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Competing unconscionability comes of age

In the light of the Procul Harum case, Tim Ludbrook reports on the effect of this emerging doctrine



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'The settlement achieved in the Pink Floyd case and the court's determination in Procul Harum seem to indicate that the prospects for claimants with stale claims might well be considerably better than was once thought.'

On 20 December 2006 judgment was handed down by Blackburne J in *Fisher & ors v Brooker & ors* – a music case that seemingly caught the imagination of a number of journalists of a certain age.

'Whiter Shade of Pale', the song around which the case centred, was first recorded by the band Procul Harum and first released on 12 May 1967. It turned out to be one of the most successful and memorable songs of the '60s, reaching number one in the UK charts in June 1967, and selling over six million copies worldwide.

As will be discussed, the 'live' issues in the Procul Harum case bear a remarkable resemblance to the really big music case of 2005 that wasn't: Clare Torry's 'David and Goliath' battle with the band Pink Floyd concerning a track from their seminal and enormously successful album *Dark Side Of The Moon* (Torry v *Pink Floyd & ors*).

Although these two cases, viewed together, might well prompt a few self-indulgent trips down memory lane, for commercial lawyers they also provide an important insight into the way the courts may view certain kinds of 'old' claim (whatever the factual context) – that is, disputes relating to a property right predicated on facts that may have taken place decades earlier and which make the case 'fret', at least at first blush, too stale to pursue.

Settlement by the parties in the *Pink Floyd* case prompted much speculation that the floodgates might open in terms of dusting down 'aged' disputes. Does the *Procul Harum* case prove the point, or are we no further forward in terms of advancing what has been tagged 'the nascent doctrine of competing unconscionability'?

Procul Harum and their dispute

The primary issue for the court's consideration in the *Procul Harum* case was a dispute as to the identity of the true composer of the organ elements of 'Whiter Shade of Pale'. Matthew Fisher (the claimant), who famously played the Hammond organ on the original recorded track, claimed authorship of these elements. Gary Brooker (the first defendant), who lent his voice and piano-playing to the recording, had always been credited with writing the totality of the music (although he assigned his copyright interest to a music publisher shortly before the track's release).

It was not disputed by the defence that Mr Fisher participated in the evolution of what went on to become the song via his contribution of the organ elements. The gravamen of the copyright part of the dispute was the extent to which these elements (especially the organ solo) were Mr Fisher's work alone and, if they were, whether his contribution entitled him to a share in the authorship of the whole song.

The court determined both matters in Mr Fisher's favour, though the reasoning employed in terms of the application of copyright authorship principles is fodder for another article. For present purposes, the interesting issue is what happened next...

The 'non-copyright' defence

As was said in the judgment:

One of the striking features of Mr Fisher's claim is that it is made so very many years after the [song] was first released.

In the usual case, the advice often given to an artist who has waited a long time

to bring a claim for a composer's credit or past royalties is to forget it. Even if it were to be determined that they do have some legal entitlement to benefit from the work in issue, by delaying for so long a court might be highly likely to conclude that the artist had acquiesced to the exploitation of the work in the interim, permitted the exploiting party to rely on such conduct to its detriment, and therefore is 'estopped' from bringing a claim.

What is more, any undue delay in bringing a claim might result in the claim being barred on that ground alone if the delay itself has produced detriment. As if all that were not enough, the Limitation Act 1980 will usually put paid to any claim of this sort earlier than six years from the issue of proceedings.

It was not suggested by Mr Fisher that, with a couple of minor exceptions, he or anyone on his behalf had ever made a claim to co-authorship until the advent of the pre-action correspondence in 2004 and 2005. This 37-year silence will be understood to be all the more remarkable once it is appreciated that Mr Fisher chose to remain a member of Procul Harum for some two years after the release of the song. Further insult (on one view) was added to injury by Mr Fisher's subsequent participation with other then-current and ex-members of Procul Harum over many years in a variety of concert tours and the like.

