

Neutral Citation Number: [2015] EWHC 3407 (IPEC)  
Case No: IP14M03253

**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
INTELLECTUAL PROPERTY ENTERPRISE COURT**

Royal Courts of Justice, Rolls Building,  
Fetter Lane, London, EC4A 1NL

25 November 2015

Before:

**MELISSA CLARKE**  
(Sitting as a Deputy Judge of the High Court)

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Between:

**HENRY HADAWAY ORGANISATION LIMITED**

**Claimant**

- and -

(1) **PICKWICK GROUP LIMITED**  
(2) **GORDON LORENZ PRODUCTIONS  
LIMITED**  
(3) **THE ESTATE OF MR GORDON LORENZ**

**Defendants**

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**Jaani Riordan (instructed by Keystone Law) for the Claimant**  
**Richard Edwards (instructed by Gordon Dadds) for the First Defendant**  
**The Second Defendant and Third Defendant were not present or represented**  
**Hearing dates: 13 and 14 October 2015**  
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**JUDGMENT**

**Melissa Clarke (sitting as a Deputy Judge of the High Court):**

***Introduction***

1. This is an action involving a dispute over ownership of copyright in a number of sound recordings of music from West End musicals listed in Annex 1 (the “**Recordings**”).
2. The Recordings were made pursuant to an arrangement between Gordon Lorenz, a well-known and prolific independent record producer who died in June 2011, and Pickwick Group Limited (“**Pickwick 1**”), a music publisher and distributor which changed its name to Carlton Home Entertainment

Limited in July 1995 (“**Carlton**”). The parties now agree that the Recordings were made between 1991 and 1997 and were first released by Pickwick 1/Carlton on CD between 1993 and 1997 on various albums which were together marketed as the “**Shows Collection**”.

3. Despite the similar name, Pickwick 1/Carlton bears no legal relationship with the First Defendant (“**Pickwick 2**”), which is a separate company incorporated in 2001.
4. The Claimant (“**HHO**”) is an independent music distributor. Its case at trial has shifted from its pleaded case, but it now claims that copyright in each of the Recordings vested in the Second Defendant, a management company owned by Gordon Lorenz and his wife and through which Gordon Lorenz worked (“**GLPL**”), as the author and first owner of copyright upon creation of each of the Recordings. HHO claims it is an exclusive licensee of some of the Recordings pursuant to an agreement with GLPL of February 2008, and the owner of copyright in the remainder of the Recordings pursuant to an assignment from GLPL of December 2008. It brings this claim as exclusive licensee to those Recordings marked with an asterisk in Annex 1 and as copyright owner of the rest of the Recordings.
5. HHO claims copyright infringement in the Recordings by the copying, issuing copies to the public and communicating to the public by Pickwick 2 of those Recordings and adaptations of those Recordings on various albums within a collection of CDs and digital downloads possessed, sold or let for hire or offered or exposed for sale or hire and distributed by it under the name “The Shows Collection” from October 2009 (“**the Pickwick 2 Issued Recordings**”). It also claims secondary infringement as set out in the Claim. It seeks damages or an account of profits and injunctive relief.
6. Pickwick 2 is an independent music publisher and distributor. It accepts that it has no right, title or interest in the Recordings and, subject to paragraph 7 below, that the release of the Pickwick 2 Issued Recordings infringes copyright in those Recordings in the manner claimed. However, it denies that HHO is the owner or exclusive licensee of those copyrights and seeks dismissal of the Claim. It advances a positive case in the Amended Defence that the rights were owned by Pickwick 1/Carlton from the date of creation of the Recordings and never assigned to GLPL. Accordingly it asserts that GLPL had no rights capable of exclusive license or assignment to HHO in 2008.
7. Alternatively, if GLPL did own the copyright in the Recordings in 2008, Pickwick 2 denies that GLPL assigned such rights to HHO. To the extent that GLPL exclusively licensed them to HHO, it pleads a defence to infringement as it claims the Pickwick 2 Issued Recordings were released with the consent of GLPL.
8. Pickwick 2 relies on various copyright statements printed on the CD liners of the Recordings as released by Pickwick 1/Carlton which, it submits, each create a presumption of copyright ownership by Pickwick 1/Carlton pursuant to section 105 of the Copyright, Designs and Patents Act 1988 (“**CDPA 88**”).

9. GLPL and Third Defendant were added as defendants by order of His Honour Judge Hacon in order to be bound by this judgment. They are aware of proceedings but take no part in them.
10. I have had the benefit of the very helpful skeleton arguments and submissions of Mr Riordan for HHO and Mr Edwards for Pickwick 2 and I thank them for their assistance.

***HHO's Witnesses***

11. Henry Hadaway is the founder and CEO of HHO with 45 years of experience in the music business. He had worked with Mr Lorenz on a number of deals from 1999 until Mr Lorenz's death in 2011 and in his evidence described him as a friend. Mr Hadaway is visually impaired and accordingly could not see documentation, but counsel read him those sections of documents they wished to question him on and he had no difficulty in responding to those questions. Mr Hadaway was closely cross-examined. He made a good witness who gave clear evidence on certain fundamental matters. He was careful only to give evidence that fell within the boundaries of his personal knowledge and resisted Mr Edwards' attempts to get him to generalise about music industry "norms". He readily admitted when he could not remember something but overall his memory appeared to be good.
12. Raymond Santilli was a director and shareholder of Point Group Limited ("**Point**") from July 1998, when it acquired Pickwick 1/Carlton, until its dissolution in 2004. He is independent of the parties to this case and I give his evidence correspondingly greater weight. He sought to assist the court to the best of his ability and gave his evidence carefully and precisely. He appeared to be a truthful witness who was frank about the limitations of his recollection of certain events. What he did remember was unshaken by cross-examination.
13. The written evidence of Norbert Toth, licensing manager of HHO, was undisputed by Pickwick 2 and he was not cross-examined. The effect of his evidence was to expose issues with the validity, provenance and accuracy of the information contained in the PRS database extracts upon which Pickwick 2 had sought to rely. It no longer seeks to do so and accordingly I give the PRS database extracts no weight and consider them no further in this judgment.
14. The written evidence of John Cooper, Managing Director of Audio Book & Music Holdings plc ("**ABM**") from 1997 to 2002, was undisputed by Pickwick 2 and he was not cross-examined.

***Pickwick 2's Witnesses***

15. Raymond Hartley is the sole director of Pickwick 2 and the sole shareholder of its holding company. He joined Pickwick 2 in 2002 and bought it in 2009. He was subjected to close cross-examination in the course of which he made significant concessions and admissions. It became apparent that a number of sweeping statements made in his written evidence were outside the scope of his personal experience. However, his statement that he believed the rights of copyright in the Recordings were "*vacated*" upon the dissolution of Point and

so available for exploitation by Pickwick 2 lacked credibility, although he did admit this belief was “*not correct or appropriate*”. His evidence about the existence, purpose and timing of the unsigned draft ‘Sale and Purchase Agreement’ and the ‘Buyout Agreement’ (as defined below) was confused and unconvincing. It appeared that he was trying to make his recollections and the documents before him fit Pickwick 2’s case. For the reasons I set out later in this judgment, I reject his allegations that Mr Lorenz often made false claims of ownership of intellectual property rights, which I find to be unfounded and self-serving. Where his evidence conflicts with that of Mr Hadaway and Mr Santilli, I prefer their evidence.

16. Graham Betts is an Artists and Repertoire Manager at Pickwick 2. He had previously worked at ABM. He also made a number of material concessions and admissions under cross-examination. These included that he had no knowledge of ownership of the copyright in the Recordings as between GLPL and Pickwick 1 despite his statement to the contrary in his witness statement. He also admitted that he instructed Pickwick 2’s lawyer to make a false assertion that Pickwick 2 had rights of copyright in the Recordings in its response to HHO’s letter before action, knowing that to be false. Despite, or perhaps because of, these admissions, I am satisfied that he did his best to assist the court. He was more measured in giving his evidence of what he described as Mr Lorenz’s “*bluster*” towards intellectual property rights, than was Mr Hartley. However, I reject it for the same reasons as I reject that of Mr Hartley. Where his evidence conflicts with the evidence of Mr Hadaway and Mr Santilli, I prefer their evidence.
17. Mike Diplock is an international sales manager for Pickwick 2 and was previously an international sales manager for Pickwick 1/Carlton until the day after its purchase by Point. Mr Diplock did his best to assist the court and gave his evidence fairly but his memory was poor. He was confused about the date on which he joined Pickwick 1/Carlton, originally stating it to be a date some years later than he eventually accepted it was. He remembered being present at about six meetings relating to the Shows Collection with Gordon Lorenz and others from Pickwick 1, but was unable to provide any detail of what was discussed at those meetings or when they were held. In cross-examination he recalled a Pickwick 1 executive, Walter Woyda, telling him in the presence of Mr Lorenz that he believed the copyright in the Recordings was owned by Carlton. He described Mr Lorenz as “*not jumping out of his chair to object*”. This evidence was not contained in his witness statement. It was vague as to timing and location of the making of the statement. Given Mr Diplock’s otherwise relatively poor memory of the events of that time, I give it accordingly little weight.

