

Case No: A2/2000/2110

Neutral Citation Number: [2001] EWCA Civ 1441
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE RIMER
CHANCERY DIVISION

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 5 October 2001

Before:

LORD JUSTICE SIMON BROWN
LORD JUSTICE CHADWICK
and
LORD JUSTICE TUCKEY

MCA RECORDS INC & anr

Claimants/
Respondents

- and -

CHARLY RECORDS LIMITED & others

Defendants/A
ppellant

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr N Merriman QC & Mr A Sutcliffe QC (instructed by Messrs Fox Williams for the Appellant, Mr Jean
Luc Young)

Mr J Baldwin QC & Mr H Carr QC (instructed by Messrs Russells, London for Respondents)

Judgment

LORD JUSTICE CHADWICK:

1. This is an appeal from an order made on 22 March 2000 by Mr Justice Rimer in copyright proceedings brought by MCA Records Inc and MCA Records Limited against Charly Records Limited, Charly International APS, Charly Holdings Inc, Mr Jean Luc Young and Charly Records (UK) Limited in relation to sound recordings known as “the Chess recordings”. The claimants’ title to copyright was conceded in the course of the trial; with the result that, in the event, the judge did not have to determine contested questions of ownership. The principal issue which he did have to decide was whether Mr Young was personally liable for acts of infringement by the first three corporate defendants. The judge found that Mr Young was liable in respect of the copying, and issuing to the public, of Chess recordings by Charly Records Limited. It is against that finding that Mr Young appeals to this Court. He does so with the permission of this Court (Lord Justice Morritt) granted on 13 June 2000.

MCA’s claim to the Chess recordings

2. Although the claimant’s title to copyright is no longer in issue, it is necessary to an understanding of the matters which the judge did have to decide – and which are raised on this appeal - that I first set out the background to the copyright dispute. MCA Records Inc is incorporated under the laws of the state of California. MCA Records Limited (now known as Universal Music (UK) Limited) is its United Kingdom subsidiary. MCA Records Inc manufactures and distributes sound recordings in which it owns copyright. MCA Records Limited manufactures and distributes sound recordings in the United Kingdom under licence from MCA Records Inc. Save where it is necessary to distinguish between them I shall refer to the claimants, together, as “MCA”.
3. MCA claims to be entitled, as assignee, to copyright in all sound recordings listed in a monograph “The Chess Labels – a Discography” compiled by Michel Ruppli and published by Greenwood Press in 1983. The recordings were originally made over a period from 1947 to 1975. The judge described the position in paragraph 4 of his judgment:

“4. . . . These recordings were the creation of two brothers, Leonard and Philip Chess. They emigrated from Poland to the USA and their early activities in Chicago in the 1940s centred on the running of clubs which featured the popular musicians of the day. They soon realised that there was also a growing demand by their clientele for recorded music and so they turned their hands to its production. Between about 1947 and 1975 they produced thousands of records by jazz, blues, rhythm and blues, and rock and roll musicians, many by well known artists: for example, Bo Diddley, Chuck Berry and Muddy Waters. The recordings became known as the Chess recordings.”
4. The first owners of the copyright were the companies used by the Chess brothers as vehicles for their recording activities. Those companies were Aristocrat Recording Corporation (in respect of the period from 1947 to 1952), Chess Producing Corporation (from 1952 until

1968) and GRT Corporation Inc (from 1968 until 1975). GRT claimed to have acquired the copyright to the recordings produced by Aristocrat and Chess Producing Corporation. On 15 August 1975 GRT assigned its rights in all sound recordings made before 14 August 1975 to Platinum Records Inc, a company controlled by Mr Joe Robinson. In 1980 Platinum entered into Chapter 11 bankruptcy proceedings and, with the approval of the court, merged with Sugarhill Records Limited, a New York company. MCA purported to acquire title to the copyright, initially under an exclusive distribution agreement made in 1983 with Sugarhill Records Inc, a New Jersey company and subsequently, in August 1985, under a confirmatory agreement from the New York company, Sugarhill Records Ltd. The chain of assignments and transfer from the first owners of the copyright, through the Sugarhill companies, to MCA is described by the judge in detail at paragraphs 37 to 45 of his judgment. He concluded: "All in all MCA's title to the Chess recordings was less than perfect." Nevertheless, it was accepted that title was established; and the judge made a declaration to that effect in his order of 22 March 2000.

Charly Records' claim to the Chess recordings

5. The judge found that Mr Young had been engaged in the music industry since about 1963. In 1972 he established a Liechtenstein company, the name of which was changed in 1980 to Charly Holdings Aktiengesellschaft ("CHA"). Its role was to hold master sound recordings. In 1975 he established a company in the United Kingdom, Charly Music Limited ("CML"). Its role was to exploit the rights held by CHA. CML produced re-issues of sound recordings in the fields of blues, jazz, rhythm and blues and rock and roll.

6. Charly Holdings Inc ("Holdings") is a company incorporated in Panama. As the judge put it, at paragraph 33 of his judgment: "The beneficial ownership of Holdings is a mystery". Holdings was ostensibly administered from Zurich by M. Raymond-Claude Foex, an industrial and financial consultant, who claimed to be its chief administrator under a power of attorney granted by its directors who, as is not unusual where a company is incorporated in Panama but owned beneficially by persons not resident there, are Panamanian lawyers. The judge explained the position in these terms:

"33. . . . Mr Young denies knowledge of who its shareholders are. His only contact with Holdings is via Mr Raymond-Claude Foex . . . whom Mr Young has known since the 1960s. Mr Foex . . . says he is prevented by Swiss law from disclosing the identity of the shareholders, although it is improbable that Swiss law would prevent the shareholders from consenting to the revelation of their identity. Mr Foex is now in his 80s. . . . He professes no expertise in the music business."

7. In 1981 Mr Young sold most of CHA's catalogue, and CML's business, to Holdings, together with the right to use the Charly name. In the same year Holdings established two wholly owned subsidiaries, Charly Records Limited ("CRL") a company incorporated under the Companies Acts and Charly International APS ("International"), a Danish company. Mr

Young assisted Holdings in establishing CRL, and was a director of that company from its incorporation until 21 December 1982. He remained an employee of CRL until 1996.

8. The judge explained the relationship between Holdings, International and CRL at paragraphs 34 and 35 of his judgment:

“34. . . . CRL’s field of operation was the re-issue market: it acquired the right, by purchase or licence, to exploit pre-existing master sound recordings produced by others, mostly those created during the 1940s to the 1970s. It came to be regarded a successful independent company operating in this particular field.

35. The rights which Holdings acquired were sub-licensed to CRL. This was done via International, acting as Holdings’ agent under an agency agreement evidenced by a letter dated 27 November 1981. . . . On 1 January 1982 CRL entered into a five year agreement with International whereby CRL obtained a sub-licence in respect of certain recordings owned by Holdings. . . .”

The agency agreement was subsequently extended for a further period, to 27 November 1992; and the sub-licence to CRL was extended to 30 June 1991. A further sub-licence was granted by International to CRL on 1 July 1991.

9. On 1 July 1987 Holdings entered into a licence with Red Dog Express Inc (“Red Dog”) under which Red Dog purported to grant a non-exclusive worldwide licence to exploit the Chess master recordings. Red Dog was a company controlled by Mr Marshall Sehorn. Mr Sehorn (or his company) claimed title to the Chess recordings under a letter agreement dated 3 December 1976 from Mr Sehorn and countersigned by Mr Robinson, to whom I have already referred as the owner of Platinum Records Inc, but who was, at that time, trading under the name of Chess Records. The December 1976 letter purported to confirm that Mr Robinson was the sole and exclusive owner of the Chess master recordings listed in a schedule (Schedule A) and to grant Mr Sehorn a right in perpetuity to exploit those recordings. In the course of negotiating the 1987 licence from Red Dog to Holdings, Mr Young obtained a declaration from Mr Robinson confirming the 1976 licence to Mr Sehorn. The judge explained the position as to the July 1987 licence at paragraph 51 of his judgment:

“51. Despite the absence of the schedule A list, on 1 July 1987 Red Dog granted a non-exclusive worldwide licence to Holdings in respect of the exploitation of the Chess masters. Its term was 11.5 years, and sub-licensing was to be permitted. No title list was attached to it, but the arrangement was that Mr Sehorn would send schedule A over when he had returned to New Orleans. Mr Young said that Holdings was the chosen licensee since worldwide rights were being offered: he said that, had only UK rights been offered, the licence would have been taken by CRL. The licence was signed on Holdings’ behalf by Mr Young. He also signed on behalf of CRL, which itself joined in the licence as a guarantor of Holdings’ obligations. Mr Young signed on

behalf of Holdings under a letter of authority from Mr Foex dated 17 June 1987; and on behalf of CRL pursuant to an authority given to him by Mr Visser, CRL's managing director."