Rather, the defence marshalled a number of 'non-copyright' arguments in answer to the copyright claim, based on estoppel, acquiescence and laches.

Unlike the *Pink Floyd* case, limitation was never in issue in the *Procul Harum* proceedings, ie a slice of the cake was not claimed for the 30-plus-years between release of the track and six years before the claim was brought.

However, in respect of that six-year period and the future royalties claim, the defence proposed five bases upon which it maintained the court should impose a bar to the claims:

- (1) Mr Fisher's failure to assert a claim before the track was released;
- (2) Mr Fisher's decision to remain a member of the band for two years after the release date;
- (3) the circumstances in which Mr Fisher eventually left the band;

(4) Mr Brooker's efforts over 40 years to promote the band's repertoire, including the song; and

(5) the long delay in bringing the claim.

Was there any detriment?

It is trite law to state that a litigant who seeks to set up any kind of estoppel must establish that it would be unconscionable for the other party to be permitted to deny what they have allowed or encouraged the other to assume to their detriment. In other words, some kind of detriment suffered by the person who wants to bar the other's claim is an essential element of a successful estoppel plea.

appreciated that he had any right to forego.

On the argument concerning Mr Fisher's decision to remain a member of the band after the release of the track and to work with Mr Brooker and others, the court was unable to see how the defence could rely on such an issue to support a plea of estoppel, because it cannot have promoted any detriment to the defendants.

On argument (3), concerning the circumstances in which Mr Fisher left the band in 1969, the defence argued that Mr Fisher's silence as to his claim caused Mr Brooker to alter his position in his detriment by agreeing to release

Limitation was never in issue in the Procul Harum proceedings – a slice of the cake was not claimed for the 30 years between release of the track and six years before the claim was brought.

Blackburne J could not find the requisite detriment. As he wryly observed:

The [track] was an extraordinary success from the moment it was released... There was unsurprisingly no evidence to suggest that if Mr Fisher had raised his interest... before the release and had insisted on his claim [the publisher] would have abandoned the recording and produced another [necessarily one which did not contain Mr Fisher's organ part] which would have been at least as successful as the [song] was. Any idea that this might have happened is the purest speculation. At least as likely is that, appreciating the quality of the [song] as recorded, [the publisher] would have been only too willing to acknowledge his role in [its] authorship.

The court was unimpressed by all five of the fact-based arguments advanced, in the sense that the judge rejected the defence of estoppel entirely. Dealing with the first three shortly, the findings made were as follows.

As regards argument (1) above, the court determined that although Mr Fisher had kept silent on his copyright interest, he had never indicated any intention whatsoever to forego his rights. In fact, it was not established on the evidence before the court that, prior to the release of the track, Mr Fisher had ever

Mr Fisher from the band's debts when, if he had known of his claim, he would not have done so, or would have done so on terms more favourable to him.

The court's view was clear:

[T]he discussions which resulted in the agreement to release Mr Fisher... from the band's debts in return for the surrender of their share of the performing royalties did not include, and were not intended to include, any composing royalties... I am not persuaded that if Mr Fisher had raised his claim the parting of the ways between him and the other band members would have been significantly different.

Godfrey v Lees

Arguments (4) and (5) raised by the defence were to the effect that an estoppel was raised in consequence of Mr Brooker's efforts in promoting the band's repertoire (including the song) over many years, and that, in any event, Mr Fisher's delay in bringing his claim was enough to bar it. In this context, the defence sought to rely on what is undoubtedly the most important precedent judicial authority in this arena, *Godfrey v Lees* [1995]. It is worth noting at this juncture that the tribunal in that case was also Blackburne J.

This was a case concerning a band called Barclay James Harvest, which

enjoyed some considerable success in the '70s. Mr Lees claimed to have written various works with the band when he was a member (before leaving at an early stage of its life) but had delayed making a co-ownership claim for very many years. The remaining members had subsequently worked very hard to promote the band's repertoire, and their commercial success had been hard won.