### ***Background and evidence***

#### **Creation of the Recordings**

18. The parties now agree that Recordings were made between 1991 and 1997 and first released by Pickwick 1/Carlton between 1993 and 1997, pursuant to a written agreement between Gordon Lorenz or GLPL on the one hand and Pickwick 1 on the other dated November 1992 (“**the 1992 Agreement**”). That

agreement is not in evidence because it cannot be found. None of the witnesses before me were involved in its negotiation or execution and none can remember ever seeing it. I will look at the evidence around the creation of the Recordings in more detail later in this judgment.

19. The Recordings were issued by Pickwick 1/Carlton on CD. In their Defence, Pickwick 2 attached copies of the CD insert and liner for each album released by Pickwick 1/Carlton and tabulated the publication and copyright statements found on each. Each takes the form “(P) 199x Pickwick Group Ltd” with a corresponding statement “Copyright in this sound recording is owned by Pickwick Group Ltd” or “(P) 199x Carton Home Entertainment Limited” with a corresponding statement “Copyright in this sound recording is owned by Carlton Home Entertainment Limited” (“**Pickwick/Carlton Statements**”).
20. Mr Hartley’s initial evidence was that these were the copyright and publication statements found on CDs as first issued to the public by Pickwick 1/Carlton and provided to Pickwick 2 by GLPL as masters of the Recordings. Five albums are expressed to be published by Pickwick 1 in 1993 and one in 1994. The remainder are expressed to be published by Carlton between 1993 and 1997, including three in 1994 and two in 1993. Mr Hartley conceded at trial that in 1993 and 1994 the company had not yet changed its name to Carlton from Pickwick 1, and accordingly these statements must have been made when the CDs were reissued at some later time, after the change of name in July 1995.

#### Point

21. The total share capital of Carlton was acquired by Point through its subsidiary Point Rights Limited in January 1999. New directors were appointed to the Carlton board, including the owner of Point, Wilhelm Mittrich.
22. Mr Santilli worked for Point at the time of the purchase of Carlton. His evidence was that he went through the entire printed catalogue of Carlton with Marcello Tommaro, previously the managing director of the Pickwick brand for Carlton, who had joined Point. They discussed what rights they had bought and how they could be exploited by reference to Carlton’s rights database. He recalled Mr Tommaro describing the Recordings as being owned by GLPL and licensed to Carlton. Mr Santilli remembers the Recordings being described in Carlton’s rights database as a joint production, with ownership rights retained by GLPL on condition that Carlton had exclusivity. He did not have sight of any underlying contracts at that meeting.
23. In July 1999 HHO and Point entered into a joint venture. They incorporated a company called HHO Licensing Limited (“**Old HHOL**”) in which Point owned 75% of the shares and HHO the remaining 25%. The intention was for Old HHOL to exploit various recordings in which Point owned or held a licence of the rights, including the Recordings.

#### Receivership of Point

24. Point and its subsidiaries, including Old HHOL, went into receivership in March 2000. Point was dissolved in 2004. Mr Santilli recalled that the rights in the Recordings could not be marketed in the receivership without Mr Lorenz's permission as they had reverted to GLPL in Point's insolvency. He described Mr Lorenz as "*making a fuss about it*". Mr Santilli remembered meeting with Mr Mittrich in or around March 2000, who told him that he was going to meet with Mr Lorenz and Mr Hadaway to try and reacquire those rights from GLPL.
25. Many of the intellectual property rights owned by the various Point group companies were purchased from the receivers by Optical Disc Service GmbH ("**ODS**"), a company owned by Mr Mittrich. Point Rights Limited was acquired by share purchase from the receivers by ABM in April 2000. The assets in Point Rights Limited at the time of the share purchase included physical stocks of CDs, trade marks of the Pickwick and Hallmark brands and the benefit of certain licences and copyrights, to the extent they had not been hived off and sold to ODS and did not revert to their owners because of the insolvency event. Mr Cooper's undisputed evidence was that Mr Lorenz prevented ABM from selling the physical stocks of CDs of the Recordings that had been acquired in this way, stating that ABM had no right to sell them as the rights had reverted to GLPL.
26. Mr Betts worked for ABM at the time. His evidence was that he searched Point's contracts carefully to see what copyrights were owned and what licensed rights had survived the insolvency. He did not pick up any paper trail relating to the Recordings. Mr Hartley confirmed in cross-examination that Pickwick 2 does not assert that ABM bought the copyright in the Recordings out of Point, nor that Pickwick 2 obtained ownership of copyright in the Recordings through its later purchase of the assets of ABM.

#### New HHOL

27. Shortly after the receivership of Point and Old HHOL, in August 2000, Mr Hadaway and Mr Mittrich agreed to incorporate a new company, this time 100% owned by HHO, to exploit various rights held by ODS and to acquire new rights for exploitation. That company was also called HHO Licensing Limited ("**New HHOL**").
28. In April or May 2000 Mr Hadaway, Mr Mittrich and Mr Lorenz met in the Landmark Hotel to discuss whether GLPL would license the rights in the Recordings to the proposed New HHOL. Mr Hadaway recalls Mr Lorenz stating that GLPL owned the copyright in the Recordings and had licensed them on an exclusive basis to Pickwick 1/Carlton. The rights had reverted on Point's insolvency. Mr Hadaway said that Mr Mittrich did not raise any objection to Mr Lorenz's statement and, accordingly, he was satisfied that it was true. It was agreed at the meeting that GLPL would license the Recordings to New HHOL.
29. New HHOL sublicensed the Recordings to two record distributors: Javelin in 2000 and SelleS in 2001.

30. ABM went into receivership in January 2002. Pickwick 2 purchased all of the assets of ABM from the receiver in February 2002. This included the Pickwick and Hallmark brands and the remaining physical stocks of CDs that ABM had bought from the receivers of Point. ABM was dissolved in March 2006.
31. By April 2002 the relationship between Mr Mittrich and Mr Hadaway had broken down. HHO presented a winding-up petition against New HHOL, which was eventually wound up on 11 March 2003.

#### HHO Agreements

32. In June 2002, Mr Hadaway and Mr Lorenz met again. There is a fax in evidence from GLPL to HHO setting up that meeting, in which Mr Lorenz raises his concerns about non-payment of royalties to him by New HHOL. Mr Hadaway's evidence is that they agreed that the copyright in the Recordings should be licensed by GLPL directly to HHO. A written agreement was entered into for a fixed 5-year term, with a 4% royalty rate payable to GLPL ("**2002 Agreement**"). That agreement is not in evidence because it cannot be found. HHO has submitted evidence, which has not been challenged, of royalties being paid to GLPL between 2002 and 2007 pursuant to the 2002 Agreement.
33. HHO sublicensed the rights to Sanctuary Record Group Limited in 2002 and Acrobat Records Limited in 2005, in each case pursuant to the 2002 Agreement.
34. In 2007, the 2002 Agreement expired. A new license agreement dated 29 February 2008 was executed by GLPL and HHO on 3 March 2008 in which no advance was paid but the royalty rate payable to GLPL was increased to 10% ("**February 2008 Agreement**"). That agreement is in evidence.
35. Mr Hadaway's evidence was that the February 2008 Agreement was wrongly entered into as a licence in perpetuity, when the discussions between him and Mr Lorenz, and the agreement reached on royalties, had been on the basis that GLPL would assign its copyright in the Recordings to HHO. Mr Hadaway said he did not believe that the agreement could have been fully read out to him before he signed it, otherwise he would have realised the mistake. He could not recall how the mistake came to be spotted some months afterwards, but he said he discussed it with Mr Lorenz and they rectified it by the execution of an assignment agreement in December 2008 ("**December 2008 Agreement**"). That agreement is also in evidence.
36. No additional payment was made to GLPL under the December 2008 Agreement, Mr Hadaway stating in cross-examination "*Mr Lorenz didn't use the mistake as a weapon to extract extra from us – he was a gentleman*". Mr Hadaway's evidence was that the December 2008 Agreement was intended to cover the same Recordings as the February 2008 Agreement but in fact several albums have been missed off which have not been assigned. Those remain subject to the February 2008 Agreement.

