

HOUSE OF LORDS

SESSION 2008–09

[2009] UKHL 41

*on appeal from: [2008]EWCA Civ 287*

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**Fisher (Original Respondent and Cross-appellant) v Brooker and  
others (Original Appellants and Cross-respondents)**

**Appellate Committee**  
**Lord Hope of Craighead**  
**Lord Walker of Gestingthorpe**  
**Baroness Hale of Richmond**  
**Lord Mance**  
**Lord Neuberger of Abbotsbury**

**Counsel**

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#### **LORD HOPE OF CRAIGHEAD**

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury. I agree with it, and I also agree with the comments of my noble and learned friend Lord Walker of Gestingthorpe. For the reasons that Lord Neuberger gives I would allow the appeal and make the order that he proposes. I gratefully adopt his description of the factual background and his analysis of the issues that were before the courts below.

2. This is, as Mummery LJ observed in the Court of Appeal [2008] Bus LR 1123, para 34, an extremely unusual case. One of its most striking features is Matthew Fisher's extraordinary delay in making his claim for a share of the musical copyright. In para 82 of his judgment Mummery LJ described the fact that Mr Fisher had waited for 38 years, with knowledge and without reasonable excuse, as unconscionable behaviour. Another, which is really a product of the first, is the fact that his claim is being maintained with a view to what happens in the future, not with a view to the past. The judge rejected his claim for a share of the royalties that were obtained in respect of the work during the six years before the issue of proceedings, and Mr Fisher did not appeal against that decision. Mummery LJ said in para 34 that what he was essentially seeking to do by insisting on his claim was to control the copyright for the future.

3. Remarkable though these features are, they need to be treated with some care as the law is applied to the facts of the case. Delay in itself is no bar to these proceedings. There is no statutory limitation period that

applies in English law to claims to copyright, the duration of which has been laid down by section 12 of the Copyright, Designs and Patents Act 1988, as substituted by the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297): see section 39 of the Limitation Act 1980. The position is less certain in Scotland. Section 8 of the Prescription and Limitation (Scotland) Act 1973 provides that if, after the date when a right to property has become exercisable or enforceable, a right has subsisted for a continuous period of twenty years unexercised or unenforced, and without a relevant claim having been made in relation to it, it is extinguished from the expiration of that period. Section 8(2) provides that the section applies to any right relating to that property, whether heritable or moveable, not being a right specified in Schedule 3 to the Act as an imprescriptible right, of which the most important is any real right of ownership in land. Intellectual property rights, such as copyright, are not mentioned in that Schedule.

4. As David Johnston, *Prescription and Limitation* (1999), para 7.08 points out, it is not self-evident that the phrase “any right relating to that property” in section 8(2) of the 1973 Act includes ownership of that property. But he accepts that this seems likely to be so, and it has been suggested that a claim to recover corporeal moveables is lost by the negative prescription of twenty years: see *Stair Memorial Encyclopaedia, The Laws of Scotland*, vol 18, *Property*, para 567. Section 8 does not say that incorporeal property is to be treated differently from corporeal property. But both David Johnston, para 7.08 and Professor David Walker, *Prescription and Limitation of Actions* 5<sup>th</sup>ed, (1996), p 85, indicate that an exception can be made in the case of the ownership of intellectual property which is regulated by other statutory provisions. Although the point has yet to be tested, I think that there is much to be said for the view that section 8 of the 1973 Act should not be read as extending to the ownership of incorporeal property the duration of which has been prescribed by another enactment. It would be anomalous if the period that section 12 of the 1988 Act prescribes for the duration of copyright throughout the United Kingdom (see section 157(1) of that Act) were to be subject to a provision about prescription that applies only to Scotland and the 1988 Act itself does not mention. It is common ground however that the provisions of the Limitation Acts 1939 and 1980 do not apply in this case. So it was to the prejudicial effects of the delay, not the mere fact that Mr Fisher has delayed for so long, that the respondents had to address this part of their argument.

5. As the judgments below have shown, this was not an easy task. The respondents' main defence to the claim when the case was before the trial judge was that Mr Fisher was not entitled to any share of the musical copyright at all. Having failed in that defence and in the related defence that because of the delay there could not be a fair trial, they now seek to rely on other aspects of the case that were not clearly focussed in the pleadings or were not fully explored in evidence. There were nevertheless some grounds for holding that the delay in itself was so unconscionable that any discretionary reliefs to which Mr Fisher might be entitled should, on equitable grounds, be refused to him.

6. It seems to me however that when they were considering the question whether the judge was right to grant all three declarations the majority in the Court of Appeal were, to a large extent, influenced by what they saw as Mr Fisher's motive for bringing the claim. He had, after all, sought an injunction before the trial judge. This led Mummery LJ, having referred to his object as being to control the copyright for the future and to dictate the terms on which he was to be entitled to share in its exploitation, to conclude that Mr Fisher was not entitled to the exercise of the court's discretion to enable him to enforce his joint share in the copyright: para 85. It was for this reason that the judge's declarations that he was a joint owner in the musical copyright with a share of 40% and that the respondents' licence to exploit the work was revoked when Mr Fisher commenced these proceedings on 31 May 2005 were set aside.

7. But there is a crucial difference in principle between the exercise of an undoubted right of property and resort for its protection to discretionary remedies. In so far as Mr Fisher may seek to restrain what the other joint owner may do in the exercise of its share of the copyright by means of injunctions, he will be subject to the court's discretion. Unconscionable delay may well have a part to play in the court's decision whether or not he is entitled to such a remedy. But it would be a very strong thing, in the absence of a proprietary estoppel, to deny him the opportunity of exercising his right of property in his own share of the copyright.

8. The law of property is concerned with rights in things. The distinction which exists between the exercise of rights and the obtaining of discretionary remedies is of fundamental importance in any legal system. There is no concept in our law that is more absolute than a right of property. Where it exists, it is for the owner to exercise it as he pleases. He does not need the permission of the court, nor is it subject

to the exercise of the court's discretion. The benefits that flow from intellectual property are the product of this concept. They provide an incentive to innovation and creativity. A person who has a good idea, as Mr Fisher did when he composed the well-known organ solo that did so much to make the song in its final form such a success, is entitled to protect the advantage that he has gained from this and to earn his reward. These are rights which the court must respect and which it will enforce if it is asked to do so.

