

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA**

SUPREME COURT CIVIL APPEAL NO COA2022CV00068

BETWEEN	DOREEN HIBBERT	1ST APPELLANT
AND	LEBA HIBBERT-THOMAS (Executrix of the Estate of Frederick "Toots" Hibbert)	2ND APPELLANT
AND	CABEL STEPHENSON	RESPONDENT

Ian Wilkinson KC and Daniel Beckford instructed by Wilkinson Law for the appellants

Keith Bishop and Janoi Pinnock instructed by Bishop & Partners for the respondent

27, 28, 29 February, 21 March 2024 and 16 May 2025

Civil practice and procedure – Tort of detinue – Unlawful detention of hard drive – Recovery of possession – Whether cause of action disclosed by pleadings – Intellectual property rights – Ownership of copyright – Joint authorship and ownership – Musical works – Sound recordings – Executive producer of sound recordings – Civil Procedure Rules, rules 8.8, 8.9, 8.9A and 20.4 - Copyright Act, sections 2, 7, 14(3), 22, 23(1) and 28(1)

STRAW JA

[1] This is an appeal against the decision of Jackson-Haisley J ('the learned judge') delivered in the Supreme Court on 1 June 2022, whereby she made certain orders in favour of the respondent's claim.

[2] We heard the appeal on 27, 28 and 29 February 2024 and handed down our decision on 21 March 2024, ordering as follows:

“1. The appeal is allowed in part.

2. Order number three of Jackson Haisley J is varied to read as follows:

‘The issue of damages is to proceed to an assessment of damages in open court from the date of the detention of the hard drive, which is deemed to be 10 December 2021 (the date on which a formal demand was made by the attorneys-at-law for the respondent), to the date of delivery.’

3. All other orders of Jackson Haisley J are affirmed.

4. Within 72 hours of the date of this order, the respondent shall remove from the Samsung SSD hard drive and deliver through his attorneys-at-law, Bishop & Partners, to the appellants through their attorneys-at-law, Wilkinson Law, a device with the following:

(a) all sound recordings of the deceased Frederick ‘Toots’ Hibbert speaking and singing;

(b) any ‘demo vocals’ of the deceased Frederick ‘Toots’ Hibbert that appear for the purpose of giving instructions to Mr Andrew Brown, also known as Droop Lion;

(c) the sound recording of the 2020 Jamaica Festival song done by the deceased Frederick ‘Toots’ Hibbert.

5. The appellants, through their attorneys-at-law, Wilkinson Law, are to provide within 24 hours to the respondent the device on which the said material from the deceased Frederick ‘Toots’ Hibbert is to be copied.

6. 90% of the costs of the appeal to the respondent to be agreed or taxed.”

[3] We promised to provide reasons for our decision, and this is a fulfilment of that promise.

[4] During the preparation of this judgment, it was discovered that the wrong year had been inadvertently stated at order number two, that is 10 December 2021. The correct date should read 10 December 2020. By virtue of the slip rule, as expressed by Harris JA at para. [14] of **Lyndel Laing and another v Lucille Rodney (Executor of estate Sandra McLeod deceased) and another** [2013] JMCA Civ 27, the correction is now being made. Order number two is corrected to read:

"2. Order number three of Jackson Haisley J's varied to read as follows:

'The issue of damages is to proceed to an assessment of damages in open court from the date of the detention of the hard drive, which is deemed to be 10 December 2020 (the date on which a formal demand was made by the attorneys-at-law for the respondent), to the date of delivery.'"

Background

[5] The respondent, Mr Cabel Stephenson, who was the claimant in the court below, initiated this matter by way of fixed date claim form supported by particulars of claim, which were filed on 28 January 2021. He sought orders for the appellants, Mrs Doreen Hibbert and Mrs Leba Hibbert-Thomas, to deliver to him a "SAMSUNG SSD Hard Drive", which was in their custody, that contained musical works in which he had a proprietary, beneficial, and financial interest ('the hard drive'), as well as damages for the loss he suffered as a result of the unreasonable detention of the hard drive.

[6] At the time of this appeal, the hard drive was still in the possession of the 1st appellant, Mrs Doreen Hibbert, a director of D&F Music Inc ('D&F Music') and the widow of Grammy award winning musician Mr Frederick "Toots" Hibbert, deceased. Both Mr and Mrs Hibbert were directors of D&F Music, which operated a recording studio at their residential property located at 32 Edinburgh Avenue, Kingston 10, in the parish of Saint Andrew ('the Reggae Centre'), which they jointly owned. The 2nd appellant, Mrs Leba Hibbert-Thomas, is the daughter of Mr and Mrs Hibbert and the executrix of Mr Hibbert's estate. Ms Cressida Rattigan, the granddaughter of Mr Hibbert, was the 2nd defendant in

the court below, in her capacity of executrix in his estate. She has, however, not been made a party to these proceedings on appeal.

[7] Prior to Mr Hibbert's death on 11 September 2020, Mr Stephenson, who worked as a music producer, manager, and booking agent, and Mr Andrew Adrian Brown, a musical artist, who goes by the pseudonym "Droop Lion", utilised the Reggae Centre to record the latter's album from February 2020 to August 2020. Mr Hibbert not only gave Mr Stephenson and Droop Lion access to the Reggae Centre, but he was actively involved in the production of Droop Lion's album. In or about May 2020, the musical works were transferred from the studio board to the hard drive, which was left in the custody of Mr Nigel Burrell, studio engineer for D&F Music.

[8] Mr Stephenson was in earnest discussions with David Spero Management about "the commercialization of the production to include distribution, publishing and marketing". Those discussions were "progressing", and they anticipated that the album would be released either in December 2020 or February 2021.

[9] Subsequent to Mr Hibbert's unfortunate passing, Mr Stephenson sought to recover possession of the hard drive. The appellants, uncertain as to whether he had a greater entitlement to the hard drive over that of Mr Hibbert, refused to comply with his demand. The potential deal with David Spero Management was put at risk because of Mr Stephenson's inability to deliver the completed recording by the established deadline. Also, Mr Stephenson asserted that he spent US\$81,000.00 on the production of the album, and he would lose that investment if he were unable to enter into an arrangement for the commercialisation of the album on account of the hard drive not being returned in a timely manner.

[10] Confronted with this impasse between them, Mr Stephenson filed his claim to recover possession of the hard drive. Following a trial in chambers over several days, on 1 June 2022, the learned judge made the following orders:

“1. [Mrs Doreen Hibbert] is required to deliver to [Mr Stephenson] the [hard drive] owned by [Mr Stephenson] and containing musical works in which he has a proprietary, beneficial and financial interest.

2. [Ms Cressida Rattigan] and [Mrs Leba Hibbert-Thomas], in their capacities as named Executrices of the last Will and Testament of Fredrick [sic] ‘Toots’ Hibbert, are required to deliver to [Mr Stephenson] the [hard drive] owned by [Mr Stephenson] and containing musical works in which he has a proprietary, beneficial and financial interest.

3. The issue of Damages is to proceed to an Assessment of Damages in Open Court.

4. Costs to [Mr Stephenson] to be agreed or taxed.”

The appeal

[11] Aggrieved by that decision, the appellants filed a notice of appeal on 13 June 2022, by which they sought to challenge several of the learned judge’s findings, as outlined in these 18 grounds of appeal:

“(a) The Learned Judge erred in law by deciding that [Mr Stephenson’s] claim should be amended to, effectively, plead the claim of ***‘Detinue’*** without any application, formal or otherwise, for such amendment having been made by [Mr Stephenson].

