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Neutral Citation Number: [2022] EWHC 74 (IPEC)

Claim No: IP-2020-000140

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

The Rolls Building

7 Rolls Buildings

Fetter Lane

London EC4A 1NL

Date: Wednesday, 19 January 2022

Before:

MS. PAT TREACY

(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between:

MR KIERAN HEBDEN **Claiman**

- and -

DOMINO RECORDING COMPANY LIMITED **Defendan**

- -

- -

SAM CARTER (instructed through the public access scheme**)** appeared for the **Claimant**.

TOM RICHARDS (instructed by **Russells)** appeared for the **Defendant**.

Hearing dates: 16 December 2021

- -

APPROVED JUDGMENT

DEPUTY JUDGE TREACY:

Introduction

1.

The Claimant, Mr Kieran Hebden, is a musical performing and recording artist who performs and records under the name Four Tet, among others.

2.
Mr Hebden has engaged Mr Carter as Counsel under the direct access scheme. He is also assisted on legal issues by Mr Aneesh Patel, but is formally conducting the litigation on his own behalf.

3.
The Defendant, Domino Recording Company ("Domino") is an independent record label. Domino's solicitors are Russells. It was represented at the hearing by Mr Richards.

4.
Mr Hebden and Domino entered into an exclusive recording agreement dated 28 February 2001 (the "2001 Agreement"). Under that agreement, Mr Hebden was obliged to provide certain sound recordings to Domino within a specified period and assigned the copyright in those sound recordings (the "Masters") to Domino. During that period, Mr Hebden was obliged to provide his services as a musical recording artist under the name Four Tet only to Domino. Domino released the Masters and accounted for and paid royalties in respect of them.

Procedural history

5.
The claim was issued in the Intellectual Property Enterprise Court on 16 December 2020.

6.
In very broad terms and for background purposes only, Mr Hebden's existing claim is that Domino has breached its contractual obligations under the 2001 Agreement, in particular by failing to account properly for royalties in respect of streaming and digital downloads. Mr Hebden seeks a declaration as to the true construction of the 2001 Agreement and monetary relief capped at £70,000.

7.
The Defence was filed and served on 21 February 2021, resisting the claim in its entirety. A Reply was served on 12 March 2021.

8.
At the CMC on 23 April 2021, a split trial was ordered with issues of liability to be determined first. The liability trial was scheduled for the third week of January 2022 and was set down for trial over two days with half a day judicial pre-reading.

9.
Disclosure was given on 30 July 2021. A specific disclosure application by the Claimant on 11 November 2021 resulted in limited further disclosure by the Defendant.

The applications

10.
There are two applications:

- Mr Hebden's application for permission to amend the Particulars of Claim (the "Amendment Application"); and

-

Domino's application for strike out and/or summary judgment (the "SJ Application").

11.
Both applications arise from recent events which are briefly summarised below:

- Domino's solicitors wrote to Mr Hebden on 16 November 2021. By that letter:
  - Domino made an open offer to pay sums corresponding to the damages sought under the original Particulars of Claim, and costs;
  - Domino informed Mr Hebden that it had instructed all digital service providers ("DSPs") to withdraw the Masters, and undertook not to exploit the Masters digitally in future without first agreeing terms in writing with Mr Hebden. Domino also indicated that it would not agree the 50% rate claimed by Mr Hebden for exploitation; and
  - Domino stated that, in the light of its offer and its unilateral conduct/undertakings, the proceedings should be stayed. Domino further explained its intention to apply for dismissal of the proceedings should Mr Hebden not consent to a stay.
- A draft Tomlin Order was subsequently provided to Mr Hebden at his request. Mr Hebden informed Domino's solicitors on 24 November 2021 that he considered Domino's conduct in withdrawing the Masters from the DSPs, and in stating that it would not exploit them digitally in future, to be a fundamental breach of the 2001 Agreement.
- Domino denied breach and issued the SJ Application on 25 November 2021.
- On 6 December 2021, Mr Hebden applied for permission to amend his Particulars of Claim to include claims relating to Domino's recent conduct.
- On 14 December 2021, Domino's solicitors wrote to Mr Hebden explaining that Domino did not consent to the proposed amendments.
- This hearing was listed for 16 December 2021 to deal with the competing applications.

The SJ Application

12.
Domino contends that, as it has made an open offer to pay Mr Hebden's existing money claim in full, and has undertaken not to exploit the Masters digitally in future, Mr Hebden has no real prospect of obtaining the declaratory relief he seeks because it would serve no useful purpose. In those circumstances, it is said that the pursuit of the remainder of the current claim to trial is an abuse of process as it is "not worth the candle" (Jameel v Dow Jones and Co [2005] EWCA Civ 75, [2005] QB 946).

13.
Domino also contends that Mr Hebden’s claim should be dismissed because it is pursued for an improper collateral purpose, namely, to exert pressure on Domino to assign the copyright in the Masters to Mr Hebden, rather than to vindicate any legal right alleged in the claim.

The Amendment Application

14.
The draft amendments allege that Domino’s decision to withdraw the Masters from digital release and no longer to make them available digitally breaches the 2001 Agreement. The amendments focus on the construction and scope of Domino’s release obligations under the 2001 Agreement and on the consequences of the alleged breach of those obligations. Permission is also sought to add an alternative claim relating to alleged restraint of trade. If permitted, the draft amendments would add significant new claims to the existing proceedings.

15.
It was agreed that if the Amendment Application succeeded the trial would have to be vacated. Domino has stated that, in those circumstances, its position would be that the action, including any amended claims, should be transferred into the Chancery Division. Mr Carter stated on instruction that Mr Hebden could afford to continue the litigation only if it remained in IPEC.

Conduct of the hearing

16.
Given the implications for the SJ Application of the success or failure of the Amendment Application, Counsel first made submissions on whether any or all of the proposed amendments should be permitted. By the time submissions on that aspect had concluded, there was no longer sufficient time to hear submissions on the SJ Application, notwithstanding earlier suggestions by Mr Carter that the entire hearing would take no more than half a day at most.

17.
As I had by that time reached a conclusion on the Amendment Application, I considered that in the interests of efficiency and of justice, I should tell the parties of my decision on that application, indicating that I would provide a reasoned Judgment in due course. For the reasons set out below, the Amendment Application was refused in respect of the pleadings related to restraint of trade, but granted for the other grounds. It was therefore not necessary to address the SJ Application.

Relevant factual background

18.
The proposed amendments will be more easily understood in the light of two key provisions of the 2001 Agreement:

“2. Term

2.1 The expression “the Term” shall mean a period commencing on the date hereof and expiring upon your termination thereof in accordance with the provisions of sub-clause 2.2 below SAVE that if we call for all the Product Commitment hereunder then the Term shall expire six (6) months after the date of initial release in the UK of the last Album to be released hereunder in fulfilment of the Product Commitment

2.2 No sooner than one (1) year nor later than three (3) years after the date of initial release of a Commitment Album in the UK (other than the last such Album) you shall send us a cassette of bona fide demo recordings of a reasonable standard of songs that you intend shall comprise the next such Commitment Album ("Next Album Demos") under cover of a notice hereunder specifying such intention and in the event that we shall fail to give you notice calling for such next Commitment Album within two (2) months of the date of our receipt of such demo recordings then you shall be entitled to serve notice on us terminating the Term hereof For the avoidance of doubt we shall be entitled to give you notice calling for a Commitment Album at any time prior to the expiry of such two (2) month period following the release of the previous such Commitment Album

2.3 We shall be entitled to suspend the Term in respect of any period in which you fail or refuse to comply with the performance of your obligations hereunder SAVE that no single period of suspension shall exceed one (1) year

[….]