### Pickwick 2 Agreements

37. Mr Betts' evidence is that Mr Lorenz offered the Recordings to Pickwick 2 to be used on albums for release under Pickwick 2's Hallmark brand.
38. Mr Betts and Mr Hartley say that Pickwick 2 entered into an agreement with GLPL to buyout its rights to receive a producer's royalty for the Recordings, so the Pickwick 2 Issued Recordings could be released ("**Buyout Agreement**"). It evidences this in the form of an invoice from GLPL for £1440 plus VAT of 1 August 2009, which simply states "*Buyout physical and digital for 46 titles*". HHO disputes that the Buyout Agreement relates to the Recordings.
39. Mr Hartley's evidence is that he then drafted an agreement for the assignment of copyright in the Recordings from GLPL to Pickwick 2 on 3 September 2009 (albeit the draft in evidence is dated 2014) using a standard form template into which he added a track list drafted by Mr Betts ("**Draft SPA**"). It was never shown to Mr Lorenz and it was never signed. At its highest, therefore, it evidences only that Pickwick 2 believed GLPL owned the copyright in the Recordings at the time it was produced.

### Pickwick 2 Issued Recordings

40. Pickwick 2 released the Pickwick 2 Issued Recordings between October 2009 and February 2010. Its pleaded case is that it collaborated with Mr Lorenz in doing so. HHO disputes that. Mr Betts accepted in cross-examination that he knew Pickwick 2 had no rights to the Recordings when it did so, but had taken a calculated risk. He said, "*It was our belief that the copyright had been vacated. We couldn't find where the rights had gone from Pickwick 1/Carlton. We couldn't believe Gordon Lorenz had the rights*". Mr Hartley also accepted that Pickwick 2 had no copyright or other right to release the Pickwick 2 Issued Recordings. He said, "*With a lot of Pickwick stuff it was almost a presumption in the industry that rights vacated. We avoid licensing. We focus on public domain. It's probably not correct, it's probably not appropriate, but that's the way it was.*"
41. Mr Hartley was shown a physical copy of a CD of a Pickwick 2 Issued Recording (Annie Get Your Gun) purchased on behalf of HHO from Amazon.co.uk. He confirmed it appeared to be one of Pickwick 2's products. The publication and copyright statement on the reverse of the CD liner say "*(P) and © 2009 Pickwick Group Limited. Hallmark is a label owned by Pickwick. The copyright in this recording is owned by Pickwick Group Ltd.*" He said that it was his understanding that Pickwick 2 didn't own the copyright and the statement was incorrect. Pickwick 2 does not rely on that statement as a presumption under section 105 CDPA 88.

### HHO Sub-licences

42. HHO did not exploit the Recordings from 2008 until 2013 when it licensed the rights to Delta Leisure Group plc and then in February 2014 to X5 Music Group AB. By this time Mr Lorenz had died, and HHO paid 10% royalties



first to GLPL and then when GLPL went into liquidation, on the instructions of the liquidator, to Joy Frisby, a legatee of Mr Lorenz.

### *The Issues*

43. Few of the issues as identified by His Honour Judge Hacon at a case management conference on 20 January 2015, and annexed to the order made on that date, have survived to trial. In particular: issue (3) has been abandoned by HHO; the parties accept that the answer to (4) is ‘no’; HHO now accepts that the answer to issue (5) is ‘yes’; issue (6) is no longer live as HHO no longer rely on the HHO Statements as presumptions under s105 CDPA 88; and issue (7) has been abandoned by Pickwick 2. That leaves the following issues for my determination:

**(i) Is HHO the owner of the copyright in the Recordings, alternatively is HHO an exclusive licensee of the copyright in the Recordings?**

**(ii) Did Pickwick 2 know or have reason to believe the copies they were making were infringing copies?**

In light of the Amended Defence I add a third issue:

**(iii) If HHO is an exclusive licensee of GLPL, does the ‘Buyout Agreement’ or any collaboration of Mr Lorenz in the release of the Pickwick 2 Issued Recordings afford Pickwick 2 a defence of consent to any infringing acts?**

### *The Law*

44. It was common ground between HHO and Pickwick 2, at least by the time of trial, that the Recordings were all made after 1 August 1989 and accordingly the law applicable to the authorship and ownership of copyright in the Recordings is the Copyright Designs and Patents Act 1998 (“CDPA 88”).
45. There is no dispute that the Recordings are sound recordings in which UK copyright subsists pursuant to section 1(1) CDPA 88.
46. Section 11(1) CDPA 88 provides that the “*author of a work is the first owner of any copyright in it*”, subject to exceptions which do not apply in this case.
47. Section 9(1) CDPA provides that the “*author*” of a work is the person who creates it. For sound recordings created after 1 December 1996, section 9(2)(aa) provides that the author is taken to be the “*producer*” of the sound recording. “*Producer*” is defined in s178 (as amended) as “*the person by whom the arrangements necessary for the making of the sound recording... are undertaken*”. For sound recordings created between 1 August 1989 and 30 November 1996, section 9(2)(a) provides that the author is taken to be “*the person by whom the arrangements necessary for the making of the recording ... are undertaken.*” Accordingly it is common ground that there is no difference of substance in the treatment of those Recordings created before and after 1 December 1996.

48. The parties rely on various authorities which provide assistance in determining whether a person is “*the person by whom the arrangements necessary for the making of the sound recording or film are undertaken*” pursuant to section 9(2) CDPA 88, in particular: *Century Communications v Mayfair Entertainment* [1993] EMLR 335; *Beggars Banquet v Carlton Television and Another* [1993] EMLR 349; *A&M Records Limited and Inside Edge Productions Ltd v Video Collection International Limited* [1995] EMLR 25; and *Slater v Wimmer* [2012] EWPC 7. *Century Communications, Beggars Banquet* and *Slater v Wimmer* relate to the production of films. *A&M Records* relates to a sound recording.
49. These cases make it clear that “*the person by whom the arrangements necessary for the making of the film are undertaken*”, is a question of fact in each case. They provide some guidance on how I should approach that determination.
50. *Century Communications* involved the shooting of a film in China. E was a Hong Kong company that wished to film in China. It could only obtain the necessary permissions to do so if it acted through a Chinese company, so E engaged C to hire the director and actors and assist in getting the film made. Sir Mervyn Davies held that E was the person by whom the arrangements necessary for the making of the film were undertaken. E necessarily had to engage C, or another Chinese company, to achieve that making, but there would have been no film if E had not undertaken the arrangements. In the course of his judgment he rejected a submission that the court should take account of arrangements made during the shooting but not arrangements made in preparation for shooting or afterwards.
51. *Beggars Banquet* was an application for an interim injunction by a Claimant record company to prevent a Defendant film production company from exploiting video footage of a rave filmed by the Defendant on the Claimant’s commission. A young man had died at the rave as a consequence of taking the drug ecstasy and the Defendant had supplied footage to Carlton Television for inclusion in a current affairs programme. There was a written agreement between the parties, which Warner J described as “*manifestly imperfect*”. The agreement contained provisions relating to the ownership and licensing of various intellectual property rights, the effects of which were disputed by the parties and in relation to which no findings were made at that interlocutory stage.
52. Warner J found it “...*eminently arguable that the person who undertakes those arrangements within the meaning of section 9(2) is the person who is directly responsible for paying the production costs rather than the person, who could be a bank, from whom the person so responsible obtains the money.*” Warner J noted the difference in treatment of the rights of commissioners under the CDPA 88 to that under section 4(3) of the Copyright Act 1956, saying “*The 1988 Act does not provide that the person who commissions the film is to be the first owner of copyright in it... The person who commissions the making of a film must ultimately bear the cost of it but that doesn’t mean that he is the person who is to be taken to have undertaken the financial arrangements necessary for the making of the film.*”

