



[2022] JMSC Civ. 65

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. SU2021CV00312**

<b>BETWEEN</b>	<b>CABEL STEPHENSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DOREEN HIBBERT</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CRESSIDA RATTIGAN (In her capacity as named executrix in the ESTATE FREDERICK “TOOTS” HIBBERT)</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>LEBA THOMAS (In her capacity as named executrix in the ESTATE FREDERICK “TOOTS” HIBBERT)</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN CHAMBERS (VIDEO LINK)**

**Mr. Keith Bishop and Ms. Roxanne Bailey instructed by Bishop and Partners,  
Attorneys-at-Law for the Claimant**

**Mr. Ian G. Wilkinson QC and Mr. Jhawn G. Graham instructed by Wilkinson Law,  
Attorneys-at-Law for the first and third Defendants**

**Ms. Jacqueline Cummings and Mr. Matthew Palmer instructed by Archer,  
Cummings and Company, Attorneys-at-Law for the second Defendant**

**Heard: February 7, 8, 9, 10 11, March 4 and June 1, 2022**

**Tort of detinue - Tort of conversion - Unlawful detention of samsung SSD hard  
drive – Recovery of possession - Delivery up - Intellectual Property Rights-  
Sections 2(1), 7, 9, 22, 23 and 28 of the Copyright Act - Authorship and ownership  
of copyright – Joint authorship and ownership- Musical works -Sound recordings  
- Executive producer of sound recordings -Sufficient degree of originality –  
Whether estate of deceased has interest in right to sound recordings - Measure of  
damages**

## STEPHANE JACKSON-HAISLEY J

### INTRODUCTION

*“Right to imitate: Aristotle in Ars Poetica in Latin, written in about 335 BCE, already recognized that we all learn by imitation. Not all imitation is unlawful. On the contrary, imitation may be said to be the essence of life. From the cradle to the grave man imitates his fellow-men in speech and song, habits, fashions and fads. Imitation is also, therefore, legitimate in business, up to a point. IP rights limit the right to imitate in a particular manner in the public interest for a limited period of time.”<sup>1</sup>*

1. In a country such as this where music is at the backbone of our cultural landscape, musical creations take on pre-eminence when it comes to intellectual property. Such works must be protected so that the creator, author or owner of the intellectual property gets the full advantage of his/her/its work and that the benefit does not go to someone who played no part in the development of the intellectual property. In the music industry intellectual property takes on different forms ranging from sound recordings, to lyrics to the musical work itself.

2. The issues raised in this Claim surround the Torts of detinue and conversion and the available remedies for breach and have to do with the protection of intellectual property rights and the rights associated with authorship and/ownership of different forms of musical creations.

### THE PARTIES

3. The Claimant Cabel Stephenson is a music producer, booking agent and road manager. He manages the musical affairs of renowned musicians which included the musical icon Frederick “Toots” Hibbert (now deceased) and which still includes the artist Andrew Adrian Brown performing as Droop Lion (hereafter Droop Lion). The Claimant alleges that in early 2020 he commenced the process of recording material for the compilation and release of an album by Droop Lion. Mr. Stephenson indicated that he

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<sup>1</sup> A Casebook on the Enforcement of Intellectual Property Rights, 4<sup>th</sup> edition, L.T.C. Harms, page 9

did this at the studio owned and operated by Mr. Hibbert. The studio is dubbed the D&F Music Inc. recording studio a.k.a. the Reggae Centre and is located at the home of the deceased 32 Edinburgh Avenue, Kingston 10.

4. Mrs. Doreen Hibbert is the first Defendant herein. She is the widow of Mr. Hibbert and surviving joint tenant of property situated at 32 Edinburgh Avenue, Kingston 10 in the parish of St. Andrew. Mr. Hibbert was a Grammy-Award winning Jamaican international recording artiste and entertainer who was the lead vocalist for the reggae, singing group, Toots and the Maytals. His performing career around the world spanned six decades up to August 2020, when he became ill. On September 11, 2020, he died at the age of seventy-seven years old. Mrs Hibbert is a businesswoman and the director of D&F Music Inc. a company incorporated by Mr. Hibbert. The company is based in Florida, United States of America and handles a plethora of business activities carried out by the deceased and his business partner, Mrs. Hibbert who engages in, among other things, matters related to the entertainment industry, artist management and before Mr. Hibbert's death she engaged in tour arrangements for him and his singing group the Maytals.

5. Ms. Cressida Rattigan is the second Defendant and is the granddaughter of Mr. Hibbert. She is joined in this claim in her capacity as named executrix in the estate of the deceased and also resides at 32 Edinburgh Avenue, Kingston 10 in the parish of St. Andrew.

6. Mrs. Leba Hibbert-Thomas is the third Defendant and the daughter of Mr. Hibbert. She is joined in this claim in her capacity as the other named executrix in the estate of the deceased. Mrs. Hibbert-Thomas is also the daughter of Mrs. Doreen Hibbert. She is a singer, entertainer, writer and musician and also resides at 32 Edinburgh Avenue, Kingston 10 in the parish of St. Andrew.

#### **SUMMARY OF THE CLAIMANT'S CASE**

7. By way of Fixed Date Claim Form and Particulars of Claim, Mr. Cabel Stephenson claimed he is the owner of the SAMSUNG SSD Hard Drive (the hard

drive'), which is currently in the possession and custody of D&F Music Inc., (also called 'the Reggae Centre') a recording studio situated and operated at 32 Edinburgh Avenue, Kingston 10 in the parish of St. Andrew. Mr. Stephenson sought against the first, second and third Defendants, recovery of possession (delivery to him) of said hard drive, which contains musical works in which he has proprietary, beneficial and financial interest. In his Fixed Date Claim Form he claims Damages for the loss suffered as a result of the unreasonable detention of his personal property, being the hard drive. In his Particulars of Claim, he expressed that he has expended in excess of UNITED STATES EIGHTY- ONE THOUSAND DOLLARS (USD\$81,000.00) on the production of the album and he stands to lose all that unless he is able to enter into an arrangement for the commercialization of the album. He claims Costs and any other Order this Honourable Court deems fit.

8. Mr. Stephenson alleged that he purchased the said hard drive in late 2019 at a Best Buy store in Colorado, U.S.A. for USD\$169.99. Sometime in May 2020, after completion of recordings done in respect of the Droop Lion album, these recordings were transferred from the Reggae Centre studio board to the hard drive. The hard drive is now the subject of this intellectual property dispute, as well as the musical works and sound recordings contained in the hard drive that Mr. Stephenson claimed to have ownership and intellectual property rights to. The hard drive was left at the studio in the care and control of the deceased about three months before the deceased became ill. Further, that the hard drive, has since been and is now being detained, and kept in the possession of the Defendants unjustifiably and illegally, as Mr. Stephenson, who owns the hard drive and contents stored on said hard drive has requested of the Defendants delivery up of said hard drive but to no avail. It is Mr. Stephenson's contention that as he was the executive producer of the Droop Lion Album Project, he is the owner of the hard drive.

9. Droop Lion claims that he is an artist and writer and asserted that he has been working for Mr. Stephenson since 2010. At that time, both of them worked together under a "loose arrangement" to produce and release some songs Droop Lion had written prior to meeting Mr. Stephenson. By way of an "Artist Management Contract",

both Droop Lion and Mr. Stephenson had entered into a contract to formalize their working relationship. Subsequent to that contract, all the musical affairs of Droop Lion have been handled by Mr. Stephenson or entities under his control as it relates to management, booking and production of his works.

10. The Claimant accepts that a significant role was played by the deceased as a co-producer in the production of the album but that he was not the only co-producer as Mr. Nigel Burrell the studio engineer was also co-producer. As co-producer, it is accepted that the deceased would prepare demos for Droop Lion to use as an indication and direction for how he was to sing the songs as the artist on the album but this did not make the deceased an executive producer of the album. The main issue relates to the element of possession and/or ownership of the hard drive and the sound recordings thereon created in furtherance of an album project by Droop Lion, to which the deceased made a significant contribution creatively, whether as a musician, executive producer, co-producer, composer or writer. Mr. Stephenson claims to have contributed to the album project as artist manager, executive engineer and executive producer, therefore claiming legal ownership not only to the physical hard drive but also some of its content. As it relates to the album project in dispute, there are thirteen songs/sound recordings that are considered "new" sound recordings sang by the artist, Droop Lion. The album project containing these new songs is yet to be released and commercialization is incomplete and it needs to be refined prior to its release. As the executive producer of the Droop Lion album project, the Claimant asserts that he was the one who provided the financial investment and financial backing for the project.

11. It is also the Claimant's assertion that the Defendants have provided no reasonable justification for withholding the hard drive from him and that this has prevented the completion of the said album. The reasons the Defendants have provided are insufficient since separate copyright owners' interests in copyright can co-exist, and these copyright owners are generally entitled to recognition. Their reasons include:

- i. That the estate of the deceased cannot release or publish the sound recordings of Droop Lion without said deceased's consent or authorization, as this would expose the estate to infringement of intellectual property rights violations; and

- ii. That Frederick "Toots" Hibbert would be entitled to receive royalties for his contribution to the album.

Therefore, if there are any rights of the deceased as a co-producer, his personal representatives under his estate would be entitled to claim royalties and any other remuneration that may be due to said estate.

### **SUMMARY OF THE DEFENDANTS' CASE**

12. The case for the Defendants is that the Droop Lion album project was a collaboration between the deceased and Droop Lion, with the deceased providing guidance and instructions in the recording of the songs, as well as the vocals, studio facilities, musicians and back up vocalists and Droop Lion providing artistry in the form of singing the songs. By following through with this collaborative Toots/Droop Lion arrangement, about thirteen songs previously recorded by the deceased, published and unpublished were re-recorded by Droop Lion under the direction and guidance of said deceased. Mrs. Hibbert in her evidence asserted that the Claimant was never a party to that arrangement and that in respect of the creations/material contained on the hard drive, the parties, whether being the deceased himself and/or Droop Lion and/or Mr. Stephenson would not be permitted to gain any access and/or commercial use and/or benefit until the Will for the estate of the deceased has been probated, the estate wound up and permission from the executrices and directors of D&F Music Inc. obtained in respect of same.

### **EVIDENCE ON THE CLAIMANT'S CASE**

13. Mr. Stephenson gave evidence that, during the period February 2020 to August 2020 in his capacity as music producer he would go to D&F Music Inc. at the Reggae Centre recording studio for the purpose of rehearsing and recording musical creations for the Droop Lion album. During those sessions, the hard drive was used to store the content of those musical creations. According to Mr. Stephenson, it is standard practice in the music industry for producers to leave their hard drives containing musical productions in the custody of studio engineers, to ensure the hard drive is kept in an

environment that preserves it, due to its sensitivity to environmental conditions because if exposed to high temperatures, it may suffer damage. As a consequence, it was left in the custody of the Reggae Centre via the studio engineer, Mr. Burrell from May 2020. A lot of informal jam sessions were recorded on the hard drive due to the fact that the covid-19 pandemic had made it impossible for tours or live venue performances to take place.