4. RELEASE COMMITMENT

4.1 We shall procure the release in the United Kingdom of each Commitment Album that we shall call for hereunder within one hundred and twenty (120) days following the Delivery of the same

4.2 We shall use our reasonable endeavours to procure the release in the Major Markets of a Commitment Album within one hundred and eighty (180) days following the release of the same in the United Kingdom

4.3 In the event that we shall not have released the relevant Commitment Album in accordance with the provisions of sub-clause 4.1 above you shall be entitled to give us written notice requiring us so to do and in the event that we shall not released the said Commitment Album within one hundred and sixty (60) [sic] days following our receipt of such written notice you shall be entitled to:

4.3.1 purchase from us the rights in the said Commitment Album upon reimbursement to us of any and all advances which we have paid in respect of such Commitment Album within sixty (60) days following the expiry of the sixty (60) period as aforesaid PROVIDED THAT you shall not have commenced making any subsequent Commitment Album and PROVIDED FURTHER THAT you shall secure a release for us of any of our obligations to make payment of monies to producers and/or any other third parties; and

4.3.2 terminate the Term of this Agreement forthwith by notice in writing PROVIDED THAT you shall not have commenced making any subsequent Commitment Album

4.4 In the event that we shall not have released the relevant Commitment Album in accordance with the provisions of sub-clause 4.2 above you shall be entitled to give us written notice requiring us so to do and in the event that we shall not have released the said Commitment Album within a period of ninety (90) days following our receipt of such written notice you shall be entitled to require us at any time thereafter to license such Commitment Album to any third party of your choice provided that the terms are reasonably satisfactory to us and provide for a royalty of not less than four per cent (4%) of the dealer price of any record embodying the Masters comprising such Commitment Album to us after payment of royalties to all other parties including you

4.5 Your entitlements under sub-clauses 4.3 and 4.4 above shall be your sole remedy in respect of any failure by us to procure a release under sub-clauses 4.1 and/or 4.2 as aforesaid"

19.
Clause 16 contains further potentially relevant provisions, requiring Domino to obtain Mr Hebden's approval before undertaking various acts in respect of the Masters. The acts in question include resequencing or otherwise altering the Masters. Clause 16 also provides that Domino will consult with Mr Hebden before entering into a licence agreement covering the United States of America. As will become apparent below, an issue between the parties is as to the construction of "Term" and its implications. For convenience, I summarise their positions on this issue here.

20.
The parties are agreed that the exclusive recording provisions of the 2001 Agreement terminated in around 2005.

21.
Mr Hebden's position is that the Term related primarily or only to those exclusive recording provisions and that at least Domino's royalty and release obligations continued after that date. The proposed amendments plead that Domino's recent conduct was a breach of those remaining elements of the contract.

22.
Domino's position is that, while some aspects of the 2001 Agreement (such as those relating to accounting and payment of royalties) survived the "Term", no obligation to release or promote survives the Term and that any other reading is inconsistent with the wording of clause 4, which is also said to set out the sole remedies available for breach, in combination with clause 14.8, which provides for certain notice requirements:

"No default of any provision hereunder shall be considered a breach of a material obligation giving a right of termination unless and until the party complaining of such default shall serve notice on the other giving full details thereof and requesting the same (if capable of remedy) to be remedied and the other party or parties (as the case may be) shall have failed to remedy such default or taken substantive steps to remedy such default within a period expiring thirty (30) days from the date of such notice."

The legal test for permission to amend

23.
Amendments to Statements of Case for which permission is necessary are dealt with under CPR 17.3. The Court's exercise of its discretionary power to permit amendment "should have regard to all the matters mentioned in CPR.1.1(2) so as to deal with the case "justly and at proportionate cost" in accordance with the overriding objective" (White Book 17.3.5).

24.
In seeking to draw the appropriate balance between the interests of the various parties to the case and of third parties, including litigants in general, one consideration is whether the amendment has real prospects of success. Other relevant considerations include, for example, the adequacy of the draft pleading before the Court and whether the application to amend is close to the trial date. A number of the potentially relevant considerations are set out in paragraph 38 of Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm) to which Mr Richards referred me during argument. That was a case in which permission was sought for very late amendments. However, the circumstances were very different from the context of Mr Hebden's application, and Mr Richards

confirmed that Domino accepted that considerations relating to the proximity to the trial date or delay did not arise in this case.

25.
Notwithstanding the multiple considerations that may, depending on the context, influence the Court's exercise of its discretion, Counsel for both parties agreed that the principal considerations in this instance were the need to deal with the case in accordance with the overriding objective and whether any or all of the draft pleadings had sufficient prospects of success to be permitted to proceed to trial.

26.
It is common ground that, as summarised in Quah Su-Ling v Goldman Sachs International: "An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation." [p. 36]

27.
The Court may conclude on a summary basis that a pleading is not arguable if the pleading is legally defective or not maintainable in law. As explained in the White Book in the context of CPR 24.2.3, it will be appropriate to do so if the application gives rise to a point of law or construction on which the Court is satisfied both that it has all the evidence necessary for a proper determination and that the parties have had adequate opportunity to address it in argument so that it is clear that there is no real prospect of success. The Court should then 'grasp the nettle'. However, the Court must not conduct a mini trial and it may be that the matters involved are of sufficient complexity, or that the pleadings arise in areas where the jurisprudence appears to be unsettled or evolving, such that evaluation in the light of full legal argument, prepared and delivered after proper consideration and preparation, is appropriate.

28.
While the complexity of a case may militate against summary decisions, complexity in itself will not preclude a decision to refuse permission to amend where it is clear that a proposed amendment has no prospects of success.

The proposed amendments for which permission is sought

29.
The proposed amendments involve a series of cascading pleadings. Counsel's skeleton arguments separated the amendments into various discrete issues and, although there were some differences between the parties as to categorisation, I have adopted that broad approach below. The proposed amendments at paragraph 2A to 2I of the proposed Amended Particulars of Claim ("APOC") are a summary of Mr Hebden's proposed case post-amendment. The substantive proposed amendments are summarised below.

Express or implied duty to exploit/duty of good faith

30.
The first substantive set of proposed amendments is at draft paragraphs 3A and 3B. These plead that under the 2001 Agreement properly construed, "each of clauses 4.1 and 4.2 imposed on Domino a

continuing obligation to use reasonable endeavours following release to exploit the Masters … by all then-industry-standard means, in the UK and in the Major Markets respectively”.

31.
Draft paragraph 3C.1 pleads an equivalent implied term.

32.
Draft paragraph 3C.2 then pleads an implied obligation on Domino “to act in good faith in relation to the exploitation of the Masters under the 2001 Agreement”.

33.
Draft paragraph 3D pleads each of the obligations pleaded in draft paragraphs 3B and 3C was a condition of the 2001 Agreement, and of the copyright assignment provided for in clause 3.2 of that Agreement.

34.
Draft paragraph 10 pleads that the exclusive recording elements of the 2001 Agreement came to an end around November 2005 but that the obligations relating to the payment of royalties and the Release Commitment in clause 4 continued in force until terminated by repudiatory breach.

