

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. C.L. 2002/A 001**

BETWEEN	KEITH ANDERSON (also known as Bob Andy)	CLAIMANT
AND	NORMA JEAN DODD AND CAROL DODD (Personal Representative of estate of Clement Seymour Dodd)	FIRST DEFENDANT
AND	JAMAICA RECORDING & STUDIO PUBLISHING LIMITED (also trading as JAMREC)	SECOND DEFENDANT

IN CHAMBERS

Mr. André Earle and Miss Anna Gracie instructed by Miss Analisa Chapman of Foga Daley and Company for the claimant

Mr. Norman Wright Q.C. instructed by Norman E. Wright and Company for the defendants

June 11 and August 18, 2006

**APPLICATION TO DISALLOW AMENDMENTS, RULES 10.5, 20.1, 20.2 OF THE CIVIL
PROCEDURE CODE**

SYKES J

1. This dispute involves two of Jamaica's celebrated figures in the music and entertainment industry. Mr. Keith Anderson, the claimant, whose performing name is Bob Andy wrote many songs that have become legendary. From his pen came "I've got to go back home", "My Time" and "Stay in My Lonely Arms". The row between the parties is not about who wrote the songs but who owns the copyright and with that the consequential right to collect royalties.
2. The late Clement "Sir Coxone Downbeat" Dodd, the original defendant, played an integral role in the development of that melodious sound - reggae - that now wafts across the musical universe to all parts of the globe. The paths of these two stalwarts of Jamaican music intersected in the early years that followed Jamaica's independence. Their contact led

to the composition of songs and melodies that further secured the reputation of Mr. Dodd's Studio One as the leading recording studio in Jamaica at the time. In fact it is virtually impossible to find any musician, songwriter or composer from that era who had no contact with Studio One. Regrettably there is now a bitter dispute about the copyright of songs which are acknowledged to have been written by Mr. Anderson.

3. Mr. Anderson initiated his action by writ of summons and statement of claim dated January 7, 2002. Mr. Dodd's response was swift and dramatic. He filed a defence and counterclaim on February 12, 2002. Since this claim began Mr. Dodd has been substituted as the defendant because he died on May 4, 2004. On December 7, 2005, Reid J. ordered that Mrs. Norma Jean Dodd and Miss Carol Dodd be substituted for Mr. Clement Dodd.

4. The claimant amended his statement of case. Both defendants have challenged the amendment and wish to have them disallowed. The challenge is by way of an amended notice of application for court orders dated January 24, 2006. The application was first made in a notice dated December 19, 2005. The difference between the December 19, 2005, notice and the January 24, 2006, application is that the former omitted to name the second defendant as an applicant also. The defendants now ask for the following orders:

- (a) that the amendments to the claim form and the particulars of claim against the first defendant be disallowed;
- (b) that the amendments to the claim form and the particulars of claim by the addition of the second defendants be disallowed;
- (c) that costs of this application be costs in the claim; and
- (d) there be such other further and other reliefs as to the court may seem just.

5. The grounds on which the application is made are as follows:

- (a) the amendments introduce substantially an entirely new case against the first defendant as represented by his personal representatives;
- (b) the allegations raise issues personal to the first defendant, the majority of which would have to be dealt with or responded to only the first defendant and the answers to which may well be outside the ambit of the knowledge of or be unavailable to his personal representatives;

- (c) the reliefs and remedies claimed by virtue of the said amendments would not be available against the first defendant on the allegation and issues raised in the claimant's original pleadings;
- (d) the said amendments are in fact and in essence an attempt by the claimant to introduce new and personal issues and seek additional reliefs and remedies against the first defendant some three (3) months after he was made aware of the death of Mr. Clement Dodd; and
- (e) the said amendments were filed and served on the attorneys at law for the defendants after the Case Management Conference was adjourned to the 29th July 2004 and some three (3) months after the death of Mr. Clement Dodd.

6. These grounds were supported by an affidavit, dated December 19, 2005, sworn by Mr. Norman Wright Q.C. The critical points made by Mr. Wright were that:

- (a) before Mr. Dodd's death the action was proceeding apace after being issued on January 7, 2002;
- (b) by December 27, 2002, the claimant's then attorneys had filed a certificate of readiness;
- (c) all that was necessary for the matter to be tried was for the Registrar to set a trial date;
- (d) the new Civil Procedure Rules ("CPR") were introduced in January 2003 which required litigants, unless they fell within the exceptions, to apply for a case management conference;
- (e) on June 9, 2003, in accordance with the rules the claimant applied for a case management conference;
- (f) on April 6, 2004, the claimant served a notice of change attorney on the defendants. Before this change occurred the parties were notified that a case management conference would be held on July 29, 2004;
- (g) when the matter came up on July 29, 2004, the conference adjourned in order for someone to be substituted for Mr. Dodd;
- (h) on July 28, 2004, a day before the case management conference, the claimant filed an amended claim form and an amended particulars of claim.