9. The second and third declarations which the trial judge made were directed to the exercise of rights, not the granting of discretionary remedies. The majority in the Court of Appeal were, for understandable reasons, reluctant to offer the court's assistance to someone who had delayed for so long in asserting his claim. But it appears that, when they decided to deny him these further declarations which were designed to give effect to the rights that flowed from his co-authorship of the work which was found on unassailable grounds to have been established by the trial judge, they overlooked this fundamental distinction. I agree with my noble and learned friend that, leaving equity on one side as one must, there were no grounds in law for setting these declarations aside.

## **LORD WALKER OF GESTINGTHORPE**

My Lords,

10. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Neuberger of Abbotsbury. I agree with it, and for the reasons that Lord Neuberger gives I would allow this appeal and make the order that he proposes. Because of the interest and importance of this appeal I add some brief comments of my own, but they do not detract from my concurrence in Lord Neuberger's opinion.

11. In paragraph 81 of his judgment Blackburne J referred to the need, if the requirements for proprietary estoppel are made out, for any relief granted by the court to be proportionate to the degree of detriment suffered by the party (normally the defendant) asserting the estoppel. That balancing exercise may involve giving weight to any countervailing advantages that have been received by the defendant in the meantime. The clearest English authority for this is probably *Sledmore v Dalby* (1996) 72 P&CR 196, where the defendant had

already enjoyed nine years of rent-free residence and any equity that he might have claimed had already been satisfied: see the observations of Roch LJ at p 204 and Hobhouse LJ at p 209. This appeal would have been an even more striking example, if the requirements for an estoppel had been made out.

12. The appellant has successfully claimed to be legally entitled to a property right, that is a share of musical copyright. The respondents have failed in their attempt to fetter (or even extinguish) that right through the doctrine of proprietary estoppel. It would be remarkable, I think, if the court were nevertheless to produce a similar result by refusing to grant declaratory relief.

13. In an important passage which I read as introductory to his reasoning on this point Mummery LJ stated ([2008] Bus LR 1123, para 79):

“There is, in my view, a substantial distinction to be drawn between the right to attribution of authorship and the right to title and to the control of exploitation in the future. It does not appear that the practical significance of the very different effects of the three declarations was explained to the judge or even to this court in the skeleton arguments or the oral submissions. I confess that the full implications of the different declarations did not become clear to me until writing this judgment. The case was presented primarily on the basis that Matthew Fisher was not entitled to any relief, either because a fair trial of his claims was impossible or because he was prevented by his dilatory conduct and acquiescence from claiming any relief. If that was wrong, then it seems to have been assumed that all three declarations were appropriate.”

14. This passage reflects the fact that (as often happens in complex litigation) the parties’ positions went through something of a process of evolution as the case progressed through the courts. Mr Purvis QC, in opening the case to your Lordships, said that his client was interested purely in future royalties (transcript, day one, page seven). This implied that what he wanted was a change in the arrangements for distribution of royalties by the Performing Rights Society and the Mechanical Copyright Protection Society, while leaving intact the structure of the existing arrangements for exploitation of the musical copyright.

15. At trial, by contrast, the appellant did seek past royalties accrued during a six-year limitation period, and also an injunction in general terms restraining copyright infringement. He failed to obtain either of these heads of relief. The judge declined to grant an injunction because (para 88) he did not detect “any intention on the defendants’ part to continue to exploit the musical copyright in the Work in defiance of any interest in it which Mr Fisher is able to establish.” Neither of these heads of relief was pursued on appeal. Moreover, even at trial the appellant’s primary aim seems to have been simply to obtain his proper share of the stream of royalties: his skeleton argument at trial stated (para 44):

“So far as the future is concerned, the declaration will ensure that C and his heirs will receive the royalties to which they are entitled from the PRS and the MCPS. The PRS and the MCPS will amend their records accordingly, so that C will in future receive his due share of the royalties collected from the performance, broadcasting and recording of the work.”

16. Looking again at para 79 of Mummery LJ’s judgment against this background, and also at the fuller discussion in paras 86-88 of his judgment, I am not sure whether Mummery LJ thought that the appellant wanted to upset the existing arrangements for exploitation of the copyright, or simply thought that he ought not to have that opportunity, whether he was likely to try to take it or not. In any event, I consider that the answer lies in para 75 of Lord Neuberger’s opinion: if and when the appellant seeks an injunction to restrain an alleged infringement of his copyright, his application will have to be dealt with on its merit, including the merits of any equitable defences.

17. Where there is trespass to land or goods, or a comparable invasion of intangible property rights, the court’s natural response is to grant injunctive relief, and not to leave the claimant to his remedy in damages. In *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322, A L Smith LJ made a much-quoted statement of principle beginning as follows:

“Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to

sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction."

18. But, as A L Smith LJ went on to say, there are cases in which that rule is relaxed, particularly where it would be oppressive to the defendant to grant injunctive relief. The whole passage was quoted by Sir Thomas Bingham MR in *Jaggard v Sawyer* [1995] 1 WLR 269, 277-278, and his judgment, and that of Millett LJ, contain a full exposition of these principles as they now stand. *Jaggard v Sawyer* was concerned with the refusal of injunctive relief for breach of a restrictive covenant, an equitable right, but the same principles have been applied in respect of legal rights such as a legal easement of light, or indeed legal freehold ownership.

19. Lord Neuberger makes it clear, but I would like to emphasise again, that your Lordships are not deciding anything, or even expressing any preliminary views, as to the grant or refusal of injunctive relief in some future situation. The restoration of the second and third declarations entitles the appellant to recognition as a co-owner of the musical copyright in the work, and enables him to start enjoying his share of royalties, but it does not anticipate any question that might arise if he were to seek injunctive relief in order to control future exploitation of the copyright.

## **BARONESS HALE OF RICHMOND**

My Lords,

20. I agree that, for the reasons given by my noble and learned friend, Lord Neuberger of Abbotsbury, supplemented by those of Lord Walker of Gestingthorpe, this appeal should be allowed and the declarations made by the trial judge restored. As one of those people who do remember the sixties, I am glad that the author of that memorable organ part has at last achieved the recognition he deserves.