35.
Having pleaded to the express or implied contractual obligations, paragraphs 15.1 to 15.11 are unamended and set out the basis of Mr Hebden’s original claim. New draft paragraphs 15.12 to 15.14 set out the basis of Mr Hebden’s draft amended claim describing the withdrawal of the Masters from digital exploitation and Domino’s statements in its solicitors’ letters of 16 November and 25 November 2021, that it would no longer exploit the Masters digitally.

36.
Draft paragraphs 17A to 17E set out the new alleged breaches and plead that those alleged breaches resulted in the termination of the 2001 Agreement. In summary:

- the terms breached were conditions of the 2001 Agreement (draft APOC, paragraph 3D);
- the alleged breaches of those terms were repudiatory or renunciatory (draft APOC, paragraph 17A);
- Mr Hebden has accepted such repudiation or renunciation (draft APOC, paragraphs 17B and 17C);
- Domino’s conduct in withdrawing the Masters from digital distribution was not in good faith but, in part at least, to avoid adjudication by the Court of Mr Hebden’s original claim (draft APOC, paragraph 17E).

37.
Finally, on this aspect of the proposed new pleading, draft paragraphs 19A and 19B plead that: (i) following the alleged termination by fundamental and repudiatory breach, the copyright in the Masters has reverted to Mr Hebden; or, (ii) in the alternative that even if Domino’s conduct is not fundamental and repudiatory breach, it is a renunciation by Domino of some or all of the 2001 Agreement, which Domino should not be permitted to remedy under clauses 4.3 and/or 4.4 of the 2001 Agreement, meaning that the copyright in the Masters reverts to Mr Hebden.

Proposed reliance on clauses 4.3 and 4.4 of 2001 Agreement

38.
Draft paragraph 19C pleads that if Mr Hebden fails both: on his case that the termination by breach pleaded in draft paragraphs 15.12 and 15.13 of the APOC is fundamental and repudiatory; and on his case that Domino's conduct is a renunciation by Domino which Domino should not be permitted to remedy, Mr Hebden is entitled to rely on clauses 4.3 and/or 4.4 of the 2001 Agreement. It is pleaded that if Domino fails to remedy its breaches by re-commencing digital exploitation within the periods provided in those clauses, Mr Hebden will be entitled to purchase the copyright in the Masters under clause 4.3 and/or to require a licence of the copyright under clause 4.4. In the alternative, if Domino does remedy its breaches, draft paragraph 19C.2 pleads that the original dispute will continue to require determination.

Restraint of trade / copyright infringement

39.
Mr Hebden seeks permission to plead a restraint of trade case to be run in the alternative if his case that the 2001 Agreement imposes continuing obligations upon the Defendant to exploit fails. Paragraph 19D pleads that the consequences of success on the restraint of trade case would be either:

(i)
that the agreement is void as from its conclusion and/or unenforceable; or

(ii)
that the agreement is voidable and/or unenforceable.

40.
The consequence of success on the first of those arguments is said to be that the copyright in the Masters at all times remained with Mr Hebden. The consequence of the second is said to be that as from, at the latest, the date on which Domino had sight of the draft APOC the copyright reverted to Mr Hebden. On either premise it is argued that Domino's continued exploitation of the Masters would amount to copyright infringement, and Mr Hebden pleads that if success on the restraint of trade case resulted in the 2001 Agreement being void from its inception, all of Domino's acts of exploitation to date and in the future would infringe Mr Hebden's rights in the Masters.

41.
Finally, the draft APOC adds some further prayers for relief reflecting the draft claims.

Submissions / assessment

42.
Mr Carter submitted that all of Mr Hebden's proposed amendments have real prospects of success. His position on the appropriate test was that, unless proposed amendments are clearly flawed, the threshold for persuading the Court that amendments have no real prospects of success is high, particularly where the relevant areas of law are complex and unclear and/or involve evolving areas of jurisprudence. In his submission all of the proposed pleadings fall into those categories so that they are not suitable for summary determination and should be permitted.

43.

Mr Carter also submitted that, while permission to amend may be refused in circumstances where draft pleadings are inadequate, this would not be appropriate where Mr Hebden had pleaded his case sufficiently clearly to allow Domino to understand that case it would have to meet. In this case, the chronology of events leading up to the hearing of the Amendment Application are said to be relevant to the Court's exercise of its discretion to permit amendment subject to any necessary clarification. Mr Carter referred, among other things, to the compressed timeframe within which the draft amendments had to be prepared.

44.
Mr Richards' position was that none of the proposed amendments was tenable. His forensic approach to the legal basis for, and legal consequences of, each of the proposed amendments was most helpful. However, for the reasons below, he was not successful in persuading me that it was appropriate to refuse permission for all of the draft amendments on a summary basis.

45.
Mr Richards criticised the drafting of parts of the draft APOC. However, ultimately, he did not suggest that drafting issues should, in these circumstances, be the criterion for refusing permission. Mr Richards further accepted that it would not be appropriate to contend that the timing of the amendments, including the likely loss of the trial date, should affect the assessment.

46.
In substance, therefore, the principal question addressed by Counsel for both parties was whether it would be appropriate in the light of the overriding objective, including the likelihood of success, to refuse permission to amend. One other issue was raised briefly, whether there was incoherence in the pleading owing to its material inconsistency with the originally pleaded case. I turn to this first.

Express or implied duty to exploit/duty of good faith – inconsistency of pleadings – submissions

47.
Mr Richards contended that the pleading of breach in the draft APOC was incoherent, referring back to the Court's observations in Quah Su-Ling v Goldman Sachs International on the Court's ability to refuse to permit a contradictory pleading: "The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or…". He submitted that the draft amended pleading was so contradictory as to be incoherent on the basis that it made no sense for Mr Hebden to allege, simultaneously, that the digital exploitation of the Masters was in breach of the 2001 Agreement and also that the cessation of such exploitation was also in breach.

48.
Mr Richards explained that Domino had understood Mr Hebden's original pleading to allege that digital exploitation of the Masters by download and streaming is in breach of the 2001 Agreement. He referred to paragraph 15 of the original Particulars of Claim, submitting that it specifically pleaded that making available the Masters by these digital means was a breach. He also referred to the pleading in the Reply, which relied on statements in the Defence that Domino had made the Masters available by streaming and downloading. Mr Richards further referred to and relied on Mr Hebden's previous objections to the exploitation of the Masters by streaming.

49.
Mr Carter's response was that the pleading contained no inconsistency and that Mr Richards' clients had misunderstood it. The original pleading was as to breach through a failure to pay royalties at the appropriate contractual rate for digital exploitation; the subsequent draft pleading was as to breach

by failing to use reasonable endeavours to continue to exploit digitally. Mr Carter submitted that the two pleadings are entirely consistent and there is no incoherence as the specific language in original paragraph 15 referred to by Mr Richards formed part of a description of the factual background to the royalty claim rather than a standalone pleading of breach of contract by streaming. Mr Carter also stated that at no point since the signature of the 2001 Agreement had Mr Hebden objected to digital exploitation as such, although he noted that there had been discussions between Domino and Mr Hebden about making the Masters available on Spotify. He drew attention to the evidence on those discussions that had been included in the bundle for the hearing.