7. The amended statement of case now added Jamaica Recording And Studio Publishing Ltd (trading as JAMREC) as a second defendant. The amended statement of case was refiled on August 3, 2004, because the new particulars filed on July 28, 2004, had incorrectly numbered paragraphs. No new allegation were added to the August 3, 2004, amended particulars. In this judgment I shall use the August 3 amendments since that document has correctly numbered paragraphs and repeats the allegations of the July 28 amendments. It is to this amended statement of case the defendants now object. The second defendant was served with the amended statement of case on August 18, 2004. The second defendant filed an acknowledgement of service on September 1, 2004. I should indicate as well that the July 28 and August 3 amendments still named Mr. Dodd as the first defendant because no one had yet been substituted for him.

8. It is convenient at this point to set out correspondence that passed between Mr. Wright and the new attorneys for the claimant. The letter of September 30, 2004 from Mr. Wright to Mesdames Foga Daley and Company states:

*Mesdames Foga Daley & Co., Attorneys-at-Law,
7 Stanton Terrace,
Kingston 6.*

*Attn: Miss Dianne Daley
Dear Mesdames,*

Re: Suit No. C.L. A-001 of 2002 Keith Anderson vs Clement Dodd

We refer to telephone discussions between your Miss Daley and the writer as to certain practical difficulties in filing a Defence herein, having regard to the need for substitution of a personal representative in the place of the 1st Defendant. As we agreed, there are certain practical difficulties in filing a Defence in relation to the 2nd Defendant which has just been added to the Suit, as well as amending the Defence in relation to the 1st Defendant, having regard to the amendments of the Particulars of Claim relative to the 1st Defendant.

Your Miss Daley indicated that Miss Tavia Dunn, Counsel being instructed in the matter, would have communicated with the writer in this regard for further discussions but up to the time of writing there has been no word from her.

We hereby confirm agreement between your Miss Daley and the writer that should it become necessary to file the Defence at this stage, your consent to the time being extended for this purpose would be forthcoming.

We reiterate our proposal that it would be a less complicated procedure to discontinue the present Suit and commence same afresh in the name of the personal representative for the 1st Defendant and including the amendments to the original Particulars of Claim against the 1st Defendant.

We are of the view that no time or advantage would be lost by adopting the above course and it would also obviate the need to raise the issue as to whether the Particulars of Claim against the 1st Defendant can be amended at this stage, having regard not only to the fact that the pleadings were closed prior to the introduction of the New Rules but also in light of the fact that the amendments are in substance significantly different from the original allegations and reliefs claimed. We look forward to hearing from you and Miss Dunn in this regard at the earliest opportunity

9. The next letter of importance is one dated August 10, 2005, written by Mr. Wright to Mesdames Foga Daley and Company. It reads:

*Miss Dianne Daley
Mesdames Foga Daley & Co.. Attorneys-at-Law,
7 Stanton Terrace,
Kingston 6.*

Re: Suit No. C.L. A- 001 of 2002 - Keith Anderson vs Clement Dodd

We write further to exchange of correspondence herein ending with yours of the 24th February, 2005, as well as to telephone message left at your office on the 9th inst., to which we have not had a response up to the time of writing.

Please be advised that we are now in receipt of Letters of Administration in the names of the widow and daughter of Mr. Clement Dodd, and wish to reopen discussions as to the most practicable way in which their names can be substituted in place of the First Defendant and an amended Defence settled in respect of the amended Statement of Claim.

Your early response in this regard to enable us to proceed with the action would be greatly appreciated.

10. The reason for setting out the two letters above is to demonstrate that it is impossible to argue that Mr. Wright by any conceivable stretch of the imagination could possibly have been taken to have indicated that he was not objecting to the amended statement of case. One would have thought that it would be obvious that since Mr. Dodd had died Mr. Wright could only act on the instructions of the personal representative and until the substitution was properly made there was nothing for the personal representatives to do because until substitution the personal representatives are not parties to the claim and have no locus standi to do anything in relation to the claim. This was all that was being indicated by the letters. Mr. Earle in his written submission has this paragraph referring to the letter of August 10, 2005:

By the said letter, the defendant's attorney at law were seemingly proceeding with the pleadings as before the court and not offering any challenge. Thus the doctrine (sic) of waiver, estoppel and/or approbation/reprobation applies.