14. During August 2020, sometime before the deceased fell ill, Mr. Stephenson indicated that he was engaged, almost daily with the studio engineer for Mr. Nigel Burrell working towards the refining and compilation of the recordings done by Droop Lion for the preparation of a disc to be recorded commercially. During that time, Mr. Stephenson claimed he was engaged in earnest discussions with Mr. David Spero of David Spero Management Inc. for the commercialization of the production to include distribution, publishing and marketing.

15. Mr. Stephenson also claimed that those discussions were progressing and prior to September 2020, it was highly anticipated that the actual release of the album would have been in the last month of the last quarter of 2020 or by February 2021. Pursuant to the discussions, Mr. Stephenson claimed that David Spero Management Inc. wrote to him setting a deadline of February 12, 2021 for delivery of the completed recording, failing which, Mr. Stephenson stood the chance of losing the deal being pursued.

16. In seeking to salvage the deal, Mr. Stephenson wrote to David Spero Management Inc. requesting an extension of time to the 28<sup>th</sup> day of February, 2021. Mr. Stephenson at the time did not receive a response but said he was hopeful that the response, when it came, would have been positive.

17. Mr. Stephenson claims that he spent in excess of **UNITED STATES EIGHTY-ONE THOUSAND DOLLARS (USD\$81,000.00)** on the production of the album and he stands to lose all that unless he was able to enter into an arrangement for the commercialization of the said album. He claimed that all of same can be averted if the

hard drive is returned to him in a timely manner, but without the Court's intervention, he will be left to face serious reputational and financial loss.

18. Mr. Stephenson further stated that after the deceased died, he had observed a reasonable and respectful period for mourning and then sought to retrieve his hard drive from the studio. He stated that his efforts, through numerous conversations directly with Mrs. Hibbert, Ms. Rattigan and thereafter through Attorney-at-Law, Ms. Debra Archer had been met with no success.

19. Mr. Stephenson also stated in his affidavit evidence that he offered to have the hard drive opened and the recordings played so that a determination could be made as to whether or not there is any material contained thereon that the Defendants may have an interest in. However, the Defendants had not responded. As a consequence, Mr. Stephenson instructed his then Attorney-at-Law, Ms. Dian Watson to make a formal demand for the return of the hard drive. As a result, letters dated the 10<sup>th</sup> day of December, 2020 were dispatched to Mrs. Doreen Hibbert, Ms. Cressida Rattigan and Mrs. Leba Hibbert-Thomas respectively.

20. Mr. Stephenson asserted that his lack of access to his property is causing him financial loss and reputational harm as the artist is becoming restive due to the lack of progress in the production and the release of the album. He also asserted that the record label (David Spero Management Inc.) was now questioning his capability to deliver promised products and the artist Droop Lion is now questioning Mr. Stephenson's ability to advance his career and help him optimize his ability to earn from his talent.

21. It is prudent to mention that at the trial, Counsel for Mr. Stephenson sought and was granted amplification of the affidavits in relation to the proposed release date, February 12, 2021. By way of amplification, Mr. Stephenson stated that there are different release dates over the period of a year. He further stated that the artist's work is on hold and that though they are heading into the second quarter of the year and they have people who are interested in the album however, they are still not sure how to

proceed with their partners in releasing the project. He also stated that in light of all that had transpired between himself and David Spero Management Inc., that relationship became a damaged one. His reputation had come into question regarding his ability to deliver on the project.

22. By way of said affidavit, Mr. Stephenson also referred to and exhibited a copy of an Artist Management Contract between himself (“the Manager”) and Andrew Adrian Brown (aka Droop Lion) (“the Artist”), dated the 3<sup>rd</sup> day of March, 2013. The purpose of the contract was twofold: (i) for Mr. Stephenson in his capacity as Manager to assist in the development of the Artist’s career and (ii) to manage the Artist’s career and work with him on an album.

23. Mr. Stephenson further stated that there was no joint recording and working between “Toots” and Droop Lion, as the album was solely being recorded by Droop Lion under his guidance and direction as executive producer and artist manager for Droop Lion and that full compensation was paid for production work done by the deceased and Mr. Burrell. At no time did Mr. Stephenson enter into any arrangement with Mr. Hibbert for him to play any executive role in the production of the album. The other contribution made by the deceased was in the material of a song previously released by the deceased, which said deceased had asked Droop Lion to re-record.

24. Mr. Stephenson stated there is nothing on the hard drive that the deceased has or had any proprietary interest in, and that the recordings on the hard drive were made exclusively by Droop Lion, who has not parted with his interest in them. According to Mr. Stephenson, the assertion of ownership of any work on the hard drive by Mrs. Hibbert is totally without merit and is at best a disingenuous manoeuvre to exact spite.

25. Mr. Stephenson further stated that Mrs. Hibbert did not have to be aware of anything he was engaged in doing on behalf of his artist, as Mr. Stephenson is his appointed manager and there was no assignment of his rights as said manager. All the services provided to Droop Lion by the Reggae Centre recording studio were fully paid for by Mr. Stephenson to the deceased and therefore no obligation is owed to the studio

by him or the artist. Mr. Stephenson further stated that the Toots Solo Recording Agreement that was exhibited was not relevant to the claim, as the claim involved recordings for the Droop Lion album and that agreement had nothing to do with said album.

26. Another point in Mr. Stephenson's evidence which must be alluded to is that he stated that Mrs. Hibbert did not make any payments on behalf of any project that Droop Lion was engaged in, as all payments to musicians and back up vocalists were all made by him. He exhibited four receipts (two dated May 20, 2020 and two dated May 21, 2020) to support this part of his claim.

27. Mr. Stephenson also mentioned that the deceased had no controlling capacity in the project. The deceased was working only in a producer's capacity, which did not give him any proprietary rights in the album. He was merely contracted for the production work he did.

28. Mr. Stephenson also gave evidence that to the best of his knowledge, information and belief the Festival Song, "Rise Up Jamaica" does not reside on the said hard drive as he never sought to place it thereon, having neither proprietary, financial or intellectual property interest therein.

29. In cross-examination, Mr. Stephenson admitted that he was not present for all the rehearsals at the Reggae Centre recording studio in respect of the Droop Lion album project. When asked by Counsel Mr. Wilkinson, Q.C. about the different musicians who did work on the Droop Lion album project, he said he was not sure how many musicians worked on the project, but save and except for naming the deceased as one of the musicians, could only name one other musician, Mr. Clinton Rufus who he stated played the lead guitar, while the deceased played rhythm guitar and bass guitar. Further, that sometimes, the deceased played even drums (although at the time the deceased would repeat that he was not a drummer), percussions and keyboard. Therefore, the deceased played at least five different instruments on the album project. As it relates to any payments made in respect of these musical instruments played, Mr.

Stephenson stated that he paid Mr. Rufus USD\$200.00 per track. However, full and final payments have not yet been made in respect of same, and are yet to be finalized after completion and possibly commercialization of the album. Mr. Stephenson also agreed that some of the material currently on the hard drive was recorded directly on said hard drive. However, not all of the material on the hard drive was recorded at the Reggae Centre recording studio.

30. Mr. Stephenson agreed with Counsel Ms. Cummings in cross-examination that the executive producer is someone who earns from the record sales whereas the writer, producer and composer earn from music royalties, which are based on how many times that particular music is played or utilized. He also stated that the only way to realize investment on his part is for the album to be commercialized. Mr. Stephenson finally agreed that to commercialize the album, they would need the agreement of the artist, writer, and composer of the items comprising the album.

31. The other affiants who gave evidence on behalf of the Claimant's case were Mr. Droop Lion, Mrs. Lisa-Gaye Davis, Mrs. Latoya Hall-Downer and Mr. Nigel Burrell.

32. Droop Lion in Response to Affidavit of Doreen Hibbert dated February 18, 2021 gave evidence that he and Mr. Stephenson eventually formalized their working relationship by entering into the Artist Management Contract. Since entering into that contract, he does nothing in the music industry without the guidance, knowledge or approval of Mr. Stephenson. Droop Lion admitted that recording sessions for the upcoming album were held at D&F Music Inc. recording studio. However, those recordings were done pursuant to arrangements made and financed by Mr. Stephenson and their Artist Management Contract, and said contractual arrangements had never been assigned to any third party, which included Frederick "Toots" Hibbert.

33. Ms. Downer and Ms. Davis both gave evidence that they have been providing backup vocals for Toots and the Maytals and the deceased in a solo capacity since 2006 and 2013 respectively. Both affiants confirmed that neither of them provided back up vocal services to Droop Lion. In respect of any payment they would receive for their

work, on rare occasions, Mrs. Hibbert would request that they sign receipts confirming they were paid for their work as back up vocalists.

34. In his affidavit responding to Mrs. Hibbert's said affidavit, Mr. Nigel Burrell deponed that in 2010, he left his employment with Anchor Recording studio to become the resident studio engineer at D&F Music Inc. Reggae Centre recording studio. He said he and the deceased worked as co-producers on the Droop Lion album. He also worked on the album as the studio engineer and all the work undertaken by them on the album was fully paid for by Mr. Stephenson, along with all the work done by musicians and back up vocalists.

35. Mr. Burrell further deponed that by the time the initial phase of the recordings had been completed and it was time for the mixing process to begin, Mr. Stephenson handed him the hard drive to transfer the completed recordings from the studio board to the said hard drive to free up storage space on the studio work drive. The said hard drive was left in the studio pending completion of the works. Mr. Burrell also stated that at the same time he was being paid for his work on the album as co-producer and engineer, he saw the deceased being paid by Mr. Stephenson for all the work said deceased did on the Droop Lion album.

#### **EVIDENCE ON THE DEFENDANTS' CASE**

36. Mrs Hibbert asserted that on or about the 20<sup>th</sup> day of July, 2005, she and the deceased acquired the property situated at 32 Edinburgh Avenue, Kingston 10 in the parish of St. Andrew as joint tenants. Mrs. Hibbert exhibited a copy of her Certificate of Marriage Registration and the Certificate of Titles as proof thereof. She also stated that the deceased died on the 11<sup>th</sup> day of September, 2020 and exhibited a copy of his relevant certified Death Registration Form.

37. She expressed that Mr. Stephenson might have known the deceased personally from about 2000 but to the best of her knowledge, he was never contracted verbally or in writing as the booking agent for the deceased or Toots and the Maytals. The deceased's booking agent for the United Kingdom was an entity called MEDIACOM

based in Europe, and the deceased's booking agent for the United States of America and the rest of the world was an entity called WILLIAM MORRIS. She added that Mr. Stephenson was the deceased's road manager and assisted with tour arrangements from time to time but this role did not begin in 2000 but some years later.

38. She asserted that she was aware of the album being done with Droop Lion, as the deceased told her about it in the beginning when he decided to do it and that they discussed it from time to time. Based on those discussions, the deceased was going to have an integral role in the production of the album, including composing or writing songs, doing vocals and playing instruments on a number of the songs. He even told her he was going to hire other musicians to play instruments for the songs as well as back up vocalists and that they would be paying them. She asserted that she and the deceased were business partners and they discussed the project from the beginning and decided that she and the deceased were to be the executive producers and producers of the album. She agreed that the rehearsals and recordings for the album by the deceased and Droop Lion were done at the said Edinburgh property, which is also her home, specifically at the studio called The Reggae Centre. She went on to state that the said hard drive was left at the studio because the work on the album had not been completed, and to the best of her knowledge, all the material on the said hard drive involving anything with the deceased and Droop Lion belong to the deceased and D&F Music Inc.