Express or implied duty to exploit/duty of good faith – inconsistency of pleadings – assessment

50.
If this issue becomes relevant at trial (for example in the context of a dispute about whether Domino's actions in requiring the DSPs to cease digital delivery of the Masters were in good faith), then the varying interpretations of the parties as to the scope of the breach originally pleaded in the Particulars of Claim may require further consideration. For the purposes of this application, however, having considered the submissions of Counsel as to the initial pleading, I conclude that there is no obvious inconsistency between the original pleading of breach and that for which permission is now sought such that permission to amend should be refused on grounds of incoherence or self-contradiction.

51.
Specifically, I do not agree that Mr Hebden's earlier objections to aspects of digital exploitation clearly support a reading of the original pleading as meaning that the 2001 Agreement did not authorise digital exploitation at all. Only limited evidence on this issue was available. The evidence that was available included Mr Hebden's Witness Statement dated 22 November 2021. That witness statement set out the circumstances in which Mr Hebden had objected to the streaming of his music via Spotify. It states that, after a request from Mr Hebden, Domino removed Mr Hebden's music from Spotify for a period of time after which Mr Hebden's Four Tet albums (but apparently not his singles) were made available to Spotify again. The Witness Statement of Mr Bell, from Domino, also dated 22 November 2021, deals more briefly with this issue, but broadly confirms that Domino removed Mr Hebden's music from Spotify (and apparently from other platforms) for a period at his request, but subsequently made it available again. In the absence of further evidence on the issue, this suggests that Mr Hebden did not object to digital distribution of his music as such. I conclude that the original pleading is sufficiently capable of bearing the interpretation contended for by Mr Carter to mean that there is no clear inconsistency between it and the amended pleading for which permission is now sought.

Express or implied duty to exploit/duty of good faith – substance – submissions

52.
Domino argued that any construction of clauses 4.1 and 4.2 and of Domino's Release Commitment which sought to impose a continuing obligation on it to exploit the Masters was untenable in the light of the wording of the contract and its clear and ordinary meaning. It was submitted that "release" describes a commercial launch rather than any kind of continuing exploitation thereafter and that this would have been obvious to the parties and their lawyers at the time they concluded the 2001 Agreement. During submissions, Mr Richards made clear that Domino's position was that the obligation to release required a 'genuine commercial release'; it could not be satisfied by a momentary release and subsequent withdrawal, a suggestion that he described as a 'strawman'. A

‘genuine commercial release’ would not, however, involve an obligation to continue to exploit subsequently.

53.
Mr Richards relied on Panayiotou v Sony Music Entertainment (UK) Ltd [1994] EMLR 229, 368 (“Panayiotou”) which he described as perhaps the leading case on recording contracts of the 1990s. In that case, Jonathan Parker J summarised the then current practice in the record industry, noting that it was rare for a record company to accept a positive obligation to exploit after first release.

54.
Mr Richards also relied on the specific wording of clauses 4.1 and 4.2, noting that these provisions refer to “release” as something that must happen “within specified time frames” and that failure to release can lead to termination of the Term under clauses 4.3 and 4.4. This was said to be clearly inconsistent with a suggestion that clauses 4.1 and 4.2 impose an obligation to exploit which continues beyond the Term for the full life of the copyright in the Masters.

55.
As to possible implied terms, Mr Richards submitted that the implied term pleaded clearly failed the tests for implying a term, namely that it should be: (i) fair and reasonable; (ii) necessary to make the contract work; and (iii) consistent with the express terms of the contract. He also noted that the tests are to be applied at the time when the contract is concluded so, in this instance, at the date of the 2001 Agreement.

56.
Mr Richards relied on three authorities to establish that it was beyond dispute that an assignment of copyright does not carry with it an implied obligation to exploit.

57.
The first was Nichols v Amalgamated Press (1908) Macg Cop Cas (1905-10) 2 166 (“Nichols”). The Court of Appeal held that the assignment by a composer to a music publisher of the copyright in songs involved no implied obligation on the publisher to publish the songs. In that case, the only payment to the composer would arise from publishing royalties if the compositions were published. The Court held (at page 168) that “The defendant company had the right to determine whether the songs should be published or not, and if published, in what form and how advertised.”

58.
Schroeder Music Publishing v Macaulay [1974] 1 WLR 1308 (HL) (“Schroeder”) also involved a music publishing contract. The composer assigned to the publisher the worldwide copyright in musical works composed over a considerable period. The House of Lords held that the publisher could simply place the compositions “in a drawer and leave them there”, saying that there were many reasons why a publisher might choose not to publish. In discussing this case Mr Richards properly pointed out that while saying that “I do not think that a publisher could reasonably be expected to enter into any positive commitment to publish future work by an unknown composer”. Lord Reid had suggested that “[p]ossibly there might be some general undertaking to use [the publisher’s] best endeavours to promote the composer’s work. But that would probably have to be in such general terms as to be of little use to the composer.” [p. 1313H]. Mr Richards did not regard that as undermining his general point that no positive obligation to exploit could be implied into an agreement assigning copyright.

59.

Both Nichols and Schroeder involved music publishing contracts where the copyright assigned was that in a musical composition, depriving the author of the ability to benefit economically from his creation for the term of the copyright. Mr Richards submitted that the principle that there is no implied obligation to exploit must apply at least as strongly to assignments where the copyright assigned is only that in the sound recording. As this means that (subject to specific contractual restrictions) the artist may perform, re-record and otherwise exploit the copyright in the underlying composition, Mr Richards submitted that there could be no question that an implied obligation to exploit would be required as a matter of necessity to make the contract work, nor would such an obligation be required as a matter of fairness and reasonableness, given the views already expressed by the Courts in the context of music publishing contracts.

60.
Mr Richards stressed that none of Domino's legal advisers had identified any case in which a recording contract had been held to include any implied obligation to exploit. He referred me to John v James [1991] FSR 397, in which the claimants sought, among other things, rescission of publishing and recording agreements under which they had assigned the copyright in a large number of musical compositions and sound recordings. The rescission claim was based on allegations of undue influence. The defendants countered this by arguing that the agreements in question contained an implied term to use reasonable diligence to exploit the works. Nicholls J disagreed. He referred to the express terms of the recording agreement as tending against such a conclusion and further held that, even if such a term were implied, any such obligation would have been necessarily so loose and imprecise that it would have afforded the claimants little protection.

61.
Mr Richards then addressed the specific draft pleading of an implied obligation on Domino "to act in good faith in relation to the exploitation of the Masters under the 2001 Agreement". He submitted that Mr Hebden had identified neither what the alleged obligation of good faith required nor how it had come about. As the content of any implied duty of good faith is variable and heavily dependent on context (Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [141], [147] per Leggatt J), it was submitted that: first, the plea was not properly particularised and had no prospect of success; and secondly, to the extent that any pleaded good faith obligation encompassed a duty to exploit, it should fail for the reasons he had already put forward in relation to the alleged express and implied terms requiring exploitation.

62.
Mr Carter disagreed that any short or straightforward point of law or construction had been identified which provided a basis to refuse Mr Hebden the possibility of having his proposed amended case dealt with at trial.

63.
As to the construction of the express provisions, he submitted that Domino's proposed construction of clauses 4.1 and 4.2 of the 2001 Agreement was clearly absurd and could not be redeemed by referring to the existence of certain specific remedies for particular breaches. In his written submissions he had suggested that Domino's construction of the 2001 Agreement would entitle Domino to satisfy its contractual obligations to release Mr Hebden's music by placing one CD on a shelf briefly and then removing it again and that such a construction would not reflect the commercial realities of a recording agreement and would be wholly unreasonable.