The court took the view that Mr Lees had deliberately bided his time before making a claim, in part to see if there was anything worth claiming. Blackburne J took a dim view of all this. He held that although Mr Lees was a co-author he must have impliedly granted the band a gratuitous licence to exploit the works in issue in the past.

The court further held that the defendants had suffered detriment in consequence of Mr Lees' conduct because, by his silence, he had allowed them to believe that they alone were entitled to exploit the works in issue and that they had laboured long and hard in that regard as a direct result.

Unsurprisingly, in the *Procol Harum* case it was asserted that Mr Brooker, too,

had worked long and hard in promoting the band's repertoire in the belief that only he and the writer of the lyrics were beneficially entitled to enjoy the fruits of such endeavours, and thus he had acted to his detriment. But the court found the evidence did not support this interpretation of events, and stated that the song:

... was by far the most successful... that Procol Harum (or Mr Brooker) ever had. It was difficult to see how increasing sales of the [song] could amount to detriment, not least when throughout the whole period down to spring 2005 the defendants had been receiving, between them, all of the musical copyright royalties. In short, the more they have promoted the [song], the more they have earned. The point about *Godfrey v Lees*, however, was that it was only as a result of the unceasing efforts of the defendants in that case that the songs in issue achieved any public recognition at all and, with that recognition, profit for the defendants. There is no comparison between the situation there and the circumstances of this case where the [song] was a huge success from the moment that it was released.

Fisher & ors v Brooker & ors
[2006] EWHC 3239 (Ch)
Godfrey v Lees
[1995] EMLR 307
Jennings v Rice & ors
[2002] EWCA Civ 159
Torry v Pink Floyd & ors
(HC-04-C00981)

In fact, Mr Brooker's own evidence in court was that he would have played the song even if he had not been credited as the writer, such was the demand from the fans to hear it. In the face of such evidence, it is hard to see how the determination of the court could have been different.

As for delay, the court made short shrift of the arguments advanced, observing baldly that, of itself, delay provides no defence. Matters might have been different if Mr Fisher had claimed some form of equitable relief such as a rescission of a transaction entered into as a result of fraud or undue influence, where delay, usually coupled with some other circumstance, may have justified the court in denying relief.

Pink Floyd

The material facts in Clare Torrey's dispute with Pink Floyd, their publishing company and EMI, bore some striking similarities to those in *Godfrey v Lees* and the *Procol Harum* case. Clare had been a session singer, called in one Sunday in 1972 to perform on a new Pink Floyd album, then in production at EMI's Abbey Road studios. Clare plucked up expecting to be provided with a composition to work with. In fact, she was asked to improvise a lyric-less vocal melody over a pre-recorded backing track. Three takes later, and her role was over.

The recorded performances of the extempore composition were mixed down and the resulting track became known as 'The Great Gig In The Sky' and the album *Dark Side Of The Moon*. The rest, as they say, is history. The album has sold in extraordinary numbers ever since its release, to become one of the biggest-selling albums of all time.

Thirty-odd years later, Clare chose to bring her claim to be the co-author of the work and for a share of 30 years' past and of all future writers' royalties. Clare's case was not only that she had

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written the song but that some band members at least had realised this at the time, yet insisted on treating her subsequently merely as a session artist. Clare alleged, in effect, that the defendants' unconscionable conduct (ie knowingly exploiting that which they did not wholly own) was worse than her own (ie silence and profound delay) – the so-called 'doctrine of competing unconscionability'.

The litigation was settled shortly before the first hearing and on confidential terms, so the application of this nascent doctrine to the facts in the case was never before the court. However, the fact that a settlement was achieved in such circumstances was truly a remarkable result, as many will appreciate.

Competing unconscionability and the *Procul Harum* case

What can we take from *Godfrey v Lees*, *Torry v Pink Floyd* and now *Fisher v Brooker*, when viewed together? Importantly, can it be said that they advance the doctrine that the task to be undertaken by the court in such circumstances will be, in effect, to weigh competing forms of unconscionable conduct in the balance and come down on the side of the less sinful litigant? The question begs a little further analysis.