39. Mrs. Hibbert also stated that the deceased had signed an Exclusive Artist Recording Agreement with Zak Starkey on the 27<sup>th</sup> day of August 2019, and which was valid until February 2022. Under this agreement, only Zak Starkey had any legal authority to negotiate or release any new album or material involving the deceased, including the album project with Droop Lion. In these circumstances, neither Mr. Stephenson nor Mr. David Spero had any legal authority or basis to negotiate any additional album deal.

40. She confirmed that she assisted the deceased in paying the musicians and back up vocalists who worked on the deceased's album with Droop Lion and exhibited

receipts evidencing proof of said payments. As far as she is aware, only the deceased, acting through D&F Music Inc. paid the musicians and back up vocalists for the Droop Lion album, and that it was the deceased and not Mr. Stephenson who paid for the studio facilities, studio time, musicians and back up vocalists. The recording studio time and facilities were provided free of cost to Droop Lion and Mr. Stephenson.

41. She further stated that the deceased contributed immensely to the album project by providing vocals, playing instruments and offering invaluable creative direction to Droop Lion during the recording sessions for the album. She denied that full compensation or any compensation at all was paid to the deceased for his contributions. Based on her discussions with the deceased no particular date was set by him for the release of the album project with Droop Lion. The deceased was a perfectionist who would take his time to ensure that the album was well done before it could be completed for release.

42. Mrs. Hibbert also stated that she told Mr. Stephenson that nothing can happen regarding the deceased's said album project with Droop Lion until after the Last Will and Testament of the deceased was probated and the estate wound up.

43. It is also Mrs. Hibbert's assertion that any work that involves the vocals, image or likeness of the deceased or any work where he was involved in its creation, production and/or composition must first obtain the necessary clearance or approval by D&F Music Inc. and any other entity that handles any other aspect of distribution, publishing and management for Frederick "Toots" Hibbert/Toots and the Maytals, before any such work can be released.

44. Mrs. Hibbert stated that based on the title of an electronic folder associated with the songs on the album, "Droop Lion Toots Album Rough 2020", the significant role the deceased/Toots and the Maytals played in the production of the album with Droop Lion is acknowledged or recognized thereby establishing the deceased's beneficial and financial interest in the said album.

45. She further stated that the deceased either contributed the lyrics or played the musical instruments for all of the songs that were listed and not just one of the thirteen songs as alleged by Mr. Stephenson. According to Mrs. Hibbert, at least ten of the thirteen songs listed in Mr. Stephenson's affidavit were written by the deceased, previously released by the deceased or are the original songs the deceased had previously recorded but were unpublished. Droop Lion re-recorded several of these previously published and unpublished songs, namely, "Crazy Conscious", "Pass the Pipe", "Pay the Rent", "Speak the Truth", "All is Well", "Turn the Radio On", "Vision", "Cacaty", "Poor People Story" and "Sitting on the Sidewalk". The deceased also played instruments and featured as a vocalist on some of the songs that form part of the said album project and that his role in the said album project included being song writer, vocalist, musician, producer and executive producer.

46. She further stated that in her capacity as director, she would have been privy to the necessary paperwork including any "royalty splits" agreement and to the best of her knowledge, no such paperwork was done in relation to the said project, therefore they are unaware of the royalty allocation for each entitled individual, including the deceased and Droop Lion. It is her understanding, knowledge and belief that the music industry standards dictate that unless there is clear agreement to the contrary, the general rule as it relates to master tapes is that the recording studio which finances and/or facilitates the recording of a song owns the master tapes for that song unless the recording studio is paid for the use of its facilities, which would then oblige it to relinquish its rights and interests in the recorded material.

47. Mr. Christopher Hooper also gave evidence in support of the first and third Defendant's case by way of Affidavit filed February 7, 2022 and was subject to cross-examination at the trial. Mr. Hooper, an audio-visual engineer with experience spanning over two decades gave evidence that based on his experience and knowledge in the music industry, he would say that the deceased was the executive producer and producer of the songs that were being recorded at the time by Droop Lion. On the last few occasions he was at the recording studio, he saw the deceased being very dedicated to the album that was being worked on by him and Droop Lion. The deceased

was very involved in the creative process and nothing was done without his input and final approval.

48. Mr. Hooper gave further evidence that Mr. Stephenson, who is known to him as "Jeffree", was never seen interacting with Mr. Hibbert in his professional capacity within the music industry. His interaction with Mr. Stephenson was limited to the deceased's recording studio. He also stated that while he was at the studio he also saw Droop Lion working on music for the album with the deceased. Mr. Hooper said he saw the deceased playing the musical instruments for the rhythms and he heard and observed him creating the melodies and lyrics for the said songs. While he did not play an active role in the recording of the songs, he said the deceased would often ask his opinion on the songs being recorded by Droop Lion. He saw Mr. Nigel Burrell at the studio, who was the recording and mixing engineer for the songs. However, he did not see Mr. Stephenson contributing to the production of the songs. Mr. Stephenson would be in and out of the studio, doing errands on the road and would check in with Droop Lion and the deceased to see how things were going. However, in cross-examination when questioned if he was present during the recording sessions at D&F Music Inc. in preparation for the Droop Lion album project, he responded that that was not so.

49. The second Defendant deponed to the fact that she has not seen the hard drive and has never been in possession of it however she asserts that it contains intellectual property belonging to the deceased and so the Estate has a vested interest in it.

50. The third Defendant's evidence is to the effect that based on her knowledge of the facts it was the deceased and her mother who provided the studio facilities, studio time, musicians and back up vocalists to do the Droop Lion project. She maintained that all the material and songs on the hard drive and any master tape of the said recordings involving the deceased and Droop Lion are owned by the deceased's estate and the company D & F Music.

## **SUBMISSIONS ON BEHALF OF THE CLAIMANT**

51. Counsel for the Claimant submitted that to succeed in the common law claim of the tort of detinue, the Claimant must prove on a balance of probabilities: that (i) he has the right to immediate possession of the hard drive against the person who has actual possession of it; (ii) proper demand was made and the Defendants have failed or refused to deliver up the property and (iii) the Defendants have no lawful excuse to retain or detain the property. It was further submitted that to maintain an action in detinue, a proper demand must be made for the return of the disputed property, and that oral requests as well as formal written demand were sufficient; see **Trevor Wright v Det. Sgt. Yates et al** [2012] JMSC Civ 52 and **Baldwin v Quest** [2017] JMSC Civ 133. Counsel referred to the evidence and stated that on multiple occasions, Attorney-at-Law for the Claimant wrote to all three Defendants personally requesting the hard drive. Prior to these requests, the Claimant deponed that after the deceased's death, and after observing a reasonable and respectful period of mourning, he requested the hard drive through several conversations with the Defendants but without success.

52. Counsel relied on **Brodber v E.W. Abraham** [2019] JMCA Civ 17, in which the Court of Appeal adopted the English case of **Alicia Hosiery Limited v Brown, Shipley** [1970] 1 QBD 195. In determining the right of possession, Counsel submitted that legal ownership must be considered and relied on **section 18 (1)** of the Sale of Goods Act. Counsel argued that proof of the purchase of the hard drive at Best Buy, Colorado Springs, U.S.A. was provided by the Claimant and that on the other hand, no such proof of title was provided by the Defendants. Based on the evidence, the only credible evidence as to the hard drive's legal ownership was provided by the Claimant. Therefore, said Claimant is entitled to enjoy all the other rights associated with its ownership, including the right to possession.

53. Counsel submitted that with respect to the issue of ownership of the sound recordings on the hard drive, the applicable sections of the Copyright Act are sections 2 and 22 (1). Counsel also cited **Henry Hadaway Organization Limited v Pickwick Group Limited** [2015] EWHC 3407, which identified the factors to take into

consideration when deciding who was the author of sound recordings. In determining who is the author of creative works on the hard drive, the Court should consider and determine – who was responsible for making the necessary arrangements for the recordings. It was submitted that based on the Claimant's evidence, he was the responsible party by virtue of certain factors, which included, *inter alia*:-

- a) the contractual arrangement the Claimant had with Droop Lion from as far back as December 2013, to manage the artist;
- b) the fact that the Claimant financed the making of the album by paying producers, both Frederick "Toots" Hibbert and Nigel Burrell, back up vocalists and musicians; and
- c) the Claimant provided the hardware on which those creative works of Droop Lion have been recorded.

54. Further, on the issue of ownership of the re-recordings of the deceased's songs by the artist, Droop Lion, the Claimant further ventilated the point by stating that, firstly both the Claimant and the 1<sup>st</sup> Defendant agree that the deceased permitted Droop Lion to re-record a "song". However, this does not give the author of a song the right to the master tape of the artist re-recording the song. The deceased gave him a licence to use the song. There are also industry practices governing how compensation is to be calculated in these arrangements or situations.

55. On the issue of whether detention of the disputed property is justified, Counsel for the Claimant submitted that where there is genuine doubt as to a Claimant's title to said property, then limited detention is justified for a reasonable time to allow for investigation of title and placed reliance on the case of **Strand Electric Engineering Company Limited v Brisford Entertainments Limited** [1952] QBD 246. Counsel for the Claimant examined each of the reasons provided by each Defendant for retaining the hard drive and conceded that the motive for retaining the hard drive, it appears, seems to be based on the assertion that Toots' solo album has to be released before the album in question. However, it was argued that the two albums have nothing in common, save and except that Droop Lion had recorded a song previously done by the deceased.

56. Counsel for the Claimant further submitted that in the alternative to the claim of detinue the Claimant also seeks a claim for conversion based on the facts of the case, and that in a case of this nature either or both actions can be maintained. Counsel relied on the authority of **Trevor Wright v Det. Sgt. Yates** et al, at paragraph [20], per Campbell (Q.C.), J. Counsel submitted that to maintain a claim in Conversion, the Claimant must establish to the required standard that the conversion was committed by all or either of the Defendants. The relevant portions of the tort of Conversion are set out comprehensively by McIntosh J.A. at paragraphs [35] – [41] of **The Commissioner of Police and the Attorney General v Vassell Lowe** [2012] JMCA Civ 55. Those two elements in this case are:

- a) the 1<sup>st</sup> and/or Defendants dealt with the hard drive and the musical recordings thereon in a manner inconsistent with the right of the Claimant; and
- b) the 1<sup>st</sup> and/or Defendants had an intention in so doing to deny the Claimant's right or asserted a right which is in fact inconsistent with the Claimant's right or asserted a right which is in fact inconsistent with the Claimant's right to the hard drive and the musical recordings.

57. Further, that it is the first Defendant and or the Defendants who bear the burden of proving that, *inter alia* the Claimant is not the owner of the hard drive and by extension is not the owner of the beneficial and legal rights to the material on the hard drive. The defence raised therefore goes beyond a mere denial and as such they have assumed the legal burden of proving such defence. Therefore, based on the elements of conversion and the Claimant's unchallenged evidence, he is the legal owner of the hard drive, master tapes, files and sound recordings on said hard drive.