21. I wish only to add a footnote, prompted by the information which we were originally given, that Matthew Fisher was aged only 20 when Procol Harum recorded “A Whiter Shade of Pale” in April 1967. These days, it is easy to forget that the age of majority was 21, until it was reduced to 18 by section 1(1) of the Family Law Reform Act 1969 as from 1 January 1970. Any member of the band, or indeed their manager, who was under the age of 21 at the relevant time was therefore an “infant” to whom the complex and confusing rules relating to infants’ contracts applied (see the discussion of the then existing law in the Law Commission, Working Paper No 81, *Law of Contract, Minors’ Contracts*, 1982, Part II; the changes made by the Minors’ Contracts Act 1987, as a result of the Law Commission’s Report, Law Com No 134, 1984, do not affect the issues under discussion here and in any event apply only to contracts made on or after 9 June 1987).

22. The policy of the law was summed up by Lord Mansfield in the leading case of *Zouch, d Abbot and Hallet v Parsons* (1765), 3 Burr 1794, 1801, 97 ER 1103, 1106:

“. . . miserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages; if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; and, without prejudice to themselves, for the benefit of others.”

23. Hence infants have always been permitted to make binding contracts of service, apprenticeship and for their performance of services, provided that these are for their benefit. They may therefore have to accept some terms which are to their disadvantage for the sake of the overall advantage which the contract brings. The question is whether the contract, taken as a whole is to the infant’s benefit. Thus in *Doyle v White City Stadium Ltd* [1935] 1 KB 110, a professional boxer was held bound by the terms of his licence from the British Boxing Board of Control, which allowed him to earn his living boxing but required him to keep the rules.

24. No doubt it was for this reason that the recording contract between the manager, on behalf of Procol Harum, and Essex Music

opens with the words “This contract for your personal services . . . .” Recording companies in those days will have been alive to the possibility that at least some of the young people with whom they were contracting were under the age of 21. But of course, the more unusual or disadvantageous the terms, the less likely it would be that such a contract would be held binding upon the infants involved. This, to my mind, is an additional reason for not construing the recording contract as an assignment of the musical copyright. The recording company very sensibly kept that as a separate matter to be dealt with by separate contracts.

25. Furthermore, the effect of even a contractual assignment of copyright by a minor is, to say the least, controversial. On the one hand, there is Lord Denning’s dissenting judgment in *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, 89 where he observed:

“The law of this country for centuries has been that if anyone under the age of 21 makes, or agrees to make, a disposition of his property by a deed or document in writing, he may avoid it at any time before he comes of full age or within a reasonable time thereafter.”

Lord Denning cited the decision in *Zouch v Parsons* (above), at 1804, 1109, where Lord Mansfield accepted the law as laid down by Perkins, the full quotation from which is as follows:

“. . . all such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate.”

That rule was, as Lord Denning pointed out, accepted without question by the House of Lords in *Edwards v Carter* [1893] AC 361, where it was held that if the infant chose to repudiate the disposition, he must do so within a reasonable time after coming of age. It finds a place in leading textbooks today: see, for example, *Emmet and Farrand on Title*, 19<sup>th</sup> ed (looseleaf from 1986) para 12.108.

26. However, Lord Denning’s view may have been affected by his view that the contract in question, although a contract for services, was not for the benefit of the infant. The majority in *Chaplin v Leslie*

*Frewin*, however, took the view that, at least if copyright were effectively assigned as part of a beneficial contract to supply services, then it was binding upon the infant and could not be avoided. However, they also expressed the view that, even if the contract had been voidable, the intellectual property had been transferred and could not be recovered. On this point, the editor of Cheshire, Fifoot and Furmston's *Law of Contract* 15<sup>th</sup> ed, 2006, p 559 suggests that Lord Denning's view is to be preferred.

27. None of this has been argued before us (the parties perhaps having forgotten when the age of majority was changed). There is no need for us to express a view on the point. When I raised this subject during the course of the hearing, we were told that Matthew Fisher was in fact 21 at the relevant time, so the question does not arise. But in this case the express assignments of copyright in the music and words were quite separate from the recording contract. The idea that an infant might be held validly to have made an implied and gratuitous assignment of his copyright would, I think, have astonished both Lord Mansfield and Lord Denning. Had Matthew Fisher been under the age of 21, therefore, this would have been an additional reason for rejecting the respondents' enterprising argument.

## **LORD MANCE**

My Lords,

28. I have had the benefit of reading in draft the opinions of all of your Lordships. For the reasons given by my noble and learned friends, Lord Neuberger of Abbotsbury, supplemented by those of Lord Walker of Gestingthorpe, I too agree that this appeal should be allowed and the declarations made by Blackburne J restored.

## **LORD NEUBERGER OF ABBOTSBURY**

My Lords,

29. This appeal concerns the ownership of the musical copyright in the song “A Whiter Shade of Pale”, which was recorded by the band Procol Harum during April 1967 and first released as a single by Decca records under licence from Essex Music Ltd (“Essex”) on 12 May 1967. As Blackburne J said in his judgment at first instance, it was “one of the most successful popular songs of the late 1960s”, and it is “no exaggeration to say that with the passage of time the song has achieved something approaching cult status” – [2006] EWHC 3239 Ch, paras 1 and 3.

*The factual background*

30. The relevant facts, as found by the judge or were common ground, are as follows. The music in its original form was composed in early 1967 by the band’s lead singer and pianist, Gary Brooker, around lyrics written by the band’s manager, Keith Reid. Mr Brooker then recorded a demonstration tape of himself singing the song as he had composed it, accompanying himself on the piano. He played this tape to Mr Platz, the managing director of Essex, who told him that he considered it to be “a certain hit”.

31. On the following day, 7 March 1967, Mr Brooker and Mr Reid entered into a written agreement with Essex (“the assignment”), whereby they assigned to Essex “all the Copyright as defined by the Copyright Act 1956... in the words and music of the composition ‘A Whiter Shade of Pale’ [and another song] ... absolutely”. In the assignment, Essex agreed to pay Mr Brooker and Mr Reid specified percentages (normally 50% between them) of the sheet music and mechanical royalties, and of the synchronisation, performing, broadcasting and rediffusion fees, receivable in connection with the song. Mr Brooker and Mr Reid also recorded in the assignment that they would share the payments due to them thereunder equally. Around 17 March 1967, the song was registered with the Performing Rights Society (“the PRS”) and with the Mechanical Copyright Protection Society (“the MCPS”). These two societies collect, and distribute, to the persons entered in their records as the copyright owners, any royalties due in respect of works registered with them.