The effect of extending the agency agreement between Holdings and International, and the sub-licence from International to CRL – to which I have already referred – was that (to the extent that the licence granted by Red Dog to Holdings on 1 July 1987 conferred rights on Holdings) the Chess master recordings which were the subject of that licence could be exploited by CRL. A further licence, dated 1 June 1992 was granted by Holdings to International in respect of (amongst other things) the Chess recordings. From August 1988 CRL manufactured and distributed Chess recordings using master recordings derived from Mr Sehorn or Red Dog. It is that manufacture and distribution which is the subject of complaint in these proceedings.

MCA's proceedings in California against Mr Sehorn and Red Dog

10. In late 1987 MCA became aware that Mr Sehorn and Red Dog were purporting to grant licences in respect of Chess master recordings. Negotiations took place during 1988; but those negotiations did not result in any concluded agreement. On 1 June 1990 MCA commenced proceedings against Mr Sehorn and Red Dog in California. On 11 September 1992, after a trial, the court gave judgment in those proceedings in favour of MCA. The court ruled that MCA had proved its title to the Chess catalogue and that Mr Sehorn had failed to prove the 1976 licence. It declared that Mr Sehorn and Red Dog did not have, and had never had, any title to the Chess master recordings. An appeal against that judgment was dismissed on 8 April 1994.

MCA's proceedings in California against the Charly companies

11. In the meantime, MCA had become aware that CRL was exploiting the Chess catalogue in the United Kingdom. On 5 June 1990, solicitors for CRL, Messrs Schilling & Lom, wrote to Messrs Russells, solicitors for MCA, to assert that CRL derived title through Mr Sehorn and Mr Robinson. In July 1991, after a year in which little progress had been made as between MCA and CRL, in-house lawyers employed by MCA met Mr Young at CRL's offices in London. The meeting did not lead to any agreement. On 10 January 1992 MCA commenced proceedings against CRL, Holdings and International in California. The allegation in those proceedings was unfair competition; but the judge accepted that, in effect, they were proceedings brought in respect of an alleged breach of copyright. In February 1992 Holdings claimed an indemnity in those proceedings against Mr Sehorn and Red Dog. The three Charly companies challenged the jurisdiction of the Californian court. Judgment in default was obtained against CRL on 2 November 1992 – that is to say, shortly after MCA had obtained judgment against Mr Sehorn and Red Dog in the parallel proceedings. Some two years later, on 26 September 1994, the Californian court declared that Holdings and International had never had any rights to the Chess catalogue. The judge found that that judgment had been given on the basis that Holdings and International were privies of Mr Sehorn and were estopped from disputing the judgment which MCA had obtained in its action against him and Red Dog – the appeal against which had been dismissed earlier in that year. A jury assessed

damages against Holdings and International in the amounts of US\$3.6m and US\$400,000 respectively. Holdings and International sought and obtained a new trial limited to quantum. On 27 July 1995 the Californian court entered judgment against Holdings and International jointly and severally for US\$6,314,093 and against CRL for US\$7,892,617. It seems that only US\$100,000 or thereabouts has been recovered under those judgments. Appeals by CRL, Holdings and International, on the grounds of want of jurisdiction were refused on 6 October 1997.

The 1993 test action

12. On 3 February 1993, following the default judgment which MCA had obtained in California some three months earlier, Russells (as solicitors for MCA) wrote a letter before action to CRL seeking undertakings that it would cease to distribute recordings derived from Chess masters in the United Kingdom. No undertakings were forthcoming. Proceedings followed almost immediately. On 11 February 1993 a writ was issued against CRL (in proceedings 1993 M 1142) in which MCA Records Inc and MCA Records Limited sought a declaration that “a purported agreement between Joseph Robinson the Defendant and Marshall Sehorn does not entitle the Defendant to sell or distribute any copies of the sound recordings identified in the schedule hereto” and an injunction and an order for delivery up in the usual form. The schedule listed just twenty record titles out of the Chess catalogue. It is plain that it was intended as a test action.

13. The 1993 action was due for trial before Mr Justice Jacob on 18 April 1996. In paragraph 87 of his judgment in the present case Mr Justice Rimer explained what occurred:

“87. . . . Two days before the trial CRL, which had been defending the action, announced that it did not intend to be represented at the trial, nor was it. On 17 April [1996] it went into administrative receivership. The trial took place on 18 April 1996 in the absence of representation from CRL. Jacob J held that the UK copyright in the Chess recordings vested in MCA on 10 June 1986 (this was the date on which a licence to a company called Pye determined). He also held that the claim that any licence had been granted by Mr Robinson to Mr Sehorn by the 1976 licence was a false claim and that “There is a whole raft of reasons as to why . . .

Jacob J awarded flagrancy damages against CRL under s.97 of the [Copyright, Designs and Patents Act 1988]. He said:

‘I have no doubt whatever that the justice of the case requires that there should be additional damages in this case. These defendants, well knowing of the finding of the Californian court, purported to claim their entitlement to issue these records pursuant to the Sehorn licence. Nobody acting honestly, faced with that judgment, or indeed the facts of the different schedules to which I have referred and

the other matters, could reasonably have thought that this was anything other than a bogus defence, a defence designed to prevaricate while infringement occurred.’ ”

These proceedings

14. These proceedings (1994 M 1150) were commenced in February 1994 against CRL as the sole defendant. The primary claim was to restrain the copying of “the Chess recordings” – meaning all the sound recordings listed in M. Ruppli’s monograph to which I have referred – and, again, there were the usual claims for an injunction and an order for delivery up. The proceedings were stayed pending the outcome of the 1993 test action between the same parties.
15. CRL went into receivership on 17 April 1996. On 22 April 1996, immediately following judgment in the 1993 test action, International, Holdings and Mr Young were joined as defendants to these proceedings. So also was Charly Records (UK) Limited, a company which (it was alleged) had taken over the business of CRL in or about September 1995. Judgments in default were obtained against CRL, International and Holdings. The claim against Charly Records (UK) Limited was compromised. In the event, therefore, the corporate defendants took no part in the trial of these proceedings. The only defendant who appeared at the trial was Mr Young.
16. In an amended statement of claim served in April 1996 it was alleged that Mr Young had personally authorised, procured and directed the acts of the four corporate defendants, that he was the moving spirit behind those companies, and that he was personally liable for their acts. A further allegation – to the effect that the phrase “the moving spirit” should be taken to mean “the directing mind and will” – was added by a subsequent amendment. The foundation for the pleaded claim was, in part at least, a statement which Mr Young had made in a witness statement served in the 1993 test action:

“I was involved in the planning of all [CRL] product releases which reproduced the Chess masters and I therefore know that all of their commercial product was manufactured from masters supplied by Marshall Sehorn/Red Dog. MCA’s allegations that [CRL] simply copied MCA’s commercial product are wrong.”

The relief sought against Mr Young was limited to relief in relation to recordings listed in a schedule to the amended statement of claim. As first served that schedule included some 400 record titles; but, by the time of the trial, the schedule had grown to include over 2,000 titles. There is a claim for damages for infringement of copyright “including damages under section 97(2) of the Copyright Designs and Patents Act 1988”.