58. It was contended that based on the totality of the evidence that was presented to the Court, there is undisputed proof that the Claimant was the one who financed the album project and paid the producers, musicians and back up vocalists. It was further submitted that the witness for the 1<sup>st</sup> Defendant, Mr. Christopher Hooper was not a credible witness nor was he a witness of truth. Mr. Hooper stated in his affidavit evidence that he was present and made certain observations at the recording studio

while Droop Lion was recording for the album project. However, in cross-examination, Mr. Hooper gave testimony that that was not true.

59. He argued that the second and third Defendants were not helpful to the Court regarding the album project. Ms. Rattigan, in her affidavit evidence admitted that she does not know about the arrangements of the project and Mrs. Hibbert-Thomas admitted to not having spoken to her father for the last three years of his life.

60. On the issue of the intellectual property rights to the contents on the hard drive, it was firstly submitted that even where demos were provided by the deceased in Droop Lion singing/covering the thirteen songs in question, whether originally sang by "Toots" or not, this made them new sound recordings and as a result, Droop Lion has derived intellectual property rights (i.e. performer's rights) through the use of his voice pursuant to the Copyright Act. As a result, his consent is required for the commercial exploitation of his performance of the thirteen songs on the album. Secondly, the Defendants have not provided any proof that the thirteen new sound recordings were copyrighted by the deceased. As a result, the deceased is not the author of the songs within the meaning of the section 2 definition of "literary work", thus making section 22 (3) of the Act applicable. Thirdly, it was submitted that separate copyright owners' interests in copyright can co-exist and these copyright owners are generally entitled to recognition. These copyright owners include: (i) authors of literary works; (ii) composers of musical works and (iii) producers of sound recordings. On that basis, Mr. Hibbert as co-producer to the Droop Lion album project would not have his estate prevented from claiming royalties and any other remuneration that may be due to said estate by virtue of the songs and/or cover versions of said songs.

61. Counsel finally submitted that the claim has not been properly defended as the Defendants have not presented a defence or counterclaim, and have not indicated what remedies or Orders they seek. As a result, they have not made out their case(s) to the requisite standard of proof.

## **SUBMISSIONS ON BEHALF OF THE 1<sup>ST</sup> and 3<sup>RD</sup> DEFENDANTS**

62. Queen's Counsel on behalf of the first and third Defendants submitted that the Court should reject the Claimant's claim. Their position is that the deceased was the author of the lyrics for the songs on the album project and the executive producer, and as a result was the owner of the musical work and sound recordings. Consequently, such musical work and sound recordings should fall under said deceased's estate. Any exploitation of such intellectual property ought to be administered by the deceased's personal representatives and not the Claimant. If the Claimant is allowed to exploit such intellectual property owned by the deceased, particularly before the deceased's estate is administered this will gravely prejudice the deceased's estate.

63. Queen's Counsel highlighted that even in the case where it is conceded that the Claimant is the owner of the hard drive, the first and third Defendants were justified in detaining the hard drive for a number of reasons. These include:

- a) the hard drive was found inside D&F Recording Studio and until otherwise determined is deemed to be the property of the deceased;
- b) no legal arrangement exists between the deceased and the Claimant regarding ownership or rights for the musical work and sound recordings on the Samsung SSD Hard Drive;
- c) the deceased was the executive producer of the Droop Lion album project and as a result the owner of the germane sound recordings, on the basis that: (i) the deceased provided majority of the financial support for the album project, including provision of the recording facility, studio time and venue free of cost and (ii) the deceased played a significant role in the artistic direction for the production of the said album project;
- d) there should be no exploitation of the musical work and sound recordings on the hard drive until a determination is made by a Court of competent jurisdiction.

64. Queen's Counsel also submitted that what is being reasonably detained by the Defendants are the contents of the hard drive and the Claimant has not established that he has an immediate right to possession of the contents of the said hard drive.

65. On the issue of the intellectual property rights conferred to the estate of the deceased, it was argued that pursuant to the Copyright Act, the deceased is the owner of the copyright in the musical works and sound recordings that reside on the hard drive and therefore, such rights are conferred to his estate. The applicable sections of the Act are sections 2, 7(1), 14(3) and 28 (1).

66. On the connected issue of whether the contents of the hard drive are the property of the deceased, Queen's Counsel submitted that the deceased is the owner of the contents on the hard drive, as the lyrics for some of the songs as part of the Droop Lion album project were lyrics from songs (published and unpublished) written and recorded previously by the deceased, that were re-recorded by Droop Lion. Consequently, it is indisputable that the deceased is the original author and copyright owner of those lyrics. Since the deceased was the executive record producer for the songs on the said album, as he financed and facilitated the recording sessions, he is the owner of the master/sound recordings.

67. On the point that no licence or contract exists between the Claimant and the deceased where the deceased authorized the use of said deceased's work, they relied on section 23 (1) of the Copyright Act, which provides that copyright in a work may be transferred, however such transfer is ineffective unless it is in writing and signed by or on behalf of the assignee. Neither the Claimant nor Droop Lion has signed any licence agreement to that effect.

68. Queen's Counsel further submitted that the deceased was a Grammy Award-winning musician for over five decades and it would be of no benefit to the deceased to serve in the role of a mere producer for an album done by a fairly unknown artist who is re-recording songs previously written and recorded by the deceased.

69. The Claimant's case should therefore fail, as he has not established that the first and third Defendants were wrong or unjustified in their detention of the hard drive. Even if the Court were to find that the Claimant is the owner, this does not mean that he is automatically the owner of the contents of the said hard drive. The first and third

Defendants were therefore justified in detaining the hard drive as the Claimant or Droop Lion required a licence from the deceased, who was the copyright owner, in order to exploit the copyright in the (i) sound recording (ii) musical work and (iii) literary work for the songs on the hard drive.

70. On the issue of damages, it was submitted that the Claimant failed to prove that he is entitled to any general damages. The Claimant also did not specifically plead any item of “special damage”, nor at trial did he prove in his evidence he suffered any loss that was as a direct result of the first and third Defendants’ conduct. Counsel relied on **Alcoa Minerals of Jamaica Incorporated v Marjorie Yvonne Patterson** [2019] JMCA Civ 49.

71. On the issue of costs, it was submitted that based on the Claimant’s conduct, the Claimant has not been amicable in the following ways:

- i. three days after the first and third Defendants’ attorneys wrote to the Claimant’s attorney explaining their position regarding the hard drive, the Claimant filed the Claim;
- ii. even with mediation the Claimant refused to change his position, which prevented any amicable resolution of the matter.

72. On this basis, if the Claimant is unsuccessful in his claim it would be fair and just for the first and third Defendants to be awarded costs in the claim pursuant to Part 64 of the Civil Procedure Rules.

73. Counsel for the second Defendant argued that the second Defendant cannot be held liable for the tort of detinue as it is undisputed that she has never been in possession or control of said hard drive. She therefore could not have delivered up same despite the Claimant’s request to do so. It was further submitted that even if Ms. Rattigan did have possession of the hard drive, she could not have been able to reasonably deliver up said hard drive and its contents without contravening her duties as an executrix.

74. As it relates to ownership of the rights in the works on the hard drive, local copyright laws require documentary proof of an assignment of an author's copyright interests and this written documentation is mandated by section 23 (1) of the Copyright Act. In any event, this was not pleaded. Neither did the Claimant plead nor is there evidence that the deceased granted a licence, irrevocable or exclusive regarding his contributions to the works on the hard drive. It was further submitted that in the absence of such proof, the deceased had an interest in the works for the album and the requisite copyright, moral rights, performance rights *et al*, which would remain with his estate.

75. There is no documentary evidence before the Court to substantiate the claim that the deceased was paid for his contributions to the album or exactly what royalties would be paid to the estate, nor is there evidence that these alleged payments also represented full and final compensation for any or all of the deceased's contributions. While it is disputed whether or not the deceased was an executive producer, it is undeniable that the deceased made a significant contribution to the album project as an author, composer and performer on the basis that he played various instruments, provided vocals and was a producer on the album project.

76. Counsel on behalf of the second Defendant further submitted that the re-recorded songs that were intended to form part of the Droop Lion album project were originally works by the deceased and/or Toots and the Maytals and as such, if the Claimant is claiming rights to these songs, he must prove that each of these re-recorded songs had a sufficient degree of originality and are not just straightforward covers of older works, in order to attract a separate copyright. This is further complicated by the fact that the deceased was involved in the creation of these re-recorded songs and would nevertheless still have rights in them even without an assignment.

77. Finally, it was submitted that the works that are on the hard drive are evidence that should be properly heard and documented, and that the Court should not grant Orders for the hard drive to be delivered up as is without first determining the interests of the author(s) and performer(s) of the works on the hard drive. Counsel relied on **Rowena Johnson-Dennie v Transport Inspector W. Emmanuel et al.** [2020] JMSC

Civ 112; **Cala Homes (South) Limited v Alfred McAlpine Homes East Limited** [1995] FSR 818; **Fisher v Brooker** [2006] EWHC 3239 (Ch); **Gary Brooker and Onward Music Limited v Matthew Fisher** [2008] EWCA Civ 287; **Fisher v Brooker and Others** [2009] UKHL 41.

78. It was also submitted that the Claimant's Fixed Date Claim Form and Particulars of Claim do not explicitly plead the causes of action of detinue or conversion as required by rule. 8.8, 8.9 and 8.9A of the CPR. All the Claimant has essentially pleaded was delivery up of the hard drive and its contents. In order to succeed in this claim, the Claimant must prove that he has a greater claim of right to the said hard drive and its content than the Defendants.

79. Counsel further submitted that it does not matter whether the deceased was a producer or executive producer or both for the Droop Lion album project. What is clear is that the deceased's estate has a greater interest in the sound recordings and the musical works on the hard drive than the Claimant.

80. It was further submitted that though same is not admitted, as an executive producer, the Claimant would only have a financial interest in the album being commercialized and distributed and it is from the sale of these musical works that the Claimant would recoup his expenditure on the project and make a profit. Finally, before the Claimant or anyone else can complete, commercialize and distribute these musical works, they must obtain the written consent of the executors of the estate of Frederick "Toots" Hibbert, and the Claimant has failed to do so.

## **LAW**

81. Detinue is a common law action for the recovery of goods. The authorities referred to in the submissions advanced demonstrate that in order to succeed in a claim for detinue, the Claimant must prove that he is entitled to immediate possession of the hard drive and that the Defendant/Defendants detained it after a proper demand has been made for its return. The Claimant must also prove that the Defendants have no

lawful excuse for failing to deliver it to him. More succinctly put, the Claimant must prove that:

- (i) he has the right of ownership and immediate possession against the Defendant/s who are in possession of it;
- (ii) that he made an unconditional/unqualified and specific demand for it and the Defendant/s have failed and/or refused to deliver it up within a reasonable time; and
- (iii) the Defendants have no lawful excuse or justification for detaining it.<sup>2</sup>

82. With respect to conversion, the Claimant must prove that the Defendant committed an act in relation to the Claimant's goods which constitutes an unjustifiable denial of his title to them, namely:

- (i) dealing with the goods in a manner inconsistent with the right of the claimant who is entitled to them; and
- (ii) in doing so, has an intention to deny that claimant's right or to assert a right which is inconsistent with such right.