64.

Having heard Mr Richards' submissions as to the proper construction of the release commitment in Clause 4 of the 2001 Agreement (see paragraph 52 above), Mr Carter submitted orally that the Court could not, without evidence, decide what a requirement of 'genuine commercial release' would have entailed in 2001. He disagreed with Mr Richard's reliance on the Panayiotou case, arguing that the comments in that case represented only a summary of the factual position as understood by the judge in the early 1990s and had no bearing on the position in the early 2000s. In any event, Mr Carter submitted that it was certainly arguable that, having released the material digitally, then taking active steps to withdraw the Masters from DSPs was not consistent with the concept of a genuine commercial release.

65.
If wrong on the construction of the express terms, Mr Carter submitted that, in the light of the facts and contents of the specific contract, the implied obligation for which Mr Hebden contended satisfied all of the relevant conditions identified by Mr Richards:

- the obligation proposed was both fair and reasonable in the light of the state of the music industry at the relevant time and the nature of the obligations that would be involved, being only to use reasonable endeavours to exploit, thus accounting for the possibility that exploitation would require disproportionate efforts from Domino (e.g. because the music was not a commercial success);

- the obligation was required for business efficacy of the contract (or was indeed obvious), as an obligation which required mere initial release and nothing further would lead to absurd results, not reflecting the commercial realities of a recording contract; and

- the obligation contended for was entirely consistent with clauses 4.1 and 4.2 on their proper construction.

66.
Mr Carter also disagreed with Mr Richards' submissions that the term suggested by Mr Hebden was contrary to authority and that Mr Hebden would have no prospect of persuading the Court at trial either to construe the 2001 Agreement so as to include such an express term or to imply such a term. He disputed that the authorities bore the weight suggested by Mr Richards.

67.
To the extent that any principle was established by Nichols, Mr Carter submitted that that case could be distinguished as it related to a bare assignment, with no obligation on the publisher to do anything. This was very different from the copyright arrangement and requirement for 'genuine commercial release' under the 2001 Agreement. He noted that while both Schroeder and Nichols related to music publishing contracts John v James, which did deal with a recording contract among other things, actually envisaged the possibility of implying continuing exploitation obligations in a contract in which copyright was assigned. Indeed, he noted that as Mr Richards had identified, Schroeder also considered such a possibility. In neither John v James nor Schroeder was the possibility pursued and fully considered because, in the circumstances of those cases, such an implied obligation would not be effective, providing no relevant protection to the party who would have benefitted from any implied term. Mr Carter submitted that Mr Hebden's case was very different as, on the facts, the implied obligation would offer valuable protection to Mr Hebden.

68.
Overall, Mr Carter submitted that all three cases relied upon by Domino were distinguishable, relating to very different agreements and factual circumstances from those relevant to the 2001 Agreement. As no case on all fours with that now advanced by Mr Hebden had yet been decided, Mr Carter submitted that the jurisprudence was inevitably lacking clarity as applied to the current dispute and that this was not a situation in which the Court should, on a summary basis, refuse permission to amend.

69.
Having completed his review of the authorities, Mr Carter concluded by submitting that it was clearly arguable that a continuing obligation to exploit, or at least not actively to cease exploitation, could form part of an arrangement under which copyright was assigned, and that no compelling reason had been identified why such a term could not be implied into the 2001 Agreement. By necessary implication, it was clearly arguable that express terms in a contract might, in appropriate circumstances, be construed in the same way.

70.
Finally, Mr Carter addressed the suggestion that the proposed implied terms would be inconsistent with the express provisions of clause 4 of the 2001 Agreement as to the extent of Domino's obligations to release and exploit the Masters and as to Mr Hebden's remedies for failure to do so. His position on this was simple – the proposed implied terms are entirely consistent with the express provisions of the 2001 Agreement, when properly construed, and Mr Richards' objections were predicated on his client's interpretation of the express terms being correct.

71.
As to an implied obligation of good faith, Mr Carter submitted that the pleading was sufficiently clear for Domino to understand the obligation that Mr Hebden requested the Court to imply, and that further clarification could be provided if necessary. He submitted that Schroeder had expressly contemplated the possibility of implying such an obligation in appropriate circumstances:

"It was argued that there must be read into this agreement an obligation on the publisher to act in good faith. I take that to mean that he would be in breach of contract if by reason of some oblique or malicious motive he refrained from publishing work which he would otherwise have published. I very much doubt this but even if it were so it would make little difference. Such a case would seldom occur and then would be difficult to prove." [p. 1313G]

72.
In all the circumstances, Mr Carter submitted that this was a case which fell squarely within the Schroeder possibility, not least because of the potential bad faith involved in the circumstances in which the Amendment Application had come about, as pleaded at paragraph 17E of the draft APOC:

"In support of the allegation that Domino's acts referred to at paragraphs 15.12 and 15.13 above were not in good faith, Four Tet will contend that the sole (or at least primary) motive behind Domino's committing such acts was to avoid the Court determining the properly applicable rate for digital exploitation under the 2001 Agreement and/or granting the declaration sought at paragraph 1 of the prayer for relief below."

Express or implied duty to exploit/duty of good faith – assessment

73.

As will be seen from the brief summary above, Counsels' submissions on the proposed amendments relating to the effective terms of the contract were complex. I commend both Counsel for their efforts to deal with the various issues in such a necessarily compressed time frame. I have considered all of the points made, although not all of them are necessarily dealt with explicitly below.

74.
I approach the Amendment Application with a view to furthering the overriding objective and bearing in mind the cautions in the authorities about circumstances in which it will be appropriate to conclude that a pleading has no reasonable prospects of success on the basis of legal submission on a summary basis. I have summarised above the considerations that affect the exercise of the discretion to permit amendment. The extent to which a judge hearing an amendment application will feel comfortable in concluding that the prospects of success are sufficiently low to exercise the discretion against granting permission may be affected by the complexity of the pleadings and of the related legal issues, particularly in circumstances where there is a concern about the sufficiency of the time available for the parties to develop and to make appropriate submissions.

75.
I have concluded that this is not a situation in which it would be appropriate to refuse Mr Hebden's request to amend his case to plead that the 2001 Agreement should be construed as including an express continuing obligation to use reasonable endeavours to exploit the Masters by all then-industry-standard means or that, in the alternative, such an obligation should be implied. I cannot conclude summarily that that draft pleading faces no real likelihood of succeeding. I have reached the same conclusion in respect of the proposed amendment in respect of an implied duty of good faith.

76.
I am not satisfied that this aspect of the Amendment Application gives rise to short or clear points of law or construction. The dispute between the parties as to the meaning of the Release Commitment in the 2001 Agreement and what a 'genuine commercial release' may or may not have required at the time when that agreement was entered into is likely to require evidence to resolve. I found Mr Richards' citation to the findings of Jonathan Parker J in Panayiotou to be helpful background, but was not satisfied that I had sufficient understanding of the factual context to reach a conclusion that Mr Hebden's draft amended case had no realistic prospect of success or was merely fanciful. This was particularly so given the potential for changes to the industry between the early 1990s and the early 2000s, including the advent of digital distribution, referred to by both parties, and specifically in the evidence of Mr Hebden (and, more briefly, in the evidence of Mr Bell).