17. The judge identified the issues for decision at paragraph 173 of his judgment. They were (i) whether Mr Young was liable as having procured, or participated in, the Chess licensing activities of Holdings and International so as to make him personally liable for unlawful authorisation contrary to section 16(2) of the Copyright, Designs and Patents Act 1988; and (ii) whether he procured, or participated in, CRL's activities in copying the Chess recordings and issuing them to the public, contrary to section 16(1) of that Act. In that context, "the Chess recordings" must be taken to mean the recordings listed in the amended schedule to the statement of claim.
18. The judge took the test to be whether Mr Young had "procured or participated in" the relevant acts of infringement from his examination of the authorities; and, in particular, from observations of Lord Justice Slade in *C Evans & Sons Ltd v Spritebrand Ltd and another* [1985] 1 WLR 316, 330G. At paragraph 15 of his judgment the judge directed himself in these terms:

"15. I derive from that and the earlier cases, therefore, that in order to make a director, other officer or employee of a company personally liable for the company's tort, it is necessary to show either that he was himself the person who committed, or participated in, the act constituting the tort, or that he directed or procured the tortious act to be done by others; and that inquiries into the matter will or may involve an "elusive question" turning on the particular facts of the case, and whose resolution may in turn involve the making of a policy decision as to the side of the line on which the case ought to fall."

The judge's findings of fact

19. The judge did not find Mr Young personally liable in relation to the licensing activities of Holdings or of International. He said this, at paragraphs 174 and 175 of his judgment:

"174. I have indicated in the course of my review of the evidence that I consider that there are strong grounds for suspicion that Mr Young is very much more closely interested in Holdings than he was prepared to admit. There are, in my view, grounds for an inference that he may be the, or at least a, beneficial owner of Holdings. Nevertheless, despite my suspicions about the matter, and despite the fact that (as I shall explain) I find that much of Mr Young's evidence was untruthful and misleading, I have concluded that there is insufficient evidence on which to justify a finding that he is in fact beneficially interested in Holdings, or that he does, or ever did, control it, whether on a de jure or on a de facto basis. I feel unable to find, therefore, that he had at any material time a decision making capacity on behalf of Holdings. With some hesitation, I conclude that I cannot find other than that it was Mr Foex who had that authority.

17 . . I find that the relevant decisions were made by Holdings acting by Mr Foex, not by Mr Young, and I am not satisfied that there is any basis for a conclusion that Mr Young either directed or procured the making of those decisions, or participated in their making in any material way. The decisions were simply not, as I find, within his power. In so far as MCA's case against Mr Young was based on the proposition that he authorised, directed or procured Holdings to do anything I find that it fails."

The "relevant decisions", in that context, are the decision to take the licence purportedly granted by Red Dog to Holdings in July 1987; the decision to extend International's agency until 27 November 1992; and the decision to grant International the licence dated 1 July 1992. That appears from paragraph 175 of the judgment.

20. The judge was more confident of the position in relation to International. He said this, at paragraph 176:

"176. Similarly, as regards International, and having heard from Mr Ranners, I have no hesitation in accepting that decisions on behalf of International were made exclusively by him, and that there is no basis for any conclusion that Mr Young authorised, directed or procured, or participated in any relevant way in, the doing by International of any of the activities material to this case. This applies to the International/CRL licences dated 1 July 1988 and 1 July 1991. I should say that, despite his denials, I have no hesitation in finding that Mr Young negotiated both those licences on behalf of CRL."

21. The remaining question, therefore, was whether Mr Young had procured or participated in CRL's activities in copying the Chess recordings and issuing them to the public, contrary to section 16 of the 1988 Act. The judge addressed that question at paragraphs 180 to 187 of his judgment. The following passages are important:

181. . . Contrary to his protestations, it is, I find, obvious that he [Mr Young] was not only a very important employee at CRL, he was the key man there and was so throughout the period with which I am concerned. The evidence reveals him as having been the central figure in almost all aspects of CRL's business and, in particular, as the person to whom everyone at CRL ultimately deferred. . . ."

182. . . . The reality is, as I find, that he played the role he did in publicising CRL and its products because he was CRL's chief . . ."

183. Consistently with his role as CRL's chief, it was Mr Young who exercised ultimate control over CRL's employees . . . It was Mr Young who engaged CRL's

managing directors and to whom they reported. . . . As regards the Chess recordings it was, on his own admission – which I regard as reflecting the truth – he who was involved in the planning of all CRL’s product releases which reproduced the Chess masters and who therefore claimed to be able to speak so authoritatively about them.

184. . . . It is no part of MCA’s case, nor do I find, that Mr Young was personally involved in every decision making activity at every level. It is, however, no answer to MCA’s case to point to documents suggesting that various transactions were apparently handled by individuals other than Mr Young. No doubt very many matters were dealt with exclusively by others and without reference to him. The point, however, is that the documents also show that Mr Young enjoyed the ultimate control of CRL and was regarded as its ultimate boss; . . .”

185. How did it come about that Mr Young enjoyed this authority within CRL? The answer is, I consider, clear. CRL was Holdings’ wholly owned subsidiary and Holdings needed to ensure that the affairs of CRL were run in a way which met its needs and expectations. Mr Young was not just the messenger boy, or conduit pipe, between Holdings and CRL that he was so anxious to urge. He was, I find, Holdings’ nominee director of CRL, albeit only a de facto or shadow director. There is, in my judgment, no doubt that he was part of the corporate governance of CRL and that he exercised the ultimate influence over it. I fully accept that CRL was run on a day to day basis by its managing directors. But I do find that decisions as to strategy and policy – and the overall ultimate control of the company – were his and that it was those decisions which ultimately carried the day. In this context it matters not whether or not Mr Young was the beneficial owner of Holdings. Even assuming that he was not, he was Holdings’ man in ultimate charge of CRL.

186. Is that enough to make Mr Young liable for CRL’s tortious activities in unlawfully copying and issuing to the public the Chess recordings? I am doubtful whether there is any evidence sufficient to justify a finding of liability on the ground that he actually participated in the copying and/or issuing activities. These were done by others. He did of course play a material part in bringing the dish to CRL’s table in that it was, I find, he on behalf of CRL who procured the granting to CRL of the licences dated 1 July 1988 and 1 July 1991; and he who personally got in the necessary master tapes so that CRL could exploit them. I find also that he played a part in the marketing and promotion of CRL’s Chess product; and of course he admits that he was involved in the planning of the release of the Chess product. Nevertheless, although again with hesitation, I decline to find that his participation in these aspects of CRL’s activities were sufficient to fix him with liability on the basis that he personally carried out, or participated in, all CRL’s copying and issuing activities of which MCA complains. His role was essentially a directorial one.

187. In my view the real question is whether Mr Young can be said to have directed or procured CRL’s unlawful copying and issuing activities. There is no evidence that he ever issued an express directive to any of the CRL employees requiring them to

copy the Chess recordings and to issue them to the public. Nor is there evidence that he was ever a party to any formal resolution that CRL should do any of these things. But to conclude from this that MCA's 'directing or procuring' case is not made out would not, in my judgment, be correct. CRL's business was re-issuing old recordings, and the re-issue of the Chess recordings represented a valuable and important part of that business. That part of its business had been brought to CRL almost exclusively by the efforts of Mr Young and it is obvious that he intended CRL to exploit it to the full, and of course it is equally obvious that he knew that it was doing so. . . . CRL continued to exploit the Chess recordings because Mr Young said it was safe to do so, having first spoken to Mr Sehorn about the matter: "Business as Usual!" was his and CRL's publicly stated stance. The simple fact is that he fully supported CRL's Chess activities and intended that they should continue as long as possible. He had, I find, the authority to stop them but did not. He knew that they were continuing and played his own personal part in their direct promotion. It maybe that he gave no express direction, or passed any express resolution, to the effect that CRL should copy the Chess recordings and issue them to the public. But it is not necessary to prove the making of an express direction or procurement. In the Performing Right Society case, at [1924] 1 KB 1, at 15, Atkin LJ said that:

"If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so, whether expressly or impliedly."

In the circumstances which I have outlined, I regard it as clear that Mr Young must be taken at least to have impliedly directed or procured the tortious acts of infringement by CRL of which MCA complains."