83. Based on the authorities of **Attorney General and Transport Authority v Aston Burey** [2011] JMCA Civ 6 and **Trevor Wright** (supra) cited by counsel for the Claimant, both torts relate to the wrongful interference, detention and dealing with a person's personal property inconsistent with their right to possession of it. Consequently, the person so deprived is entitled to bring an action in either or both tort(s). However, the main distinction between the two torts is that in the case of detinue, the Claimant is seeking to recover the actual item detained whereas in the case of Conversion he is more interested in the value of the item. In this case the Claimant's main concern is for the return of his hard drive so I find that the appropriate tort to be considered is therefore detinue.

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<sup>2</sup> Brodber v EW Abraham [2019] JMCA Civ 17; Ailcia Hosiery Ltd v Brown, Shipley (1970) 1 QBD 195, 207; Gary Baldwin v Dave Quest [2017] JMCA Civ 133; Trevor Wright v Detective Sergeant Yates and Inspector Canute Hamilton and Attorney General of Jamaica [2012] JMCA Civ 52.

84. The Defendants have contended that the Claimant failed to expressly plead the tort of detinue and it is a fact that the Claimant did not use the word detinue in his Claim however I do not find that to be detrimental to his Claim as it is clear from the words used in his Claim that he was always seeking the delivery of his hard drive and had in fact set out quite clearly in the pleadings the elements required for the tort of detinue. It has been expressly stated in our courts that once the facts establishing a cause of action have been pleaded, it is not fatal that the Claimant has not identified the cause of action.<sup>3</sup>

85. In seeking to prove that he is entitled to immediate possession, the Claimant relies on the provisions of the Copyright Act by virtue of the fact that he is the owner and author of the hard drive and its contents. An examination of the Copyright Act is therefore essential to the consideration of the issues raised in this matter.

86. Under section 2(1) the word “author” in relation to a work means the person who creates it, being in relation to a musical work, the composer and in relation to a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken.

87. Section 7(1) stipulates that a work qualifies for copyright protection if the author was a qualified person at the material time. The material time in relation to a sound recording is when it is made.

88. Section 7(2) recognises the concept of joint authorship which is expressed as follows:

***“A work of joint authorship qualifies for copyright protection if any of the authors satisfies the requirement of subsection (1), so however, that, where a work qualifies for copyright protection only***

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<sup>3</sup> See Medical and Immunodiagnostic Laboratory Limited v Dorett O’Meally Johnson [2010] JMCA Civ 42 and Section 48 (g) of the Judicature (Supreme Court) Act

***under this section, only those authors who satisfy such requirement shall be taken into account for the purposes of sections 9 and 22.***

89. The rights of a copyright owner are provided for in section 9(1) of the Copyright Act and stipulates that the owner of the copyright in a work shall have the exclusive right to do or authorise other persons to do certain acts to include performing the work in public or in the case of a sound recording play the work in public.

90. Copyright authorship in musical works arises and/or is acquired once the person creates the work. Based on section 14(1) of the Copyright Act, the author of a literary, dramatic, musical or artistic protected work has the right to be identified as the author of the work. Subsection (3) provides that the author of a musical work or a literary work consisting of words intended to be sung or spoken with music has the right to be identified as such whenever –

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

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

91. Section 22 deals with ownership of copyright and provides in subsection (1) that the author of a protected work is the first owner of any copyright in that work unless there is an arrangement to the contrary. Subsection (3) stipulates that where a protected work is a work of joint authorship the authors thereof shall be the co-owners of the copyright in that work.

92. From an examination of the aforementioned sections it appears that although the general rule is that the author of the copyright is the owner, it is not in every case that the author of the copyright is synonymous with the owner of the copyright. In a case where someone creates an item on behalf of someone else it may be that the creator is the author but not necessarily the owner. It is a question of fact in each case and would depend on the arrangement or agreement between the parties.

93. There are also cases which demonstrate that more than one person can own the copyright in an item which is what is referred to as joint ownership. The concept of joint authorship or ownership is an issue this Court will have to contend with and so it is

useful to examine a case which deals with this. The case of **Cala Homes (South) Ltd et al v Alfred McAlpine Homes East Ltd** cited by counsel for the 2<sup>nd</sup> Defendants had to do with an action for infringement of copyright and inducement for breach of contract, in which the Plaintiffs, a group of companies headed by the parent company, Cala Plc along with its employee, Roger Date sued the defendant company, Alfred McAlpine Homes East Limited for damages. Both the plaintiffs and defendant companies were engaged in the business of designing and building homes. It was asserted that Mr. Date is joint author of copyright in the 1988 drawings that were produced by Crawley Hodgson employees, within the meaning of section 10(1) of the Copyright, Designs and Patents Act, 1988 and that when the Defendant reproduced a substantial part of those drawings without the Plaintiffs' consent, this constituted copyright infringement.

94. The Court held that the plaintiffs were joint owners of the copyright in the drawings and by virtue of the provisions of the 1988 Act has that exclusivity. Mr. Justice Laddie made the following statement:

*“In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant. As Mr. Howe has said, where two or more people collaborate in the creation of a work and each contributes a significant part of the skill and labour protected by the copyright, then they are joint authors. In this case Mr. Date was a joint author of the drawings for the New Standard House Range. Indeed not only was he a joint author, in my view he was the major author. It follows that Cala is the joint owner of the copyright in those drawings. It also follows that McAlpine has infringed that copyright.”*

95. From an examination of the case law, it is clear that ownership carries with it certain rights. The case of **Performing Right Society Ltd v Galleria Cinemas Ltd** was relied on by the Claimant to demonstrate the concept of first ownership. This case

concerns a challenge to the decision of trial court that the Copyright Act of the Bahamas does not provide the owner of the copyright in musical work with the exclusive right to authorize the public performance of the musical work when it is embedded in a motion picture and the motion picture is shown in public. The main issue on appeal was whether, based on a correct interpretation of the Act the exclusive right of a public performance associated with a musical work, is lost when that musical work becomes part of a sound recording, which then becomes part of a motion picture.

96. The Court of Appeal allowed the appeal and found that by virtue of the provisions of section 6(1) (b) and 9 (1) (d) of the Copyright Act the author of a musical work has the exclusive right to authorize the performance of that work publicly and that there is nothing in the Act that substantiates the position that a holder of that copyright loses his right to the same once that musical work is incorporated into a musical recording. The author of the musical work and the author of the sound recording which comprises the musical recording can each at the same time hold copyrights to their creations. The court made the following pronouncement at paragraph 22 of the judgment:

***“Copyright in a sound recording is separate from any copyright in the words and music contained in the recording. The first owner of the copyright in a sound recording is usually the record producer. The composer of the music in a sound recording will be the author of the musical work and will usually own the copyright in that music. The lyrics of a song are protected separately by copyright as a literary work and will usually be owned by the person who wrote them.”***

97. The point was made that there may be a need for two copyrights for every song - one for the musical work and one for the actual sound recording embodied on the disc. Thus, when someone sells a pirated CD, they are actually infringing two copyrights – the musical work copyright and the sound recording copyright. What this shows is that a production can feature different authors, an author of the sound recording and author of the musical work which is the umbrella under which the sound recording falls.

98. The **Henry Hadaway** and **A&M Records Ltd.** cases referred to by counsel for the Claimant demonstrate the importance of the person making the arrangements for the production and how the court should treat with his role. This is in keeping with the

provisions of our Copyright Act which expressly provide that the author of a sound recording is the person by whom the arrangements necessary for its making are undertaken.

99. The **Henry Hadaway** case involved a dispute over copyright ownership in a number of sound recordings within a film. The Claimant, HHO an independent music distributor claimed to be exclusive licensee of some recordings (marked with asterisk in Annex 1) pursuant to a February 2008 agreement with the 2<sup>ND</sup> Defendant, GLPL. HHO also claimed to be copyright owner of the rest of the Recordings pursuant to a December 2008 assignment from said GLPL. In respect of copyright infringement by the 1<sup>ST</sup> Defendant, Pickwick 2, an independent music publisher and distributor, HHO sought damages or an account of profits and injunctive relief. The Claimant's case on ownership was based purely on GLPL's authorship of them and alternatively, that GLPL and Pickwick 1 (a music publisher and distributor) were joint authors and joint first owners of copyright in the Recordings. The relevant issues for determination were: (i) whether the Claimant was copyright owner in said Recordings or in the alternative exclusive licensee; and (ii) if the Claimant was held to be exclusive licensee, did the Buyout Agreement or any other arrangement provide the 1<sup>ST</sup> Defendant with the defence of consent.

100. The applicable statutes were the Copyright Designs and Patents Act 1998 (CDPA 88) and the Copyright Act, 1956. The Court held that: (i) GLPL (2<sup>ND</sup> Defendant) was author and first owner of copyright in the Recordings, (as they made the arrangements necessary for the making of said Recording) but this was subject to any express contract and (ii) HHO (Claimant) was the exclusive licensee of GLPL in the Recordings marked with an asterisk in Annex 1, and copyright owner of the remainder of the Recordings and (iii) Pickwick 2 (1<sup>ST</sup> Defendant) has no rights or consent from GLPL to exploit the Recordings and therefore has no defence to the claim.

101. The case of **A&M Records Ltd.** addressed the point that in determining what is meant by "the person by whom the arrangements necessary for the making of the sound recording or film are undertaken" the facts of this case were considered, as they

relate to a sound recording. The brief facts are that sound recording of music was used by skaters, Torvill and Dean in three of their performances in 1984. No written agreement existed. The question of who was the record producer was an issue for consideration. The Court held that the 2<sup>ND</sup> Claimant was the producer and first owner of copyright in the recording based on the fact that he arranged for its making.

102. Another principle that will have to be addressed in this case is the concept of originality for which the case of **Matthew Fisher v Gary Brooker and Onward Music Ltd** provides useful guidance. The Court looked at how the work came to be written and made the following point:

*“It is well established that the fact that a musical work is an arrangement of an earlier copyright work does not mean that the arrangement cannot attract a separate copyright. The question is whether by comparison with the original work the arrangement exhibits a sufficient degree of originality, namely the application by its author of skill and labour in its creation (beyond what is involved in reproducing the original work). If it does the arrangement is capable of constituting a separate copyright work. In principle the degree of originality required is no different from what is required in order to establish copyright in any other work (whether a work of sole authorship or one of joint authorship).”*

103. **Redwood Music Ltd. v Chappell & Co. Ltd.** [1982] RPC 109 also deals with the principle of the degree of originality. The test is, when compared with the original work, does the arrangement show a sufficient degree of originality. A sufficient degree of originality is defined as the measure of skill and labour that was applied by the author in its creation (beyond what was involved in reproducing the original work). This test applies whether the work concerns sole authorship or joint authorship.

## **ISSUES**

104. Two main issues arise for determination in this case. The first is whether or not the Defendants are liable to the Claimant in the Tort of detinue for the retention of the Samsung hard drive. The second issue is whether the first Defendant and the second and third Defendants, in their capacity as personal representatives of the estate of Mr. Hibbert, have any lawful justification for retaining the said hard drive. If the Claimant is

successful, is he entitled to damages and if so what is the quantum of damages that should be awarded. In order to resolve the main issues, other peripheral issues need to be first determined which can be itemized as follows:

1. Who is the legal owner of the Samsung hard drive?
2. Who is the executive producer of the Droop Lion album project?
3. Who is the legal owner of the album content?

## **ANALYSIS**

105. In my analysis I will refer to a few of the songs on the album as headings simply for the purpose of adding flavour to the judgment.