77.
I was also unable to conclude that Nichols, Schroeder and John v James precluded the possibility that a music recording contract might be construed to require continued exploitation of some sort, including potentially on the basis of a good faith obligation, as contended for by Mr Carter. Mr Carter's submissions about the bases on which those authorities might, if necessary, be distinguished were sufficient overall to lead me to conclude that the law was not sufficiently clear to allow me to effectively determine the point on a summary basis.

78.
By way of example, in both the more recent cases (Schroeder and John v James) it was the Defendants in the action who had suggested that the respective contracts should be construed as containing some continuing obligation to deal in the copyrighted material. Had this been the case, it might have provided a defence against allegations that the contracts in question should be set aside (in Schroeder

because otherwise the contract might be held to be in restraint of trade and in John v James to avoid an allegation that the agreements should be set aside owing to undue influence). In both cases, the Court declined to imply the proposed terms on the basis that they would be so imprecise as not to afford sufficient protection to the claimants. Both cases are different on the facts from this case and in neither case did the Court conclude that continuing obligations could not arise in copyright assignments, whether by construction of express terms or by implying terms in appropriate circumstances.

79.
In addition, neither Nichols nor Schroeder contained any positive release obligations on the assignee of the copyright, nor was the assignor given any continuing rights under those assignments, other than to receive royalties if any accrued. They are at least to that extent different from the position under the 2001 Agreement. I am therefore unable to conclude at this stage that the authorities are so clear as to make Mr Hebden's proposed amendments to this Agreement clearly unsustainable.

80.
In respect of the requirements to be satisfied for implying terms into a contract, I was not persuaded that Mr Hebden has no realistic prospects of establishing that those conditions could, if necessary, be satisfied. To reach that conclusion would require a greater understanding of the factual position in the industry at the time the contract was concluded than is currently the case. Without that it is impossible to conclude that it would have been neither fair or reasonable to expect Domino to assume some continuing obligations in respect of the materials it had released, particularly as the implied term for which Mr Hebden contends is to use 'reasonable endeavours' in respect of those materials. It is also impossible to conclude that it is not arguable that some obligation to act in good faith could be regarded as fair and reasonable.

81.
It is also unclear at this stage that the proposed terms to be implied are not at least arguably necessary to make the agreement work. As to the proposed implied continuing obligations to exploit digitally, digital distribution has been a part of the parties' relationship under the 2001 Agreement for some time. As set out above, the evidence currently available shows that the parties discussed specific aspects of digital distribution (not including royalty payments) during the term of the contract. It is not unarguable that the proposed term is consistent with the express terms of the 2001 Agreement, as this depends on the construction of those terms. As to the proposed obligation to act in good faith, for the reasons mentioned above, I conclude that it is arguable that such a term may be necessary to make the agreement work effectively and do not consider it to be clearly so inconsistent with the express terms of the 2001 Agreement as to be unarguable.

82.
Finally, I do not consider it to be clear that the authorities on which Mr Richards relies necessarily lead to the conclusion that the terms suggested by the Claimant are so contrary to principle and authority such that they could not be implied, not least when both Schroeder and John v James appear to have countenanced the possibility that terms of that nature might, in appropriate cases, be implied, and when both Nichols and Schroeder involved different types of assignment on rather different terms.

83.
As to other considerations, and in particular proportionality and the overriding objective, it is unclear whether the construction/contractual terms amendments proposed would require very substantial

factual evidence. This was not the subject of significant discussion either in written submissions or during the hearing (although Mr Richards did note that restraint of trade cases such as Panayiotou often require significant evidence). As will be clear from my comments above, I consider that some evidence will be necessary. Overall, however, given the potential consequences for Mr Hebden of refusing permission to amend when I have concluded that the amendments are not simply fanciful and have at least some prospect of success, I consider that I would not be doing justice between the parties if I refused permission. Overall, the interests of justice require me to grant permission to amend the pleadings in respect of these issues.

Express or implied duty to exploit/duty of good faith – consequences of breach – submissions

84.
The next series of draft amended pleading relate to the consequences of any breach of a contractual duty to exploit or to act in good faith. Mr Hebden's position is that:

(i)
Domino's release (and, on his case, continuing exploitation) obligations survived the Term of the exclusive recording provisions (see paragraph 21 above);

(ii)
the remainder of the surviving agreement has now been terminated by Domino's conduct in ceasing, and making clear that it will not resume, digital exploitation; which,

(iii)
constitute acts of fundamental breach and/or renunciation.

85.
Mr Carter submitted that the notice periods and other provisions in clauses 4.3, 4.4 and 14.8 do not apply in the light of Domino's unequivocal statements that it will not exploit the Masters through digital means in future. Mr Carter also stated that if, contrary to his primary submission, notice was required, Mr Hebden had given the necessary notice in a letter dated 29 November 2021 (as pleaded in draft paragraph 17C) and that it was not possible for Domino now to remedy its breaches, in view of its undertaking that it would not upload the Masters in future. It was therefore clear that the notice period would expire without the breaches having been remedied.

86.
In the circumstances, Mr Carter submits that the copyright in the Masters reverts (or should revert) to Mr Hebden. A variety of routes (both legal and equitable) are proposed by which this may occur.

87.
In particular, Mr Carter contends that, notwithstanding the overall complexity of this area of the law, certain propositions are well established, including that termination for repudiatory breach restores to the parties any rights which are not "rights unconditionally acquired". While acknowledging that he had not been able to identify as at the date of the hearing authorities which squarely matched the situation in the present case, he referred to the review of authorities in Copinger and Skone-James on Copyright, 18th edn, 28-367 and relied on, among others Crosstown Music Co LLC v Rive Droite Music Ltd & ors [2012] Ch 68 ("Crosstown") for the statement of principle of Mummery LJ that: "Those cases … show that reversionary rights in copyright outside the area of trusts have been recognised." (at paragraph 37), submitting that this suggests that there is no firm rule against

reversions of copyright, while acknowledging that in that particular case the reverter was provided for contractually.

88.
Mr Carter submitted that the assignment of copyright under the 2001 Agreement was conditional on, among other things, Domino fulfilling its continuing obligations as pleaded in the draft APOC. It was his position that following breach of those obligations the copyright reverts by operation of law to Mr Hebden. Mr Carter referred to specific express provisions in the 2001 Agreement providing for reversion which he submitted make it clear that the assignment of copyright under the 2001 Agreement was not unconditional and, indeed, indicated that the case was not outside the class of cases envisaged by the Court of Appeal in Crosstown.

89.
By way of alternative, Mr Carter stated that, if no reversion occurred through operation of law, a fundamental breach of the nature pleaded could give rise to a claim in equity, restitution or unjust enrichment for reversion of the copyright if the consequence of the breach was that all the release and royalty provisions were terminated in law.

90.
Mr Richards submitted that the proposed pleadings are nonsensical and have no prospect of success at trial.

91.
Mr Richards relied first on an argument that the Term of the 2001 Agreement has expired and that there could thus be no breach and no remedy. The parties' arguments on this issue have been summarised above at paragraphs 20 to 22.

92.
Mr Richards relied secondly on the remedy provisions in clauses 4.3 to 4.5 and 14.8, submitting that, even if it had not terminated in all respects material to the current dispute at the end of the Term, the 2001 Agreement is clear that:

(i)
Mr Hebden's only remedy for failure to release was that provided in clauses 4.3 and 4.4; and

(ii)
Mr Hebden could not terminate the 2001 Agreement for breach unless: first, he served notice under clause 14.8; and secondly, Domino failed to take substantive steps to remedy the notified breach within 30 days.