22. The reference in paragraph 187 to "Business as Usual!" as the public stance of both Mr Young and CRL is to the incident which the judge had described earlier in his judgment, at paragraph 83:

"83. On 19 December 1992 CRL issued an advertisement in Music Week, a trade publication. It was headed "Business as usual!" and included a picture of a clenched fist Mr Young urging dealers to get their Chess product from CRL and not from MCA. Ten Chess articles were listed next to Mr Young's picture. Below it was the legend "Practice [sic] safe licensing. Contact CHARLY your safe source for Chess, Checker, Cadet and Argo". The Chess Seahorse logo was also shown. MCA was shown as relegated to a reject box on Mr Young's desk.. ."

The date of the advertisement, 19 December 1992, shows it to be a response to the judgment which MCA had obtained against CRL in the Californian proceedings some six weeks earlier.

23. The judge directed an inquiry as to damages against Mr Young in respect of CRL's infringing activities in copying and issuing to the public Chess recordings. The inquiry was limited to the period from 21 April 1990; that being the date six years before Mr Young was joined as a defendant in these proceedings. The judge accepted that claims in respect of acts done before that date were barred by limitation. But he indicated his view that, on the taking of the inquiry, the court should consider an award of additional damages, under section 97(2) of the 1988 Act, in respect of infringing activities committed on and after 12 September 1992. The significance of that date appears from paragraphs 198 and 199 of his judgment:

“198 . . . I am inclined towards a lenient view of CRL's and Mr Young's conduct at least down to the Californian judgment dated 11 September 1992 in the MCA/Sehorn action. I am prepared to accept that, until then, CRL and Mr Young bona fide regarded the Sehorn route of title as a good one, or at least as arguably good. It is easy to be wise after the event (or the judgment) as to the hopelessness of the 1976 licence as a root of title.

199. However, once the judgment had been given on 11 September 1992 – one which, contrary to his evidence, I find that Mr Young did read – it should have been obvious to CRL and Mr Young that Mr Sehorn's title was a hopeless one and that CRL had no title to exploit the Chess recordings. Despite this, however, CRL continued to exploit them, and Mr Young was the prime mover in CRL's defiant and arrogant attitude that it would continue to do so. In my judgment, CRL's and Mr Young's conduct with regard to the exploitation of Chess recordings as from 11 September 1992 was about as flagrant as it could be.”

24. By his order of 22 March 2000, the judge declared that MCA Records Inc, was the owner of the copyright in the sound recordings listed in the schedule to that order. The judge found Mr Young liable for infringement of MCA's copyright in the Chess recordings. He made the usual orders restraining further acts of infringement and for the delivery up of infringing copies. He ordered an inquiry as to damages; and ordered that Mr Young pay to the claimants the sums found due upon that enquiry, with interest at a rate and for a period to be determined by the inquiry.

The issues raised on this appeal

25. In the skeleton argument lodged on his behalf, Mr Young identifies the two issues on which he seeks to challenge the judge's decision: (i) that the judge was wrong to hold that he, Mr Young, was personally liable for the infringements of copyright committed by CRL on the basis of what the judge described as his “directorial role as Holdings' nominee with ultimate influence”; and (ii) that the judge was wrong to order that flagrancy damages be assessed under section 97(2) of the 1988 Act.

26. There are two questions subsumed in the first of those issues, as expressed. First, there is the question whether the judge applied the correct test, as a matter of law, when he said – in the passage at paragraph 15 of his judgment to which I have referred – that in order to make a director, other officer or employee of a company personally liable for the company’s tort it is necessary either (i) to show that he was himself the person who committed, or participated in, the act constituting the tort (which, on the facts found by the judge, is not this case) or (ii) that he directed or procured the tortious act to be done by others. Second, there is the question whether the judge was entitled to find, on the particular facts of this case, that – as the judge put it in the final sentence of paragraph 187 of his judgment - “Mr Young must be taken at least to have impliedly directed or procured the tortious acts of infringement by CRL of which MCA complains”.
27. It is clear from the appellant’s notice, and from the skeleton argument served on his behalf, that Mr Young challenges the judge’s conclusion on the facts. It is reasonably clear also, I think, that he contends that the judge did not apply the correct test, as a matter of law. This appears from two passages in the appellant’s notice. First, after a reference to the judge’s reliance on *C Evans & Sons Ltd v Spritebrand Ltd and another* [1985] 1 WLR 317 and earlier authorities, it is said: “The problem remains that those authorities give no clear guidance as to the circumstances in which a director or employee’s involvement in the acts of the company should give rise to personal liability”. Second, in paragraph 10 of the appellant’s notice – in the course of a criticism of the judge’s conclusion on the facts – it is said that the judge should have held that the correct test to apply was that set out by this Court (Lord Justice Nourse, Lord Justice Pill and Lord Justice Waller) when giving Mr Young permission to appeal from an order for summary judgment made against him on 22 November 1996 by Mr Justice Jonathan Parker in these proceedings. In the course of his judgment, given on 13 November 1997, Lord Justice Nourse said this, at page 14 of the transcript:

“But suppose that the true position is that Mr Young has been a director, actual or “shadow”, of one or more of the defendant companies or has enjoyed a position of comparable influence enabling him to authorise, procure and direct their acts. *It is still necessary . . . for the evidence to establish that he was personally involved, to a substantial extent, in the release of the product.* His involvement in other aspects of the companies’ activities would not, or would not necessarily, have involved him in the infringing acts complained of.”
[emphasis added]

Particular reliance is placed on the sentence which I have emphasised.

28. In those circumstances it is convenient to examine the authorities and to seek to identify the correct test in law, before turning to the particular facts of this case.

The correct test in law

29. It is important to keep in mind that the claim against Mr Young in these proceedings is a claim for infringement under section 16 of the Copyright, Designs and Patents Act 1988. Section 16(1) of that Act provides that the owner of copyright in a work has the exclusive right to do the following (amongst other) acts in the United Kingdom – (a) to copy the work, (b) to issue copies of the work to the public. Section 16(2) provides that copyright in a work is infringed by a person who, without the licence of the copyright owner, does any of the acts restricted by the copyright. In that context “acts restricted by the copyright” includes the acts of copying the work and of issuing copies to the public described under paragraphs (a) and (b) of section 16(1). Section 16(3) provides that references to the doing of an act restricted by the copyright are to the doing of it either directly or indirectly.
30. Paragraph 26 of the amended statement of claim asserts, in terms, that “the Defendants and each of them have infringed the Plaintiff’s copyright in the Chess recordings by doing . . . or being party to the doing of” the restricted acts of copying, and of issuing to the public copies of, the Chess recordings. Paragraph 30 contains the allegation, “further or in the alternative” that Mr Young is liable because he “has personally authorised, procured and directed” the acts of copying and issuing which are the subject of complaint in the proceedings.
31. *Prima facie*, a claim in that form is a claim that CRL and Mr Young are liable as joint tortfeasors for the infringement of a statutory right. The basis of such a claim was explained by Lord Justice Mustill in *Unilever Plc v Gillette (UK) Limited* [1989] RPC 583. The claim in that action was for infringement of a European patent of which Unilever was the proprietor. The question on the appeal was whether there was a good arguable case against the United States parent company of the existing defendant sufficient to justify the grant of leave to join the parent company as a defendant to the action and to serve proceedings on it out of the jurisdiction. At page 602 of the report, Lord Justice Mustill set out the provisions in section 60(1) of the Patents Act 1977, which, as he said, described certain acts which constitute infringement of a patent. There is, of course, an obvious similarity between the structure of section 60(1) of the Patents Act 1977 (as it was) and section 16(2) of the Copyright, Designs and Patents Act 1988. Lord Justice Mustill went on, at line 46 on page 603:

“In a case such as the present, where the infringement alleged includes (for example) the sale of the patented product made up into marketable form, and the importation of the product, a literal interpretation of the section might lead to the conclusion that only the person who has actually sold the product and imported it can be an infringer – apart, perhaps, from the exceptional case, contemplated by Sir George Jessel MR in *Townsend v Haworth* (1875) 48 LJ Ch 770 at 772 where the direct infringer is the “mere cat’s-paw” of someone else. This is not however the way the law has developed. It has gone further than this, in two stages.