(b) The Learned Judge erred in law by, effectively, amending [Mr Stephenson’s] claim to ‘plead’ the claim of ***‘Detinue’*** without affording the parties, particularly [Mrs Hibbert and Mrs Hibbert-Thomas], an opportunity to address such an amendment.

(c) The Learned Judge erred in law by inferring or accepting that although [Mr Stephenson] did not plead detinue as a cause of action expressly, his pleadings filed clearly set out the elements required for the tort of detinue or conversion.

(d) The Learned Judge erred in law in finding that [Mr Stephenson] had satisfied the elements required to establish the tort of detinue.

(e) The Learned Judge erred in finding, essentially, that [Mrs Hibbert and Mrs Hibbert-Thomas] had retained possession of the [hard drive] for an unreasonably long period of time.

(f) The Learned Judge erred in law in granting an order to return the [hard drive] to [Mr Stephenson] without first listening to the contents of the said hard drive to determine whether there was a sufficient degree of originality in relation to the songs that were re-recorded by Droop Lion.

(g) The Learned Judge erred in law in granting an order to return the [hard drive] to [Mr Stephenson] without the Learned Judge listening to the contents of the said hard drive to determine whether the songs that were re-recorded by Droop Lion can, or could, be deemed to form a separate copyright under the Copyright Act.

(h) The Learned Judge erred by preferring the *viva voce* and affidavit evidence of [Mr Stephenson] to that of [Mrs Hibbert and Mrs Hibbert-Thomas] despite several aspects of [Mr Stephenson's] evidence being uncorroborated and severely impugned under cross-examination thereby affecting its credibility significantly and irreparably.

(i) The Learned Judge erred in finding that [Mr Stephenson] was the executive producer of the Droop Lion Album Project and was responsible for the arrangements and investments in the said album project, without any credible evidence such as sufficient receipts showing expenditure by [Mr Stephenson], including alleged payments to the deceased, a formal contract between [Mr Stephenson] and the alleged David Spero.

(j) The Learned Judge erred by not appreciating, sufficiently or at all, the evidence given at the trial by [Mr Stephenson's] witness, Andrew Adrian Brown also known as Droop Lion, that the idea for the album project was conceived by the deceased Frederick 'Toots' Hibbert and not [Mr Stephenson], after the said deceased had heard Droop Lion singing for the first time and suggested that Droop Lion re-record some of the deceased's songs.

(k) The Learned Judge erred in making her said orders as she failed to appreciate properly, or at all, the cumulative effect of the lack of credibility or '*veracity*' on the part of [Mr

Stephenson] and his witnesses on the issue of who was the executive producer for the said Droop Lion album project.

(l) The Learned Judge erred in law and denied [Mrs Hibbert and Mrs Hibbert-Thomas] herein a fair trial by failing to pay careful attention to, or take proper notice of, the evidence on [their] behalf particularly regarding the issue of who was the executive producer for the said Droop Lion album project.

(m) The Learned Judge erred by not sufficiently appreciating the evidence that many of the songs re-recorded by Droop Lion for the album project were written and/or recorded previously by the deceased Frederick 'Toots' Hibbert from as far back as 1979 and others were recorded by the said deceased in 2008, 2012, 2014, 2015 and 2017, several years before the recording of the Droop Lion album project.

(n) The Learned Judge erred in law by granting an order to return the [hard drive] to [Mr Stephenson] without any evidence that the deceased Frederick 'Toots' Hibbert was paid in full, or anything at all, for his contributions towards the Droop Lion Album Project or any evidence as to the existence of any agreement regarding any royalties, or other interest, to which the deceased's estate would be entitled.

(o) The Learned Judge erred in finding that- '[Mrs Hibbert-Thomas] had not spoken to the deceased for three years leading up to his death and so would not go inside the studio' (**Paragraph 140 of the Judgment**), when the unchallenged evidence was that '[Mrs Hibbert-Thomas]', ... had been speaking to her father the deceased; the deceased had brought a Toyota Prado motor vehicle for [Mrs Hibbert-Thomas] in 2020; and [Mrs Hibbert-Thomas] spoke to the deceased and was the person who took him to the hospital when he got ill in 2020;

(p) The Learned Judge erred in law and fact in finding that [Mrs Hibbert and Mrs Hibbert-Thomas] were not justified in retaining the [hard drive].

(q) The Learned Judge erred as her findings or rulings are inconsistent with her own words - ('If Droop Lion is claiming rights to these songs, he must prove that each of these re-recorded songs had a sufficient degree of originality and are not just straightforward covers of older works, in order to

attract a separate copyright.’- **paragraph 157 of the Judgment**) which indicate she was uncertain about, and did not rule on, whether Droop Lion had established the necessary proof of ‘...sufficient degree of originality’.

(r) The Learned Judge erred in law in finding that [Mr Stephenson] is entitled to damages for the alleged detinue regarding the said [hard drive].” (Italics and bold as in the original)

The learned judge’s findings

[12] The learned judge identified two main issues for her determination:

“104. ...The first is whether or not [Mrs Hibbert and Mrs Hibbert-Thomas] are liable to [Mr Stephenson] in the Tort of detinue for the retention of the [hard drive]. The second issue is whether [Mrs Hibbert] and [Ms Rattigan] and [Mrs Hibbert-Thomas], in their capacity as personal representatives of the estate of Mr Hibbert, have any lawful justification for retaining the said hard drive. ...”

[13] In resolving those issues, she first addressed the question of who is the legal owner of the hard drive. The learned judge accepted Mr Stephenson’s evidence that he had purchased the hard drive for his own use and purpose while visiting the United States of America. For that reason, she decided that he was the owner of the hard drive and entitled to immediate possession of it.

[14] The learned judge acknowledged that the hard drive was not in its original state since it now contained the Droop Lion album and other material (‘the album project’). This led her to the second question of who was the executive producer of the album project. Having reviewed the evidence, the learned judge accepted that Mr Stephenson not only financed the making of the album but he also negotiated the release of the album, was responsible for producing the master record, and managed the affairs of Droop Lion. Although the learned judge observed that he did not tell the truth regarding the extent of Mr Hibbert’s contribution to the songs on the album, she found the appellants’ evidence to be comparatively inadequate since they could not speak to

essential facts such as the arrangements for the album project. Furthermore, she accepted Mr Stephenson's evidence that Mrs Hibbert had not been involved with the musical affairs of Mr Hibbert on a day-to-day basis, and so she was not privy to the details of their arrangement regarding the album project. The learned judge acknowledged that Mr Hibbert played an integral role in accordance with being a producer, but stated that it did not "accord exclusively with his status of an executive producer". She continued as follows:

"138. ... The fact that Mr. Hibbert provided his studio as well as his sound recordings and no doubt his talent does not mean without more that he takes on an equal role as executive producer. It seems consistent with how he has been described by [Mr Stephenson] which is as a co-producer."

[15] Ultimately, she concluded that Mr Stephenson was the executive producer of the album project.

[16] She further noted, in the light of the Copyright Act ('the Act'), that as the executive producer, Mr Stephenson could be deemed to be the author and owner of the album project or master recording but not the songs, sound recordings, or contents of the album project. For that reason, she considered a third question, namely, who is the legal owner of the album content.