32. Shortly thereafter, Matthew Fisher joined the band as organist, and, together with Mr Brooker and the other members of the band (Bobby Harrison, Ray Royer, and Dave Knight), he rehearsed and added to the music of the song, so that it evolved into its final form (“the

work”) which the band recorded in April 1967 (“the first recording”). Crucially for present purposes, Mr Fisher composed the familiar organ solo at the beginning of the work, and the organ melody which is a counterpoint throughout most of the four minutes during which the work lasts. The recording of the work was released on 12 May 1967 as a “single” record on the Decca label, under Essex’s licence, and it became an instant “hit”.

33. On 16 May 1967, the five members of the band, effectively acting through Mr Reid (therein “the manager”) entered into a further contract (“the recording contract”) with Essex. The effect of this contract was to enable Essex to exploit any recording made by the band over the period of a year (subject to renewal by Essex a maximum of four times). In return, Essex was to pay the members of the band a specified royalty in respect of every record of any such recording which was manufactured. The main purpose of the recording contract from the point of view of Essex was that it operated as “the consent required by section 1 of the Dramatic and Musical Performers Protection Act 1958” – clause 3(a). Unfortunately, there are two clauses with that assignation, so I shall refer to it as clause 3(ii)(a). By the first clause 3(a) – “clause 3(i)(a)” – the band members granted to Essex “the right to manufacture... sell, lease, license or otherwise use or dispose of .... records embodying the performances to be recorded hereunder ....”. Further by what I shall for consistency’s sake refer to as clause 3(i)(e), the members of the band also granted to Essex “the right to incorporate in records to be made hereunder instrumentations, orchestrations and arrangements owned by the manager at the time of recording them”. It has been common ground that the recording contract applies to the first recording.

34. Thereafter, over the next two years or so, apart from enjoying great acclaim in connection with the work, the band recorded other songs (with words written by Mr Reid and music composed by Mr Brooker, sometimes together with Mr Fisher), whose musical and lyrical copyrights were assigned to Essex in the same form, and on the same terms, as the assignment.

35. In his evidence, Mr Fisher said that, during 1967, he had raised the question of his having a share in the rights in respect of the music with Mr Brooker and Mr Reid, but had been rebuffed or ignored by them. He explained that he had not wanted to push his claim as he feared that, if he did so, he would be asked to “say goodbye to a career in ... a number one pop group”. In 1969, however, Mr Fisher did indeed leave the band, which by then had accrued certain debts. A relatively

informal agreement was reached whereby the remaining members agreed to release (or, more accurately, I think, to indemnify) Mr Fisher from any liability in respect of such debts in return for his waiving any right to certain specified royalties (not including any copyright royalties in respect of the work).

36. Despite leaving the band, Mr Fisher was invited to play with them at various functions from time to time between 1969 and 2003. On a couple of occasions during that period, once in 1971 and once in 1991, Mr Fisher contended that he was entitled to certain royalties which he was not receiving, but he never suggested that he was entitled to any money in respect of the exploitation of the work.

37. In or about 1993, Essex's rights under the assignment and the recording contract were purportedly assigned to Onward Music Ltd ("Onward"), and Onward was registered with the PRS and MCPS as the owner of the copyright in the work. Meanwhile, the first recording was proving very successful, resulting in substantial royalties, which were collected by the PRS and MCPS and distributed to Essex (or their successors), as they were registered with the societies as owners of the copyright, and Mr Brooker and Mr Reid were then paid their shares under the terms of the assignment.

38. Quite apart from the first recording, the work has been extraordinarily successful over the 38 years since it was first released. It has been the subject of many articles and interviews, and has a dedicated following, as can be seen from the number of websites devoted to the work and the band. There are over 770 versions of the work performed by other groups, and themes of the work (especially the introductory bars) are available, and popular, as mobile telephone ring tones.

39. During April and May 2005, Mr Fisher, through his solicitors wrote to Essex and Mr Brooker (together "the respondents") notifying them of his claim to a share of the musical copyright in the work, explaining the grounds for his claim, threatening proceedings if his claim was not acknowledged, and putting forward terms of settlement. Those terms were rejected; accordingly, Mr Fisher began proceedings on 31 May 2005, and they came before Blackburne J, who gave a judgment which was largely favourable to Mr Fisher – [2005] EWHC 3239 Ch. However, on appeal, the respondents substantially succeeded: Mummery LJ and Sir Paul Kennedy set aside two of the three

declarations made at first instance, although David Richards J dissented – [2008] Bus LR 1123.

*The issues before the judge and the Court of Appeal*

40. The judge had to decide a number of issues, only some of which are now raised in your Lordships' House. First, there was the question whether a fair trial was possible, bearing in mind the passage of time between the composition of the work and the issue of Mr Fisher's claim. Although the judge rightly described Mr Fisher's silence about his claim between 1967 and 2004 as "remarkable" and "quite extraordinary", he concluded that a fair trial was possible - [2006] EWHC 3239 Ch, paras 16 and 17, and 24. This conclusion was strongly challenged by the respondents on appeal, but the Court of Appeal rightly upheld the judge on this point – [2008] Bus LR 1123, para 43. There is no appeal on this point by the respondents.

41. Secondly, the judge had to determine whether, and if so to what extent, Mr Fisher could, in principle, claim any share of the musical copyright in the work. He decided that "Mr Fisher's instrumental introduction (i.e the organ solo ... as repeated) is sufficiently different from what Mr Brooker had composed on the piano to qualify in law, and by quite a wide margin, as an original contribution to the work" - [2006] EWHC 3239 Ch, para 42. Consequently, he held that "Mr Fisher qualifies to be regarded as a joint author of the work" - *ibid.* After considering various arguments raised by the respondents, the judge concluded that "Mr Fisher's interest in the work should be reflected by according to him a 40% share in the musical copyright" – *ibid.*, para 98. Rightly, the Court of Appeal had little difficulty in dismissing the respondents' appeal on this issue – [2008] Bus LR 1123, para 44. The respondents do not seek to appeal further on this issue.