### **Who is the legal owner of the Samsung hard drive?**

106. In order to substantiate a claim for detinue, the Claimant must prove that he is the owner of the hard drive and therefore entitled to possess it. There is no issue taken in relation to the fact that the hard drive is and has been since the death of Mr. Hibbert in the custody of the first Defendant who has retained it in her capacity as owner of the property on which it was left to include the Reggae Studio. Although the second Defendant has asserted that she has never been in possession of the said hard drive she and the third Defendants have both opposed the return of the hard drive to the Claimant as they are of the view that as personal representatives they are entitled to do so by virtue of the fact that the deceased is the legal owner of the hard drive and its contents and therefore the person entitled to possess it.

107. The issues raised concerning the legal ownership of the hard drive are questions of fact for which the Court has to consider the question of credibility.

## DO YOU BELIEVE?

***(Under this heading the question of credibility will be addressed.)***

108. The credibility of the Claimant came under scrutiny during the course of the cross-examination. He gave evidence that he was the one who purchased the hard drive whilst on a visit to the United States of America at a Best Buy store in Colorado for USD\$169.99. The first Defendant sought to mount some challenge to this evidence by suggesting that the deceased was present and that the hard drive was acquired at the deceased's direction and for the benefit of the Reggae Centre. The Claimant's response to this was that this was very much incorrect. The Defendants brought no evidence to support this suggestion.

109. On the other hand, the Claimant's evidence on this point is supported by the evidence of the witness Mr. Nigel Burrell who indicated that he was present when the Claimant bought the hard drive. I therefore accept the evidence provided by the Claimant as being credible, and on a balance of probabilities find that he in fact purchased the hard drive and that he did so for his own use and purpose.

110. I agree with the submissions advanced by counsel for the Claimant that the hard drive is an object and is therefore subject to the provisions of the Sale of Goods Act. Section 18 (1) of the Sale of Goods Act provides that:

***“where there is a contract for the sale of specific or certain goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred”***

On this basis I am satisfied on a balance of probabilities that it is the Claimant who purchased said hard drive and therefore he is the owner of it. The Claimant in the normal course of things would be entitled to all the rights associated with ownership of hard drive including the right to immediate possession.

111. However, it is the uncontested evidence before me that the hard drive is not in the same state it was in when it was purchased. It now contains what would be the album for the Droop Lion project and other material. That fact has not been denied. The

Claimant contends that as executive producer of the album he is the owner of it but the Defendants contend that the deceased was the executive producer of the album and so his estate is the owner and therefore entitled to retain possession of it. Therefore, the question as to who is the executive producer of the Droop Lion project and who is the owner of the album content are live ones that must be determined.

### **Who is the executive producer of the Droop Lion album project?**

#### **VISION**

***(Under this heading the question of the visionary behind the project will be addressed)***

112. The role of an executive producer is an important one. In fact, based on the evidence that has been led it strikes me that the executive producer is the visionary behind the project. He could be described as the person with the vision, the individual who conceptualized the project and therefore the person by whom the arrangements necessary for the making of the album were undertaken. It is important to note that the album is not yet published and that it is a work in progress and so any reference to copyright in it would be more of a futuristic position hence also the use of the term "vision".

113. During the course of the trial four witnesses gave evidence as to their understanding of who was an executive producer vis-a-vis a producer, two on the Claimant's case and two on the Defendants' case. Their evidence for all intents and purposes was relatively similar. The evidence given by the Claimant as to who is an executive producer was not subject to significant challenge and was to the following effect:

*"A producer is someone who an executive producer would have employed to oversee the recording session for him. That person would have been a knowledgeable person about vocals, chords, notes and will help to get the artist to sing properly and the sound recording, to put his vocals properly and to ensure that the musicians are playing in sync so that everybody is playing in their right chords. A producer would direct the sessions. The producer would ensure that when the master recording session finalized and*

*everything is correct, it is then given to the executive producer who owns that sound recording. The executive producer is the financier of the project.*

*An executive producer would be a person who would invest in a sound recording or an artist that he is investing and sometimes a record label as an executive for the project would employ a producer to produce, which means you are the owner of the project, 'cause they are investing in the project and they would have employed a producer to produce for them likewise.*

*You would agree with me that sometimes the record label would often be the executive producer”*

He distinguished between the executive producer and a producer in this way:

*“It’s possible, that’s what producers do, they play and direct the recording session, that’s what a producer does. A producer is like a contractor that builds the house, the person who is financing the house would own the house but the owner who finances owns the house.”*

*and*

*“A producer produces the music and the arrangement and the executive producer is the person who provides monies for studio time, engineers and producers”*

He insisted that the deceased was only a producer for the project and not an executive producer.

114. Mr. Nigel Burrell also spoke about the difference between an executive producer and a producer as follows:

*“A producer produces the music and the arrangement. The executive producer is the person who provides the money for studio time, the musicians, engineers and producers.”*

The first Defendant also gave evidence as to her understanding of who is a record producer as follows:

*“he put the project together and arrange the music”*

When asked about the role of an executive producer she responded “pay for everything”

115. Mr. Christopher Hooper explained that an executive producer is the person who provides the facilities for the creation of the music and recordings or finances the production of music. This includes the recording studio, the equipment, the software, the instruments, food, drink and the utilities being used. He continued that the executive producer owns the master recordings that are stored on the storage medium unless otherwise written and agreed between the relevant publishers and the said executive producer.

116. This description provided by the witnesses appears to be consistent with the practice in the industry as seen in the publication referred to by Queen's Counsel appearing on behalf of the first and third Defendants, **Becoming a Globally Competitive Player: The Case of the Music Industry in Jamaica** written by Zeljka Kozul-Wright and Lloyd Stanbury, October 1998. The following excerpt was extracted from **Chapter 2, titled "The Production Process of Music Products and Services"** paragraph A 1

*"Despite much crossover and integration among separate activities, there are four distinct phases of the recorded music business, i.e. recording, manufacturing, marketing cum distribution and retailing phases. Let me briefly summarize the key activities involved in each phase.*

**1. Recording phase**

*The first phases of the process involves the making of a master recording of a musical work whereby singers, musicians, songwriters, sound engineers and record producers assemble in a recording studio in order to produce a master recording (studio recording facilities are generally rented). This completes the first phase of the music making process.*

*The record producer is usually the owner of the master recording (but not the song itself, which remains the property of the creators by virtue of the law of copyright). The commercial exploitation of the recording and the song incorporated in the recording normally generates income by way of royalties. Royalties generated from the exploitation of the recording are shared amongst the producer and the artist, while royalties from the exploitation of the song are shared between the creator (songwriter) and the publishers. The publisher, by virtue of song-writing agreements, secures rights to administer the copyrights on behalf of the song writers. Publishers*

***and song writers usually secure the services of music agencies, such as the Performing Rights Society (PRS), American Society of Composers, Authors and Publishers (ASCAP), Mechanical Copyright Protection Society (MCPS) and the Harry Fox Agency, to deal copyright collection with the issuance of licences for the use of musical works and the collection and distribution of royalties generated from the use of the works.***

***The record producer's responsibility is usually to finance the cost of the studio recording process and to coordinate the activities of songwriters, singers, musicians, and recording in the engineers in the recording studio. The master recording which results from the studio recording sessions is usually the property of the record producer.***

117. The use of the term "record producer" seems to be synonymous with the executive producer and he is viewed as the owner of the master recording but not necessarily the songs. That remains the property of the creators by virtue of the laws of Copyright. The authorship of a work is governed by the provisions of section 22(1) of the Copyright Act which provides that:

***"subject to the provisions of this section, the author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary."***

118. It is essential to determine whether the evidence led by the Claimant supports the fact of him being an executive producer. I have found the **Henry Hadaway** case to be quite instructive in this regard. Although the term executive producer was not used the Court appeared to be referring to the concept of the executive producer when it spoke about the person who made the arrangements necessary for the making of the recording or the visionary behind the project. The Court made it clear that "the person by whom the arrangements necessary for the making of the film are undertaken", is a question of fact in each case. I have set out below some of the questions that the court sought to answer:

- who made the arrangements necessary for the making of the recordings?
- who commissioned the making of the recordings
- who discussed and approved the albums to be recorded and the named artists to be used in the recordings

- who was involved in the creation of the recordings
- who set the budget for the album
- who was responsible for engaging and negotiating with artists, booking, hiring and paying for musicians and paying the costs associated with them
- who was responsible for paying production cost and entering into contracts with artists
- where did the idea come from ( the vision) or who created the idea, who was responsible for the genesis of the idea, who was the visionary, and the impetus for their creation was concerned
- took the lead in suggesting artists, albums,
- who was responsible for the costs associated with studio time
- attended the studio sessions
- produced the recordings
- who would be responsible for providing and paying for the physical media on which the Recordings were captured

119. Interestingly though, the Court found that GLPL, as the person who made the arrangement necessary for the making of the recordings, was the author and first owner of the copyright in them subject to any express contractual provision otherwise in the 1992 Agreement although it found that Pickwick 1/Carlton commissioned and financed the production of the Recordings, the court concluded that GLPL was the person making the arrangements necessary for the making of the Recordings and so the author of them. The Court even considered whether Pickwick 1/Carlton and GLPL could be joint authors, but rejected this possibility as the evidence did not support this.

120. In arriving at its decision it does not appear that the Court found that it was sufficient that Pickwick commissioned and financed the production of the Recordings as the court gave considerable weight to the role played by GLPL as being the person making the necessary arrangements for the making of the Recordings and so found him to be the author.

## **SPEAK THE TRUTH**

***(Under this heading I will be comparing the evidence led on the Claimant's case with that led on the Defendants' cases)***

121. The question as to who is the executive producer is indeed a question of fact and several witnesses gave evidence on this issue so it is for the Court to assess them and determine who or which version is more probable than not.

122. There are some aspects of the evidence given by the Claimant and his witnesses which the Defendants have not been able to successfully challenge. The clear evidence of the Claimant was that it was he who arranged with Droop Lion to do this project. It was he who engaged Mr. Hibbert to be a part of this project as a co-producer. He arranged to use the studio of the deceased. It was he who engaged all the other musicians and it was he who engaged the co-producer Nigel Burrell.

123. It has not been contested that it was the Claimant who entered into a contract with the artist Droop Lon for the production of an album for him and therefore the person who made the arrangements for the making of the album. Consequent upon that the Claimant made arrangements for the recordings to be done at the studio with the permission of the deceased. I have already found that it was the Claimant who provided the hard drive on which the recordings were to be placed. I also accept that the Claimant financed the making of the album by paying the studio engineer, a fact supported by the studio engineer himself, musicians and the vocalists. The Claimant thereafter commenced the process of negotiations for the release of the album. The only person who has shown the budget is the Claimant who in the form of a four-page document listed all the songs on the Droop Lion Album Budget. It sets out all of the various players involved in producing each song on the album which included studio time, bass player, rhythm guitar, drummer, percussions, lead guitar, producer, engineer, food and drink.

124. It is significant that it was the Claimant who entered into a contract with Spero, a fact which has not been disputed. The 1<sup>st</sup> Defendant's assertion of some other company

being in dialogue with the deceased in this regard has not been supported by any credible or direct evidence. It is clear that the Claimant was the one responsible for the producing of the master record and this lends support to his assertion that he was the executive producer to the exclusion of Mr. Hibbert.