Godfrey v Lees represents the previous high-water mark in judicial thinking in this context. But, it wasn't really a case about competing unconscionable conduct at all, at least not so far as the court was concerned. The value of the assets in issue was only worth fighting over because of the efforts of the defendants. Those efforts may never have occurred if Mr Lees had not waited over a decade to bring his claim. The court held that such conduct was unconscionable and that the estoppel arose as a consequence.

Torry v Pink Floyd was one step further along the line. The claimant had kept silent as to her rights but then so had the defendants. Notwithstanding the success of the track and the album concerned, might the band have acted differently if Clare had made her claim before the track's release? Perhaps, and so the prospect of detriment flowing from the delay might not have been dismissed by the court. We shall never know, of course.

What of the *Procul Harum* case? Does it take matters any further? Well, the

first observation to make must be that 'the sting was taken out of the tail' for the purposes of this discussion because no attempt was made by Mr Fisher to claw back lost royalties beyond the six-year limitation bar.

One might speculate endlessly as to precisely why such an obvious additional claim was not made. The fact of the matter is that the 'delay plus unconscionable conduct' nexus ended up with considerably less 'potential' in it than in the other two cases because the scope for alleging detriment appeared less on the facts – and therein might lie the answer as to why the scope of the claim was self-limited by the claimant.

But the question still arises as to what would have happened if the judge had established detriment enough to ground the estoppel claim? In those circumstances, the court would have had to decide whether Mr Fisher should be deprived of his right to exploit for himself a valuable property right (owned by him and which had been exploited by others in the full knowledge of his rights) because his failure to bring his claim at the proper time had caused detriment to the defendants. How would the court have dealt with this competing unconscionability?

Well, on the facts (and on one view at least), the 'sin' of some of the defendants in the *Pink Floyd* case was perhaps more clear cut and profound than in the *Procul Harum* case. But, nonetheless, the

court would have had to weigh in the balance the competing conduct in order to make its determination. Thankfully, Blackburne J gave us some insight into his thinking in the *Procul Harum* case, albeit as obiter commentary:

If I had thought that the defendants made out any of their estoppel pleas, I would have had to consider how best to give effect to the equity thereby established. It is now well recognised that in approaching that task the court is likely – and in this case I would have considered it appropriate – to balance the expectation or assumption generated by the estoppel... against the degree of detriment suffered by the defendants on the faith of the conduct which has given rise to the expectation or assumption... [As Aldous J has put it in *Jennings v Rice (flors)*]: The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment.

In my estimation, by his commentary the learned judge has made the way forward clear. Well-established it may not be, but the doctrine is certainly no longer nascent – and, in appropriate circumstances, it will be applied by the courts in order to do justice. So, for commercial litigators everywhere, it may be time to dust off some of those old property cases to see if there isn't life in the old dog yet! ■

Key points

- Until recently, an artist who waited a significant period of time before bringing a claim to be the author of a copyright-protected work and for past royalties may well have been advised to forget it.
- The settlement achieved in the recent *Pink Floyd* case and the court's determination in the even more recent *Procul Harum* case seem to indicate that the prospects for claimants with 'stale' claims might well be considerably better than was once thought.
- What these cases may show, particularly when juxtaposed with the court's reasoning in the older *Godfrey v Lees* case, is that disputes relating to a property right which are initiated years after the factual events occurred, in appropriate circumstances may be evaluated according to what some refer to as 'the (nascent) doctrine of competing unconscionability'.
- This 'doctrine' is merely a tag for the exercise conducted by the court in balancing the unconscionable conduct of the claimant in not bringing the claim much earlier or remaining silent as to their rights, against the unconscionable conduct of the defendant in exploiting for many years that which they knew belonged to another.
- This process of determining 'the less sinful litigant' could lead to increasing numbers of old intellectual property disputes being re-opened, and it may be that the 'doctrine' enjoys a currency that is considerably wider than this field.