[17] In doing so, the learned judge considered the undisputed evidence that the album project contains a variety of musical works and sound recordings. She stated that Mr Hibbert was the author of several of the sound recordings and the lyrics contained in the music, and played up to seven instruments. She accepted that Mr Hibbert had contributed at least ten songs to the album project. Accordingly, he was a co-producer and the author and owner of several of the sound recordings, lyrics, music, and musical works on the hard drive. Nevertheless, she held as follows:

"154. It seems to me that the parties came together with [Mr Stephenson] as executive producer, Droop Lion as the main artist and the deceased as producer and others as [sic] such

as Nigel Burrell as producer and engineer to reflect a conglomeration of talent where they mutually understood their separate roles and responsibilities. It is clear from this that the musical works and the sound recordings on the hard drive do not all belong to the estate of the deceased and D & F Music. ...”

[18] Having reviewed the respective contributions of Mr Hibbert and Droop Lion, she concluded:

“159. Regardless of all the rights that could be claimed by each of the contributors under the Copyright Act, [Mr Stephenson] as executive producer would still be viewed as the first owner of the album itself. It seems clear to me that the hard drive should therefore be under the custody and control of the executive producer and master recorder [Mr Stephenson]. This does not take away from the fact that the estate of the deceased would have an interest in the album content and be entitled not only to royalties to be gained from these sound recordings but also to the value of the work done by the deceased as co-producer. The extent of the copyright held in the production could not be determined without viewing the actual content of the hard drive. It is an issue that would no doubt have to be determined by an expert in the music industry after a full review of the album [sic] content. However, that is not necessary to determine the main issue here which is whether [Mr Stephenson] is entitled to detain as I have already found that [Mr Stephenson] as executive producer of the album is to be deemed its owner. ...”

[19] The learned judge proceeded to contemplate whether the appellants and Ms Rattigan were justified in retaining the hard drive. She referred to section 28 of the Act as well as the cases of **Robert Dale Brodber v EW Abrahams & Sons Limited and Maxell Ormsby** [2019] JMCA Civ 17 (**‘Brodber’**), **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd** [1952] 2 QB 246 (**‘Strand Electric and Engineering’**) and **Cohen v Roche** [1927] 1 KB 169. She found that the appellants and Ms Rattigan failed to justify their entitlement to retain the hard drive, and as such, Mr Stephenson, being the executive producer, was entitled to immediate possession of the hard drive and its contents. Consequently, the learned judge declared that the appellants

and Ms Rattigan were liable for the tort of detinue and ordered that they deliver the hard drive to Mr Stephenson.

Issues for consideration on appeal

[20] Given the grounds of appeal and corresponding submissions, as well as the learned judge's considerations and conclusions, I am of the view that there were three salient issues in this appeal, namely:

- i. whether the claim for detinue was properly before the court (grounds a, b and c);
- ii. whether Mr Stephenson was entitled to demand possession of the hard drive (grounds d, f, g, h, i, j, k, l and o); and
- iii. whether the appellants' refusal to comply with the demand was unqualified and unjustifiable (grounds e, m, n, p, q and r).

The relevant law

[21] In the absence of any criticism that the learned judge had misdirected herself on the law, the issues are primarily concerned with her findings of fact and the application of the law. It is well known that this court, in those circumstances, will not lightly interfere with a decision of a judge at first instance unless it can be demonstrated that she was "plainly wrong" in concluding as she did (**Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 and **Thomas v Thomas** [1947] 1 All ER 582). With that being said, the overarching question is whether the learned judge erred in her assessment of the facts in light of the law when she decided the issues mentioned above.

[22] The matter of **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 is also relevant. At paras. [9] and [10] Brooks JA (as he then was) detailed the law relating to the treatment by an appellate court of findings of fact, as follows:

“[9] ...Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

‘...The authorities seem to establish the following principles:

1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was ‘plainly wrong’. - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA No. 133/98 delivered December 20, 1999 among others.

2. In **Chin v Chin** [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in exercising its function of review, can ‘within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a rehearing below.’

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge - See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an

analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra).'

[10] In the latter case, K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:

'The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make.'

[23] Each issue will now be examined in turn.

Whether the claim for detinue was properly before the court (grounds a, b and c)

[24] The issue of whether the tort of detinue was specifically pleaded in Mr Stephenson's claim was raised before the learned judge. The appellants disagreed with the learned judge's consideration of detinue, since the fixed date claim form and particulars of claim did not explicitly refer to it in accordance with rules 8.8, 8.9, and 8.9A of the Civil Procedure Rules, 2002 ('the CPR'). The learned judge articulated as follows:

"84. [The appellants] have contended that [Mr Stephenson] failed to expressly plead the tort of detinue and it is a fact that [Mr Stephenson] did not use the word detinue in his Claim however I do not find that to be detrimental to his Claim as it is clear from the words used in his Claim that he was always seeking the delivery of his hard drive and had in fact set out quite clearly in the pleadings the elements required for the tort of detinue. It has been expressly stated in our courts that once the facts establishing a cause of action have been pleaded, it is not fatal that the Claimant has not identified the cause of action [See **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42 and Section 48 (g) of the Judicature (Supreme Court) Act]."

Submissions

[25] King's Counsel, Mr Ian Wilkinson, submitted on behalf of the appellants that the tort of detinue was not specifically pleaded in the particulars of claim as the cause of action to sufficiently ground the claim against the appellants. Germane to this submission is rule 8.9A, which provides that a claimant cannot rely on an allegation or factual argument that could have been set out in the particulars but was not, unless the court permits. The claim ought to have specified the tort of detinue and pleaded the particulars in satisfaction of the elements (**George and Branday Limited v Lee** (1964) 7 WIR 275 ('**George and Branday**') and **Alicia Hosier Ltd v Brown Shipley & Co Ltd and another** [1970] 1 QB 195 ('**Alicia Hosier**') were cited in support of this submission). Instead, the particulars of claim simply requested the delivery of the hard drive. Furthermore, he submitted that there was failure to comply with the rule, which mandates

that an affidavit be filed and served in support of a fixed date claim form (rule 8.8(2)(a) of the CPR). As a result of the incomplete pleadings, there was no proper claim for detinue before the court.

[26] For Mr Stephenson, counsel Mr Keith Bishop submitted that, notwithstanding that deficiency, the fixed date claim form explicitly requested the return of the hard drive, for which Mr Stephenson claimed sole ownership. That position was made clear by Mr Stephenson's filing of a notice of application for court orders on the same day (28 January 2021) for the appellants to deliver the hard drive to him. The written submissions, which were filed on 5 March 2021, also argued grounds relative to the tort of detinue. Accordingly, the appellants were, at all times, apprised that Mr Stephenson's cause of action was detinue. It was contended, therefore, that the learned judge was entitled to find that the elements for detinue had been proven to the requisite legal standard and to order the return of the hard drive to Mr Stephenson.

[27] Counsel submitted that, by virtue of part 20 of the CPR, the learned judge correctly exercised her discretion to allow the amendment of Mr Stephenson's statement of case. Furthermore, he argued that although the amendment was made at trial, the appellants have not complained about prejudice nor did they challenge the learned judge's exercise of her discretion. Mr Bishop attributed this to the fact that the fixed date claim form and particulars of claim outlined the cause of action of detinue, even though the word "detinue" was not mentioned. The appellants cannot say that, even without the amendment, they did not appreciate that the claim was for detinue, counsel contended. The amendment only served to "provide precision as to the cause of action without providing new information on the matter pleaded" (**Peter Salmon v Master Blend Feeds Limited** (unreported), Supreme Court, Jamaica, Suit No CL 1991/S163, judgment delivered 26 October 2007, was cited in support).