11. This submission is misconceived because at the time of the August 10, 2005 letter the personal representatives were not properly parties to the claim. To say that one wishes to settle a defence does necessarily mean that there is no objection to the amendments to the claim. The submission did not take account of the fact that from 2004, Mr. Wright had indicated that he had concerns about the propriety of amending the claim at this point given that pleadings had already been closed. This was a clear indication that Mr. Wright was giving thought to making the amendments an issue. I therefore attach no weight or significance to the point made regard the letter of August 10, 2005.

12. On January 17, 2006, the defendants took the point before Norma McIntosh J. that the amended statement of claim should have been done with the permission of the court. The court ruled against that submission and held that the amended statement of case could be made without permission pursuant to rule 20.1 of the CPR. This was without prejudice to the defendant's application dated December 19, 2005, now contained in notice of application for court orders dated January 24, 2006. Norman McIntosh J. also ordered that Mr. Dodd should file an amended defence and the second defendant should file a defence within thirty days of the order.

13. The application before me involves the interpretation and application of rules 20.1 and 20.2 of the Civil Procedure Rules ("CPR"). Rule 20.1 states:

A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either –

(a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or

(b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period)

applies.

Rule 20.1 is plain enough. It allows a party to amend a statement of case at any time before the case management conference without the court's permission unless the amendment is to one which is covered by rule 19.4 or rule 20.6.

14. Rule 20.2 is in the following terms:

(1) Where a party has amended a statement of case where permission is not required, the court may disallow the amendment with or without an application.

(2) A party may apply to the court for an order under paragraph (1) –

(a) at the case management conference; or

(b) within 14 days of service of the amended statement of case on that party.

The submissions

15. Mr. Wright submitted that rule 20.2 is plain in meaning. He said that the ability of any party to amend its statement of case before the case management conference is not immune from challenge. There is power in the court, acting on its own motion, to disallow the amendment. The other party may challenge the amendment. Therefore, he submitted he is able to challenge the amendment notwithstanding the order of Norma McIntosh J. of January 17, 2006. In short he submitted that an amendment under rule 20.1 is at best a provisional amendment which only becomes permanent when the court allows it to stand or the other party does not challenge it or has made an unsuccessful challenge.

16. The essence of the objection was that some of the amendments raised a new case against Mr. Dodd's estate and such allegations could only be answered by Mr. Dodd. The claimant, Mr. Wright submitted, should have made these allegations long before because the defence and counter claim raised matters in such a manner that the claimant could not have failed to appreciate the import of the defence. Instead the claimant prepared for trial on the pleadings as they then stood and it would now be unfair to change the case because some of the matters now raised cannot be answered by the personal representatives. He submitted that only Mr. Dodd can answer them. To put it bluntly, allowing the amendments to stand would not be in keeping with the mandate to dispose of cases justly because, in this case, there could not be a fair "fight" on the issues now raised.

17. Mr. Earle submitted that the amendment should be allowed because it is necessary to do justice between the parties. Mr. Earle said that if I am going to accede to Mr. Wright's

submission then I can only do so if I am going to act under rule 26.3(1) of the CPR. This rule deals with the power of the court to strike out a statement of case or part of a statement of case in the circumstances set out by the rule.

18. Mr. Earle responded by embarking on an elaborate argument based on waiver and estoppel. Mr. Earle referred to a letter dated August 10, 2005. I have already dealt with this. Mr. Earle referred to cases on approbation, reprobation and waiver to support his arguments. He even referred to decision of Neuberger J. on amendment to a statement of case made after judgment but before the order was perfected. I do not believe that the resolution of this case requires this voyage into the world of waivers, approbations, reprobations and estoppel. It really is much simpler than that.

Analysis of Mr. Earle's

19. Mr. Earle's submission regarding rule 26.3 (1) is not supportable. When one examines rules 20.2 and 26.3 it is too plain for argument that they deal with different situations. Rule 20.2 flows out of rule 20.1. Rule 20.1 authorises either party to amend at any time before the first case management conference. Whenever a party exercises the power vested in him to amend his statement of case before the first case management conference, that exercise of power is not final and conclusive until the amendment is either not disallowed by the court acting on its own motion or unsuccessfully challenged by other parties to the claim or not challenged at all. When the court is acting under rule 20.2 to disallow the amendment or the other party is challenging the amendment, it is inaccurate to describe what is happening as a striking out under rule 26.3. All rule 20.1 does is to save time and costs. Conceptually it would help if the amendment under rule 20.1 is seen as an application to amend without leave of the court. The applicant is making an application to the court and notifying the other party of his intention to amend his statement of case. He saves money because he does not need the permission of the court. At best his amendment is provisional and only become final and conclusive when the court allows it to stand or the other party does not challenge it or challenges the amendment and fails.