42. The third issue was whether, nonetheless, Mr Fisher had no right to claim a share of the musical copyright owing to the circumstances in which he made his contribution to the work. In effect, the respondents argued that, given that the song in its original form had been recorded, and the musical copyright in it had been assigned to Essex, in March 1967, Mr Fisher impliedly assigned to Essex any interest he acquired in the musical copyright in the work. The judge rejected that argument – [2006] EWHC 3239 Ch, para 63. However, the Court of Appeal, or at least the majority, left the point open – [2008] Bus LR 1123, para 100. This "implied assignment" argument is raised by the respondents by way of cross-appeal.

43. The fourth issue was whether Mr Fisher had lost his right to maintain his claim to an interest in the musical copyright by virtue of the recording contract. The judge held that the agreement “did not purport to take from Mr Fisher any copyright interest he had in the musical composition”, and therefore rejected the argument – [2006] EWHC 3239 Ch, para 66. The Court of Appeal, or at least the majority, left the point open - [2008] Bus LR 1123, para 111. The respondents maintain their case in this House on this issue by way of cross-appeal.

44. The fifth issue was whether Mr Fisher had lost his interest in the copyright as a result of estoppel, laches or acquiescence. The respondents failed on this issue before the judge – [2006] EWCA Civ 3239, para 82. The Court of Appeal accepted that the judge was entitled to come to this conclusion, and that they could not interfere – [2008] Bus LR 1123, paras 67 (Mummery LJ, with whom Sir Paul Kennedy agreed) and 117 (David Richards J). On this “laches, estoppel or acquiescence” issue, the respondents maintain their case by cross-appealing.

45. The sixth issue at first instance was whether Mr Fisher could claim his share of the monies paid out by the PRS and the MCPS in respect of the work during the six years before the issue of proceedings (it being rightly accepted by Mr Fisher that any claim going further back would be time-barred). The monies collected by the societies had been paid to Essex, or, since 1993, Onward, as the copyright owner registered with the societies, and the appropriate share in accordance with the assignment had then been paid to Mr Reid and Mr Brooker. The judge rejected this claim, on the basis that “for so long as Mr Fisher chose not to make ... his claim [and] allowed the societies to account to the [respondents], ... he must be taken to have gratuitously licensed the exploitation of his copyright” – [2006] EWHC 3239 Ch, para 94. The judge went on to find that this implied licence was revoked when the letter before action was sent to the respondents in May 2005 – *ibid*. There was no appeal to the Court of Appeal by Mr Fisher on this finding.

46. The final matter to be considered by Blackburne J was the nature of the relief to be accorded to Mr Fisher. The judge refused an injunction restraining Essex from exploiting the musical copyright in the work, as there was no evidence of the respondents seeking to do so “in defiance of any interest in it which Mr Fisher is able to establish” –

[2006] EWHC 3239 Ch, para 88. There was no appeal by Mr Fisher on this issue.

47. However, the judge granted declarations in these terms:

- “1. [Mr Fisher] is a co-author of ... ‘A Whiter Shade of Pale’ as recorded by ... Procol Harum (‘the work’) and released as a single on 12 May 1967.
2. [Mr] Fisher is a joint owner in the musical copyright in the work, with a share of 40%.
3. The [respondents’] licence to exploit the work was revoked on 31 May 2005”.

Allowing the respondents’ appeal, the majority of the Court of Appeal held that it was unconscionable, in all the circumstances, for Mr Fisher to have revoked the implied licence, and that “the defences of acquiescence and laches operated to disentitle [Mr] Fisher from the exercise of the court’s discretion to grant the second and third declarations” – [2008] Bus LR 1123, para 85. Accordingly, they held that the licence continued and the second and third declarations should be set aside – *ibid*, para 89. David Richards J dissented – *ibid*, para 140. Mr Fisher’s appeal against the setting aside of the second and third declarations raises a point which I regard as an aspect of the laches, estoppel, and acquiescence issue.

48. Accordingly, there are three matters to be considered, namely the implied assignment issue, the recording contract issue, and the laches, estoppel and acquiescence issue. In relation to the first two of these matters, it is right to mention that there was some discussion whether the rights granted to Essex under the assignment or the recording contract were assignable, at least without the consent of the other parties to the agreement. This point, which is of particular apparent force in the case of the recording contract (given that, as pointed out by my noble and learned friend, Baroness Hale of Richmond, it describes itself as concerned with “personal services”), was not decided by Blackburne J or by the Court of Appeal and was only lightly touched on in argument in this House. Although it would be desirable to resolve all issues between the two parties, I do not consider that this is one which we can properly determine at this stage. For present purposes I am prepared to proceed on the assumption that Onward effectively stands in the shoes of Essex.

*Was there an implied assignment?*

49. The respondents contend that the circumstances in which the work came into existence are consistent only with the copyright in the work becoming vested solely in Essex, and, in particular, with Mr Fisher having impliedly assigned his interest in the musical copyright to Essex. The essence of this argument is that Essex had taken an absolute assignment of the musical (and lyrical) copyright in the song in its original form, and was intending, and was intended by the members of the band, to exploit the song as developed for the first recording and released in May 1967, i.e. as the work. Accordingly, runs the argument, it must have been intended by Essex and by all members of the band, including Mr Fisher, that Essex would be the sole owner of the copyright in the work.

50. This argument is based on implication, which is normally invoked in order to give rise to an unexpressed term into an existing contract. However, it is clear, as a matter of principle, commercial reality, and indeed authority, that an unexpressed contract can arise by way of implication. In order to succeed in such an argument, it is, of course, necessary for the well established requirements for implication to be satisfied. Thus, in this case, the respondents have to show that, at the time of the alleged assignment, (a) it would have been obvious to Mr Fisher (as well as Essex) that his interest in the musical copyright was being, or had to be, assigned to Essex, or, which may amount to the same thing, (b) the commercial relationship between the parties could not sensibly have functioned without such an assignment.

51. In my judgment, this argument faces a number of insurmountable problems. First, it assumes that Mr Fisher knew that the song in its original form had been recorded and that the copyright had been assigned to Essex. He may have known these facts as at the time the work was recorded in April 1967 or when it was released in May 1967, but he did not say that he did and it was not put to him that he did. In this connection, it is relevant to mention that he had not, by that time, effected any assignment to Essex of copyright in relation to other musical works, so it could not be said that he must have been aware of Essex's usual practice. Where a party contends for an implied term or an implied contract, it is up to that person to establish the relevant factual foundation for his case. Indeed, the fact that these points were not put to

Mr Fisher is scarcely surprising, as the contention was not pleaded, although it was advanced before the judge in argument, albeit in somewhat different terms from the way it is now put.