Discussion

[28] Rules 8.8(1)(a) and (b), 8.8(2)(a) and (b), 8.9(1), (2), (3) and 8.9A of the CPR provide:

“Contents of fixed date claim form

8.8 (1) Where the claimant uses form 2, the claim form must state-

(a) the question which the claimant wants the court to decide; or

(b) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;

...

(2) The following steps apply for the purposes of this rule:

(a) Where the claimant uses Form 2 the claimant must file an affidavit containing the evidence on which the claimant intends to rely.

(b) The claimant’s affidavit must be served on the defendant along with the claim form.

...

Claimant’s duty to set out case

8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

(2) Such statement must be as short as practicable.

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

...

Consequences of not setting out case

8.9A The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.”

[29] Rule 20.4 of the CPR provides:

“Amendments to statements of case with permission

20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.

(2) Statements of case may only be amended after a case management conference with the permission of the court.

(3) Where the court gives permission to amend a statement of case it may give directions as to -

(a) amendments to any other statement of case; and

(b) the service of any amended statement of case.”

[30] There is no evidence either from the transcript or the written judgment that an amendment was granted or made by the learned judge to add the tort of detinue as the cause of action on the pleadings. In that regard, reference to rule 20.4 of the CPR (dealing with amendments to the statement of case) is not relevant. The learned judge indicated her reasons for concluding that a claim in detinue had been made out based on the actual pleadings set out in the claim (see para. [84] of the learned judge’s judgment set out at para. [24] above).

[31] With regard to the tort of detinue, this court in **Brodber**, at para. [82] stated that detinue is a common law form of action for recovery of goods and adopted the legal definition set out by Donaldson J in **Alicia Hosiery** as follows:

“A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in possession of the goods and who, upon proper demand, fails or refuses to deliver them up without lawful excuse.”

[32] The fixed date claim form set out factual allegations concerning the cause of action. It was averred that (1) the hard drive belonged to Mr Stephenson; (2) the musical production was transferred to the hard drive; and (3) the hard drive with its contents was left in the custody of Mr Nigel Burrell, at the studio of D&F Music. It was further averred that Mr Stephenson made requests to the appellants, on the death of Mr Hibbert, for the hard drive to be returned to him and this request was not honoured. A short statement of all the facts being relied upon was set out, as required by rule 8.9 of the CPR. The remedy that Mr Stephenson was seeking, the return of the hard drive and its contents, the legal basis for such a remedy and a request for damages, were also set out pursuant to rule 8.8. Mr Stephenson was not relying on any allegation or factual argument that was absent from the fixed date claim form. In the particulars of claim filed on 28 January 2021, Mr Stephenson averred that he owned the hard drive and spoke to the potential financial losses if there was no intervention by the court and requested the orders as set out in the fixed date claim form.

[33] No affidavit was filed in support of the fixed date claim form. However, one was filed to support a notice of application for court orders, seeking, among other things, an order that the hard drive be listened to, so as to determine whether or not it contained any material in which the appellants had an interest. The fixed date claim form, notice of application and affidavit in support were all filed on the same date, 28 January 2021. Attached to the affidavit were several correspondences to the appellants from Mr Stephenson's then attorney, Dian Watson, as well as correspondences between David Spero Management, Inc and Mr Stephenson concerning the "proposed '**Droop Lion**' album" (emphasis as in the original).

[34] No issue was raised before the learned judge by the appellants as to the absence of a specific affidavit supporting the fixed date claim form. Under those circumstances, the submission on behalf of the appellants concerning the absence of such an affidavit (in accordance with rule 8.8(2)(a) of the CPR) was not entertained by this court. In any event, Mr Stephenson was cross-examined on the affidavit that was filed.

[35] In his affidavit of 28 January 2021 (accompanying the notice of application), Mr Stephenson indicated that, after observing a reasonable and respectful period following Mr Hibbert's death, he had numerous conversations with Mrs Hibbert and Ms Rattigan, as well as an attorney representing Ms Rattigan, regarding the return of the hard drive. He did not meet with any success. He also stated that letters were subsequently dispatched from his attorney to both appellants and Ms Rattigan, issuing a formal demand for the return of the hard drive. Up to the time of the filing of the fixed date claim form on 28 January 2021, this request was not successful.

[36] The learned judge indicated that both counsel made submissions in relation to the tort of detinue. In particular, counsel for the appellants contended that they were justified in retaining the hard drive with the musical content, as Mr Stephenson had not established that he had an immediate right to possession of the contents and, had not established that the appellants were wrong or unjustified in their detention of the hard drive (see paras. [51], [64] and [69] of the judgment). Considering all the above, it has not been demonstrated that the appellants suffered any prejudice in meeting the case as it was pleaded. The defence relevant to that tort was clearly defined and set out in their affidavits in response.

[37] **George and Branday** offers no support for the appellants' contention. That case concerned the jurisdiction of a Parish Court Judge under the Judicature (Parish Courts) Act (previously the Judicature (Resident Magistrates) Act). This case and the peculiarity of the jurisdiction of Parish Court Judges as it related to civil matters were discussed recently by this court in **Jennifer Clarke v Icolyn Anderson** [2024] JMCA Civ 27. V Harris JA stated on behalf of the court:

"[14] The discussion will be commenced by considering section 76 of the JPCA, which states:

'76. No evidence shall be given by the plaintiff on the trial of any action, of any demand or cause of action, except such as shall be specified in the summons hereinafter directed to be issued.'

[15] This provision mandates that the evidence the plaintiff presents at trial should be confined to the cause of action before the court. Having reviewed the evidence, I believe the respondent complied with this section. The question that naturally arises is whether a judge of the Parish Court could use that evidence to ground liability in a defendant for a totally unrelated cause of action not specified in the summons (as has happened in this case).

[16] It seems to me, given the clear and mandatory language of section 76, that this question must be answered in the negative. That section sets out, in precise terms, the jurisdiction of a judge of the Parish Court, during the trial of any civil matter, to only receive evidence from a plaintiff concerning the cause of action specified in the summons. This is perfectly reasonable and understandable since the summons notifies a defendant of the case that he or she must meet at trial, and the evidence to be received by the court must be relevant to the claim before it. Therefore, it is difficult to envision any circumstance (and I have located no authority to the contrary) where a judge of the Parish Court could use evidence presented in a claim specified in the summons and plead to arrive at a decision for an entirely different cause of action, not similarly particularised.

[17] In fact, an authority from this court, **George and Branday Limited v Lee** (1964) 7 WIR 275, illustrates the opposite. In that case, the respondent, Lee, had sued the appellant company for detinue. The resident magistrate (as judges of the Parish Court were then designated) found for the respondent in conversion based on the facts that the resident magistrate said he accepted during the trial. Waddington JA, writing for the court, stated, ‘... the respondent’s claim was in detinue and not in conversion, and, without an amendment, it would not have been open to the resident magistrate to have found a conversion’ (page 279C of the judgment).”

[38] There was also another point of distinction in relation to **George and Branday** and the case at bar. Conversion and detinue are two separate torts, and each requires a specific evidential basis. In the case at bar, no such issue arises as a distinct tort was not pleaded. There was no legal or evidential basis to challenge the learned judge’s

determination that the appellants would have been able to appreciate what the claim was about from the fixed date claim form. In that regard, we also considered section 48(g) of the Judicature (Supreme Court) Act which authorises a judge of the Supreme Court to “grant either absolutely or on such reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter...”.