The first stage concerned a general question in the law of tort, arising where two persons were acknowledged or found to have committed tortious acts which led to the same damage. The question was whether these persons had

committed individual wrongs for which they were individually liable, or whether they had joined together in committing the same wrong. This was formerly of great importance, for there could only be one action in relation to one tort, so that judgment against one tortfeasor A would release any claim against the other tortfeasor B; and so also with any accord and satisfaction of the liability of A. The severity of this rule was mitigated by statute in 1935, but by then a jurisprudence had grown up concerning the distinction between joint and several tortfeasors. The most celebrated example of this is to be found in the judgment of Scrutton LJ in *The Koursk* [1924] P 140 at 156 where three situations are identified where A might be jointly liable with B: i.e., where A was master and B servant; where A was principal and B agent; and where the two were concerned in a joint act done in pursuance of a common purpose. This list may not be exhaustive, but it forms the basis for all subsequent statements of the law.

Thus far, the cases were concerned with the question whether A and B, acknowledged or found to be joint tortfeasors, were responsible individually or jointly for what had been done: *The Koursk* being a particularly acute case of such a dispute. In *Brooke v Bool* [1928] 2 KB 578 however a bold step was taken, by applying the gist of *The Koursk* to determine, not whether the two acknowledged tortfeasors A and B were responsible for the same tort, but whether in a case where B was undeniably liable, A could be held liable as well. In that case A and B had set out together to investigate the source of a gas leak which was B's direct concern alone. A had come with him to help. Because B was too old to carry out a particular task, A carried it out instead. The means of investigation were ill-chosen, and an explosion ensued. A was plainly liable. The Divisional Court held that B was liable too, as a joint tortfeasor engaged in a common venture with A.

Brook v Bool has engendered curiously little in the way of subsequent reported authority, but no doubt has been cast in the intervening 60 years on the proposition that participation in a common venture may cause someone to become directly liable as a tortfeasor, together with the person who actually did the damage.

The second line of authority concerns persons who are said to have jointly infringed a patent. Essentially this takes a situation where A is an infringer, and adds to it (via the authorities on joint tortfeasors) the possibility that B may also have infringed, not through any act which he himself has done, but by virtue of a common design with A. This also is a bold step, since it applies a common law doctrine to the interpretation of a statute. Nevertheless, in the light of *C.B.S. Songs v Amstrad Consumer Electronics* [1988] 2 WLR 1191 the principle is firmly established: for although it is true that the *Amstrad* case was concerned with the Copyright Act 1956, the statements in the leading speech of Lord Templeman, to which I shall later return, are applicable

equally to the patent legislation, and indeed most of the authorities cited in support were drawn from the field of patents.”

32. Lord Justice Mustill examined the authorities, from *Townsend v Haworth* (1875) 48 LJ Ch 770 to *C.B.S. Songs Ltd and others v Amstrad Consumer Electronics Plc and another*, now reported at [1988] AC 1013. It is unnecessary to repeat that exercise in this judgment. It is enough to refer to two observations in the speech of Lord Templeman in *CBS Songs v Amstrad* which are directly relevant to an understanding of what Lord Justice Mustill went on to say in *Unilever v Gillette*. The first is at [1988] AC 1013, 1057:

“My Lords, joint infringers are two or more persons who act in concert with one another pursuant to a common design in the infringement. In the present case there was no common design. Amstrad sold a machine and the purchaser or the operator of the machine decided the purpose for which the machine should from time to time be used. The machine was capable of being used for lawful or unlawful purposes.”

Lord Templeman then considered (at pages 1057G-1058H) the alternative submission that, even if Amstrad was not itself an infringer, nevertheless the activities of Amstrad in connection with the advertisement and sale of its models constituted a tort at common law. He referred to the well known passage in the judgment of Mr Justice Erle in *Lumley v Gye* (1853) 2 E & B 216, at page 232; and to the observations of Lord Justice Buckley in *Belegging-en Exploitiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59 at page 66, which, for convenience, I will set out. Lord Justice Buckley had said this:

“The plaintiffs do not only assert infringement by the defendants. They also say that the defendants have procured, counselled and/or aided other persons to infringe. This may perhaps amount to an allegation of direct infringement by the defendants themselves, but I am inclined to think that it is a claim in respect of a distinct, suggested tort of procuring infringement by others (based upon the principle enunciated by Erle J in *Lumley v Gye*, 2 E & B 216, 231) . . .”

Lord Templeman went on, at [1988] AC 1013, 1058E-F:

“My Lords, I accept that a defendant who procures a breach of copyright is liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement. The defendant is a joint infringer; he intends and procures and shares a common design that infringement shall take place. A defendant may procure an infringement by inducement, incitement or persuasion. But in the present case Amstrad do not procure infringement by offering for sale a machine which may be used for lawful or unlawful copying. . . . The purchaser will not make unlawful copies because he has been

induced or incited or persuaded to do so by Amstrad. The purchaser will make unlawful copies because he chooses to do so.”

33. It is, I think, pertinent to note that the reason which Lord Templeman gave (at page 1058F) for rejecting the alternative contention – based on the alleged procurement of an infringement of copyright – is indistinguishable from that which he gave (at page 1057B) for rejecting the primary contention – based on the allegation of common design. He does not seem to have been attracted by the tentative view of Lord Justice Buckley in the *Belegging* case that the procurement of an infringement of a statutory right (in that case a right to a patent) is best regarded as a distinct tort, actionable at common law; rather, he treated procurement of an infringement as a case where the person alleged to have procured the infringement would be liable as joint tortfeasor with the actual infringer, on the basis that they shared a common design.
34. Lord Justice Mustill addressed that point in the *Unilever* case. After citing the passages from *CBS Songs v Amstrad* which I have just set out, he went on, at [1989] RPC 583, 608, line 35:
- “I have set out these cases in some detail in deference to the care with which they were analysed during the argument on this appeal. In truth, however, I believe that they do little more than illustrate how in various factual situations the courts have applied principles which are no longer in doubt, save perhaps as regards the relationships between indirect infringements by procuring and by participation in a common design. There may still be a question whether these are distinct ways of infringing, or different aspects of a single way. I prefer the former view, although of course a procurement may lead to a common design, and hence qualify under both heads. We need not however explore this question” “I use the words “common design” because they are readily to hand, but there are other expressions in the cases, such as “concerted action” or “agreed on common action” which will serve just as well. The words are not to be construed as if they formed part of a statute. They all convey the same idea. The idea does not, as it seems to me, call for any finding that the secondary party has explicitly mapped out a plan with the primary offender. Their tacit agreement will be sufficient. Nor, as it seems to me, is there any need for a common design to infringe. It is enough that the parties combine to secure the doing of acts which in the event prove to be infringements.”
35. To adopt Lord Justice Mustill’s terminology, CRL may be seen as the primary infringer in the present case; in that CRL’s acts of infringement by copying, and issuing to the public copies of, the Chess recordings is acknowledged. The question in the present case is whether Mr Young has combined with CRL to secure the doing of acts which constitute the infringement.
36. Lord Justice Mustill did not find it necessary, in *Unilever v Gillette*, to decide whether the procurement of acts of infringement is capable of constituting a distinct tort at common law. It is unnecessary to decide that point in the present case. On the facts of this case, as found by the judge, it is impossible to avoid the conclusion that it was Mr Young’s purpose and intent, in doing what he did, that the Chess recordings should be copied and marketed through CRL.

This is one of those cases in which, if there is a distinct tort of procuring infringement by another, actionable at common law, the acts which are said to expose Mr Young to liability under that tort also expose him to liability as a joint tortfeasor with CRL in relation to CRL's acts of infringement.

37. The judge observed, at paragraph 12 of his judgment, that:

“It has . . . long been recognised that a director or other officer of a company may in certain circumstances be personally liable for the company's torts, although he will not be liable merely because he is an officer: he must be personally involved in the commission of the tort to an extent sufficient to render him liable. Whether he is sufficiently involved is a question of fact, requiring an examination of the particular role played by him in the commission of the tort.”