53. Warner J also found it a “*telling point*” but “*not to my mind a conclusive point*” that without access to the site of the rave obtained by the Claimant, the Defendant could not have filmed the footage.
54. *A&M Records* related to a sound recording of music used by the skaters Torvill and Dean for their performances in the 1984 British Championship, European Championship and Winter Olympics. There was no written agreement between the parties. There were two potential producers of the recording, R and GP.
55. R was a conductor and arranger of music. He had commissioned and paid for the musical arrangements used, booked and paid for the studio, arranged and paid for 51 musicians to attend, arranged and paid for scoring, a sound engineer and a fixer, and paid for all expenses relating to the recording session, including meals and taxis. The recording that resulted was not to Torvill and Dean’s liking and so a second studio session took place which R did not attend or pay for. This resulted in the final recording used by the skaters.
56. GP was the agent of Torvill, Dean and the Second Claimant. He found and commissioned R to work on the recording, he agreed the fee to be paid to R, and he made it clear to R that the recordings would also be used on a CD for sale to the public. A director of the Second Claimant booked and paid for the second studio session. Sir Mervyn Davies found that although R was responsible for the making of the recording, GP as agent for the Second Claimant was the person who undertook the arrangements necessary for that making and accordingly the Second Claimant was the producer and first owner of copyright in the recording.
57. *Slater v Wimmer* concerned ownership in film footage of a skydiver over Mount Everest. Wimmer was the skydiver who paid for the trip including Slater’s costs. Slater was a cameraman hired by Wimmer to shoot the footage. Both claimed to own the copyright. Wimmer used some of the footage shot by Slater in a Danish television programme.
58. HHJ Birss QC (as he then was) found that there was no written or express oral agreement between the parties relating to copyright although there was an oral agreement between them for the provision of Slater’s services as cameraman. He found that Slater was the only and principal director of the footage and Wimmer was the person by whom the arrangements necessary for the making of the film. It was Wimmer’s idea to skydive over Everest. It was his idea to film it. He financed it, including paying Slater’s travel costs, he engaged another cameraman, a still photographer and a cinematographer to be involved, he arranged for Mr Slater to be provided with video equipment to shoot the footage. Accordingly he found that there was joint authorship of copyright between Slater as principal director and Wimmer as producer.
59. HHJ Birss QC declined to imply any terms licensing or assigning one party’s rights of copyright to the other into the agreement for services, mainly because Slater was not paid a fee for his services (only his travel expenses) and no

agreement had been reached between the parties about the sharing of future profits.

60. Counsel for HHO touched upon the case of *Robin Ray v Classic FM* [1998] FSR 622 in his skeleton argument. It appears to me to be relevant. It was discussed by HHJ Birss QC in *Slater v Wimmer* and it is convenient to quote part of his useful summary of it, in paragraphs 15 and 16 as follows:

*“15. In practice the English rules of equity are also important. In Robin Ray v Classic FM [1998] FSR 622 Lightman J dealt with a case arising from a dispute about ownership of copyright, which arose from work done by claimant pursuant to a consultancy contract with the defendant. The defendant argued on various grounds that it owned the copyright. One argument was that it had commissioned the creation of the copyright work in question by the claimant and therefore the defendant owned the copyright in equity. Lightman J analysed the law on this question in detail from p640 to 644. The whole analysis is relevant to the case before me. It was approved in full by the Court of Appeal in R Griggs Group v Evans [2005] EWCA Civ 11 (Jacob LJ paragraphs 13 to 16).*

16. *In summary the salient points at the outset of Lightman J’s analysis are:*

(a) *There are a considerable number of authorities where a copyright, brought into existence by a person (“the contractor”) pursuant to a contract for services with another (“the client”), has been held to belong in equity to the client;*

(b) *The issue in every such case is what the client under the contract has agreed to pay for and whether he has “bought” the copyright.*

(c) *The alternatives in each case are that the client has bought the copyright, some form of copyright licence or nothing at all.*

(d) *The general principles governing the respective rights of the contractor and client are as follows:*

*(1) the contractor is entitled to retain the copyright in default of some express or implied term to the contrary effect;*

*(2) the contract itself may expressly provide as to who shall be entitled to the copyright in work produced pursuant to the contract;*

*(3) the mere fact that the contractor has been commissioned is insufficient to entitle the client to the copyright. Where Parliament intended the act of commissioning alone to vest copyright in the client e.g. in the case of unregistered design rights and registered designs, the legislation expressly so provides [...]. In all other cases the client has to establish the entitlement under some express or implied term of the contract.”*

61. Mr Riordan submits in his skeleton that the question of authorship of the Recordings is “*fundamental and ownership cannot properly be determined until this question has been resolved*”. HHO’s case is that GLPL is the person by whom arrangements necessary for the making of the Recordings were made, and therefore the author of them. As the author of the Recordings it is the first owner of copyright in them. Mr Riordan submits that any submission by Pickwick 2 that the Recordings were commissioned works are irrelevant, “*absent a written assignment which does not occur*”, since the CDPA 88 does not contain any provision by which copyright vests in a commissioner of sound recordings. Mr Riordan submits in his skeleton that Pickwick 2 does not plead or suggest that such a written assignment exists and “*does not put forward any executed assignments to show how copyright could have been assigned by GLPL at any point since the creation of the Recordings*”.
62. This appears to mischaracterise Pickwick 2’s position. Pickwick 2 now advances a positive case through its Amended Defence that Pickwick 1 was the author and first owner of copyright in the Recordings as the person by whom arrangements necessary for the making of the sound recordings were made. However, in Mr Edwards’ closing he made clear submissions that, even if the court does not find that Pickwick 1 was the author of the Recordings, it remains for HHO to prove on the balance of probabilities that Pickwick 1 did not obtain the rights of copyright in some other way, in order to successfully rebut the section 105 presumptions upon which Pickwick 2 relies. I accept this as a correct analysis of the law. Mr Edwards submits that in such a case, the copyright may have been obtained by Pickwick 1: (i) as commissioner of the Recordings, by express provision in the 1992 Agreement that the rights of copyright in the Recordings should vest in Pickwick 1; or (ii) if GLPL was the author and first owner of the copyright in the Recordings, by a written assignment of the copyright from GLPL to Pickwick 1 in the 1992 Agreement or later assignment.
63. HHO makes no pleaded case, and Mr Riordan makes no direct submissions for HHO in his skeleton or closing arguments, as to the effect, if any, of the 1992 Agreement on the ownership of copyright in the Recordings. HHO’s case on ownership is based purely upon GLPL’s alleged authorship of them. Mr Riordan submits merely, without mentioning the 1992 Agreement directly, that “*the arrangement between GLPL and Pickwick 1 was simply that Pickwick 1 was to have a licence to exploit the Recordings. This was to be exclusive for a fixed period of time...*”. HHO’s alternative case is that the GLPL and Pickwick 1 were joint authors and joint first owners of copyright in the Recordings.
64. Although not expressed as such, therefore, in my judgment Mr Riordan’s submissions make legal sense only if HHO’s position is that the 1992 Agreement: (i) made no express provision for ownership in the Recordings to vest in either GLPL or Pickwick 1, which must therefore be determined by reference to authorship and first ownership; or (ii) merely acknowledged either that GLPL was the author and first owner of copyright in the Recordings or that GLPL and Pickwick 1 were joint authors and first owners under the

CDPA 88; and (iii) contained no assignment of copyright from GLPL to Pickwick 1 but only a licence.

65. For completeness, it appears to be no part of HHO's or Pickwick 2's case that the court should imply terms dealing with the vesting of copyright in the Recordings - for example, that rights of copyright should vest in Pickwick 1 as commissioner. Accordingly I will not consider the law relating to implied terms as discussed in, *inter alia*, *Robin Ray v Classic FM* and *Slater v Wimmer*.
66. Section 105(1) of the CDPA 1988 provides:

*"In proceedings brought by virtue of this Chapter with respect to a sound recording, where copies of the recording as issued to the public bear a label or mark stating:*

- (a) that a named person was the owner of copyright in the recording at the date of issue of the copies, or*
- (b) that the recording was first published in a specified year or in a specified country,*

*the label or mark shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved."*

67. Mr Riordan submits that, in the absence of any assertion or evidence of assignment of rights from Pickwick 1 to GLPL, it is sufficient for HHO to satisfy the court on the balance of probabilities that GLPL was the owner of the copyright in the Recordings at the time it entered into the February 2008 Agreement, in order to rebut such section 105 presumptions as are raised by the Pickwick/Carlton Statements. He submits that the presumptions impose no higher hurdle. I accept that as a correct analysis within the facts of this case and reject the suggestion that there is a 'special' burden of proof attaching to the presumptions, as is implied by the wording of paragraph 6B of the Amended Defence.
68. Finally, section 101 CDPA 88 provides:

- (1) An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.*
- (2) His rights and remedies are concurrent with those of the copyright owner...*
- (3) In an action brought by an exclusive licensee by virtue of this section, a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.*

### ***Preliminary Finding of Fact***

69. It is clear from the various agreements entered into by Mr Lorenz, and from the documentary evidence of his dealings with Pickwick 1, Carlton, HHO and Pickwick 2, that Mr Lorenz carried out his business as a record producer through GLPL. All of his disclosed invoices come from GLPL; all his disclosed letters are written on GLPL letterhead; those contracts which survive or are evidenced appear to have been made by GLPL; the tenor of all the witnesses' evidence was that their dealings were with Mr Lorenz in his capacity as director of GLPL. I find that it is more likely than not that Mr Lorenz dealt with the Recordings at all relevant times for and on behalf of GLPL.