52. Secondly, the fact that the recording contract was only entered into on 16 May 1967, about a month after the work was first recorded, and four days after the release of the recording, undermines the notion that, before that date, Mr Fisher had impliedly assigned his interest in the musical copyright to Essex. The date of the recording contract shows that, as one would have expected, the members of the band were content to leave it to Essex, an experienced record and publishing company, to produce the relevant documentation for them to execute as and when appropriate. That is scarcely consistent with the alleged implied assignment having taken place before 16 May 1967. The unattractiveness of the respondents' argument is reinforced by the fact, identified by Baroness Hale, that one is here concerned with five musicians, all of whom were in their early twenties, and a highly experienced music recording and publishing company, on whom they were no doubt relying.

53. Thirdly, having heard the evidence, the judge found that the question of what was to be done in relation to any interest in the musical copyright in the work as a result of additions to the original song "was left at large" – [2006] EWHC 3239 Ch, para 63. The question whether there was an implied contract is one of inference rather than primary fact, but it is a question which, at least in this case, turned to a significant extent on the precise factual circumstances, which were very much for the trial judge to evaluate. It is also true that those circumstances had arisen nearly 40 years earlier, and some of the important witnesses (in particular the relevant employees of Essex, including Mr Platz) were dead, but there was a significant amount of relevant oral evidence. In my judgment, there would have been no warrant for an appellate tribunal interfering with the clear and carefully considered conclusion reached by the judge on this issue.

54. Finally, there is the point that, even if there was some sort of implied contract, it is very unlikely to have been an outright free assignment of Mr Fisher's interest in the musical copyright. First, such an arrangement would have been more than was necessary to give business efficacy: all that would have been needed was a licence by Mr Fisher, as someone with a share of the copyright in the work, permitting Essex to exploit the first recording. Secondly, particularly in the light of the terms of the assignment, it would very probably have been

appropriate to include provision for a reasonable payment, or quantum meruit, in respect of any implied assignment or licence. In the light of the other problems this argument faces, it is unnecessary and inappropriate to expand on this aspect.

*The effect of the recording contract*

55. There is no doubt that one of the main purposes of the recording contract was to ensure that Essex was able to exploit the first recording free from any rights which band members had in the sound recording itself – i.e. free the publishing right, as it is often called: hence clause 3(ii)(a). However, the more difficult question concerns the effect of clause 3(i)(e), when read together with clause 3(i)(a). For the respondents, Mr Baldwin QC, who appears with Ms Bowhill, (neither of whom appeared at first instance), places considerable reliance on paras (a) and (e) of clause 3(i). At one point, he appeared to go so far as to say that the effect of those provisions was to assign to Essex any copyright interests in the work owned by any member of the band.

56. The judge rejected this argument, on the basis that the recording contract was not concerned with copyright in the work – [2006] EWHC 3239 Ch, para 66. As he put it, the contract “merely gave to [Essex] the right to exploit the [April 1967] recording” and any other recording of the work played during the currency of the agreement.

57. In my view, the judge was right to reject the contention that, by executing the recording contract, Mr Fisher effectively assigned his share of the musical copyright in the work to Essex. Indeed, in the Court of Appeal, Mr Baldwin disclaimed any reliance on such a contention – [2008] Bus LR 1123, para 107. However, I would be inclined to accept (indeed Mr Purvis QC and Mr Cuddigan, who appeared for Mr Fisher did not seem strongly to resist) the contention more strongly advanced by Mr Baldwin that clause 3(i)(a) and (e) operated as a licence to Essex from Mr Fisher, in his capacity as part owner of the musical copyright in the work, to exploit the first recording.

58. If this were not so, a member of the band with a copyright interest in the work would have been able to enjoin Essex from exercising its apparently unfettered rights under clause 3(i)(a), which seems inconsistent with the purpose of the recording contract. Further, it is hard to resist the contention that clause 3(i)(e) has precisely the effect

which is contended on behalf of the respondents. Commercial sense suggests that Essex could well have been concerned to ensure that, although they had the benefit of the assignment from two of the five members of the band, other members may have contributed to the work as it had been developed in the mean time and acquired intellectual property rights which might interfere with the unimpeded exercise of the rights granted by the recording contract. The notion that clause 3(i)(e) is concerned with such rights is supported by the use of the word “owned”, as pointed out by my noble and learned friend, Lord Walker of Gestingthorpe.

59. On this basis, the terms of the recording contract may have the effect of depriving Mr Fisher of any royalties he might otherwise seek as a result of the exploitation of the work, in so far as it is through the medium of the first recording. However, even if that is right, it in no way impinges on the issue before your Lordships’ House, namely whether the three declarations granted by the judge should be affirmed.

#### *Laches, estoppel, and acquiescence*

##### *Preliminary observations*

60. There are a few preliminary points in relation to the equitable arguments raised by the respondents and based on laches, estoppel, and acquiescence. First, a number of such arguments, which were raised and rejected at first instance, have not been raised before your Lordships. Save for the purpose of referring to them in connection with the points which have been pursued in this House, it is inappropriate to discuss them further.

61. Secondly, the equitable arguments raised by the respondents arise at three different stages, and, as my noble and learned friend, Lord Hope of Craighead, pointed out, there has been a tendency to conflate these stages, which has led to confusion. Having said that, it is only fair to add that the subsequent passage of time may, at least in some circumstances, reinforce (or even diminish) the unconscionability of a party raising a claim which he could have raised at an earlier stage. In this case, the three different stages are (i) during 1967, around the time the first recording was made and released; (ii) in 1969, when Mr Fisher left the band; and (iii) in 2005, when the current proceedings were started.

62. Thirdly, laches and estoppel are well established equitable doctrines. However, at least in a case such as this, I am not convinced that acquiescence adds anything to estoppel and laches. The classic example of proprietary estoppel, standing by whilst one's neighbour builds on one's land believing it to be his property, can be characterised as acquiescence - see per Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Ltd* (Note) [1982] QB 133, 151. Similarly, laches, failing to raise or enforce an equitable right for a long period, can be characterised as acquiescence.