20. There is no need to introduce rule 26.3. Rule 26.3 is dealing with circumstances where no amendment is in view. Rule 26.3 deals with striking out statement of case or parts of a statement of case that have passed the stage of amendment. In other words, rule 26.3 presupposes that all amendments have been made or none is being made and the

statement of case at the time of striking out is the final statement of case of the party against whom the application is made. It is a gross misuse of language to categorise an objection to an amendment as a striking out. Nothing is being struck out because until the amendment is allowed to stand in circumstances where the party amends without the court's permission the amending party has, in practical terms, an embryonic amendment which only comes to maturity if the court does not disallow it or the other party does not object or objects unsuccessfully. It is only after this has occurred that the amending party can safely conclude that his "application" to amend has been approved. Rule 20.1 is a time and cost saving provision. It must be noted that the wording of the provision leaves open the possibility that the other party may not object but the court may disallow the amendment.

21. Mr. Earle's submission is the twenty first century reincarnation of this nineteenth dictum from Bowen L.J. in *Cropper v Smith* (1884) LR 26 Ch D. 700 at page 710:

Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.

22. Since those days questions of efficiency, speed, allocation of resources, the impact of delay on other litigants, ensuring that a case consumes its proportionate share of resources and other considerations are now given much greater prominence than they were in the late 1800s. Mr. Earle is suggesting that Mr. Anderson should not be penalised for the deficiencies of the original claim.

23. The consideration in the instant is not so much whether the claimant is being punished but rather whether it is just to allow the amendment to stand when it alleges conduct on the part of Mr. Dodd that could have been raised while he was alive.

24. Before going on I must say that I am a bit taken aback by the affidavit of Miss Chapman. It reads like a legal treatise. Affidavits are to speak to facts and not make legal arguments.

The resolution

25. Rule 20.2 does not state the criteria that should be used in determining whether the amendment should be disallowed. This being so I have to go back to rule 1.1. Dealing with a case justly must embody ideas of fairness. What is fair in one situation may well be unfair in another. The ultimate question in this case is whether a fair trial can take place on the issues raised by the amendment now that (i) a critical witness is now deceased; (ii) the amendments were made after the death of the witness; and (iii) the claimant had an opportunity to raise those matters in his pleadings before the death of the witness. This question cannot be answered without an examination of the pleadings as they stood before the death of Mr. Dodd.

The claimant's original claim

26. The claimant alleged that he was the composer and/or writer of a number of songs. These were "My Time", "Desperate Lover", "Life Could be a Symphony", "Too Experience(d)", "I've Got to Go Back Home", "I Would Be A Fool", "Going Home", "Stay In My Lonely Arms", "Let Them Say", "Unchained", "Feeling Soul" and "Crime Don't Pay". He alleged that he is the owner of the copyright of these songs.

27. Paragraph three of the particulars of claim alleged that during the year 1972 and years thereafter and continuing to the date of filing Mr. Dodd unlawfully and without licence or consent of the claimant produced, reproduced the songs or substantial parts of the songs and made records, cassettes, compact disk and then sold, offered for sale, distributed them to the public and the profits were converted to the use of Mr. Dodd and others without the knowledge of the claimant. These breaches it is said deprived the claimant of any or substantial benefit in his copyright.

28. Paragraph four of the particulars accuses Mr. Dodd of flagrantly disregarding the claimant's copyright thereby depriving the claimant of any or any substantial benefit in the said copyright.

29. The claimant further alleges that Mr. Dodd did not credit him with the authorship and/or composition of any of the songs and of the records, cassettes and compact discs produced by Mr. Dodd. He continued by saying that other persons were falsely and/or maliciously credited other persons with authorship and/or composition of the songs.

30. Mr. Anderson alleged that the songs were composed and/or recorded during the years 1966 to 1969 during discussions with Mr. Dodd with a view to arriving at an agreement with the defendant in respect of the production, manufacture, sale and distribution of the said songs but no agreement was ever made by or between the parties.

31. Mr. Dodd is said to have committed the infringement despite repeated warnings from the claimant and the defendant failed or neglected to pay the claimant any or any substantial monies in respect to the said infringement despite repeated requests by the claimant for payment and/or account for the same.

32. The claim ends with a prayer for an injunction restraining Mr. Dodd, his servants or agents from further infringing the claimant's copyright in the songs listed earlier. There is a claim for damages including exemplary and/or aggravated damages; damages for conversion of infringing copies. In the alternative there is claim for an inquiry as to damages for infringement of copyrights and/or an inquiry as to damages for conversion. The claimant is claiming 30% interest per annum from January 1, 1973 to date of payment and such further or other relief as the court thinks fit.