***Is HHO the owner of copyright in the Recordings? Alternatively is it the exclusive licensee?***

70. The approach I will take to determining these first two issues is as follows:
- i) Who made the arrangements necessary for the making of the Recordings? If not GLPL either solely or jointly with Pickwick 1/Carlton, then HHO's claim must fail, as it has framed its case around GLPL's rights as author and first owner of copyright, as discussed.
  - ii) If GLPL solely or jointly made the arrangements necessary for the making of the Recordings, what effect, if any, does the 1992 Agreement have on the ownership of copyright in the Recordings?
  - iii) Is there any evidence of assignment of GLPL's rights of copyright to Pickwick 1/Carlton or any other third party after the 1992 Agreement and before the February 2008 Agreement?
  - iv) Has HHO succeeded in rebutting the s105 presumptions upon which Pickwick 2 relies?
  - v) What effect, if any, does the December 2008 Agreement have on ownership of copyright in the Recordings?

***Who made the arrangements necessary for the making of the Recordings?***

71. Mr Diplock is the only witness with any direct, albeit limited, experience of the process surrounding the making of the Recordings. He described attending A&R meetings with Mr Lorenz and others, in which the production of various albums for the Shows Collection was discussed in the mid 1990s although he was unable to give credible evidence if this was towards the beginning of the process in 1992/1993, or later. He described Mr Lorenz as heavily involved in the creation of the Recordings, but was unable to say which aspects were handled by GLPL and which were handled by Pickwick 1/Carlton. In particular he had no knowledge of who set the budget for an album. His evidence was therefore of limited assistance to the court. He described Mr Lorenz as actively participating in a two way process in which he discussed potential albums and artists with Pickwick 1/Carlton A&R and sales employees. He described Mr Woyda as having a very good knowledge of

artists and his own ideas about who he wanted and how much they might cost. He described artists' names as dropping in and dropping out of the discussions. I accept this evidence.

72. There appeared to be some dispute over where the idea of the making of the Shows Collection came from but, in fact, I do not find the evidence to be conflicting. Mr Hadaway's evidence is that Mr Lorenz had told him that he had spotted a gap in the market for the cost-effective recording of hits from musicals, being performed by well known artists, which could then be released as mid-price or budget recordings. Mr Diplock said that Mr Woyda at Pickwick 1 came up with a "*change of direction where Pickwick 1 would start to produce its own music instead of releasing the music of others*" and had come up with the name "the Shows Collection". He accepted that Mr Lorenz's idea, although not unique, dovetailed nicely with Mr Woyda's idea. I accept the evidence of both witnesses.
73. The only near-contemporaneous documentation referring to the making of the Recordings is contained in a single file, which Mr Hartley said was found in Pickwick 2's office and "*which must have been left there from the time that ABM was around*". ("**Pickwick 1 Correspondence File**"). The contents date from 9 July 1993 to 7 January 1994 (and include a letter of January 1994 wrongly dated as January 1993). The file contains: correspondence between Gordon Lorenz and employees of Pickwick 1, in particular Lorraine Jones (who appears from the documentation to have fulfilled a purely administrative and secretarial function); correspondence between Miss Jones and named artists and agents; and internal correspondence. Those documents afford a snapshot of the contractual and financial arrangements being put in place between the various parties and artists during that 18 month period as new recordings are being considered, agreed, cast and produced for the Shows Collection.
74. Mr Hartley agreed that the Pickwick 1 Correspondence File showed terms being agreed, performance rights being cleared and contracts being settled in a very efficient manner. He agreed they show: Pickwick 1 approving named artists, approving and paying named artists' fees and royalties, entering into contracts with those artists and paying production budget costs; and Mr Lorenz suggesting vocal artists, playing an important role in their selection, negotiating artists' royalties and advances and informing Pickwick 1 of deals agreed and names and addresses of artists' agents to whom contracts should be sent. He suggested that Mr Lorenz would be following instructions from Pickwick 1's A& R team, although agreed there was no evidence of that.
75. Mr Betts described Mr Lorenz as having one of the best address books in the industry. His evidence was that Mr Lorenz booked and paid for studio time on GLPL's account and that Pickwick 1/Carlton would not have been able to do so, as it was not a producer and so could have no account with the studio. He disagreed with the suggestion that GLPL was "*the person who made the arrangements necessary for the making of the Recordings*" because, he said, Pickwick 1/Carlton took the financial risk. He described Pickwick 1/Carlton like a bank supplying a mortgage.



76. Mr Hartley described the roles of the two protagonists in his witness statement as follows: *“I refer to the entirety of the documentation [the Pickwick 1 Correspondence File] which establishes beyond any doubt that Pickwick 1 was the record label that was commissioning the recordings and paying the artists and that Gordon Lorenz was simply acting as a record producer.”*
77. I am satisfied on the balance of probabilities that Pickwick 1/Carlton:
- i) commissioned the making of the Recordings;
  - ii) created the marketing name “the Shows Collection”;
  - iii) set and paid to GLPL the fixed production budget (excluding named artists’ advances and royalties);
  - iv) discussed and approved the albums to be recorded and the named artists to be used in the Recordings;
  - v) approved and paid, or rejected, the named artists’ advances and royalties negotiated by GLPL;
  - vi) entered into contracts with the named artists; and
  - vii) provided administrative and secretarial services in the form of Miss Jones.
78. I am satisfied on the balance of probabilities that Mr Lorenz through GLPL:
- i) created the idea of what became the Shows Collection and brought it to Pickwick 1;
  - ii) agreed to produce each Recording on a fixed production budget (exclusive of named artists’ fees);
  - iii) made all other payments, including providing for GLPL’s production fee, from the fixed budget;
  - iv) took the lead in suggesting albums and named artists for discussion and approval by Pickwick 1/Carlton;
  - v) negotiated named artists’ advances and royalties for approval by Pickwick 1/Carlton;
  - vi) instructed Lorraine Jones to enter into contracts with named artists on those approved terms;
  - vii) provided Lorraine Jones with contact details and addresses of named artists and agents to enable her to do so;
  - viii) decided upon, booked, hired and paid for musicians and non-named artists;

- ix) booked, hired and paid for CTS Studio time on GLPL's account;
  - x) attended the studio sessions;
  - xi) 'produced' the Recordings, in the technical sense of the word, at those sessions;
  - xii) provided and paid for the physical media on which the Recordings were captured;
  - xiii) provided finished masters to Pickwick 1/Carlton; and
  - xiv) drafted the CD liner notes for each album.
79. Taking all the relevant evidence and these findings into account, I find that Pickwick 1/Carlton commissioned and financed the production of the Recordings, but GLPL was the person making the arrangements necessary for the making of the Recordings and so the author of them. I have considered whether Pickwick 1/Carlton and GLPL could be joint authors, but reject this possibility. The evidence does not support it.
80. In reaching this conclusion I place particular weight, as Mr Riordan submits I should, on the evidence that GLPL, through Mr Lorenz, created the idea of a collection of low-cost high quality recordings of West End musicals. He pitched the idea to Pickwick 1 and it was serendipitous that Mr Woyda was at that time thinking that Pickwick 1 should start to produce its own product rather than exploiting the music of others.
81. I am satisfied on the evidence that if Pickwick 1 had rejected GLPL's idea, Mr Lorenz would have continued to pitch the idea to other record companies in an attempt to persuade a different company to commission it. Mr Hadaway, Mr Hartley and Mr Betts all gave evidence that Mr Lorenz pitched to multiple companies in this way. In this way, GLPL takes a similar role to Mr Wimmer in *Slater & Wimmer*, at least as far as the genesis for the idea of the Recordings and impetus for their creation is concerned.
82. Conversely, if GLPL for some reason had decided not to produce the Recordings with Pickwick 1, there is no evidence that Pickwick 1 would have created the Recordings itself. The evidence is that Pickwick 1 wanted to produce music for its own catalogue, not that it specifically wanted what turned out to be the Shows Collection. It appears likely that if GLPL had been busy doing something else, Pickwick 1 would have picked up a different idea from a different producer and built up a catalogue that way. Nor is there any evidence that Pickwick 1 could have created the Recordings itself. It was a company that until now had only exploited other people's music and the evidence suggests that Pickwick 1 at that time had no:
- i) staff producers;
  - ii) experience of producing its own music;
  - iii) accounts with studio facilities to enable the recordings to be made;

