti-competitive effect for the purposes of Article 85(1) he has to do so by reference to exclusivity. If the exclusivity elements in the 1988 Agreement do not suffice for this purpose, then in my judgment the other aspects of the 1988 Agreement which were relied upon by Mr Lever cannot, either singly or together, justify the conclusion that the 1988 Agreement has an anti-competitive effect for the purposes of Article 85(1).

C4.7 In the course of his submissions, Mr Lever used the word 'exclusivity' in the two different senses to which I drew attention in the context of the restraint of trade issue. On the one hand he used it with reference to the fact that the 1988 Agreement has the effect of absorbing the entirety of Mr Michael's output of Master Recordings during the currency of the agreement (i.e. exclusivity of output). On the other hand, he used it with reference to the fact that in relation to each Master Recording Sony Music has exclusive rights of exploitation of that Master Recording (i.e. exclusivity of exploitation). In addressing Mr Lever's submissions on this aspect of the Article 85 issue it is, I think, of importance to keep the distinction between exclusivity of output and exclusivity of exploitation clearly in mind.

C4.8 So far as exclusivity of exploitation is concerned, Mr Lever recognised, as he was bound to do, that Sony Music is entitled to a measure of exclusivity in relation to product delivered to it under the 1988 Agreement. For my part, even leaving aside for the moment Article 222 of the Treaty (relating to intellectual property rights), I am unable to see any basis for contending that the copyright and other protection afforded to Sony Music by or by virtue of the 1988 Agreement in relation to individual items of product (i.e. individual Master Recordings) delivered to it from time to time pursuant to the 1988 Agreement exceeds what is reasonable or gives rise to an anti-competitive effect.

C4.9 As I said earlier (para. C2.27), becore concluding that the 1988 Agreement has an anti-competitive effect in this respect, it is in my judgment ***425*** necessary for the Court to carry out the kind of thorough market analysis carried out by the European courts in the network distribution cases. I am unable to do that, as the evidence before me is wholly insufficient for that purpose.

C4.10 However, the real thrust of Mr Michael's case in relation to exclusivity, as I understand it, relates to exclusivity of output. It is submitted that the fact that Sony Music has exclusivity of output in relation to Mr Michael's recordings during the continuance of the 1988 Agreement prevents Mr Michael from providing Master Recordings to other record companies in other Member States during that period.

C4.11 In my judgment, however, in applying Article 85(1) it is necessary to recognise that exclusivity of output is the direct consequence of Mr Michael having agreed to sell to Sony Music, and Sony Music having agreed to buy, all Master Recordings produced by Mr Michael during the currency of the agreement. Equally, when Mr Lever points to the 'duration' of the 1988 Agreement as being excessive, the 'duration' of the 1988 Agreement is a direct consequence of the number of albums which are included in the deal. Viewing the 1988 Agreement in that way, I am unable to see how the fact that it covers all Mr Michael's output for so long as it continues on foot can amount *in itself* (*per se*) to an anti-competitive effect for the purposes of Article 85(1).

C4.12 Accordingly, I conclude that Mr Michael has not established the requisite anti-competitive effect.

C4.13 Up to this point, I have addressed the question of the application of Article 85(1) in the instant case without reference to the provisions of the Treaty (and in particular Article 222) which relate to intellectual property rights (see generally para. A8 above). I now turn to this aspect.

C4.14 Article 222 of the Treaty is in the following terms:

> This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

C4.15 It is clear on the authorities that Community law draws a distinction between on the one hand the *existence* of intellectual property rights, which is not affected by the competition rules, and on the other hand the *exercise* of such rights, which is subject to the competition rules (*Deutsche Grammophon, Coditel II* and *RTE,* and see also Bellamy & Child para. 8–003).

C4.16 I accept Mr Pollock's submission that the 1988 Agreement does not involve the *exercise* of copyrights; rather, it transfers copyrights, present and future, from Mr Michael to Sony Music. It follows, in my judgment, that for the purposes of the Community law the 1988 Agreement is concerned with the *existence* of the copyrights, in contrast to their *exercise.*

C4.17 Mr Lever seeks to find a way round this (to my mind) clear distinction by submitting that the 1988 Agreement is to be treated for the purposes of the competition rules as if it were a licence for the full copyright period in relation to each Master Recording. He bases this submission on the broad proposition that where there is an assignment of copyright for a consideration which takes the form of royalties, so that there is (as he put it) an 'ongoing relationship' between assignor and assignee, in applying the competition rules Community law assimilates the assignment with a licence for the full ***426** copyright period. Founding himself on that proposition, he submits that the 1988 Agreement constituted an exercise of copyright for Community law purposes. As authority for this submission he relies principally on *Nungesser.*

C4.18 However, I agree with Mr Pollock that Mr Lever's broad proposition is contrary to principle, and that *Nungesser* affords no support for it.

C4.19 Approaching the matter first as one of principle, I can see no reason why the effect on competition of an assignment of copyright should be any different according to whether the consideration for the assignment takes the form of royalties or of a lump sum. After all, it is common ground that the competition rules are concerned not so much with the position *as between contracting parties* as with the effect of the agreement on third parties operating in the relevant market or markets. The existence of an ongoing commercial and/or contractual relationship between assignor and assignee seems to me to be irrelevant to the application of the competition rules.