The defence and counterclaim to the original claim

33. The defendant denied any breach of copyright or that he acted without licence or consent of the claimant. Mr. Dodd specifically asserted that between 1966 and 1973 he employed Mr. Anderson by Mr. Dodd between 1966 and 1973 to compose and write musical works on behalf of Jamaica Recording and Publishing Studio Ltd, trading as JAMREC. He pleaded that at the time of making the works in question the claimant was employed under a contract of service dated in or about 1966 and contracted to him under songwriters contracts dated March 18 and June 23, 1966 and February 27, 1967. Under these contracts all rights in the original musical composition written and/or composed by the claimant were sold, assigned, transferred and delivered to Mr. Dodd and consequently all rights in the said musical works are owned by Mr. Dodd. Mr. Dodd stated specifically that at the trial he would be referring to and relying on the contracts for their full terms and effect.

34. Mr. Dodd responded to paragraph three of the claimant's particulars by stating that Mr. Anderson was paid "in respect of the sale and distribution of all productions and reproductions of the said musical works, and the correctness of such statements verified on the receipts of such payments acknowledged and signed for by the claimant". Mr. Dodd

then counterclaimed alleging that he (Dodd) produced a book called "Bob Andy's Song Book" in which the claimant was given due credit for his composition of the works in question. It is alleged that the claimant published the said works through his publishing house known as Andy Songs Publishing thereby infringing Mr. Dodd's copyright in the said works.

35.Mr. Dodd further alleged that the claimant wrongfully registered himself as owner of the works in question with the Mechanical Copyright Protection Society and the Performing Right Society and has diverted to himself royalties properly payable to Mr. Dodd. These acts, it is said, resulted in loss, damage and expense to Mr. Dodd. Mr. Dodd claims compensation in the sum of \$20,000,000.00 being the royalties due from the societies mentioned. He also claims an injunction, an enquiry as to damages or an account of profits and accounting for all sums collected from the two societies. There is a claim for damages for infringement of the defendant's copyright and the usual such further or other relief as the court may deem just.

The reply to the defence

36. Mr. Anderson responded to the defence and counterclaim by admitting that he was employed to Mr. Dodd between 1966 and 1969 under a contract of service. He also admitted that he and Mr. Dodd entered into Songwriters Contracts whereby the claimant and Mr. Dodd agreed to share equally the publishing rights only in respect of the musical works that were the subject of the Songwriters Contract. He denies that all rights were sold, assigned transferred and delivered to Mr. Dodd.

37.Interestingly, Mr. Anderson then went on to say that he denied any contract with Mr. Dodd as alleged in the defence and if there were such contracts they were not supported by consideration and if there was consideration it was past consideration and not sufficient to support the alleged contracts. Mr. Anderson denied that Mr. Dodd made any payments to him.

38.In respect of the counterclaim Mr. Anderson said that he did produce the album "Bob Andy's Song Book". Mr. Anderson admitted that he published and registered the musical works from which "Bob Andy's Song Book" was produced. He did not say whether the works were registered with the two societies mentioned by Mr. Dodd.

Analysis of the original claim

39. The battle lines were well defined. Mr. Dodd set out quite clearly what he perceived to be the effect of the contracts. Even though Mr. Dodd stated quite clearly in his defence that Mr. Anderson was employed by Mr. Dodd (not Jamaica Recording And Studio Publishing Limited) to compose and write musical works for JAMREC, no issue was taken with this allegation. The contest was about the validity of the contracts assuming such contracts existed and whether the contracts, if valid, were as extensive as Mr. Dodd claimed.

40. Mr. Dodd pleaded the date and year the contracts were executed. He said that he would be relying on the contracts at any pending trial. There is nothing in Mr. Anderson's pleadings to indicate that he was alleging that any contract entered into was an oral contract. He seemed to be saying that the written contracts that exist were not supported by any consideration. It is important to note as well that Mr. Anderson never claimed that he had a contract with the second defendant.

41. There is not one hint of a suggestion of undue influence, no allegation of any breach of contract, no allegation of misrepresentation, no allegation of bad faith and no allegation of mistake. Had the matter gone to trial as matters then stood the real questions before the court would be (a) whether the contracts were supported by consideration; (b) the terms of the contract assuming there was adequate consideration and (c) the effect of the terms.