With the qualification that, if he is liable for the company's tort, it is because he is liable with the company as a joint tortfeasor – so that the relevant enquiry is whether he has been personally involved in the commission of the tort to an extent sufficient to render him liable as a joint tortfeasor – I would accept that as a correct statement of the law. It is important to keep in mind that, save in the exceptional case where the company can be regarded as the mere tool or “cats-paw” of the individual director or officer – to which Sir George Jessel, Master of the Rolls, referred in *Townsend v Haworth*, reported as a note to *Sykes v Haworth* at (1875) 48 LJ Ch (NS) 770, at page 772 – cases where the individual is liable jointly with the company fall within the third of the categories identified by Lord Justice Scrutton in *The Koursk* [1924] P 140 at 156. Save in the exceptional case of that kind, the liability of the individual is not founded on any concept of vicarious responsibility. The individual is not vicariously liable for the wrong done by the company.

38. If authority for the proposition that an individual may be liable jointly with a company which he controls, or of which he is a director or other officer, is required it may be found in the observations of Lord Buckmaster in *Rainham Chemical Works Limited (in liquidation) and others v Belvedere Fish Guano Company Limited* [1921] 2 AC 465, at page 476:

“If the company was really trading independently on its own account, the fact that it was directed by Messrs Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads.”

Lord Justice Atkin suggested, in *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1, at page 14, that that was, perhaps, to put the point a little more narrowly than would have been apt if Lord Buckmaster had intended to make a general pronouncement without reference to the particular case. The true position, in his view, was that an express direction was not necessary: “If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so, whether expressly or impliedly.”

39. The earlier cases were reviewed by this Court in *C Evans v Sons Ltd v Spritebrand Ltd and another* [1985] 1 WLR 317. Lord Justice Slade, with whose judgment the other members of the Court (Lord Justice Cumming-Bruce and Lord Justice O'Connor) agreed, emphasised, at page 323H, that:

“The mere fact that a person is a director of a limited liability company does not by itself render him liable for torts committed by the company during the period of his directorship.”

but went on, at page 324B:

“Nevertheless, judicial dicta of high authority are to be found in English decisions which suggest that a director is liable for those tortious acts of his company which he has ordered or procured to be done.”

40. The issue in *Evans v Spritebrand* was whether a statement of claim should be struck out. As Lord Justice Slade put it at page 329H, the question for decision was:

“...is it the law of England that a director of a company who has authorised, directed and procured the commission by the company of a tort of the nature specified in section 1(2) of the Copyright Act 1956 can *in no circumstances* be personally liable to the injured party unless he directed or procured the acts of infringement in the knowledge that they were tortious, or recklessly, not caring whether they were tortious or not?”

It is, perhaps, not surprising that the Court answered that question with an unqualified “No”. Lord Justice Slade observed (at page 329G) that he did not regard an appeal on a striking out application as an appropriate occasion for this Court to attempt a comprehensive definition of the circumstances in which a director of a company who has “authorised, directed and procured” (adopting the words in the pleadings in that case) a tortious act should be held personally liable. But he went on to say this, at pages 330H-331B:

“The Federal Court of Appeal of Canada in the *Mentmore* case [*Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195], eschewed any attempt to give a precise definition of the nature and extent of participation in the tortious act which will render a director who has directed or authorised it personally liable as a joint tortfeasor. As it rightly observed, this is an “elusive question”, a “question of fact to be decided on the circumstances of each case.” Nor, with respect, do I dissent from that court’s assumption that under English law, at least in some cases, broad considerations of policy may be material in deciding on which side of the line his participation fell. If there has been no “knowing, deliberate, wilful quality” in his participation, the court may naturally be more reluctant to hold the director personally liable.

Lord Salmon himself observed in the *Wah Tat Bank* case [*Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507] that “each case depends on its own particular facts”.

41. *Evans v Spritebrand* was considered in *PLG Research Ltd and another v Ardon International Ltd and others* [1993] FSR 197, at pages 238 and 239. After citing Lord Justice Slade’s comments, at page 329B-C in the *Evans* case, that the authorities clearly showed “that a director of a company was not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs” and that “in every case where it is sought to make him liable for his company’s torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of”, Mr Justice Aldous said this, at pages 238-9:

“ I believe it is clear that a director will not be liable unless his involvement would be such as to render him liable as a joint tortfeasor if the company had not existed. For example, the law distinguishes between facilitating and procuring a tort. A person who only facilitates a tort is not liable as a joint tortfeasor whereas a person who procures a tort is liable (see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] RPC 567 and *Belegging-en Exploitatiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59).”

It is difficult to see how the individual could have been liable *with the company* as a joint tortfeasor *if the company had not existed*. What, as it seems to me, Mr Justice Aldous had in mind is that the relevant question in each case is whether the individual, say A, would be liable as a joint tortfeasor with the primary infringer, say B, whether or not the relationship between A and B was that A was a director of B; in other words, would A’s involvement in the acts of B be such as to give rise to liability as a joint tortfeasor if A were not a director of B. The cases to which Mr Justice Aldous referred – *CBS Songs v Amstrad* and *Belegging* case – are, as I have sought to point out earlier in this judgment, directly relevant to that question. So understood, I would respectfully endorse Mr Justice Aldous’ formulation of the test. It is, I think, consistent also with the approach of Mr Justice Ferris in the later case of *Springsteen v Flute International Limited and others* [1999] EMLR 180, at pages 226-7.

42. The appellant places reliance on a short passage in the speech of Lord Steyn in *Williams and another v Natural Life Health Foods Ltd* [1998] 1 WLR 830. The principal question in that case was whether the second defendant, Mr Richard Mistlin, a director of a franchisor company, was personally liable to franchisees for loss which they suffered as a result of negligent advice given to them by the company. Lord Steyn (with whose speech the other members of the House of Lords agreed) held that, on the facts, Mr Mistlin had never assumed responsibility for the advice given by the company – see at page 838B-C. So there was no basis for an independent claim against Mr Mistlin personally. It was then sought to support the judgments below on the alternative ground that “Mr Mistlin had played a prominent part in the production of the negligent projections and had directed that the projections be supplied to the plaintiffs”, with the result (so it was contended) that Mr Mistlin was to be treated as a joint tortfeasor with the company. Lord Steyn addressed that argument at pages 838F-839A. The first difficulty for the respondents was that the case had not been put on that basis below; the judge had never intended to find that Mr Mistlin was liable as a joint tortfeasor; the possibility of reliance on such a cause of action had been expressly abandoned in the Court of Appeal; and it was not raised in the agreed statement of facts and issues before the Appellate

Committee. In those circumstances the point was not open to the plaintiffs in the House of Lords. But Lord Steyn went on to say this, at pages 838H-839A:

“In any event, the argument is unsustainable. A moment’s reflection will show that, if the argument were to be accepted in the present case, it would expose directors, officers and employees of companies carrying on business as providers of services to a plethora of new tort claims. The fallacy in the argument is clear. In the present case liability of the company is dependent on a special relationship with the plaintiffs giving rise to an assumption of responsibility. Mr Mistlin was a stranger to that particular relationship. He cannot therefore be liable as a joint tortfeasor with the company. If he is to be held liable to the plaintiffs, it could only be on the basis of a special relationship between himself and the plaintiffs. There was none. I would therefore reject this alternative argument.”

43. In my view it is impossible to read into that passage a general proposition that a director can never be liable as a joint tortfeasor with the company. The basis of Lord Steyn’s rejection of joint liability in that case, as it seems to me, is that Mr Mistlin could not himself be liable to the plaintiffs, whether jointly or severally, because he was not party to the special relationship which had given rise to an assumption of responsibility and upon which, alone, liability could be founded. But, if I were wrong in that view, and Lord Steyn did intend, in that passage, to propound a more general proposition, I would respectfully decline to follow it. The point did not arise for decision; the relevant authorities, including the decisions of the House of Lords in *Rainham Chemical Works v Belvedere Fish Guano Company* [1921] 2 AC 465 and *CBS Songs v Amstrad Consumer Electronics* [1988] AC 1013 were not cited or considered; and the observations are plainly *obiter*.
44. We were referred, also, to the recent decision of this Court in *Standard Chartered Bank v Pakistan National Shipping Corporation and others (No 2)* [2000] 1 Lloyd’s Rep 218. The fourth defendants, Oakprime Limited, were cargo owners and charterers in respect of a cargo of bitumen. Oakprime had persuaded the shipowners, Pakistan National Shipping Corporation, to authorise signature of bills of lading which Oakprime knew to be false. Oakprime presented the bills of lading to Standard Chartered Bank in order to obtain payment under letters of credit. A question on the appeal was whether the third defendant, Mr Arvind Mehra, a director of Oakprime, was personally liable for the false representations made to the Bank. The judge, Mr Justice Cresswell, had held that he was, on the ground that he had authorised, directed and procured the acts complained of with full knowledge that those acts were tortious – see at paragraph 62 in the judgment of Lord Justice Evans. This Court reversed that decision. It did so on the ground that, although Mr Mehra was the person who was responsible for making the misrepresentations, he did not commit the deceit himself; the representations were made by Oakprime and the Bank relied upon them as representations by Oakprime and not as representations made by Mr Mehra. The Court went on to consider whether it had been open to the judge to hold that Mr Mehra was liable as a joint tortfeasor for authorising and procuring the misrepresentations.
45. Lord Justice Aldous, with whose judgment on this point both the other members of the Court agreed, identified three circumstances in which a director or employee, acting as such, would be liable for tortious acts committed during the course of his employment. First, where the