C4.20 I turn next to *Nungesser.* In *Nungesser,* the owner of intellectual property rights (viz. plant breeder's rights) entered into an arrangement for the sale of part of those rights (viz. the rights as they affected Germany). There was thus no transfer of the entirety of the worldwide rights, but a dealing with the rights on a lesser basis (cf. in this respect *Coditel II,* where there was a transfer of the right to exhibit a particular film in Belgium). Having conducted a thorough investigation of all the surrounding facts, the European Court of Justice concluded that in economic terms the transferee's position on the market was that of an exclusive licensee: a good example, as it seems to me, of the preference of the European courts for substance over form.

C4.21 In a case such as *Nungesser,* it is not difficult to see why, after a detailed examination of all the relevant circumstances, the European Court of Justice should conclude that in economic terms the position of the assignee was equivalent to that of an exclusive licensee. Dealings with an intellectual property right which fall short of an outright transfer of the entirety of the right may (in the particular circumstances of an individual case) lead to such a conclusion. By contrast, however, in the instant case the entirety of the copyrights in the Master Recordings (present and future) the subject of the 1988 Agreement are sold to Sony Music outright: the 1988 Agreement does not contain any lesser dealing in those rights, still less any dealing of a territorial nature such as was present in (for example) *Nungesser* and *Coditel II.*

C4.22 Finally, in so far as Mr Lever sought to place separate reliance on the existence of what he described as deemed transfers of future copyright, I agree with Mr Pollock that such submissions

are misconceived, given that by virtue of section 91(1) of the Copyright, Designs and Patents Act 1988 future copyrights will vest automatically in Sony Music as and when they come into existence.

C4.23 Accordingly, I conclude that Community law treatment of intellectual property rights (as reflected in Articles 222 and 36 of the Treaty) would in any event save the 1988 Agreement from contravening Article 85(1), if it were otherwise in contravention of the Article.

In the result, therefore, I find that none of the requirements for the application of Article 85(1) are met in the instant case. Accordingly Mr Michael fails on the Article 85 issue.

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PART VI: SUMMARY OF CONCLUSIONS

I return to the broad issues for decision as set out in Part 1 of this judgment (see page 249 above).

A. The Restraint of Trade Issue

A1 I conclude that the 1988 Agreement (as varied) is not rendered unenforceable, in so far as it remains unperformed, by the application of the doctrine of restraint of trade. I reach this conclusion firstly on the ground that it is not open to Mr Michael, on public policy grounds, to allege that the doctrine of restraint of trade applies to the 1988 Agreement (see pages 342–347 above); and secondly (if the first conclusion be wrong) that if the doctrine does apply to the 1988 Agreement, the terms of the 1988 Agreement are justified, so that the doctrine does not render them unenforceable (see pages 347–381 above).

The above conclusions on the restraint of trade issue render it strictly unnecessary for me to consider Sony Music's 'equitable defences' or the counter-equities pleaded by Mr Michael. Were it necessary for me to consider those matters, my conclusions would be:

A2 Leaving aside the counter-equities, Sony Music's 'equitable defences' preclude Mr Michael from alleging that the restraint of trade doctrine applies to the 1988 Agreement (see pages 382–389 above).

A3 The counter-equities do not defeat Sony Music's 'equitable defences' (see pages 389–404 above).

B. The Article 85 Issue

The 1988 Agreement is not prohibited by Article 85(1) of the EEC Treaty, and is accordingly not rendered void by Article 85(2) thereof (see pages 405–426 above).

The result, therefore, is that Mr Michael's claims are dismissed.

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Appendices

Appendix 1 WITNESSES WHO GAVE ORAL EVIDENCE

A. Factual Evidence

A.1 For the plaintiffs:

A.1

NAME	CAPACITY	DAY(S) ON WHICH EVIDENCE WAS GIVEN
MICHAEL, George	1st plaintiff	9,10,11,26.
RUSSELL, Tony	George Michael's solicitor 1983 to 1993	11,12,13,26,44.
KAHANE, Rob	George Michael's manager from 1986	13,14,15,16,25.
LEAHY, Dick	George Michael's music publisher and adviser	16,20.
HOWARD, Brian	Solicitor: partner of Tony Russell	20.
BRACKMAN, Stephen	George Michael's accountant	26,44.

A.2 For the defendant:

A.2

EHRLICH, Fred	Gen. manager of Columbia Records (a division of Sony in the US)	21,22.
KRUGMAN, Jay	Vice-Pres. E. Coast Marketing, Columbia Records (US)	22,23.