42. There is no mention of moral rights or any breach of moral rights.

The amended statement of case

43. After the death of Mr. Dodd the claim was amended by Mr. Anderson's new attorneys. The amended claim form not only added the second defendant but sought declarations that:

1. a declaration that the claimant is sole author and first owner of copyright including moral rights in the lyrics and/or melodies comprising the relevant songs;
2. a declaration that he has established certain exclusive rights in the relevant songs based on many decades of his consistent course of public dealing in said songs by himself and/or through his duly authorised agents;
3. a declaration that time-limitation rules or equitable rules generally, prevent the defendants from making ownership claims over all or any of the

relevant songs, inter alia, by filing conflicting song claim forms with collecting societies, thereby damaging claimant's business;

4. a declaration that such contract as either defendant may seek to rely on in these proceedings were void and/or voidable by reason of misrepresentation, and/or mistake and/or undue influence and/or bad faith and/or uncertain and/or were invalidly executed in the first place and are not enforceable;

5. as an alternative to claim no. 4, in the event the court may find that any contract was concluded, a declaration that the defendants are, in any event, in fundamental repudiatory material breach of any purported contract, inter alia, b (sic) their fundamental failure to register all or any of the relevant songs with the relevant collecting societies and/or to collect and/or pay royalties in respect of all or any of the relevant songs and/or to account to the claimant accurately or at all for money/royalties derived from all or any of the relevant songs and/or from the claimant's recordings generally;

6. an injunction to restrain the defendants, their servants, agents or otherwise from further infringing the copyrights of the claimant in respect of all or any of the relevant songs and other copyrighted works, including sound recording of all or any of the relevant songs and from further infringing the claimant's moral rights in any of the relevant songs and from further unlawfully/wrongful interference with the claimant's business;

7. an injunction to restrain the defendants, their servants, agents or otherwise from exploiting any recordings of all or any of the relevant songs, including the claimant's performances of the relevant songs, due to such of the claims herein as the court considers meritorious;

8. such further relief as may be set out in the summary of claims at the conclusion of the amended claim form.

44. In the amended particulars of claim Mr. Anderson now alleges that he began working at Mr. Dodd's studio under an informal agreement. He now says that at no time he was contractually employed to the defendants and neither was he contracted to compose and write musical works on behalf of the defendants. This is in stark contrast to the position before the amendment. Can the personal representatives speak to this informal

arrangement and its terms some forty years later? The amended statement of case implies that the informal arrangements were oral only.

45. According to Mr. Anderson, the second defendant, manufactured and distributed sound recordings under the label known as Studio One.

46. At paragraph 4 of the amended particulars the claimant alleges that during the years 1965-1968, he wrote the lyrics and composed melodies for a number of songs including the relevant songs listed in two documents, exhibits A and B, attached to the amended claim form. The list included those songs named in the original particulars and other songs not listed in the original claim. These songs it is alleged were recorded at the "defendants' studio with a view to arriving at an agreement with the 1st defendant, regarding the production, manufacture, sale and distribution of the said songs" (see para 4 of amended particulars). The songs were registered by the claimant with the United Kingdom based Performing Right (sic) Society. His publishing company became a member of the Mechanical Copyright Protection Society in the 1970s.

47. The document called exhibit A now has these songs the relevant songs written and composed by the claimant: "Good Luck and Goodbye", "Love at Last", "Love's Dream", "I Don't Want to See You Cry", "Impossible", "Mark My Words", "Melody Life", "Truly", "Feel Like Jumping", "Tell Me Now", "Mr. Everything/You Mean The World to Me", "Really Together (a.k.a Always Together" and "I Don't Care (I Don't Mind)". In respect of "Truly" and "Feel Like Jumping" the claimant is now alleging that he and the now deceased Jackie Mittoo were co-authors and co-owners of the copyright with a "50% share by agreement". Mr. Anderson seems to have dropped his claim in respect of the song "Stay in My Lonely Arms" since it is not on either list.

48. The songs on exhibit B are the same as those in the original claim save for "Stay in My Lonely Arms". This exhibit B represents the songs allegedly adapted, compiled and released by both defendants in or around 1972 without Mr. Anderson's licence or permission. These songs it is being said were released on an album called "Bob Andy's Song Book". Mr. Anderson alleges that this album has been released by way of records, cassettes and compact discs.