[39] The appellants failed to show any merit concerning this issue. These grounds of appeal, therefore, failed.

Whether Mr Stephenson was entitled to demand possession of the hard drive (grounds d, f, g, h, i, j, k, l and o)

[40] Ownership of the hard drive grounds the entitlement to demand its possession. When determining who was the rightful owner of the hard drive, the learned judge considered ownership of the physical hard drive separately from ownership of its contents. She accepted Mr Stephenson’s evidence that he had purchased the hard drive, so he was the owner of the physical hard drive and entitled to immediate possession of it. Concerning the ownership of the contents of the hard drive, the learned judge referred to the Act, as well as relevant case law and sought to ascertain who would be regarded as the executive producer of the album project and who was the legal owner of the album content. Ultimately, she concluded that, on a balance of probabilities, Mr Stephenson was the executive producer, Mr Hibbert was a co-producer and Mr Stephenson was the owner of the contents of the hard drive.

[41] However, she also made it clear that, based on the provisions of the Act, the executive producer could be deemed the author and owner of the album or master recording, but not the songs, sound recordings or contents of the album. In this regard, she took into account the uncontroverted evidence that Mr Hibbert was the author of several of the sound recordings on the hard drive, the lyrics, as well as the music. I have already referred to her findings in that regard at para. [17] above.

Submissions

[42] Mr Wilkinson has objected to those findings on the appellants' behalf. He contended that even if the learned judge found that Mr Stephenson was the owner of the hard drive because he purchased it, this did not automatically mean that he was the owner of its content. Reference was made in his submissions to several sections of the Act (sections 2, 7, 14(3), and 28(1)) in support of the contention that the hard drive contained musical works for which Mr Hibbert owned the copyright. At least 10 of the 13 songs were previously recorded by him. Further, an 11th song was written in collaboration with Droop Lion, Mr Hibbert and two others.

[43] Without a transfer in writing duly signed by Mr Hibbert in accordance with section 23(1) of the Act, Mr Stephenson had no right to his work. There was no evidence indicating that either Mr Stephenson or Droop Lion had a license and/or contractual agreement with Mr Hibbert for the use of the latter's musical work, which featured on the hard drive. It was the appellants' position that by ordering that the hard drive be delivered to Mr Stephenson, the learned judge had effectively exposed Mr Hibbert's musical work to be exploited for Mr Stephenson's benefit. This would prejudice Mr Hibbert's estate and the appellants in their capacity as the beneficiaries of the estate.

[44] It was, therefore, submitted that Mr Hibbert, being the author of the copyright-protected work contained on the hard drive, would be the first owner of the copyright pursuant to section 22 of the Act. Reliance was placed on **Alicia Hosiery**, and **Reverend Dr Ralph Griffiths v Attorney General for Jamaica and Transport Authority** [2019] JMCA Civ 44 ('**Dr Ralph Griffiths**').

[45] Mr Wilkinson conceded, however, during oral submissions, that merely contributing 11 songs to the hard drive would not be a legal basis to conclude that Mr Hibbert was the executive producer. Rather, it would provide legal justification for the appellants to detain the hard drive.

[46] He also conceded that if the evidence established who was the executive producer, that person would be entitled to the hard drive. While not disputing that Mr Stephenson purchased the hard drive, he contended that Mr Hibbert was the executive producer, as the work was done at the Reggae Center at the expense of Mr Hibbert, so he was the owner of the contents of the hard drive.

[47] Counsel also submitted that Mr Stephenson was not a credible witness as he failed to provide evidence regarding the financial dealings relevant to the role of an executive producer, and asserted incorrectly that Mr Hibbert had only written or contributed one song to the hard drive.

[48] Counsel Mr Bishop contended that Mr Stephenson had requested (in his notice of application for court orders filed 28 January 2021, and written submissions filed 28 February 2022) that the parties listen to the hard drive to determine if there was material on it in which the appellants would have an interest. According to his account, the appellants strongly opposed the request. Therefore, the learned judge's decision to reject the request was consistent with the appellants' stance in the court below.

[49] Mr Bishop submitted that the assessment of the credibility of Mr Stephenson by the learned judge was favourable to the appellants as the learned judge appeared not to have appreciated that Mr Stephenson's denial in relation to the number of songs contributed by Mr Hibbert had to do with evidence concerning the authorship of the songs, that is, who actually composed the songs. Proof of authorship was not provided by the appellants. So, Mr Stephenson's credibility on this aspect of the evidence should not have been assessed negatively. He referred to section 2 of the Act, which provides the definition of the author of a work. In relation to a musical work, it is the composer. He submitted that if the appellants are asserting that some of the songs were authored, and not merely covered by Mr Hibbert, then the process to determine that issue would have to be pursued. Counsel also commended to the court the learned judge's conclusion that Mr Hibbert "played an integral role in the creation of the musical work and sound recordings", as well as her reliance on the case of **Redwood Music Limited v Chappell**

& Co Ltd [1982] RPC 109. He submitted that the learned judge was correct in concluding that, regardless of all the rights that could be claimed by the contributors to the contents of the hard drive, Mr Stephenson, as the executive producer, would be regarded as the “first owner of the album”.

Discussion

[50] The relevant provisions of the Act are as follows:

“2. – (1) In this Act –

...

‘author’ in relation to a work, means the person who creates it, being in relation to –

- (a) a literary or dramatic work, the author of the work;
- (b) a musical work, the composer;
- (c) an artistic work (other than a photograph) the artist;
- (d) a photograph, the person taking the photograph;
- (e) a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken;
- (f) the typographical arrangement of a published edition, the publisher;
- (g) a broadcast, the person making the broadcast as described in section 4(2) or, in the case of a broadcast which relays another broadcast by reception and immediate retransmission, the person making that other broadcast;
- (h) a cable programme, the person providing the cable programme service in which the programme is included;
- (i) a computer-generated literary, dramatic, musical or artistic work, the person by whom the arrangements necessary for the creation of the work are undertaken,

and in relationship to a work of a joint authorship, references in this Act to the author of a work shall, except as otherwise provided, be construed as references to all the authors of the work;

...

'musical work' means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music;

...

'sound recording' means-

(a) a recording of sounds from which sounds may be reproduced; or

(b) a recording of the whole or any part of a literary, dramatic or musical work from which sounds reproducing the work or part may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced;

...

7.- (1) A work qualifies for copyright protection if the author was a qualified person at the material time.

(2) A work of joint authorship qualifies for copyright protection if any of the authors satisfies the requirement of subsection (1), so however, that, where a work qualifies for copyright protection only under this section, only those authors who satisfy such requirement shall be taken into account for the purposes of sections 9 and 22.

(3) In this section 'the material time' means in relation to-

(a) an unpublished literary, dramatic, musical or artistic work, when the work was made or, if the work extended over a period, a substantial part of that period;

(b) a published literary, dramatic, musical or artistic work when the work was first published or, if the

author had died before that time, immediately before his death;

(c) a sound recording or film, when it was made;

(d) a broadcast, when the broadcast was made;

(e) a cable programme, when the programme was included in a cable programme service;

(f) the typographical arrangement of a published edition, when the edition was first published.

14. – ...

(3) The author of a musical work or a literary work consisting of words intended to be sung or spoken with music, has the right to be identified as such whenever-

(a) the work or an adaptation thereof is published commercially;

(b) copies of a sound recording of the work or an adaptation thereof are issued to the public; or

(c) a film, the sound track of which includes the work, is shown in public or copies of such film are issued to the public.