125. The Claimant also gave evidence that there was no arrangement for Mr. Hibbert to play an executive role. His evidence is that this is a project being done for the benefit of the artist Droop Lion who he managed and that he entered into no arrangement for the project to be owned by the deceased. He insisted that any production work done by the deceased was paid for.

126. The input of Droop Lion is therefore important in determining who was the main man behind this album. His evidence supported the testimony of the Claimant. Not much of his evidence was significantly challenged. I found Droop Lion to be a credible witness. I accept that his musical affairs were being managed by the Claimant. He conceded that there was an arrangement for the recordings for his upcoming album to be done at Toots' studio but that this was pursuant to an arrangement made and financed by the Claimant and that the album was being produced pursuant to the contractual arrangement in place between them. He was never advised that the arrangement was assigned to any third party, in fact he said he knew of no arrangement with the deceased as he would have refused to record under those arrangements. He even went as far as to say that the arrangement referred to by Mrs Hibbert is news to him as the deceased was reluctant to expend funds to produce and promote his own music.

127. He asserted that the words on the hard drive that relate to him are all his intellectual property and to the best of his knowledge the executive production rights are owned by Mr. Stephenson. During cross-examination, he admitted that during the rehearsals Mr. Hibbert would guide him as to how he wanted him to sing a particular song but he insisted that he did that as a producer as that is what producers do. He said most times the deceased would do a 'demo' and Mr. Burrell would send it to him. However, when they were together in studio he would sing after him. He admitted that

for several of the songs on the album he got 'demos' from Mr. Hibbert and that he brought some of the songs to the album project such as 'Poor People Story', 'Sitting on the Sidewalk', 'Vision' and 'Do You Believe'. With respect to the song 'I Know' he says Mr Hibbert produced it and Mr Burrell co-produced it but that he wrote 'Money is God on Earth' and Mr. Hibbert produced it.

128. Another song 'Wave your Hands' was written by himself, Mr. Burrell, Mr. Hibbert and another person and produced by Mr. Hibbert. He agreed that Mr. Hibbert contributed significantly to the project but insisted that it was in his capacity as producer.

129. In cross-examination on behalf of Ms. Rattigan he explained that as far as he is aware music can be owned by the people who make it like the artist, composers and writers and that there are elements where the ownership can be shared. He agreed that Mr. Hibbert would own a portion of the intellectual property rights on the album.

130. The evidence of Mr. Burrell supported the Claimant's case that he and the deceased were co-producers on the Droop Lion album and that he also worked as studio engineer and that the work undertaken on the album was fully paid for by the Claimant along with all the work done by musicians and backing vocalists. He said the hard drive contains no personal recordings for Mr. Hibbert or any works that he had ownership of and that he witnessed Mr. Hibbert being paid by Mr. Stephenson for all the work done by him on the album at the time he was paid for him work as co-producer and engineer. He indicated that all executive decisions were made by Mr. Stephenson in his capacity as executive producer.

131. He admitted in cross-examination that Mr. Hibbert wrote songs such as 'All is Well', 'Crazy Conscious', 'Poor People Story', 'Sitting on the Wall', 'Speak the Truth', 'Turn the Radio On', 'Vision' and 'Pay the Rent' however it was Droop Lion who wrote 'Money is God on Earth'. He also agreed that there are a lot of Mr. Hibbert's vocals on the album.

132. Although the Claimant's case was in fact supported by his witnesses, there are certain aspects of his evidence that must be carefully considered. In assessing the

Claimant's credibility Queen's Counsel has asked me to consider carefully the nature of the evidence elicited in the cross-examination of the Claimant. He asked me to consider the fact that, with respect to the sums allegedly paid by the Claimant, he was asked about the notes he made but failed to produce them during the course of the trial. In addition, there is no evidence to support the fact that these significant payments were made. In the absence of that, the Court should find that no payment was made to the deceased for the use of the recording studio. This supports the fact of the deceased being the executive producer who made the studio available to Droop Lion free of cost.

133. He also contended that the Claimant tried to mislead the Court in his affidavit when he stated that the only form of contribution made by the deceased was in the form of one song that the deceased asked Droop Lion to record. This was different from the evidence in cross-examination where he admitted that the deceased contributed at least ten of his songs. The Claimant also failed to disclose in his affidavits the contribution the deceased made by playing several musical instruments.

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

135. There is also a blatant inconsistency in the evidence of Claimant as he first gave the impression that only one song on the album was attributable to the deceased and in cross-examination he was very evasive in terms of the contribution the deceased made to the various songs on the album. He sought to downplay the role played by the deceased to the various songs on the album. His witnesses gave evidence of the significant contribution the deceased made to at least ten songs on the album. This was consistent with the first Defendant's assertion on that issue. I found that the Claimant failed to speak the truth in respect of the extent of contribution by the deceased to the actual songs on the album.

136. Despite the fact that these aspects of the Claimant's evidence lack veracity, it did not severely affect the root of his case and the question as to who is the executive producer. It is a question that must be determined on a balance of probabilities and so despite the conflicts in the Claimant's evidence, the Defendants' case proved to be even more inadequate as the Defendants were unable to speak to certain essential facts concerning the genesis of the arrangement and who made the necessary arrangements throughout the project.

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

138. The evidence of the first Defendant was that she had discussions with the deceased about him playing an integral role in the production of the album and that she and the deceased were to be the executive producers and producers of the album. Any discussions had with the deceased would be hearsay and not admissible to prove any fact here. Even the evidence of the first Defendant that the deceased was not paid and that he made financial contributions to this project would be tantamount to hearsay as the clear evidence which I accept is that she was never present during the recording of the album and that she did not play an integral role in the musical affairs of the deceased. She admitted that she didn't know anything about the hard drive until after the death of her husband. The extent of her knowledge seemed to be based on the fact that her husband would come to her for money and she would write receipts. It

appeared that she based her claim that her husband was executive producer by virtue of the fact that the project was done at the Reggae Centre. The fact that Mr. Hibbert provided his studio as well as his sound recordings and no doubt his talent does not mean without more that he takes on an equal role as executive producer. It seems consistent with how he has been described by the Claimant which is as a co-producer.

139. Even the first Defendant's witness Mr. Christopher Hooper was not able to provide much support to her case. He gave evidence of seeing the deceased and Droop Lion at the studio on only three occasions and that the Claimant was present but he did not see him contributing to the production of the songs. He said however he would be in and out and would check in with Droop Lion and the deceased to see how things were going. He indicated that he observed the deceased being very dedicated to the album and he was very involved in its creative process, and that nothing was done without his input or final approval. This description of Mr. Stephenson's actions is not inconsistent with his role as executive producer and the role of Mr. Hibbert and Mr. Burrell as producers. In cross-examination he agreed that he was not present at all times during the production of the album and that he did not know the names of the songs on the album. He agreed that he was not in the studio when Droop Lion was doing his stint with Mr. Hibbert.

140. Neither the second nor third Defendant was able to assist with respect to the arrangements surrounding the production of the album. The third Defendant had not spoken to the deceased for three years leading up to his death and so would not go inside the studio. Ms. Rattigan admitted that she was not aware of the arrangements regarding the project. Ms. Rattigan was not able to provide much assistance as she did not know about the project with Droop Lion before her grandfather's death.

141. I have had the opportunity to observe the demeanour of the Claimant and his witnesses as well as that of the Defendants and their witness. Essentially, what the Court is being asked to do by the Defendants is to accept the indirect and scanty knowledge of the Defendants over that of the Claimant who was integrally involved.

142. Despite the inconsistencies and discrepancies on the case for the Claimant, the Claimant's case struck me as being more consistent with the truth than that of the Defendants' case. I accept the evidence of the Claimant that the 1<sup>st</sup> Defendant had never been a part of the musical affairs of the deceased on a day to day basis. She was therefore not privy to the details of the arrangement between the deceased and the Claimant with respect to this project.

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

#### **Who is the owner of the album content?**

144. The undisputed evidence is that the album contains musical works and sound recordings. The definition accorded to musical works under section 2 of the interpretation section of the Copyright Act is that of "a work consisting of music exclusive of any words or action intended to be sung, spoken or performed with the music". Sound recording is defined as follows:

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

***(b) a recording of the whole or any part of a literary, dramatic or musical work from which sound reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced"***

145. The Defendants contend that the deceased was author for at least three categories of works protected under the Act, that is the sound recording, the musical work and the literary work. However, literary work under the Copyright Act is defined as any work other than a dramatic or musical work. However, the composer of the lyrical content and the music in a musical work would enjoy copyright protection. The

uncontroverted evidence was that Mr. Hibbert was the author of several of the sound recordings on the hard drive, the lyrics as well as the music.

146. It is important to reiterate the dicta in the case of **Performing Rights Society Limited v Galleria Cinemas Limited** where the Court of Appeal stated the UK position (according to the UK Intellectual Property Office), to be as follows:

*“copyright in a sound recording is separate from the copyright in the words and music contained in that recording;*

- a) the first owner of the copyright in a sound recording is usually the record producer;*
- b) the composer of the music in a sound recording will be the author of the musical work, and will usually own the copyright in that music;*
- c) the lyrics of a song are protected separately by copyright as a literary work and will usually be owned by the person who wrote them.”*

147. In the above case the Court referred to the textbook, **“The Independent Filmmaking, The Law & Business Guide™ for Financing, Shooting & Distributing Independent & Digital Films, A Capella Books (2d Ed. 2009)”**, which supports the position that the sound recording of a song is protected through a copyright held by the producer of the song or the record company that manufactured and distributed the song. In delivering his judgment, Evans JA (Actg) at paragraph [20] stated that:

*“On my reading of the Act I can find nothing which substantiates the position that a holder of that copyright loses his right to the same once that musical work is incorporated into a musical recording. In my view the author of the musical work and the author of the sound recording which comprises the musical recording can each at the same time hold copyrights to their creations.”*

## **SITTING ON THE WALL**

***(Under this heading I will examine how the Claimant responded to questions regarding the album content)***

148. During cross-examination of the Claimant he conceded that several of the songs on the album were produced by the deceased. He said it was possible that 'Sitting on the Wall' was written by the deceased. He agreed that Mr. Hibbert's festival song 'Rise up Jamaica' is also on the album. This is in contrast to what he had stated in his affidavit. He also agreed that Mr. Hibbert played as many as six or seven instruments on the Droop Lion Project. He did not agree that 'Vision' was written as far back as 2012 but did not seek to deny it. He agreed that the deceased produced 'I Know'.

149. When asked whether the deceased has anything to do with 'Money is God on Earth', he replied that Mr. Hibbert was involved in the production of all the songs and that Mr Hibbert directed the sessions in his capacity as a producer. In relation to 'Wave your Hands' he replied that Mr. Hibbert produced that song also and that he was intricately involved in all the production on the album. When it was suggested to him that Mr. Hibbert selected the songs for the project his response was that it was a dialogue between all parties, including the artists and that Mr. Hibbert was someone who he had full confidence in and that he was a friend of his. It was thereafter suggested to him that he was not being truthful when he had said the deceased produced only one song. He did not agree with this suggestion. It is however evident that the deceased contributed at least ten of the songs on the album and that he was not in fact being truthful when he said only one song was produced by the deceased.