49. Mr. Anderson now says that he left Studio One and Mr. Dodd kept all the master recordings of all Mr. Anderson's recordings of the songs made at Studio One. The claimant now alleges that there was a verbal agreement with Mr. Dodd that he (the claimant) would

benefit from the releases by receiving from both defendants a "good share or any royalties or other money arising on account of such releases and that they would properly, accurately and regularly account to him and pay him in respect of same. No formal agreement was ever concluded regarding the release of the recordings and no percentage share was ever agreed to" (see para. 7 of amended particulars). This is an entirely new allegation. At the end of the pleading in the initial claim Mr. Anderson denied the existence of any contract or if there were contract it rested on past consideration. He never alleged any verbal agreement or any oral contract. This is an allegation that is easily made and hard to refute now that Mr. Dodd is dead. It is difficult to see how the personal representatives can properly respond to this now that Mr. Dodd is dead and he was not presented with an opportunity to respond to these very personal allegations.

50. Mr. Anderson now says that he was entitled to rely on the aforesaid verbal and/or implied agreement. He alleges further that the defendants breached the agreement without reference to the claimant and without payment of royalties or other monies and/or accounts rendered to the claimant. He claims that the defendants released the master recordings of the relevant songs and converting the profits to their own use and/or the use of others unknown to the claimant.

51. The amended claim goes on to say that the defendants acted beyond the scope of the verbal and/or implied agreement in relation to the master recordings by holding themselves out as publishers of the relevant songs. How can the personal representatives and the second defendant adequately defend against these allegations when from the outset Mr. Dodd pleaded contracts with specific date and year of execution and on which he made it plain he intended to rely on at trial?

52. The allegation of undue influence now makes its appearance in the claim for the first time. So too the allegations of misrepresentations, mistake and bad faith. Mr. Anderson said that assuming there were agreements with the defendant, which are not admitted, any such agreement arrived at was the result of undue influence because the claimant relied on Mr. Dodd's superior business expertise and bona fides and representations made to him.

53. The amended claim introduces a claim for moral rights which is entirely new. There is now an allegation of fundamental repudiatory breach of any purported contract.

54. I shall not set out any more of the amended claim. This is sufficient for the purposes of the application.

The amended defence and counterclaim

55. The defendants have filed an amended defence and counterclaim dated February 15, 2006. Consistent with the defence filed to original claim, they maintain that Mr. Anderson entered into contracts on March 18 and June 23, 1966 and on February 27, 1967. The only significant change is that it is now being said that the contract was entered into between both defendants and the claimant. This is understandable and not necessarily inconsistent with the original defence because in that defence Mr. Dodd was the only person sued and so he said that he concluded the contracts with Mr. Anderson who was contracted to write songs for the second defendant. The defendants have denied the new allegation made against them.

56. I observe that this defence is not in accordance with the rules. Under the new rules there are only three possible responses open to a defendant. These are (a) he admits the truth of the allegations; (b) he denies because he does not know whether it is true or not and wishes the claimant to prove the allegation or (c) he denies because he alleges that they are not true **and** then puts forward his version (see rule 10.5). So important is this rule that rule 10.5 (5) states that where the defendant does not admit any allegation or does not deny and put forward a different version of events **the defendant must state the reasons for resisting the allegation**. There is simply no room for a bald denial. Responding in the way contemplated by the rules is vital if the court is going to be able to manage the case effectively. Unless the cases are set out with some clarity how will the court be able, for example, to say that only a particular set of issues need to be determined in order to resolve the case? I shall also comment on the amended statement of case.

57. The counterclaim has no significant amendments. Thus the defendants' case rests exclusively on the contracts to which they refer; the same contracts Mr. Dodd pleaded in the original defence.

Analysis of the amended claim

58. From what has been set out there is no doubt that the claimant has shifted ground considerably. In the amended statement of case the claimant is has now abandoned his claim based on lack of consideration and has now introduced misrepresentation, mistake, undue influence, bad faith, uncertainty and invalid execution. In the supporting particulars

there is no allegation that the second defendant did anything other than distribute the sound recordings under the label Studio One. Mr. Anderson has not alleged that he had any kind of understanding or hoped to have any kind of understanding with the second defendant.

59. The new allegations about the misrepresentation and so on are being attributed to Mr. Dodd personally. It was alleged that it was Mr. Dodd who caused his servants and/or agents including the second defendant to distribute the claimant's works without accounting to him (the claimant) for any royalties. Now that Mr. Dodd is dead it is hard to see how the personal representatives can adequately defend the allegation of misrepresentation. There is no suggestion that anyone else knew or was present when these alleged misrepresentations were being made. Worse yet, it would be virtually impossible for the defendants to rebuff a case of undue influence when it is being said that it was Mr. Dodd who exercised this undue influence. Those parts of the claimant's amended statement of case that allege misrepresentation, undue influence and that there was a verbal or implied agreement against Mr. Dodd should be disallowed. These allegations could not possibly have been new to the claimant. He must have known about them before the original claim. This kind of case is to be distinguished from, for example, an accident case where the claimant's condition might have deteriorated between the filing of the claim and the case management conference. In the case before me Mr. Anderson is complaining of conduct that took place in the 1960s and continued up to the filing of the original claim.