22. – (1) Subject to the provisions of this section, the author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary.

(2) Subsection (1) shall not apply to copyright subsisting in a work pursuant to section 146.

(3) Where a protected work is a work of joint authorship the authors thereof shall be co-owners of the copyright in that work.

23.- (1) Subject to the provisions of this section, copyright in a work may be transferred as personal or moveable property by-

(a) assignment;

(b) testamentary disposition; or

(c) operation of law,

and a transfer pursuant to this section by way of assignment shall not be effective unless it is in writing and signed by or on behalf of the assignor.

28.- (1) On the death of a person entitled to the right conferred by section 14, 15 or 17-

(a) the right passes to such person as he may by testamentary disposition specifically direct; or

(b) if there is no such direction but the copyright in the work in question forms part of his estate, the right passes to the person to whom the copyright passes,

and if, or to the extent that, the right does not pass under paragraph (a) or (b), it is exercisable by his personal representatives."

[51] The learned judge gave a well-reasoned judgment dealing with all the concerns raised by the appellants on this issue (see paras. 106 to 159 of the judgment). She considered who the legal owner of the physical hard drive was and, in coming to her conclusion, she examined the credibility of the witnesses, in particular that of Mr Stephenson.

[52] She stated at paras. 134 and 135:

"134. I have assessed [Mr Stephenson's] case in its entirety. [Mr Stephenson's] assertion that he paid the deceased for all the production work done came across as being exaggerated as it did not appear consistent with the loose arrangement that they enjoyed. The fact that he kept referring to his notes but was never able to produce them or to give any indication of what sums were paid to the deceased caused me to think that it was unlikely that he paid the deceased for all the work he did.

135. There is also a blatant inconsistency in the evidence of [Mr Stephenson] as he first gave the impression that only one song on the album was attributable to the deceased and in

cross-examination he was very evasive in terms of the contribution the deceased made to the various songs on the album. He sought to downplay the role played by the deceased to the various songs on the album. His witnesses gave evidence of the significant contribution the deceased made to at least ten songs on the album. This was consistent with [Mrs Hibbert's] assertion on that issue. I found that [Mr Stephenson] failed to speak the truth in respect of the extent of contribution by the deceased to the actual songs on the album."

[53] She also reiterated this at paras. 151 and 152:

"151. [Mr Stephenson] demonstrated a lack of decisiveness hence the description accorded that he seemed to be sitting on the wall in respect of several of the songs on the album. He agreed that the deceased had produced several of the songs on the album but was generally evasive in relation to the role played by the deceased in respect of the songs on the album. He did not agree with many of the suggestions made with respect to the individual songs on the album. His witnesses Droop Lion and Mr. Burrell were more helpful in this regard. They were more assertive in terms of the role played by the deceased. They gave evidence that the deceased as producer would prepare 'demos' for Droop Lion to use. The evidence of Mr. Burrell which was unchallenged and which I accept was that 'demos' were sketch voices to show how a song was arranged and directed and that it was more of a guide.

152. I also accept that the thirteen songs were re-recorded by Droop Lion for the album and were sung by Droop Lion with at least ten of these sound recordings being authored by Mr. Hibbert. This is the majority of the album. It is clear that the deceased was not only a co-producer but also is the author and owner of several of the sound recordings, lyrics and music and musical works on the hard drive."

[54] At paras. 136 and 137, she stated:

"136. Despite the fact that these aspects of [Mr Stephenson's] evidence lack veracity, it did not severely affect the root of his case and the question as to who is the executive producer. It is a question that must be determined on a balance of

probabilities and so despite the conflicts in [Mr Stephenson's] evidence, the [appellants'] case proved to be even more inadequate as the [appellants] were unable to speak to certain essential facts concerning the genesis of the arrangement and who made the necessary arrangements throughout the project.

137. There is no evidence led to support any assertion that the deceased commissioned the recordings, set any budget, engaged and negotiated with artists or musicians or paid for production costs. [Mrs Hibbert] made an attempt to show that there was some payment made by D & F to some vocalists but this was successfully challenged by what I found to be the credible evidence given by Ms. Latoya Hall-Downer and Ms. Lisa-Gaye Davis that the money received by them was never in relation to the Droop Lion project. No cogent evidence has been provided that the deceased financed the production, short of providing the recording studio. The fact that he provided his studio is highly suggestive that he intended to play an integral role, however the fact that he played an integral role does not accord exclusively with his status of an executive producer as he would have been expected to play an integral role even in his capacity as producer."

[55] Having assessed the evidence before her, the learned judge concluded at paras. 142 and 143 as follows:

"142. Despite the inconsistencies and discrepancies on the case for [Mr Stephenson], [Mr Stephenson's] case struck me as being more consistent with the truth than that of the [appellants'] case. I accept the evidence of [Mr Stephenson] that [Mrs Hibbert] had never been a part of the musical affairs of the deceased on a day to day basis. She was therefore not privy to the details of the arrangement between the deceased and [Mr Stephenson] with respect to this project.

143. I therefore find that on a balance of probabilities that [Mr Stephenson] was the executive producer of the album. It is important to note that as executive producer, taking into account the provisions of the Copyright Act, he could be deemed the author and owner of the album or master recording but not the songs, sound recordings or contents of the album so this brings me now to the question of who is the owner of the album content."

[56] Therefore, the learned judge thoroughly considered the complaints raised by the appellants about Mr Stephenson's credibility.

[57] The complaint of Mr Wilkinson that the learned judge was wrong to have assessed what Mrs Hibbert-Thomas knew of the deceased affairs by remarking that she was not speaking to her father at that time, does not detract from her vigorous assessment of the credibility of Mr Stephenson and his witnesses, Droop Lion and Nigel Burrell. In any event, as Mr Bishop submitted, Mrs Hibbert admitted that Mrs Hibbert-Thomas had not spoken to her father for the last three years of his life. Mrs Hibbert-Thomas, herself in response to the question whether she had spoken to her father within two years of his passing, answered "[n]o and yes" (see page 98 of the record).

[58] The learned judge concluded that Mr Stephenson was the owner of the physical hard drive and that his evidence on this point was supported by Mr Burrell. She noted that the appellants brought no evidence to contradict this finding. The appellants, as indicated above, are not contesting this finding with any vigour and rightly so, as there was sufficient credible evidence for this finding to be made (see paras. 108 to 110 of the judgment).

[59] However, concerning Mr Stephenson's entitlement to immediate possession of the hard drive and its contents, the learned judge had to determine who owned the content. In doing so, she considered the evidence that was before her as to who the executive producer was. The authorities provide a legal basis to show that this approach was correct. In fact, both counsel agreed that the executive producer would be the owner of the contents of the hard drive. This is on the legal basis that the executive producer is the financier of the project. The executive producer is to be contrasted with a producer. While a producer puts together the music and the arrangement, the executive producer provides the money for studio time, engineers and producers.

[60] In determining who the executive producer was, the learned judge relied on several authorities, including **Henry Hadaway Organisation Limited v Pickwick**

Group Limited [2015] EWHC 3407 (**Henry Hadaway**). At para. 98, the learned judge stated as follows:

“The **Henry Hadaway** and **A&M Records Ltd.** cases referred to by counsel for [Mr Stephenson] demonstrate the importance of the person making the arrangements for the production and how the court should treat with his role. This is in keeping with the provisions of our Copyright Act which expressly provide that the author of a sound recording is the person by whom the arrangements necessary for its making are undertaken.”