BAUMGARTNER, Burt	Snr Vice-Pres. Promotions dept. Columbia Records (US)	23.
RUSSELL, Paul	Pres. Sony Music Entertainment, Europe	28,29,30,31,32,37,48.
MOTTOLA, Thomas	Pres. Sony Music, US	33.
ROWE, Richard	Pres. Sony Music Publishing, formerly Business Affairs Manager for def.	34,35,36.
COLEMAN, Sylvia	Dir. of Corp. Business Affairs for def.	36,37.
TYRRELL, Thomas	Vice-Pres. Adm. Sony Music Int. (in US)	41,42.
STERNBERG, Jonathan	Director, Legal Corp. & Business Affairs for def.	44.
CORBETT, Peter	Director, Fin. Services for def.	44,45,51.

B. Expert Evidence

B.1 For the plaintiffs:

B.1

HUNT, Brad	Marketing consultant: US	24.
LEE, Robert	Solicitor: legal expert	38,39.
CONNOLLY, Terence	Indep. business consultant: Industry expert (UK)	43.
RAVDEN, David	Accountant: financial expert	46,47,48.

B.2 For the defendant:

B.2

MORRIS, Anthony	Former Vice-Pres. Polygram Int: Industry expert (UK)	18,19.
KENNEDY, John	Solicitor: legal expert	40,41.
TWEEDALE, Garth	Accountant: financial expert	49,50,51.

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Appendix 2 TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY

Part One: Principles

Article 2: The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, and increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Article 3: For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the time-table set out therein

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

…

(f) the institution of a system ensuring that competition in the common market is not distorted;

…

Part Two: Foundations of the Community

Title 1: Free Movement of Goods

Chapter 2: Elimination of Quantitative Restrictions between Member States (Arts 30–37)

Article 30: Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Article 34: Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36: The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, ***430** however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Part Three: The Policy of the Community

Title I: Common Rules

Chapter 1: Rules on Competition

Section 1: Rules applying to undertakings (Arts 85–90)

Article 85:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by other parties or supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings;
— any decision or category of decisions by associations of undertakings;
— any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 86: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ***431**
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Part Five: Institutions of the Community

Title I: Provisions governing the Institutions

Chapter 1: The Institutions

Section 4: The Court of Justice (Arts 164–188)

Article 177: The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;
…

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

…

Part Six: General and Final Provisions

Article 222: This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.
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Appendix 4 LIST OF EUROPEAN AUTHORITIES

Text Books

Bellamy & Child's *Common Market Law of Competition* (4th edition, 1993) ('Bellamy & Child')
Halsbury's *Laws of England* 4th edn. Vol. 52 ('Halsbury')
Vaughan's *Law of the European Communities Service* ('Vaughan')

Decisions of the European Court of Justice

Société Technique Minière v Maschinenbau Ulm (*56/65) [1966] ECR 235* (' *Technique Minière* ')
Consten and Grundig v Commission (*56 & 58/64) [1966] ECR 299* (' *Consten and Grundig* ')
Brasserie de Haecht v Wilkin (No. 1) (*23/67) [1967] ECR 407* (' *Brasserie de Haecht* ')
Volk v Verwaecke [1969] ECR 295
Deutsche Grammophon v Metro (*78/70) [1971] ECR 487* (' *Deutsche Grammophon* ')
Commercial Solvents v Commission (*6 & 7/73R) [1973] ECR 223* (' *Commercial Solvents* ')
Metro v Commission (No. 1) (*26/76) [1977] ECR 1875* (' *Metro* ')
Hugin v Commission [1979] ECR 1869 (' *Hugin* ')
Nungesser v Commission (*258/78) [1982] ECR 2015* (' *Nungesser* ')
Coditel v Cine-Vog Films (No. 2) (*262/81) [1982] ECR 3381* (' *Coditel II* ')
Remia v Commission [1985] ECR 2545 (' *Remia* ')
Windsurfing International v Commission (*193/83) [1986] ECR 611* (' *Windsurfing* ')
BAT and Reynolds v Commission (*142 & 156/84) [1987] ECR 4487* (' *BAT and Reynolds* ')
BNIC v Aubert [1987] ECR 4789
Bodson v Pompes Funèbres (*30/87) [1988] ECR 2479* (' *Bodson* ')
Stergios Delimitis v Henniger Brau AG (*C-234/89) [1991] 1 ECR 935* (' *Delimitis* ')
Petrofina v Commission [1991] II ECR 1087 (' *Petrofina* ')

Decisions of the Court of First Instance of the European Communities

Radio Telefis Eireann v Commission (*T69/89) [1991] 4 CMLR 586* (' *RTE* ')
Italian Flat Glass [1992] 5 CMLR 302

Decisions of the European Commission ('the EC Commission')

Reuter and BASF [1976] 2 CMLR D44
RAI/Unitel (26 May *1978) [1978] 3 CMLR 306* (' Unitel ')
Film purchases by German television stations (15 September *1989) [1990] 4 CMLR 841* (' *German Films* ')
Scottish Nuclear, Nuclear Energy Agreement OJ 1991 L179/31 (' *Scottish Nuclear* ')

Re Eirpage Ltd [1993] 4 CMLR 64 (' Eirpage ')

Footnotes

1 **Editor's Note:** The judgment has been edited to remove references to the bundles of documents and transcripts of evidence.
2 **Editor's Note:** Appendix omitted.
3 **Editor's Note:** Appendices omitted.