- iv) address book of orchestras and musicians and vocalists; and
  - v) evidence of close relations with the calibre of named artists needed, or their agents.
83. No one of these points is conclusive but, to use Warner J's wording from *Beggars Banquet*, they are all telling.
84. I further accept Mr Riordan's submissions that (i) it is highly relevant, applying the guidance in *Beggars Banquet*, that GLPL directly paid the production costs and booked and paid for the studio facilities to which Pickwick 1/Carlton had no access as a non-producer; and (ii) the fact that the budget was a capped fee that GLPL had the ability to spend or not, any surplus remaining being GLPL's producer fee, points to Pickwick 1/Carlton being a mere co-financer and commissioner of the Recordings.
85. I reject Mr Edwards' submission for Pickwick 2 that GLPL's role can be equated to R in *A & M Records*, i.e. the person organising and paying for studio time and musicians and making the sound recording, but not the person making the arrangements necessary for the making of the recording. I distinguish GLPL's position from that of R in *A & M Records*, firstly because of my finding that Mr Lorenz was the originator of the idea for the recordings as well as the person who made them, unlike R, and secondly because in *A & M Records*, R was only responsible for organising one of the two studio sessions which resulted in the recording finally used by Torvill and Dean. R had little or nothing to do with the arrangements for the second recording session and didn't even attend it. There is nothing of that nature in this case where the evidence suggests that Mr Lorenz acting through GLPL retained absolute control of the production process.
86. Accordingly, I find that GLPL, as the person who made the arrangements necessary for the making of the Recordings, was the author and first owner of the copyright in them, subject to any express contractual provision otherwise in the 1992 Agreement.

*What is the effect of the 1992 Agreement, if any?*

87. The 1992 Agreement cannot be found. None of the witnesses have ever seen it. The only near-contemporaneous documentation which relates to it are two internal Pickwick 1 memoranda which appear in the Pickwick 1 Correspondence File. The first is dated 26 November 1993 and states "*We have agreed a new release with Gordon Lorenz for the Shows Collection series – 'High Society'. Can you raise an addendum to the agreement of November 1992 for this new title. The production cost fee is £13,000 – 50% on signing the contract and 50% upon receipt of the master. Royalties and other conditions as before.*" The second is dated 17 December 1993, refers to five new named albums and again asks for an addendum to the 1992 agreement in identical terms. They tell us very little about the 1992 Agreement except that a royalty is payable pursuant to it. It is not disputed that royalties flowed from Pickwick 1/Carlton to GLPL.

88. I need to determine the provisions of the 1992 Agreement based on the evidence before me of what happened afterwards.
89. I have set out above the history of how these rights were exploited from the date of creation to the December 2008 Agreement. Putting to one side the specific allegations made against Mr Lorenz by Pickwick 2 and the Pickwick/Carlton Statements, each of which I will consider below, in my judgment that history credibly supports HHO's case that the 1992 Agreement did not displace the copyright from GLPL but merely provided Pickwick 1/Carlton with an exclusive licence to exploit the Recordings in return for a 4% royalty. In reaching this conclusion I place particular weight on the following:
- i) Mr Santilli's clear and credible recollection of discussing the copyright in the Recordings with Mr Tommaro in 1999, after the purchase of Carlton by Point, and checking it against Carlton's own rights database to find it logged as being owned by GLPL and exclusively licensed to Carlton. I find this compelling. His evidence was that he did ask the terms of the agreement between the parties, but can't remember them. It seems likely to me that if he had been informed that the terms of the agreement were different to his initial understanding, i.e. that Point did own the rights through its purchase of Carlton, he would be likely to remember that. His inability to remember the terms gives further weight to his evidence that the rights were owned by GLPL.
  - ii) The undisputed evidence of Mr Cooper that Gordon Lorenz prevented ABM from selling the physical stocks of CDs of the Recordings following the purchase by ABM of Point Rights Limited, because the rights had reverted to GLPL. Again, Mr Cooper remembers that he tried to look for any agreements relating to the Recordings but doesn't remember what he found. If Mr Cooper had found any evidence that the rights were not owned by GLPL but remained in the ownership of the receivers of Point, for example, I would expect him to remember it.
  - iii) Mr Santilli's evidence of conversations with both Mr Lorenz and Mr Mittrich around the time of the Point receivership in 2000, in which both told him they believed the rights in the Recordings had reverted to GLPL. I find it more likely than not that Mr Mittrich, as the previous owner of Point, would have known who owned the copyright in the Recordings as between GLPL and Pickwick 1/Carlton.
  - iv) The evidence of Mr Hadaway that at the meeting in April/May 2000 with Mr Lorenz and Mr Mittrich, Mr Lorenz mentioned he owned the Recordings and Mr Mittrich did not object. I bear in mind that the purpose of this meeting was to persuade Gordon Lorenz to allow New HHOL to exploit the Recordings. If Mr Mittrich knew or believed that the copyright was owned by Point through its ownership of Carlton, it would make no sense for him to agree to his

joint venture, New HHOL, obtaining a licence of the Recordings from GLPL.

- v) The evidence that the intellectual property rights of the Point group companies at the time of its receivership, including any rights in the Recordings, either (a) were licensed rights which reverted to the copyright owner because of the insolvency event; or (b) were bought by ODS in their intellectual property asset purchase from the receivers in 2000; or (c) remained in Point Rights Limited when the shares in that company were bought by ABM. There is no evidence before the court that any intellectual property rights either were sold elsewhere, or passed *in bona vacantia* to the Crown on the dissolution of the Point companies, which are the other possible options. Pickwick 2 suggests the latter happened, by Mr Betts and Mr Hartley's evidence that they believed the rights had 'vacated'. I cannot accept that it is likely the receivers would have allowed this to happen, when it is clear that the Recordings had commercial value and were of interest to both ABM and ODS.

Since it is not part of Pickwick 2's case that ABM bought the copyright in the Recordings, point (c) above can be discounted. It appears from the evidence of Mr Hadaway and Mr Santilli that ODS had not bought the copyright in the Recordings from Point, so point (b) above can be discounted. That leaves (a) as the only possibility supported by evidence – that the rights enjoyed by Point in the Recordings were licensed rights, which reverted to the GLPL as copyright owner on the insolvency of Point.

Allegations made against Mr Lorenz?

90. Mr Edwards, for Pickwick 2, submits that HHO's case is based largely upon Mr Lorenz telling people that he owned the copyright in the Recordings and those people believing him. Mr Edwards submits Mr Lorenz exploited the uncertainty around the insolvency of the Point group "*...otherwise it could end up that nobody exploited the copyright and he would get no royalties*". He submits that Mr Lorenz had a "*fast and loose way of discussing rights in these cases*", was "*inherently unreliable*", and "*wanted his royalty whether he was the copyright owner or not*". He tempers this slightly, by saying that Mr Lorenz's conduct was "*understandable as he had been left high and dry by the collapse of Point*" although he conceded, at my suggestion, that Mr Lorenz could have sought to buy the copyright in the Recordings from the receiver if, in fact, that is where they remained.
91. These amount to an attack on the professional reputation and integrity of a man who is no longer alive to defend himself. It appears to me that those submissions go further than is warranted by the evidence of Mr Hartley and Mr Betts upon which they are based. I will deal with them in detail.
92. It is common ground amongst the witnesses that Mr Lorenz was a "larger than life character", a man of great energy, creativity and drive who was constantly coming up with and pitching ideas to record companies in order to sell his

services. It is also common ground that he was a prolific record producer of vast experience responsible for producing over 800 albums, selling 8 million records and working with well known and well regarded singers, orchestras and choirs over a decades-long career.