63. Fourthly, in so far as the respondents' argument is put on the basis of estoppel, they would have to establish that it would be in some way unconscionable for Mr Fisher now to insist on his share of the musical copyright in the work being recognised. As Robert Walker LJ said in *Gillett v Holt* [2001] Ch 210, 225D, "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine" of estoppel. Given that their case at each of the three stages is based on the fact that Mr Fisher did not raise his entitlement to such a share, one would expect the respondents to succeed in estoppel only if they could show that they reasonably relied on his having no such claim, that they acted on that reliance, and that it would be unfairly to their detriment if he was now permitted to raise or to enforce such a claim. As was also said in *Gillett* [2001] Ch 210, 232D, the "overwhelming weight of authority shows that detriment is required" although the "requirement must be approached as part of a broad inquiry" into unconscionability.

64. Fifthly, laches is an equitable doctrine, under which delay can bar a claim to equitable relief. In the Court of Appeal, Mummery LJ said that there was "no requirement of detrimental reliance for the application of acquiescence or laches" - [2008] EWCA Civ 287, para 85. Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion. In *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 239, the Lord Chancellor, Lord Selborne, giving the opinion of the Board, said that laches applied where "it would be practically unjust to give a remedy", and that, in every case where a defence "is founded upon mere delay ... the validity of that defence must be tried upon principles substantially equitable." He went on to state that what had to be considered were "the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

*Estoppel based on Mr Fisher's silence in 1967*

65. The respondents rely on the fact that, during 1967, Mr Fisher stood by and said nothing to Essex, and very little to Mr Brooker or Mr Reid, about his having a claim to a share of the musical copyright in the work, so that the respondents, and presumably Mr Reid, proceeded on the assumption that he had, or at any rate was making, no such claim. In particular, Essex spent money and effort in promoting and exploiting the work, on the assumption that the terms of the assignment reflected the copyright ownership in the work and the right to royalties thereunder. The respondents now argue that, had Mr Fisher raised his claim in April or May 1967, he would have been required to assign any share he had in the musical copyright in the work to Essex. Further, by waiting until the work became a great popular success, he has much greater bargaining power as a result of staying silent.

66. There are a number of problems with this argument. First, it does not reflect the respondents' re-re-amended defence. It was there pleaded that, if Mr Fisher had raised a claim in 1967 to a share in the musical copyright, the song would have been recorded and released without his contribution and/or he would have been expelled for the band. It was not pleaded that, had Mr Fisher raised such a claim, he would have assigned his share in the musical copyright to Essex.

67. Secondly, and no doubt as a result of this, there was no investigation before the judge as to whether there would have been such an assignment, what its likely terms would have been, or its likely financial consequences for the two respondents or Mr Reid, let alone as to whether they would have acted differently from how they did, over the ensuing years if there had been such an assignment, and how they would be prejudiced as a result of the point being raised only in 2005. Save in the most unusual case (and this is not such a case), it is inappropriate for an argument of this sort to be raised by a defendant for the first time on appeal, and impossible for the argument to succeed on appeal. The necessary factual investigation and findings will not have been made by the judge, and the claimant will not have been given an appropriate opportunity to investigate the relevant facts before and during the trial.

68. Thirdly, it seems to me likely that, if Mr Fisher had raised the issue in 1967, and had consequently assigned his copyright share to

Essex, he would have received some share of the royalties. After all, Mr Brooker received some 25% of the royalties on the work for composing the original music, and Mr Fisher's subsequent contribution was significant, and, especially the introductory eight bars, an important factor in the work's success. In those circumstances, the respondents' estoppel argument would have had to take into account that, by delaying his claim for nearly forty years, Mr Fisher appears to have lost a great deal of money, which has been received by the respondents.

69. This was a point which the judge well appreciated. At [2006] EWHC 3239 Ch, para 81, he said that "it would... be a wholly extravagant and unjust result to deprive Mr Fisher for the [future] of his interest in the work's musical copyright on the basis of the estoppels that have been pleaded, ... when for almost 40 years the [respondents] have enjoyed the fruits of that copyright interest without the need to account for any part of them to Mr Fisher". That assessment (which exemplifies how the passage of time can have an effect on arguments relating to what happened in 1967) is self-evidently a conclusion with which an appellate court should interfere only if satisfied that it was plainly wrong or based on a mistaken understanding of established facts (which has not been demonstrated here).

70. The respondents contend that this assessment was arrived at in relation to estoppel arguments rather different from that now advanced by the respondents. Apart for the inherent unattractiveness of such a contention being raised by the respondents, it seems to me that the assessment is just as applicable to the estoppel argument advanced in this House as to those raised before Blackburne J. Mr Baldwin also points out that the judge did not consider the position of Essex and Mr Brooker separately, and suggests that it was only Mr Brooker, and not Essex, who would have benefited in the way described by the judge. That was not a point which appears to have been raised on the pleadings or in evidence or argument at first instance, and it is not right to entertain it on appeal. Its force depends on the terms upon which Mr Fisher would have assigned his share of the musical copyright, and what Mr Brooker and Essex (and Mr Reid) would have agreed in relation to their rights under the Assignment, all of which is pure speculation at this stage.

*Estoppel based on the events in 1969*

71. The respondents argue that Mr Fisher's failure to raise his claim to a share of the musical copyright during the negotiations leading to the financial agreement when he left the band in 1969 deprive him of the right to raise it subsequently. It is well-nigh impossible to see how Essex or Onward could rely on these negotiations, as they were not involved in them in any way. Mr Brooker was a party to the agreement, but it is hard to see how it can give rise to any estoppel which assists him in these proceedings. No mention was made of the possibility or existence of any musical copyright interest which Mr Fisher might have had in the work, but that seems to me to add nothing to the point that Mr Fisher did not maintain his claim till 2005. It is not as if the agreement reached in 1969 was stated or implied to be in full and final settlement of all accrued rights which Mr Fisher had. I accept that the fact that the claim was not raised in 1969 could, in principle, have been relied on to cast doubt on the value of the contribution Mr Fisher made to the work, and that it would have assisted any argument the respondents had as to the reasonableness of any belief which they may have had that Mr Fisher had no such claim. Those might have been good arguments at first instance, but I cannot see how it takes matters any further now, in the light of the facts found by the judge.