director or employee commits the tort himself –see at paragraph 16 of that judgment, where Lord Justice Aldous gives as an example the lorry driver who is involved in an accident in the course of his employment. Second, where the director or employee, when carrying out his duties for the company, assumes a personal responsibility –see at paragraph 17, where Lord Justice Aldous gives *Williams v Natural Life Health Foods Ltd* as an example of a case where alleged liability on that ground failed on the facts. Third, where the director does not carry out the tortious act himself, nor does he assume liability for it, but he procures and induces another, the company to, commit the tort – see paragraph 20. At paragraph 21 (page 235 of the report) Lord Justice Aldous said this:

“A person who procures and induces another to commit a tort becomes a joint tortfeasor (see *Unilever Plc v Gillette (UK) Limited* [1989] RPC 583 and *Molnlycke AB v Procter & Gamble Ltd* [1992] RPC 583). There is no reason why a director of a company should be in any different position to a third party and therefore it is possible that a director can be capable of becoming a joint tortfeasor by procuring and inducing the company, for which he works, to carry out a tortious act. However there are good reasons to conclude that the carrying out of duties of a director would never be sufficient to make a director liable. That was the view of the Court of Appeal in *C Evans v Spritebrand Ltd* [1985] 1 WLR 317.”

46. It is important to appreciate that this Court said nothing in the *Pakistan National Shipping Corporation* case to suggest that it would have reached a different conclusion from Mr Justice Cresswell on the question of Mr Mehra’s liability as a joint tortfeasor for procuring and inducing the tort of deceit if it had thought that that point was open. The reason why it was not open appears from paragraph 24 of the judgment of Lord Justice Aldous:

“In my judgment it would be unjust to allow the amendment to plead procurement and inducement by Mr Mehra. I cannot think of any evidence which would have been before the Judge that could have affected the decision that he arrived at and in that sense the amendment could be considered to be a mere technicality. However the amendment would in reality amount to an allegation that Mr Mehra had procured and induced a fraud. That allegation should, if it was to be relied on, have been pleaded at the outset and I do not believe it right to allow such an allegation to be introduced at this stage. That means that the finding of the Judge that Mr Mehra was liable upon that basis cannot stand.”

47. In *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 the Federal Court of Appeal of Canada described the question whether, and if so in what circumstances, a director should be liable with the company as a joint tortfeasor as “a very difficult question of policy”. At page 202, Mr Justice Le Dain, delivering the judgment of the court, said this:

“On the one hand, there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and officers, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of limited liability afforded by incorporation. On the other hand, there is the principle that everyone should be answerable for his tortious acts.”

Plainly, it is necessary, in the individual case, to achieve a balance between those two considerations. Equally plainly, the judge appreciated that. As he put it in paragraph 15 of his judgment: “inquiries into the matter will or may involve an ‘elusive question’ turning on the particular facts of the case, and whose resolution may in turn involve the making of a policy decision as to the side of the line on which the case ought to fall.”

48. It is because there is a balance to be struck on the facts of each case that it is dangerous for an appellate court to appear to attempt a formulation of the principles which may come to be regarded as prescriptive. But I think it can be said with some confidence that the following propositions are supported by the authorities to which I have referred.
49. First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company – for example by voting at general meetings and by exercising the powers to appoint directors. Lord Justice Aldous suggested, in *Standard Chartered Bank v Pakistan National Shipping Corporation and others (No 2)* [2000] 1 Lloyd’s Rep 218, 235 – in a passage to which I have referred – that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word “never” in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort, as Lord Justice Aldous recognised at paragraphs 16 and 17 of his judgment in the *Pakistan National Shipping* case.
50. Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control. As I have said, it seems to me that this is the point made by Mr Justice Aldous (as he then was) in *PGL Research Ltd v Ardon International Ltd* [1993] FSR 197.
51. Third, the question whether the individual is liable with the company as a joint tortfeasor – at least in the field of intellectual property - is to be determined under principles identified in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 and *Unilever Plc v*

Gillette (UK) Limited [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v Amstrad* at page 1058E to which I have already referred, the individual “intends and procures and shares a common design that the infringement takes place”.

52. Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does “intend, procure and share a common design” that the infringement should take place may be liable as a joint tortfeasor. As Lord Justice Mustill pointed out in *Unilever v Gillette*, procurement may lead to a common design and so give rise to liability under both heads.
53. In the light of the authorities which I have reviewed I am satisfied that no criticism can be made of the test which the judge applied. But, in my view, the test can, perhaps, be expressed more accurately in these terms: in order to hold Mr Young liable as a joint tortfeasor for acts of copying, and of issuing to the public, in respect of which CRL was the primary infringer and in circumstances in which he was not himself a person who committed or participated directly in those acts, it was necessary and sufficient to find that he procured or induced those acts to be done by CRL or that, in some other way, he and CRL joined together in concerted action to secure that those acts were done.

The challenge to the judge’s findings of fact

54. It is, I think, important to keep in mind that, at the relevant times, Mr Young did not hold office as a director of CRL. The judge described him, at paragraph 185 of his judgment, as “Holdings’ nominee director, albeit only a de facto or shadow director”. But that is, I think, only another way of saying that Mr Young was the individual through whom Holdings exercised control. Whatever the true relationship between Mr Young, Holdings and CRL, it is plain, on the judge’s findings, that control was not exercised through the constitutional organs of CRL. This, then, is not a case in which the “very difficult question of policy” identified by the Federal Court of Appeal in *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at 202 needs to be resolved. If the judge’s findings of fact are accepted, Holdings and Mr Young chose to exercise control over CRL otherwise than through its constitutional organs.
55. The relevant questions, therefore, are (i) was the judge entitled on the evidence to find as a fact that control over CRL was exercised by or through Mr Young; and, if so, (ii) was the judge entitled to find on the evidence that Mr Young used his powers of control to ensure that the Chess master recordings derived from Mr Sehorn and Red Dog were copied by CRL and that copies were issued to the public.
56. The judge described Mr Young (at paragraph 181 of his judgment) as “the person to whom everyone at CRL ultimately deferred”. He held (at paragraph 184) that “the documents . . . show that Mr Young enjoyed the ultimate control of CRL and was regarded as its ultimate boss”. He said (at paragraph 185) that Mr Young exercised the ultimate influence over it: “decisions as to strategy and policy – and the ultimate control of the company - were his and it was those decisions which ultimately carried the day . . . he was Holdings’ man in ultimate charge of CRL”. At paragraph 187 the judge expressed his conclusion in these terms:

“CRL’s business was re-issuing old recordings, and the re-issue of the Chess recordings represented a valuable and important part of that

business. That part of its business had been brought to CRL almost exclusively by the efforts of Mr Young and it is obvious that he intended CRL to exploit it to the full, and of course it is equally obvious that he knew that it was doing so. . . . CRL continued to exploit the Chess recordings because Mr Young said it was safe to do so, having first spoken to Mr Sehorn about the matter: “Business as Usual!” was his and CRL’s publicly stated stance. The simple fact is that he fully supported CRL’s Chess activities and intended that they should continue as long as possible.”