60. The claimant has now widened his claim to include songs not disputed before Mr. Dodd died. The issue joined on the pleadings before the death of Mr. Dodd was whether there was a contract between Mr. Dodd in his personal capacity and Mr. Anderson in respect of the then disputed songs. Mr. Dodd pleaded that there was such a contract which he intended to rely on. Mr. Anderson said no such documents exist but if they do, then they are unenforceable because of lack of consideration or that the consideration was passed. It would not be fair to widen the claim to include songs not named in the original claim. The action should be restricted to the specific songs named in the original claim.

61. The claimant has an application in which he now wishes to introduce a handwriting expert because he wants to say that his signature was forged assuming such signatures exist. This issue was never raised or even hinted at before Mr. Dodd's death. Indeed the

claimant was ready for trial and the matter would have been on the pleadings as they then stood had it not been for the introduction of the CPR and Mr. Dodd's untimely death.

62.Mr. Anderson is now introducing a verbal agreement between himself and Mr. Dodd. It is difficult to see how the personal representative can properly refute this allegation. Indeed Mr. Anderson said that no formal agreement was ever concluded regarding the release of his songs. This part of the amended claim should be disallowed.

63.An examination of the amended statement of case does not show that any allegation is being made that the second defendant and Mr. Anderson entered into any agreement of any kind, oral or written. Neither is there any such allegation in the original statement of case. Yet the amended statement of case is alleging that the defendants breached the verbal or implied agreement allegedly made between Mr. Anderson and Mr. Dodd. It is a bit puzzling to see how the amended statement of case could make such an allegation without the foundation allegation that the second defendant was a party to this alleged express or implied verbal agreement or in the alternative, having known about the agreement procured its breach.

64. Mr. Earle resisted these conclusions by submitting that the defendants have filed defences and so they are able to defend the claim. This submission does not give sufficient weight to the fact that the defendants raised objections to the amendments but were ordered to file defences. In other words, the defendants were complying with a court order. Further the defence is really a restatement of the original defence and counterclaim.

Conclusion

65.It would seem to me that dealing with this case justly demands that some of the amendments be disallowed. While I can accept that some of the amendments are an expansion of what was in the original particulars of claim it is obvious that the claimant has introduced new allegations against Mr. Dodd that only he can answer.

66.Having regard to the fact that the second defendant is relying on the contracts pleaded I do not think that it would be unfair to join the second defendant at this stage. The allegation against the second defendant is that it distributed the works of Mr. Anderson without his licence or permission. Mr. Dodd's defence to the claim filed in the initial claim did say that Mr. Anderson was contracted to compose songs for the second defendant. This means that the second defendant would not be unduly prejudiced since its success depends

wholly and exclusively on the validity of the contracts referred to by Mr. Dodd. In any event it is a company and ought to have records of its activities since one of the purposes of incorporation is to have a legal person that can outlive the natural person.

67. I have not seen the contracts and so I do not know whether the additional songs on exhibit A were included the alleged contract between Mr. Dodd and Mr. Anderson.

68. I need to address specifically the claim for breach of moral rights. Broadly speaking the Copyright Act speaks to two kinds of moral rights. They are (a) the right to be identified as the author of a given work and (b) the right to object to derogatory treatment of the work. There is nothing in the particulars of claim to indicate that we are dealing with derogatory treatment. The right to be identified as the author is quite likely the right that the claimant has in mind. This breach could not possibly have been unknown to the claimant before the amendments. Mr. Dodd, had been accused of this misdeed, while he was alive would have been able to respond. To raise the issue now that he is dead and expect his personal representatives to respond adequately is not just and so should be disallowed.

69. I therefore disallow all amendments to the amended claim form and particulars of claim that allege

- (1) that the contracts are void or voidable and therefore unenforceable on the grounds undue influence, misrepresentation, mistake, bad faith, uncertainty or invalid execution (i.e. paragraph 4 of the amended claim form and paragraphs 26A, 27 and 28);
- (2) a breach of moral rights (i.e. paragraphs 21G, 22, 23, 24 and 25 of the particulars of claims);
- (3) the existence of any informal and/ or verbal arrangement between Mr. Anderson and Mr. Dodd in which it was allegedly agreed that Mr. Anderson would benefit from any releases (i.e. paragraphs 6, 7, 8, 9, 11, 17, 20 of the particulars of claim)

70. Issue of costs reserved pending the outcome of mediation proceedings. Leave to appeal granted.