93. Mr Hartley described Mr Lorenz as irritating to deal with and pushy and I accept that as his opinion. I also accept his and Mr Betts' evidence that Mr Lorenz would often pitch the same idea to several record labels at once. Mr Hadaway pointed out that there was nothing wrong in him dealing with different companies and seeking to get the best deal he could and Mr Betts agreed that Pickwick 2's agreements with Mr Lorenz were often expressed to be exclusive, to ensure their product was not competing with other similar products in different record companies. I accept that. That appears to be part and parcel of the life of an independent record producer seeking to drum up business.
94. However, Mr Hartley also stated in his written evidence "*Gordon, as would often be the case, inferred that he owned the copyright [in the Recordings] but this did not hold up to scrutiny. It became clear to me that he didn't have any underlying ownership.*" In cross-examination he conceded that the basis for this statement was that Mr Lorenz could show no documentary evidence of his copyright ownership in the Recordings in 2009. Mr Hartley produced no additional evidence or examples of Mr Lorenz claiming copyright in recordings he did not own on any other occasion.
95. Mr Betts in cross examination said "*If you dealt with Gordon Lorenz it was difficult to accept what he said at face value without documentary proof. There was lots of bluster. He claimed he owned this, he owned that, but we looked into it and all he had was a producer's royalty.*" Again, this assertion was not backed up with any evidence of any other occasions Mr Lorenz had allegedly made false claims. Both Mr Hartley and Mr Betts suggested that Mr Lorenz was desperate for money in 2008 and 2009, the implication being that he would claim ownership of rights he didn't have, in order to gain financially.
96. Mr Hadaway said that these were unfair characterisations. The evidence of Mr Hartley and Mr Betts on this subject, which I found extremely thin, was described by Mr Hadaway as "*not according with my experience at all.*" It also does not, in my judgment, accord with the documentary evidence in the Pickwick 1 Correspondence File, which shows Mr Lorenz meticulously documenting the various royalties and agreements made with artists, or with Mr Lorenz's correspondence with Pickwick 2, in which a number of emails show him correcting copyright statements on albums, providing corrected credits etc. Reading through several years of documentation, Mr Lorenz comes across, in my view, as acutely aware of the various rights of copyright in the musical works and recordings he is dealing with and careful to attribute them correctly. In my judgment, these allegations do not accord with the lack of any documentary evidence, save the Pickwick/Carlton Statements, in support of Pickwick 2's contention that Pickwick 1 ever owned the copyright in the Recordings. Finally, it does not accord with the very long, busy and successful career of Mr Lorenz as a highly respected independent record producer. I have no doubt that such a career would not have been so successful and highly-

regarded if he had been a man to play “*fast and loose*”, as Mr Edwards submits, with rights of copyright which, after all, is what the music business is based upon.

97. As regards the allegation about Mr Lorenz being desperate for money, Mr Betts accepted that this was contradicted by the evidence of the February 2008 and December 2008 Agreements which provided for no upfront payments to GLPL, merely an increased royalty with no obligation on HHO to work the Recordings. Pickwick 2 offers no evidence in support of this allegation save the existence of the Buyout Agreement. My findings in relation to that agreement are set out below and show that it provides no such support.
98. For these reasons I have no difficulty whatsoever in rejecting Pickwick 2’s allegations concerning Mr Lorenz. In my judgment they are baseless slurs upon Mr Lorenz’s character, made in an attempt to discredit him and bolster Pickwick 2’s case. Mr Lorenz’s reputation survives them unblemished.

*Evidence of Later Assignment?*

99. There is no evidence, beyond a mere assertion by Pickwick 2, that there may have been any assignment by GLPL of copyright in the Recordings to Pickwick 1, otherwise than pursuant to the 1992 Agreement. Mr Edwards submits that HHO needs to show that Pickwick 1 had not become the owner by some other means, but there is no evidence of any kind that there can have been any means other than the 1992 Agreement. The section 105 CDPA 88 presumptions do not afford Pickwick 2 any real corroborative evidence on this point, as the earliest presumption arises from the copyright statement showing Pickwick 1 as the copyright owner in 1993. There is no evidence of a later assignment to Pickwick 1 between the execution of the 1992 Agreement in November 1992 and the end of 1993. If there had been such an agreement, I would expect to see some reference to it in the 1993 Pickwick Correspondence File. There is none. Instead, it contains the two memoranda of 1993 requesting addenda to the 1992 Agreement. I am satisfied on the balance of probabilities that there was no such later assignment.

*Section 105 Presumptions?*

100. Mr Edwards submits that the Pickwick/Carlton Statements provide clear evidence of the effect of the 1992 Agreement, by raising the presumption under section 105 CDPA 88 that Pickwick 1 or Carlton (as the case may be) was the owner of copyright in the relevant Recording released on CD at the date of issue of that CD to the public. The difficulty which arises from Mr Hartley’s acceptance that at least some of the CDs are not the first issued versions, is that there is no evidence of the date of re-issue of those particular CDs to the public, save that they must date from after Pickwick 1 changed its name to Carlton in July 1995 and before the Point receivers were appointed in August 2000. In order to raise a valid presumption, the date of issue of the CD to which the statement is applied must be known.
101. I will not spend any time on considering whether or not all or some of the presumptions are validly raised, because I have no difficulty in finding that, to

the extent they are, HHO has rebutted them. The evidence set out in paragraph 89 above overwhelmingly points to the 1992 Agreement as either expressly confirming GLPL's rights as first owner of copyright in the Recordings or merely providing an exclusive licence of GLPL's copyright to Pickwick 1. I have found there is no evidence of a later assignment to Pickwick 1. Indeed, it appears to be impossible to reconcile the evidence with a scenario where the copyright in the Recording was owned by Pickwick 1/Carlton in accordance with the Pickwick/Carlton Statements. Mr Betts almost said as much in cross-examination when he said, "*From our investigations it was our belief that the rights had been vacated. We couldn't find where the copyrights had gone from Pickwick 1/Carlton. We couldn't believe GLPL had the rights*". In my judgment it is more likely than not that the reason Pickwick 2 couldn't find out 'where the copyrights had gone' from Pickwick 1/Carlton, was because the copyrights were never owned by Pickwick 1/Carlton.

102. I bear in mind, when making this finding, the evidence that the majority of the copyright statements made by HHO, Delta and Pickwick 2 itself in relation to the Recordings or the Pickwick 2 Issued Recordings are also incorrect, by both parties' admissions. Mr Hartley's first response when presented with what appeared to be errors in the Pickwick/Carlton Statements was that they might have been the "*product of an over-zealous art department*". Mr Santilli suggested that they were just template wording with the publication dates dropped in, again suggesting a mistake in the art or marketing department. It appears a likely explanation, but I make no finding on the point.

*Effect of the December 2008 Agreement?*

103. HHO's case is that the December 2008 Agreement assigns to HHO the rights to the copyrights in the Recordings listed in Schedule 1. It is between GLPL (referred to as "*the Producer*") and HHO (referred to as "*the Company*"). The recital refers to the Producer producing "*Audio long-playing Albums as detailed in schedule 1*". Schedule 1 is headed "*The Works*" and lists various of the Recordings. The relevant clauses are:
- i) Clause 1 - "*The Company shall be deemed the sole owner of the master recordings with complete and total rights of exploitation throughout the world by any means whatsoever including but not limited to Public Performance, broadcast and the manufacture of devices for the means of audio reproduction whether now known or in the future and the right to sell, assign or license such rights to third parties*".
  - ii) Clause 3 - "*The Company shall be solely responsible for the fulfilment of all copyright obligations arising out of the manufacture and sale of the Records hereunder.*"
  - iii) Clauses 4 and 5, which provide for payment to GLPL of a 10% royalty on the wholesale price of all records sold, with six monthly accounting.