57. Mr Young, through his counsel, has sought to attack those findings of fact. The attack has taken the familiar form of a trawl through the transcripts of evidence in order to demonstrate that there are passages in the evidence which are inconsistent with the judge’s conclusion that Mr Young was in ultimate charge or control at CRL; that he was the person whose decisions carried the day. But it is important to keep in mind that the judge heard evidence from many witnesses over a period of several days; in particular, he heard evidence from Mr Young himself. He summarised the evidence which he had heard, carefully and in detail, at paragraphs 97 to 169. At paragraph 181, after stating his conclusion that Mr Young was the person at CRL to whom everyone else deferred, the judge commented that: “In so far as the evidence of other witnesses tended to paint a different picture, I reject it as either untruthful or at least unreliable”.
58. Amongst those who gave evidence at the trial was Mr Sayyed Hasan Akhtar, who joined CRL as deputy managing director in 1994 and was subsequently appointed managing director. In a witness statement, signed on 4 August 1999 and subsequently adopted as his evidence, Mr Akhtar had said this:

“5. It soon became clear to me that notwithstanding my title, my authority in the company was limited. I had no real executive powers, as any material decisions regarding the company had to be authorised by Mr Young which inevitably slowed matters. . . . I soon learnt that Mr Young expected to be kept apprised of all company developments. . . .

. . .

11. Although I was never told that I was working for Mr Young or that he was my boss, my belief was that as a consultant he represented the shareholders and those entities which ultimately controlled CRL and the associated Charly companies, thus his keen interest in the running of CRL and the authority which was clearly vested in him. . . . I thought of Mr Young as the interface between me and the structure above me comprising of entities whose identities I did not know but to whom I answered. I have no way of knowing when I sought Mr Young’s comments on various matters, if he then referred those matters for decision to others, or whether he made the decisions alone.”

59. We were taken to an affidavit sworn by Mr Akhtar in 1996 in support of Mr Young's opposition to the application for summary judgment against him; and also to passages in his cross-examination in which, it is fair to say, he appears to resile from, or at the least to qualify, the evidence given in the two paragraphs which I have just set out. But the judge was well aware of the suggested inconsistencies. In commenting upon Mr Akhtar's evidence, at paragraph 129 of his judgment, he said this:

“Mr Akhtar was called as a witness by MCA. His evidence attributed to Mr Young a rather wider role than did an affidavit he made on 7 October 1996 in support of Mr Young's defence to the summary judgment application then being mounted against him. He there deposed that Mr Young had a “well defined role” within CRL, revolving around the negotiation and acquisition of copyrights. Considerable play was made in cross-examination about the change of emphasis in Mr Akhtar's evidence to me as compared with what he had said in the affidavit; but I found him to be a truthful witness and accept the essence of his evidence to me. The wider role he attributes to Mr Young is consistent with other evidence.”

60. It is not the role of an appellate court to retry issues of primary fact on the basis of transcript evidence. The judge has had the advantage, which this Court does not have, of seeing and hearing all the witnesses who do give evidence at the trial. He is in a much better position than this Court can be to assess where the truth lies, taking all the evidence together and in context. It is only if it can be demonstrated that he did not make proper use of that advantage that this Court can be justified in interfering with his conclusions on matters of primary fact. The material to which we have been shown comes nowhere near to demonstrating that. I have no doubt that we should resist what is, in effect, an invitation to say, on the basis of the transcripts, that we would have reached a different view from that reached by the judge. I am satisfied that the judge was entitled to reach the conclusions of primary fact set out in his judgment.

61. Viewed in the light of the test which I have set out there was abundant evidence to support the conclusion that Mr Young was liable with CRL as a joint tortfeasor. It is plain from the judge's findings of fact that Mr Young induced CRL to copy the Chess recordings and to issue copies to the public. It is plain that he and CRL joined together in concerted action to ensure that those acts were done. That was the whole purpose of obtaining the licences (or purported licences) for CRL. There was never any question but that CRL would exploit the licences in respect of the Chess recordings which Mr Young had negotiated on its behalf. If evidence of that be required it is found in Mr Young's witness statement in the 1993 test proceedings: “I was involved in the planning of all [CRL] product releases which reproduced the Chess masters”. Further confirmation of the inducement to infringe can be found in the December 1992 advertisement “Business as usual” to which the judge referred in paragraph 83 of his judgment.

62. It follows that I would uphold the judge's conclusion that Mr Young was liable, with CRL, as a joint tortfeasor, in relation to the acts of copying, and of issuing to the public copies of, the Chess recordings in respect of which complaint is made in these proceedings.

Additional damages under section 97(2) of the 1988 Act

63. Section 97(2) of the Copyright, Design and Patents Act 1988 is in these terms:

“The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to-

- (a) the flagrancy of the infringement, and
- (b) any benefit accruing to the defendant by reason of the infringement,

award such additional damages as the justice of the case may require.”

The relevant paragraph of the order of 22 March 2000 directs an inquiry as to damages against Mr Young, but with the added words in parenthesis –“including additional damages pursuant to Section 97 of the [1988 Act] for the period after 11.9.92”.

64. We were told that an order in that form is usual in cases where (as in the present case) the claimant opts for an inquiry as to damages rather than an account of profits. But I confess that I find it difficult to see how an order in that form provides a suitable basis for a challenge to the finding which underlies it; namely that the defendant’s conduct after the stated date was deserving of the epithet “flagrant”. The effect of the direction in the present case, as it seems to me, is twofold: (i) it indicates to the court before which the inquiry as to damages is to be taken that it is the judge’s view that, notwithstanding the provisions of section 97(2) of the 1988 Act, it would not be appropriate to award additional damages in respect of any period prior to 12 September 1992; and (ii) it indicates to that court the judge’s view that consideration ought to be given to an award of additional damages in respect of the period after 11 September 1992. The first of those limbs is unlikely to be the subject of appeal, at least by the defendant. But it is difficult to see why the judge’s view that the defendant’s conduct before 12 September 1992 did not amount to flagrant infringement can, or should, prevent the court before which the inquiry as to damages is taken from considering whether there are other factors which make it appropriate (absent a finding of flagrant infringement) to award additional damages. The second limb, in terms, tells the court before which the inquiry as to damages is to be taken that, in taking the inquiry, it must consider whether the justice of the case requires an award of additional damages. But that is a matter to which section 97(2) of the Act itself requires the court taking the inquiry to have regard in any event.
65. The true position in a case where such an order is made is that the trial judge intends to indicate to the court before which the inquiry is to be taken that it is his view that the infringement was sufficiently flagrant to justify that court taking into account, as one factor amongst “all the circumstances” which section 97(2) of the Act requires it to take into account, “the flagrancy of the infringement”. That is a matter on which the trial judge’s view is likely to be of particular relevance. What he is not in a position to determine – or to give a direction about – is whether the flagrancy of the infringement, taken together with all the other circumstances to which the statute requires the court to have regard, is such as to lead to the conclusion that “the justice of the case” requires an award of additional damages. That is a matter for the decision of the court before which the inquiry is taken, when it has identified the other circumstances which are of relevance.
66. To my mind, it would be better if orders made at the conclusion of the trial were drawn so as to reflect more closely what it is that the trial judge is really doing. A direction that: “in considering whether the justice of the case requires an award of additional damages under section 97(2) of the 1988 Act, the court taking the inquiry should have particular regard to the findings as to the flagrancy of the infringement made in the judgment” would meet the

concern which I have expressed. It would also provide a proper basis for an appeal against the findings of flagrancy which the trial judge has made.

67. In the present case, I would treat the appeal in respect of damages as if it were an appeal against the findings made in paragraph 199 of the judgment. So regarded, I am satisfied that the appeal must fail. It seems to me that the judge was entitled to reach the conclusion that, after Mr Young had knowledge of the judgment in the action brought by MCA against Mr Sehorn in California, the continued infringement of MCA's copyright in the Chess recordings was, indeed, "about as flagrant as it could be". I do not find it necessary to add to the reasons which the judge gave for that conclusion.

Conclusion

68. I would dismiss this appeal.

TUCKEY LJ:

69. I agree.

SIMON BROWN LJ:

70. I also agree.

Order: Appeal dismissed. Permission to appeal to the House of Lords refused. Minute of order granted.

(Order does not form part of the approved judgment)