[61] She adopted the questions referred to by the court in that case when determining who the person was that made the arrangements necessary for the recording or the visionary behind the project (see para. 118 of her judgment). While acknowledging that the court in **Henry Hadaway** did not refer to the term “executive producer”, she determined, in my view, quite correctly, that the court appeared to be referring to the concept (of the executive producer) in posing the questions for the determination referred to above. She indicated that the answers to those questions would assist in the determination of who was the author of the recordings. At para. 118, she set out the list of questions to be considered. It is not necessary to replicate these as the parties do not dispute the entitlement of the executive producer to the musical content on the hard drive.

[62] The evidence before the learned judge included the evidence of both Andrew Brown and Nigel Burrell. Mr Brown stated that Mr Stephenson handled his musical affairs by virtue of contractual arrangements and that the recordings done at the Reggae Centre were done pursuant to arrangements made and financed by Mr Stephenson. Mr Burrell stated that he and Mr Hibbert worked as co-producers on the Droop Lion project and that Mr Stephenson had handed him the hard drive to free up storage space on the studio work drive. He also stated that the hard drive had been left in the studio pending completion of the work. Further, he testified that the work done by musicians and backup singers and himself was fully paid for by Mr Stephenson. The learned judge’s assessment

also took into account the evidence of receipts from Mr Stephenson in relation to payment of backup singers for the Droop Lion project, as well as the lack of evidence or receipts from the appellants of payments made to musicians in relation thereto.

[63] Therefore, a strong evidential basis existed for the learned judge to have come to the conclusion that Mr Stephenson was the executive producer, in spite of the inconsistencies and discrepancies in his case (see **Dr Ralph Griffiths** at paras. [212] and [213]).

[64] At paras. 102 and 103, the learned judge addressed the concept of originality and referred to **Matthew Fisher v Brooker and others** [2009] UKHL 41 and **Redwood Music Ltd v Chappell & Co Ltd** [1982] RPC 109. The principle established by these authorities is that if the work is considered to be sufficiently original, although it is an arrangement of an earlier copyright work, it can attract a separate copyright. The learned judge, therefore, did not ignore the potential rights of Mr Hibbert's estate under the Act. She made a detailed analysis of this evidence at paras. 154 to 158 and then concluded that Mr Stephenson, as executive producer, was the first owner of the album (see para. [17] above).

[65] Section 22(1) of the Act describes the author of a protected work as the first owner of the copyright in that work (see para. [50] above). At para. 163 of her judgment, the learned judge expressed that there had been no denial that the deceased owned the copyright to some of the sound recordings and the musical works. Further, Mr Stephenson's evidence was to the effect that the project was not finalised until the final mixing, "cause you have to listen and when you listen some things are clashing, some things are out". This was again emphasised when he stated that there was a lot of work left to be done, "some of the instruments are demo, it's not finalized as yet" (see page 24 of the record).

[66] Mrs Hibbert was well aware of how copyright issues could be dealt with. In her evidence, she stated that the record producer is the one who put the project together

and arranged the music; that the executive producer paid for everything, and that he is the one who markets the completed CD. She also agreed that there were songs Mr Hibbert covered and he was not the original writer. Under those circumstances, he would receive a small percentage of royalty (page 92 of the record). She stated that the contribution made by Mr Hibbert to the Droop Lion project, would allow him, at the end of the project, to go and register to get royalties (page 93 of the record). She expressed that Droop Lion would also get royalties for his version (page 94 of the record).

[67] Mr Hibbert's rights under the Act, in relation to the musical works and sound recordings in the disputed album, remained extant even if the hard drive was delivered to Mr Stephenson. The learned judge considered it to be a live issue that could not be resolved at the trial and that it was unnecessary to do so. Further, she indicated that the issues relating to copyright would have to be determined by an expert in the music industry (she could hardly be expected to adjudicate on this issue without such expertise). Mr Wilkinson's complaint that the learned judge ought to have listened to the hard drive before making an order for its return to Mr Stephenson, as there were issues of contractual rights and copyright breaches that would have had to be considered is, therefore, baseless. In fact, in his oral submissions, he admitted that he was not really dwelling on the issue.

[68] The learned judge's approach in the particular circumstances of this case was, therefore, correct. The appellants failed to demonstrate where the learned judge erred on the law or in the assessment of these facts.

[69] These grounds of appeal, therefore, lacked merit.

Whether the appellants' refusal to comply with the demand was unqualified and unjustifiable (grounds e, m, n, p, q and r)

[70] The learned judge briefly addressed this issue at paras. 163 and 164 of her judgment and found that "[t]he estate is not the only person entitled to a share in the content and so they are not justified in retaining it. It is [Mr Stephenson] in his capacity

as executive producer who is entitled to immediate possession of it". She also considered the case of **Strand Electric and Engineering** and concluded that although it is not unreasonable to refuse to deliver the goods immediately upon demand in circumstances where a defendant wished to investigate the rights of a claimant, there was more than sufficient time for the appellants to do so, based on the length of time they had the hard drive.

Submissions

[71] Mr Wilkinson cited the case of **Brodber** in relation to the issue of "lawful excuse". He submitted that the hard drive was found at the Reggae Centre, which was located at the residential home of Mr and Mrs Hibbert. The appellants retained the hard drive because they were uncertain as to what was on it, and until otherwise determined, the hard drive was deemed to be the property of Mr Hibbert. They eventually discovered that the sound recordings on the hard drive included recordings of Mr Hibbert's vocals and him playing musical instruments, as well as the reproduction of songs previously recorded or written by Mr Hibbert that were re-recorded by Droop Lion. No legal arrangement existed between Mr Hibbert and Mr Stephenson, giving the latter ownership or rights for the musical work and sound recordings, it was submitted. Furthermore, at the time of the proceedings in the court below, Mr Hibbert's last will and testament had not yet been probated, and so the distribution of his assets could not be properly administered.

[72] Further, it was contended that the hard drive was retained after Mr Stephenson asserted that Mr Hibbert was only involved in one of the songs on the hard drive. The learned judge, however, noted the evidence of Droop Lion that not only did he receive "demos" from Mr Hibbert for several of the songs, but that Mr Hibbert brought some of the songs to the album project. Accordingly, the decision of the learned judge was prejudicial to the appellants and Mr Hibbert's estate. If Mr Stephenson were to be given possession of the contents on the hard drive, it would amount to an infringement of Mr Hibbert's copyright and ownership of the material on the hard drive, including the sound recordings, musical work, and literary works. King's Counsel also emphasised the

evidence of Mr Nigel Burrell that Mr Hibbert composed, produced, and/or wrote the vast majority of the songs on the album project. For those reasons, he argued, the appellants had established reasonable justification for retaining the hard drive.

[73] Mr Bishop's perspective, however, is clearly at variance with Mr Wilkinson's. Mr Bishop submitted that, subsequent to Mr Hibbert's death, Mr Stephenson observed a period of mourning before speaking to the appellants about the return of the hard drive. The claim in the court below was only initiated because, after several attempts, the appellants refused to return the hard drive. He expressed the view that the learned judge carefully considered whether the appellants were justified in retaining the hard drive and ruled in favour of Mr Stephenson. Her decision was in accordance with the case of **George and Branday**, as she found that the appellants are liable in the tort of detinue and that Mr Stephenson is entitled to immediately recover possession of the hard drive, including its contents. The cases of **Brodber** and **The Attorney General and The Transport Authority v Aston Burey** [2011] JMCA Civ 6, were also cited in support of these arguments and in contending that the learned judge was correct in law in finding that the appellants held onto the hard drive for an unreasonable length of time without justification. Once the elements of detinue were proven, the learned judge was correct in ordering the immediate return of the hard drive to Mr Stephenson.