- iv) Clause 6 - *“The Company shall be entitled to the right of production, reproduction and sale in the territory of the world of Records manufactured in pursuance of this agreement. The company shall at all times have the right at their discretion to decide whether and/or when to commence or discontinue the said production and sale Records manufactured in pursuance of this agreement and the right and licence at all times to use and publish the artist(s) name(s) for the labelling catalogues and exploitations of the said Records.”*
  - v) Clause 7 - *“The term “Records” or “Master Recordings” used in this Agreement shall be deemed to be a reference to any disc records of any material and revolving at any speed or any other device or contrivance of any tape, character or description whether now or hereafter known for the reproduction of sound.”*
104. Mr Edwards made very limited submissions on this point. They were as follows: Pickwick 2 accepts that the February 2008 Agreement provides an exclusive licence in perpetuity to HHO in the Recordings named within it. It is odd that such an agreement would be entered into if both parties actually intended to assign those rights, as Mr Hadaway states. It is particularly odd that this agreement, which is meant to rectify that mistake, does not use the word “assignment” within it, although he accepts that is not a requirement for an effective copyright assignment. However, he submits, the agreement is not effective to assign copyright because of the lack of clarity to Clause 7.
105. I reject that submission. I must construe the December 2008 Agreement to seek to give effect to the commercial intention of the parties who entered into it, following the relevant principles of contractual interpretation set out in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. Those cases tell me that I must seek to determine what the parties meant by the language they used in the contract, by ascertaining the meaning that the language used would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract. I accept both Mr Hadaway’s explanation of how this agreement came about and Mr Riordan’s submission that, in light of the existence of the February 2008 Agreement which provides HHO with an exclusive licence in perpetuity to many of the same Recordings, the “*only place to go*” for the parties in entering into this agreement is an assignment, and I find that these form part of the background information, or factual matrix, against which I must construe the agreement.
106. I find that the wording of Clause 1, namely *“The Company shall be deemed the sole owner of the master recordings with complete and total rights of exploitation throughout the world”* and *“the right to sell, assign or license such rights to third parties”* is effective to assign copyright in the master recordings of those Works listed in Schedule 1, albeit that clause 7 defines the master recordings in terms of the physical media upon which they are recorded. I am satisfied that the definition has been framed in this way merely to distinguish the copyright in the sound recording, which is being assigned

under this agreement, from the mechanical copyrights, which are not. In light of the background facts described above, I find that the wording is sufficiently clear to convey to the reasonable person with that knowledge that this was intended to be an assignment of copyright in the listed Recordings to HHO.

***Did Pickwick 2 know or have reason to believe the copies they were making were infringing?***

107. Both Mr Hartley and Mr Betts accepted in evidence that Pickwick 2 knew it was neither the owner nor the licensee of the copyright in the Recordings at the time the Pickwick 2 Issued Recordings were released. Mr Betts described it as a “*calculated risk*”. Subject to the limited defence of consent in relation to those Recordings the ownership of which is retained by GLPL, in relation to which I will make findings below, I find that Pickwick 2 knew the Pickwick 2 Issued Recordings infringed the copyright in the Recordings at the time of release.

***Does the Buy-out Agreement or any collaboration by GLPL in the Pickwick 2 Issued Recordings afford Pickwick 2 any defence of consent?***

108. The burden of proof on this issue is for Pickwick 2 to the civil standard. Mr Edwards submits for Pickwick 2 that I can be satisfied that GLPL consented to the doing of the acts of infringement on the basis of: Mr Hartley’s and Mr Betts’ evidence that Pickwick 2 bought GLPL’s contractual rights to a producer’s recording, albeit Pickwick 2 accepts there was no contract between it and GLPL at any time in relation to the Recordings; the documentary evidence of various emails from GLPL to Pickwick 2 which Pickwick 2 says shows GLPL’s intention to enter into such an agreement and collaborate with the release of the Pickwick 2 Issued Recordings; and Mr Betts’ evidence that Mr Lorenz delivered the masters of the Recordings to Pickwick 2.
109. Pickwick 2 has failed to satisfy me on every point:
- i) I have found that Mr Hartley’s evidence was confused and unconvincing. In particular, his explanation for why Pickwick 2 bought out rights it accepted it had no contractual obligation to pay, which was paraphrased in Mr Edwards’ submissions as “*I’d better pay him something because he was the producer and how else is he to be paid*”, lacks credibility.
  - ii) I find the emails from Mr Lorenz to Mr Betts, which purportedly relate to this buyout of rights, to be problematic. Mr Betts says that Mr Lorenz’s suggestion of a buyout of rights in the Recordings is found in an email of 30 June 2009. The reference is “*I wondered if you had an opportunity to consider... [various unrelated projects]... and finally a buy out for the 32 CDs listed.*” No list is attached. This is not a full-page printout like all of the other emails, but a reduced size photocopy. It is tailed by a Pickwick 2 auto message, which can only have been applied if it was replied to or forwarded by somebody within Pickwick 2, but that response is not disclosed. I cannot know if the response might have shed some light on the buyout referred to.

It is difficult to avoid the conclusion that the email from GL has been copied in order to remove the Pickwick 2 response. I bear in mind that this point was not put to Mr Betts in cross-examination and he has had no opportunity to answer it.

- iii) Mr Betts says that the list of 32 CDs to which that email relates is found attached to an earlier email of 27 May 2009 and includes many of the titles of the Recordings. There is no evidence connecting the two, save that the earlier email appears to contain a list of 32 CDs. However this appears to be the first page of a multipage email. It has no sign-off from Mr Lorenz as is his almost invariable style and it is not tailed by the AVG virus-checking wording that is seen on most of the other emails from Mr Lorenz around this time. It is not clear whether this is a list of 32 CDs or a truncated part of a longer list. This was put to Mr Betts who had no answer to give.
  - iv) The Buyout Agreement itself is not an agreement as such, merely an invoice for a buyout of 46 unspecified titles of 1 August 2009. It does not refer in any way to the Recordings. As evidence of an agreement it provides no real assistance.
  - v) Pickwick 2's evidence of Mr Lorenz's delivery of the masters of the Recordings was extremely weak. Mr Hartley admitted he had no direct knowledge of whether the masters were delivered. Mr Betts described masters generally as being on CD-R discs with handwritten or printed labels. Despite this, the CDs disclosed as masters by Pickwick 2 in these proceedings are those retail copies of the CDs on which the Pickwick/Carlton Statements were found. I do not accept that they are the masters, nor that Mr Lorenz delivered them. It is more likely than not that they are part of the old stock of CDs which passed to Pickwick 2 on the purchase of ABM.
110. Finally, in order to accept Pickwick 2's case on this point, I would have to find that it was more likely than not that Mr Lorenz entered into the Buyout Agreement and provided such collaboration and consent when he: (a) had already assigned the bulk of the copyrights to HHO in December 2008; and (b) knew or should have known that such consent would be in breach of the exclusive licence granted to HHO under the February 2008 Agreement in relation to those Recordings to which GLPL retained ownership. For the reasons I have already given in paragraphs 90 – 98 above, I decline to make such a finding.
111. I find that Pickwick 2 has no defence of consent to infringing acts in relation to those Recordings the ownership of which remains in GLPL.

### ***Conclusions***

112. HHO is the exclusive licensee of GLPL in the Recordings marked with an asterisk in Annex 1. It is the owner of the copyright in the remainder of the Recordings listed in Annex 1. Pickwick 2 has no rights to exploit any of the Recordings and no consent from GLPL has been provided to Pickwick 2 to

exploit the Recordings in which GLPL retains ownership. Pickwick 2 has no defence to the Claim, which succeeds.

## Annex 1 – The Recordings

Annie Get Your Gun  
Aspects of Love  
Cabaret  
Carousel  
Cats  
\*Chicago  
\*Chitty Chitty Bang Bang  
\*Crazy for Gershwin  
\*Damn Yankees  
Evita  
Fiddler on the Roof  
\*Gigi  
Godspell  
Grease  
Guys and Dolls  
Hair  
Hello Dolly  
\*High Society  
Jesus Christ Superstar  
Joseph and the Amazing Technicolor Dreamcoat  
Kiss Me Kate  
Les Miserables  
\*Mary Poppins  
Me and My Girl  
Miss Saigon  
My Fair Lady  
Oklahoma  
Oliver  
\*Paint Your Wagon  
Phantom of the Opera  
\*Porgy and Bess  
Showboat  
South Pacific  
Starlight Express  
Starlight Express  
\*Summer Holiday  
\*Sunset Boulevard  
The King and I  
\*The Lion King  
The Rocky Horror Picture Show  
The Sound of Music  
Val Doonican Love Songs  
West Side Story  
\*Whistle Down the Wind

\* Those Recordings included in Schedule A to the February 2008 Agreement  
but not contained in Schedule 1 to the December 2008 Agreement