93.
His position was that Mr Hebden has not served the necessary notice and is not therefore entitled to terminate for breach, irrespective of any alleged renunciation of the 2001 Agreement by Domino and/or any purported termination of the 2001 Agreement by Mr Hebden. That being so, there can be no remedy. In any event, even if a remedy could be envisaged (for example if the notice were given), that would not involve reversion, but only specific remedies provided for in the contract.

94.
Finally, Mr Richards attacked the viability of the draft APOC pleading on reversion of copyright following termination by breach, submitting that even if the earlier objections to the pleadings could be overcome, Mr Hebden's argument on that issue was legally unsustainable and therefore should not

be permitted. The arguments on this issue were complex but, in essence, the main thrust of Mr Richards' submissions were:

- that termination for breach operates only prospectively and does not undo the contract as from the beginning;

- that the kind of reversion of copyright suggested by Mr Hebden is unknown to the law; and

- that no reversion in equity could come about in the absence of an equitable basis for the remedy, such as a pleading of undue influence giving rise to right of rescission.

95.
Mr Richards submitted that Mr Carter's position on legal reversion was premised on a misreading of Crosstown and that, when read in context, it became clear that the statement of Mummery LJ relied on by Mr Carter is not authority for a general proposition that rights may revert generally on breach. He also contended that Mr Carter's submissions that clauses 4.3 and 4.4 of the 2001 Agreement had a similar effect to the provisions considered in Crosstown was unsustainable: clauses 4.3 and 4.4 are contractual rights, rather than a carve out from an assignment and presuppose that an unconditional assignment has taken place. Mr Richards noted that there was no disagreement between the parties that a reversion of copyright could take place where it was contractually provided for; the fundamental disagreement was whether such a reversion could take place purely by operation of law. The conditions under which clauses 4.3 and 4.4 might operate had not been satisfied and they were otherwise irrelevant. In Mr Richards' submission, they did not provide any foundation for a claim that the copyright had been conditionally assigned under the 2001 Agreement nor that it should revert to Mr Hebden by operation of law at any point during or after the Term of that Agreement.

96.
Mr Richards separately addressed the draft alternative pleading that if Mr Hebden is incorrect about termination by breach and the consequences that flow from that breach, he may rely upon the provisions of clauses 4.3 and 4.4 of the 2001 Agreement as entitling him to purchase the copyright in the Masters under clause 4.3 and/or to require a licence of the copyright under clause 4.4 if Domino fails to recommence digital exploitation within the periods prescribed. Mr Richards gave three reasons why those contentions are untenable:

(i)
Mr Hebden states that he no longer considers himself bound by the 2001 Agreement and cannot simultaneously seek to take any benefit of the 2001 Agreement;

(ii)
clauses 4.3 and 4.4 relate to a failure to "release" and not to a failure to continue post-release exploitation, even if clauses 4.1 and 4.2 or some other implied term required such exploitation; and

(iii)
there is no prospect of Mr Hebden establishing that clauses 4.3 and 4.4 remain in force following the expiry of the Term of the 2001 Agreement.

Express or implied duty to exploit/duty of good faith – consequences of breach – assessment

97.
On the question of the consequences of breach (other than through reliance on clauses 4.3 and 4.4), I had considerable sympathy with Mr Richards' arguments as to the consequences of breach and, in particular, as to the likelihood that Mr Hebden will be able to establish at trial that there is a basis on which copyright in the Masters has or should revert to him. The authorities to which I was referred by Mr Carter seemed unlikely ultimately to support the conclusions he sought to draw as to reversion at law. Mr Richards referred to the arguments as novel and also strongly contested Mr Carter's interpretation of the principal authority on which Mr Carter sought to rely. Nevertheless, Mr Carter's arguments were made with some conviction in view of the potential position that may be faced by Mr Hebden if he were to succeed in establishing breach. I did not feel able to reach the view that they were fanciful or clearly unsustainable given the time available to Counsel to make full submissions in this complex area. On balance, given the conclusion I have reached above on the proposed amendments as to breach, and as the arguments as to remedy will require legal submission only at trial rather than significant evidence, I conclude that it would not be appropriate to refuse Mr Hebden permission to amend in line with the substance of the draft APOC and that, on balance, the overriding objective is best served by permitting the amendment.

98.
As to the objections to the alternative draft pleading relying on clauses 4.3 and 4.4 as giving rise to a right for Mr Hebden to acquire the rights or to require them to be licensed to a third party, these were dealt with only briefly in written and oral submissions by Counsel. Mr Richards' points were that, as Mr Hebden no longer considered himself to be bound by the agreement, he could not take any benefit under it, that clauses 4.3 and 4.4 related only to initial release; and that they did not survive the expiry of the term.

99.
Mr Richards' second and third objection were both predicated on Mr Richards' submissions on those issues ultimately proving correct. I do not consider it to be clear that that will be the case: my initial view is that at trial it may be concluded that a number of elements of the 2001 Agreement have not expired and that the correct construction of Term is closer to that contended for by Mr Hebden. Further, the meaning of 'release' is core to the issues between the party, and I have already concluded that the pleadings on that issue should go to trial. Given that position, I do not consider that objections based on Mr Hebden's arguable equivocation as to the status of the contract are sufficient to exercise my discretion to refuse permission for this aspect of the draft amended pleadings.

<u>Restraint of trade/copyright infringement – submissions</u>

100.
Mr Hebden's proposed case on restraint of trade would arise in the event that he is wrong about the construction of the contract and that Domino is right. Mr Carter submitted that, in those circumstances, Domino could have fulfilled its contractual obligations towards Mr Hebden's Masters with minimal or no effort for a limited period never subsequently exploiting them and this would permit the 'sterilisation' of a substantial portion of Mr Hebden's output under the name Four Tet by which he is known to fans. An agreement permitting such a sterilisation is said to be an agreement in restraint of trade and Mr Carter states that this is clear from Domino's withdrawal of the Masters from digital exploitation, and its subsequent undertakings precluding future digital exploitation of the Masters. The sterilisation effect is said to be particularly clear where those albums already have a significant fan base.

101.
Mr Carter further submitted that 'sterilisation' is not a necessary prerequisite for a finding of restraint of trade as numerous other authorities exist where a unilateral right to decide whether to exploit copyrights has been held to amount to restraint of trade. He referred in particular to Schroeder:

"In the present case the respondent assigned to the appellants "the full copyright for the whole world" in every musical composition "composed created or conceived" by him alone or in collaboration with any other person during a period of five or it might be 10 years. He received no payment (apart from an initial £50) unless his work was published and the appellants need not publish unless they chose to do so. And if they did not publish he had no right to terminate the agreement or to have copyrights re-assigned to him. I need not consider whether in any circumstances it would be possible to justify such a one-sided agreement. It is sufficient to say that such evidence as there is falls far short of justification. It must therefore follow that the agreement so far as unperformed is unenforceable.