#### *The Court of Appeal's reasoning*

72. As I have mentioned, the Court of Appeal upheld the judge's conclusion that the judge was entitled to reject the respondents' case on estoppel, but the majority went on to conclude that Mr Fisher was nonetheless not entitled to determine the licence which the judge found that he had impliedly granted. Mummery LJ's careful analysis, at [2008] Bus LR 1123, paras 81 to 90, for reaching this conclusion and for setting aside the second and third declarations made by Blackburne J, seems to me to be encapsulated in the following two propositions. First, since May 1967, Essex, Onward and Mr Brooker had, to Mr Fisher's knowledge, continued "exploitation of the work on the basis that they owned all the copyright in it", and "it would be unconscionable for him [now], with a view to enforcing his property right by final injunction, to assert a joint share in the copyright and to terminate the implied licence under which he accepts the [respondents] have acted for very many years" (para 87). Secondly, Mr Fisher's delay in bringing his claim means that "he could dictate his terms and put the [respondents] in a weaker bargaining position than they would have been in, had he made his claim in, say, 1967 or 1969" (para 88).

73. As to the first of those reasons, it seems to me that, save in a very unusual case, it would be inconsistent to conclude that a claimant was not estopped from asserting his copyright interest, but then to refuse, on equitable grounds, to declare that the right existed. It is possible that there may be cases where such a course could be appropriate, but it would require wholly exceptional facts. As my noble and learned friend, Lord Mance said, if, as the Court of Appeal accepted, Mr Fisher originally had 40% of the musical copyright in the work and is not estopped from asserting it, then it is hard to see how he could be prevented from bringing proceedings simply for financial compensation or injunctive relief on the ground of copyright infringement. The refusal to grant him declaratory relief because he might seek an injunction on the back of it therefore seems to be questionable as a matter of principle.

74. In the present case, the majority of the Court of Appeal thought it appropriate to take such a course primarily because of the apparent inequity of Mr Fisher being able to seek an injunction to enforce his rights as the holder of an interest in the musical copyright in the work. Quite apart from the point made by Lord Mance, this point, as Mr Purvis argues, involves the tail wagging the dog. If the declarations set aside by the Court of Appeal are reinstated, then, were Mr Fisher subsequently to apply for injunctive relief to prevent unauthorised use of the work, such an application would be dealt with on its merits. If the court was satisfied that it would be oppressive to grant an injunction in the particular circumstances, for instance because of prejudicial delay, it would refuse an injunction to restrain the infringement, and leave Mr Fisher to his remedy in damages: see *Shaw v Applegate* [1977] 1 WLR 970.

75. Mr Purvis contends that Mr Fisher was not primarily interested in obtaining injunctive relief, but was more concerned to establish his contribution to the work and to share in the future royalties. That may well be right, but he did seek an injunction before Blackburne J and there would be nothing to stop him seeking an injunction if the declarations set aside by the Court of appeal were reinstated. However, the essential point is that, if and when Mr Fisher seeks an injunction to restrain an alleged infringement of his copyright, it should be dealt with on its merits.

76. Further, the decision of the majority of the Court of Appeal deprived Mr Fisher of the ability not only to seek injunctive relief, but also to claim any royalties in respect of the exploitation of the work, of which he owned 40% of the musical copyright. (That must follow from

the conclusion that he could not determine the implied licence). It is hard to see how that could be right, simply on the basis that it would be inappropriate to grant him injunctive relief, given that Mr Fisher was not estopped from asserting his 40% interest in the musical copyright in the work.

77. As for the change in the bargaining position of the parties between 1967 and 2005, that was neither pleaded nor argued before the Judge. In any event, there was no evidence that Essex or the respondents would have acted any differently from the way in which they did if Mr Fisher had pressed his claim in 1967 or in the ensuing few years. Further, there is also the judge's finding at [2006] EWHC 3239 Ch, para 81, to which I have also referred, that Mr Fisher's very long delay in asserting his claim has been of considerable financial benefit to the respondents, effectively outweighing any disadvantage to them resulting from the delay.

#### *The passage of time*

78. As Lord Walker said in argument, the basic problem for the respondents is that there is no English law statutory equivalent in the field of intellectual property to the doctrine of adverse possession in relation to real property (although the Land Registration Act 2002 has made considerable inroads into that doctrine). Indeed, as Lord Hope mentioned, Mr Fisher would face considerable difficulties if he sought to maintain his claim in Scotland on the present facts, in the light of sections 7 and 8 of the Prescription and Limitation (Scotland) Act 1973. Be that as it may, the position in this jurisdiction is that the mere passage of time cannot of itself undermine claims such as those raised by Mr Fisher in the current proceedings. The respondents therefore rely on laches.

79. The argument based on laches faces two problems. The first is that, as pointed out by David Richards J, laches only can bar equitable relief, and a declaration as to the existence of a long term property right, recognised as such by statute, is not equitable relief. It is arguable that a declaration should be refused on the ground of laches if it was sought solely for the purpose of seeking an injunction or other purely equitable relief. However, as already mentioned, that argument does not apply in this case. Secondly, in order to defeat Mr Fisher's claims on the ground of laches, the respondents must demonstrate some "acts" during the course of the delay period which result in "a balance of justice"

justifying the refusal of the relief to which Mr Fisher would otherwise be entitled. For reasons already discussed, the respondents are unable to do that. They cannot show any prejudice resulting from the delay, and, even if they could have done so, they have no answer to the judge's finding at [2006] EWHC 3239 Ch, para 81, that the benefit they obtained from the delay would outweigh any such prejudice.

### *Conclusion*

80. In these circumstances, essentially for the reasons given at first instance by Blackburne J and in the Court of Appeal by David Richards J, I would reject all the respondents' arguments based on equitable principles.

### *Disposal*

81. It follows from this that I would allow Mr Fisher's appeal, dismiss the respondents' cross-appeal, and restore the two declarations set aside by the Court of Appeal save that the third declaration may require to be amended to keep open the issue whether Essex's rights under the recording contract have been validly assigned to Onward. I understand that your Lordships and Ladyship are of the same view, and accordingly I would suggest that the parties have 14 days to make submissions in writing as to the order that this House should make in relation to the costs in your Lordships' House and below.