150. When asked about whether Mr. Hibbert's vocals were on the hard drive he agreed that his "demo vocal" was on the hard drive and also added that as producer he would be speaking and that it was not for release or for commercial purposes. He also agreed that Mr. Hibbert played as many as six or seven instruments on the Droop Lion project.

151. The Claimant demonstrated a lack of decisiveness hence the description accorded that he seemed to be sitting on the wall in respect of several of the songs on

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

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

153. Queen's Counsel on behalf of the first and third Defendants contended that there is no licence or contract between the Claimant and the deceased authorizing him to use the deceased's work. However, from the evidence led on both the Claimant's case and that of the first Defendant, the clear inference from the fact of the integral role played by the deceased as producer was that he must have given his permission not only for his studio to be used but for his sound recordings to be used as a part of the album. The clear inference from the evidence is that the deceased gave permission for his sound recordings to be re-recorded with Droop Lion as the 'singer' of the songs on the album.

154. It seems to me that the parties came together with the Claimant as executive producer, Droop Lion as the main artist and the deceased as producer and others as such as Nigel Burrell as producer and engineer to reflect a conglomeration of talent where they mutually understood their separate roles and responsibilities. It is clear from this that the musical works and the sound recordings on the hard drive do not all belong to the estate of the deceased and D & F Music. The **Cala Homes** case supports the position that where two or more people collaborate in the creation of a work and each

contributes a significant part of the skill and labour protected by the copyright, then they are joint authors. The relevant principle from this case is that, the requirements necessary for a work of joint authorship are that: (i) there must have been collaboration of the authors in the production of the work; and (ii) there must be some significant contribution from each of the authors.

155. It is well established that the fact that a musical work is an arrangement of an earlier copyright work does not mean that the arrangement cannot attract separate copyright. See **Redwood Music Ltd. v Chappell & Co Ltd.** It is clear to me that the deceased played an integral role in the creation of the musical work and sound recordings. Several of the songs were previously either written, recorded or published by him. He also played musical instruments for the songs. His vocals and demos were provided throughout the process. He provided the studio facilities. He was co-producer no doubt drawn in for his talent and artistic direction in the production of the album. He could therefore be viewed as co-author of the musical work. However, he was not the only author. The undisputed evidence given by Mr. Stephenson supports the fact that the album featured different musicians to include Mr. Hibbert, that Mr. Hibbert as producer played demo tracks as a guide on the project for the musicians to follow, that he played different instruments, along with other musicians such as Mr. Burrell who played percussions and keyboard on the project.

156. Droop Lion as the main artiste for the album and the one whose vocals featured in the majority of the songs could also be deemed an author. Authorship in the work could also be ascribed to him and so he would also be a co-author of these recordings subject to the rights of the deceased. There is no question as to whether he being the composer of the song "Money is God on Earth", would be entitled to have copyright in that song however the question as to whether he has copyright in all of the sound recordings would depend on the degree of originality that he brought to the sound recording. The songs recorded by Droop Lion whether originally sang by Mr. Hibbert or not, could be deemed to be new sound recordings and as a result, Droop Lion could derive intellectual property rights (i.e. performer's rights) through the use of his voice pursuant to the Copyright Act. **Redwood Music Ltd. V Chappell & Co. Ltd.** deals with

the principle of the degree of originality. The test is, when compared with the original work is whether or not the arrangement shows a sufficient degree of originality. A sufficient degree of originality is defined as the measure of skill and labour that was applied by the author in its creation (beyond what was involved in reproducing the original work).

157. If Droop Lion is claiming rights to these songs, he must prove that each of these re-recorded songs had a sufficient degree of originality and are not just straightforward covers of older works, in order to attract a separate copyright. This is further complicated by the fact that the deceased was involved in the creation of these re-recorded songs and would nevertheless still have rights in them. It is important to note that a work may be deemed to be original even if in its creation there was some infringement of copyright of an earlier work and that the test is whether its creation involved great skill and labour which is often referred to as the sweat of the brow test.

158. Under those circumstances it would be open to any one of those collaborators to claim joint authorship or ownership of the album content. The estate of Mr. Hibbert could claim for his entitlement as producer and author. Droop Lion could claim rights as artist and author, the Claimant as master recorder and even Mr. Nigel Burrell as producer, musician and writer for at least one song. The case **Fisher v Brooker** supports the position that even where there is contribution by way of an organ solo that could attract copyright protection but only if it is viewed as a new invention and even then the court had to consider whether his contribution was such as to entitle him to a share in the authorship of the overall work.

159. Regardless of all the rights that could be claimed by each of the contributors under the Copyright Act, the Claimant as executive producer would still be viewed as the first owner of the album itself. It seems clear to me that the hard drive should therefore be under the custody and control of the executive producer and master recorder Cabel Stephenson. This does not take away from the fact that the estate of the deceased would have an interest in the album content and be entitled not only to royalties to be gained from these sound recordings but also to the value of the work

done by the deceased as co-producer. The extent of the copyright held in the production could not be determined without viewing the actual content of the hard drive. It is an issue that would no doubt have to be determined by an expert in the music industry after a full review of the album content. However, that is not necessary to determine the main issue here which is whether the Claimant is entitled to detinue as I have already found that the Claimant as executive producer of the album is to be deemed its owner. The next issue to contend with is whether or not the Defendants are justified in retaining or detaining the hard drive.

**Are the Defendants justified in retaining the hard drive?**

160. The final element of the tort of detinue relates to whether the Defendants have a lawful excuse or justification for detaining the hard drive. In the **Brodber** case the Court of Appeal outlined that the issue of lawful excuse is a relevant issue to be considered. The fact of the Claimant being the executive producer puts him in the position of owner of the master recording and so he would be entitled to immediate possession unless it is proven by the Defendants that they are justified in retaining the hard drive. It has been suggested that they are so justified in their capacity as personal representatives of the deceased, based on the provisions of section 28 of the Copyright Act. This would only be so if the deceased himself would have been justified in retaining it if he were alive.

161. Section 28(1) of the Copyright Act provides as follows:

***On the death of a person entitled to the right conferred by section 14, 15 or 17-***

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

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

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

162. The Defendants are contending that the hard drive does not solely contain musical work and sound recordings bearing the voice of Droop Lion in the form of new

sound recordings. It contains sound recordings of the deceased speaking, singing and playing musical instruments as well as sound recording of his 2020 Jamaica Festival Song. If this is the case any material unconnected with the Droop Lion project should be removed from the hard drive and placed on some other medium and given to the estate of the deceased. Any “demo vocals” of the deceased which appear for the purpose of giving instructions to the artist would also have to be removed.

163. It has not been denied that the deceased owns the copyright to some of the sound recordings and the musical works. It is clear that the deceased made significant contribution to the creation of the sound recordings in several capacities. Under these circumstances, could it therefore be said that his estate as his personal representative are justified in retaining it. I have accepted Mr. Stephenson’s testimony that he invested most of the funds in producing the album and that he was the executive producer and master recorder. The **Strand Electric and Engineering Co Ltd** case suggests that there may in certain circumstances be a basis to retain items for investigations to be done for some time but the suggestion is that the time must be reasonable. It is not unreasonable to refusing to deliver up property immediately upon demand where it is that the Defendant wishes to enquire into the rights of the Claimant. However, in this case, based on the length of time the first Defendant had the hard drive in her possession, there was more than sufficient time within which to carry out investigations into the hard drive’s content. Although the Claimant offered to make himself available for the opening and playing of the recordings this was not accepted by the first Defendant within a reasonable time

164. The Claimant as executive producer had already entered into a contract to have it published. Droop Lion as main artiste has a right to enjoy the fruits of his labour. The retention of the hard drive by the Defendants will no doubt affect the interest of the other persons entitled to it. In fact, it may also be in the interest of the estate to have the album commercialized at the earliest which is what the Claimant has stated that he intends to do. The estate is not the only person entitled to a share in the content and so they are not justified in retaining it. It is the Claimant in his capacity as executive producer who is entitled to immediate possession of it. He would have to honour any

practices in the music industry which govern how the right of contributors are to be determined. If the project is commercialized the estate of the deceased would be entitled to the royalties for the production and any other contribution by the deceased that they are able to establish.

165. Queen's Counsel has also contended that the Defendants are justified in retaining the hard drive as the Claimant or Droop Lion required a licence from the deceased being the copyright owner, in order to exploit the copyright in the sound recording, musical work and literary work for the songs on the hard drive. That may very well be an issue to be addressed before the work can be published however that does not affect the main issue at this stage, which is, who is entitled to immediate possession of the hard drive at this point.

166. On the issue of recovery of possession or delivery up, there is the principle that the equitable remedy of delivery up/recovery of possession will not normally be granted where damages are adequate to compensate the claimant for the alleged wrong (see **Cohen v Roche** [1927] 1 KB 169 at 180 – 181). However, this is not a usual case where damages can be said to be adequate. This claim concerns a unique piece of personal property which contains intellectual property, of which authorship and ownership in copyright has been ascribed to the Claimant.

167. In my view on a balance of probabilities, the Claimant has satisfied the elements required to establish the tort of detinue. He provided evidence that he made unqualified/unconditional and specific demand to the first, second and third Defendants for the return of the hard drive to him and that they have failed or refused to hand over the hard drive to him. The Defendants have failed to justify that they are entitled to retain the hard drive. The Claimant as the executive producer is therefore entitled to immediate possession of the hard drive and all the contents thereon. The order of the Court will in no way dispose of or preclude the issue of copyright protection for any person who has an interest in any intellectual property contained in the album.

168. The second Defendant has contended that she has never been in possession of the hard drive and the third Defendant has not accepted that it is in her possession. It is the first Defendant who is said to have assumed physical possession of the hard drive. However, the fact of the second and third Defendants being the executrices under the Estate of the deceased puts them in a position where they have certain control over the property of the deceased at this point and therefore any order for delivery up of the item in question must also refer to them.

169. I therefore find that all the Defendants liable in the tort of detinue. The Claimant is entitled to recover immediate possession of the hard drive with all the contents intact.

## **DAMAGES**

### **MONEY IS GOD ON EARTH**

*(Under this section I will look briefly at the question of monetary compensation for the Claimant)*

170. The measure of damages to be awarded to adequately compensate Mr. Stephenson would be to quantify the loss he has suffered as a result of the detention of the hard drive from the date of detention to the date of delivery to the Claimant. During the course of the in-Chamber trial the Claimant sought to put before the Court some evidence on which his claim for Damages is based. However, this was not the proper forum for the assessment of damages to take place. The matter is therefore to proceed to an Assessment of Damages in Open Court.

## **ORDERS**

1. That the first Defendant is required to deliver to the Claimant the Samsung SSD hard drive owned by the Claimant and containing musical works in which he has a proprietary, beneficial and financial interest.
2. The second and third Defendants, in their capacities as named Executrices of the Last Will and Testament of Frederick "Toots" Hibbert, are required to

deliver to the Claimant the Samsung SSD hard drive owned by the Claimant and containing musical works in which he has a proprietary, beneficial and financial interest.

3. The issue of Damages is to proceed to an Assessment of Damages in Open Court.
4. Costs to the Claimant to be agreed or taxed.

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**Stephane Jackson Haisley**  
**Puisne Judge**