I would dismiss this appeal." [p. 1315A]

102.
As to the consequences of a finding that a recording agreement is in restraint of trade, Mr Carter argues that the question as to whether the 2001 Agreement is void or voidable is far from clear. He relies on a passage from Copinger (28-367) which first states that "it may be that such an agreement is better described as unenforceable" and then goes on to comment that in consequence "… any assignment in the agreement of the copyright in future works would not be effective to vest in the publishers the copyright in works brought into existence after the agreement is held to be in restraint of trade. What the position is regarding copyrights in works already brought into existence at that date is far from clear […] if, as it is thought, such an agreement is merely voidable as to the future then the position may be that the legal title to such works in existence before the agreement is avoided is effectively assigned to the assignee at law by such agreement, and notwithstanding the subsequent avoidance of the agreement remains vested in the assignee, subject to the court ordering, in the exercise of its equitable jurisdiction, reassignment of the copyright in such works." In the light of that passage, Mr Carter submitted that the issue is therefore manifestly not suitable for summary determination. Mr Carter submitted that the case relied on by Mr Richards as authority that the proposition was unarguable did not bear the weight that Mr Richards sought to place upon it as the point of principle had in fact been conceded by Counsel and was not argued before the Court.

103.
Mr Richards submitted that Mr Hebden's restraint of trade case has at least two fatal flaws, meaning that it is wholly fanciful and could not lead to a successful outcome for Mr Hebden.

104.
First, the 2001 Agreement does not sterilise Mr Hebden's output because:

- it imposed obligations on Domino to release the Masters;
- during the Term, the 2001 Agreement restricted Mr Hebden's activities only as a recording artist under the name "Four Tet" and his own legal name but left him free to carry on creating and recording music under any other name;

- following the expiry of the Term, Mr Hebden was (and remains) free to exploit his output subject only to certain time limited rerecording restrictions;

- while the 2001 Agreement permits Domino to choose not to exploit the Masters copyright in which has been assigned to it, that is not a restraint on Mr Hebden's trade; and

- notwithstanding the alleged sterilising effect of the contract today given the growth of digital means of exploitation, whether or not a contract is in restraint of trade is to be assessed as at the date of its conclusion.

105.
Secondly, proving that a contract is in unreasonable restraint of trade does not lead to rescission but has the effect that "the agreement so far as unperformed is unenforceable" (Schroeder [p. 1315A] per Lord Reid). Mr Richards submitted that this was unarguable, having subsequently been applied by all three judges in the Court of Appeal in O'Sullivan v Management Agency and Music Ltd [1985] QB 428 ("O'Sullivan"):

"The effect of such an agreement was considered in Instone v. A. Schroeder Music Publishing Co. Ltd. [1974] 1 All E.R. 171, affirmed in the House of Lords under the name A. Schroeder Music Publishing Co. v. Macaulay [1974] 1 W.L.R. 1308. The Court of Appeal held that because the agreement was in unreasonable restraint of trade it was unenforceable in so far as it had not been carried out. and Lord Reid, dismissing the appeal against that decision, concluded his speech with these words, at p. 1315: "It must therefore follow that the agreement so far as unperformed is unenforceable." (Waller LJ [p. 470D]).

106.
In the light of that ruling by the Court of Appeal, Mr Richards submitted that it was clear, and unarguable, that in the absence of a finding of some additional fiduciary duty (as in Schroeder and in O'Sullivan) the consequence of a finding that an agreement is in restraint of trade is that it is voidable and unenforceable.

107.
That being so, Mr Richards argued that the 2001 Agreement clearly would not be rendered void by a finding that it is in restraint of trade, and that a result under which the 2001 Agreement is unenforceable would be of no assistance to Mr Hebden: even if it were arguable that the 2001 Agreement was in restraint of trade, the only consequence of success on that argument would be the unenforceability of the agreement against Mr Hebden, something that is, in practice, irrelevant as Mr Hebden's obligations under the 2001 Agreement have been performed and the Term has expired. Mr Richards continued that there is no prospect of Mr Hebden obtaining the copyright in the Masters as a consequence of a finding of restraint of trade as the assignment of any copyright in the Masters under the 2001 Agreement has been performed and cannot be undone because restraint of trade would not render the Agreement void.

108.
Finally, Mr Richards submitted that permission to introduce the alternative restraint of trade pleading should be refused not only on the grounds that it has no realistic prospect of succeeding at trial but also on the basis of proportionality and the overriding objective. He referred to the costs and burden

on the parties of preparing for a restraint of trade case. Mr Richards submitted, by reference in particular to the Panayiotou case, that such cases give rise to the need for substantial factual and expert evidence. In his submission such costs and the burden of the parties and the Court could not be justified where the case for which permission is sought is only a tertiary alternative case and has at very best a fanciful chance of succeeding on the substance and ultimately of assisting the party seeking to raise it.

109.
Given the arguments above, Mr Richards finally submits that Mr Hebden's pleading of copyright infringement and related relief must also fail because it relies on the restraint of trade argument. In written submissions, Mr Richards also put significant store on inadequacies in the pleading of first ownership, but during the hearing these were less important, not least because further particulars had been provided in Mr Carter's skeleton argument, which it was agreed could be incorporated in any permitted draft pleading.

Restraint of trade/copyright infringement – assessment

110.
As with many other aspects of the Amendment Application, the submissions relating to the proposed amended pleading on restraint of trade were complex, albeit packed into a fairly short period of time.

111.
Mr Richards raised a number of very significant legal and practical hurdles to be overcome by Mr Hebden if he is to succeed on this pleading. These relate not only to the substantive elements of the common law doctrine of restraint of trade, but also to the utility to Mr Hebden of any such finding given the clear statements in the authorities that the effect of a finding that a contract is in restraint of trade is that the contract is voidable, and an inability to enforce the contract against the other party. I have reviewed the authorities to which I was referred and conclude that, in the light of those authorities, it would be very difficult for Mr Hebden to succeed at trial in obtaining the relief he seeks as a consequence of the proposed amendments on restraint of trade.

112.
Mr Carter's submissions that Schroeder might ultimately be less compelling in itself because the conclusion was based on a concession rather than full argument were eloquent. However, in my view, the conclusions of the Court of Appeal in Sullivan, applying Schroeder and drawing a clear distinction between cases in which a contract was held to be voidable and unenforceable in consequence of a finding of restraint of trade and those in which a contract was held to be void and unenforceable owing to some breach of a fiduciary duty would make it very difficult indeed for Mr Hebden's proposed amended case on restraint of trade to succeed.

113.
As mentioned above, it is necessary for the Court deciding any application for permission to amend to have regard both to the utility of the application (both as to prospects of success and otherwise) and to the need to balance all other considerations, including proportionality and justice as between the parties and as against third parties.

114.
Taking all of the above into consideration, I have concluded that it would be inappropriate to grant Mr Hebden permission to introduce a new case on restraint of trade as an alternative to the other new claims for which permission has been granted. I reached this view in part on the basis of the

significant legal difficulties such a case would face as well as the difficulties Mr Hebden faces in obtaining a useful remedy likely to give the claim utility in the context of the action as a whole. Additional considerations are the likely disproportionate cost and time burdens on the parties of preparing for such a claim (which is in any event only a tertiary fall back, with limited prospects of success), the additional pressure on Court resources in dealing with it, and fairness for other litigants. On balance, I concluded that, given the requirements of CPR 17 and the overriding objective, permission for this proposed amendment should not be granted.

115.
As the restraint of trade claim is not to be included in the case, the proposed copyright infringement case, which relied on the 2001 Agreement being void as from the outset, cannot succeed and permission for that proposed amendment is also refused.