Discussion

The relevant statutory provision

[74] Section 28 of the Act provides:

"28.-(1) On the death of a person entitled to the right conferred by section 14, 15 or 17-

(a) the right passes to such person as he may by testamentary disposition specifically direct; or

(b) if there is no such direction but the copyright in the work in question forms part of his estate, the right passes to the person to whom the copyright passes,

and if, or to the extent that, the right does not pass under paragraph (a) or (b), it is exercisable by his personal representatives.”

[75] In a cause of action for detinue there must be a wrongful detention of property, and, in order to establish that, there must be an unconditional demand for the return of the property and a refusal after a reasonable time to comply with such a demand (see **Dr Ralph Griffiths** at para. 137 where Halsbury’s Laws of England, 3rd edition is quoted).

[76] I have already concluded that the learned judge could not be said to have erred when she determined that Mr Stephenson was the executive producer and he was entitled to the immediate possession of the hard drive. The only remaining issue is whether the appellants could be said to have a reasonable justification for retention of the hard drive.

[77] Mr Stephenson provided evidence that he made an unqualified and specific demand to the appellants for the return of the hard drive and that there was no compliance. The learned judge found that the appellants had failed to justify that they were entitled to keep the hard drive.

[78] Whether the appellants had any lawful excuse or were unreasonable and unjustified in retaining the hard drive is fact-specific, as established by the evidence. Although both parties were claiming the right to possession, the learned judge found, based on the evidence before her, that the appellants did not establish that they were justified in refusing to give up possession. In coming to that conclusion, she considered that while Mrs Hibbert gave evidence that she was in charge of the business affairs relevant to D&F Music, the appellants were not aware of the specific arrangements made by Mr Hibbert with Mr Stephenson and Droop Lion, regarding the project. This was in contrast to the evidence of Mr Stephenson, Droop Lion and Mr Burrell who spoke about the roles played by both Mr Hibbert and Mr Stephenson. Further, although Mrs Hibbert exhibited four receipts of payments made to two backup singers on 26 February 2020 and 4 August 2020, she admitted that these receipts were not evidence of work paid by D&F Music on the Droop Lion project. Those backup vocalists were identified as Latoya

Downer and Lisa Davis. In Ms Downer's affidavit, she stated that while she had done backup vocals for Mr Hibbert and his children, she was never engaged to do so on the Droop Lion project. Ms Davis, in her affidavit, also stated that she had never provided services for the Droop Lion project. There was no proof of payments made for the Droop Lion project by D&F Music.

[79] Mrs Hibbert was also cognisant of the fact that songs provided by Mr Hibbert on the hard drive, as well as his role in the playing of musical instruments, were not proof, without more, of his role as executive producer of the project. The appellants would only have been justified to retain possession of the hard drive after a reasonable time had elapsed for investigation of the matter. The appellants would have been aware of these issues, as they had retained counsel in the matter.

[80] On the other hand, Mr Stephenson, in contending that he was the executive producer, exhibited a copy of the Artist Management Contract he had with Droop Lion, as well as showed that there was a contractual arrangement with Dave Spero concerning the Droop Lion project. He also spoke to paying musicians and backup vocalists and exhibited four receipts dated 20 and 21 May 2020 to Sheldon Palmer and Hopeton Williams, specifically indicating that it was work for hire on the Droop Lion project.

[81] The appellants were also invited to review the sound recording jointly with Mr Stephenson in order to mediate the issues. They refused to do so at the time (it was apparently during a subsequent mediation process that the parties listened to the contents). It is within this context that the learned judge would have assessed the issue of lawful excuse and reasonableness.

[82] A review of the chronology of events is helpful to fully determine this issue. After Mr Hibbert's death on 11 September 2020, Mrs Hibbert-Thomas wrote a cease and desist letter dated 30 September 2020 to Mr Stephenson. Mr Stephenson gave evidence that he sought to retrieve the hard drive that had been left in the custody of Mr Burrell, as he wished to complete the album for possible release in the last quarter of 2020 or the first

quarter of 2021. Further, he had numerous conversations with the appellants as well as with the lawyer representing Mrs Hibbert-Thomas. He was seeking to retrieve the hard drive but met with no success. He also stated that he offered to have the hard drive opened and the recordings played, so a determination could be made as to whether the appellants had an interest in the material, but they never responded. He then instructed his lawyer to issue a formal demand. This was done on 10 December 2020 by letter to the appellants. Between 10 December 2020 and 11 January 2021, discussions were held between attorneys for the appellants and Mr Stephenson. On 28 January 2021, the fixed date claim form was filed. Mr Stephenson contended that his lack of access to the hard drive caused him significant financial loss, as it was relevant to the contract with David Spero Management. A letter from Mr David Spero to Mr Stephenson, dated 18 January 2021, was also exhibited. That letter enquired about the master tapes for the proposed Droop Lion album.

[83] The letter of 10 December 2020 is exhibited. It shows that the demand was made for the hard drive to be delivered within seven days, failing which, instructions had been given for the necessary action to be taken. The response of the appellants, through their attorney, was a letter written on 22 January 2021 explaining that steps were being taken to probate the will of Mr Hibbert and that the deceased's estate had a significant interest in the contents of the hard drive. There was no indication of whether there was any willingness to go through the hard drive jointly.

[84] If one disregards the entire month of October, the appellants had the period between the month of November and 10 December 2020 and even beyond that to 28 January 2021 (when the fixed date claim form was filed), to ascertain the contents of the hard drive and hold discussions with all relevant persons, including examining any documentary evidence. Instead, a hard line was taken. Mrs Hibbert, in her affidavit, stated that she advised Mr Stephenson that nothing should happen in this matter until the estate is probated and wound up. In cross-examination, she said that she did not know how long that would take (page 96 of the record). Also, she was well aware of the

distinction between a producer and an executive producer, and that any rights in favour of the estate of the deceased could be protected. Mr Hibbert's legal rights would have been protected under the Act.

[85] The retention of the hard drive was unjustified and unreasonable. While a limited detention was justified for a reasonable time to allow for investigation following the death of Mr Hibbert, it is apparent that the appellants had no interest in moving forward with such an investigation in a timely fashion. In my view, a reasonable period for discussion and investigation would have ensued between November and December 2020. By 10 December 2020, when Mr Stephenson's counsel wrote to the appellants' counsel, a reasonable position should have been adopted in all the circumstances. In relation to the issue of damages, the learned judge concluded that this was a matter for assessment of damages. At that time, Mr Stephenson would have the burden to prove what damages, if any, he suffered.

[86] These grounds were found to have no merit.

[87] It is for these reasons that we made the orders set out at para. [2] and correct at para. [4] above.

FOSTER-PUSEY JA

[88] I have read the draft reasons for judgment of my learned sister Straw JA and I agree that it was for these reasons that I concurred with the orders made. I have nothing else to add.

V HARRIS JA

[89] I, too, have read, in draft, the reasons for judgment of my learned sister Straw JA, which accord with my own reasons for concurring with the court's decision. I have nothing else to add.