



OUTER HOUSE, COURT OF SESSION

[2012] CSOH 158

A731/10

OPINION OF LORD GLENNIE

in the cause

NAXOS RIGHTS INTERNATIONAL
LIMITED

Pursuer;

against

(FIRST) PROJECT MANAGEMENT
(BORDERS) LIMITED; and
(SECOND) KEITH JOSEPH
SALMON

Defenders:

Pursuer: Lake, QC; MacRoberts LLP

First Defender: not represented

Second Defender: Party

9 October 2012

Introduction

[1] The pursuer is Naxos Rights International Limited. Until 8 August 2003 it was known as Bramwell International Limited ("Bramwell"). It trades as a record label under the name "Naxos". In the course of its business it commissions recordings of artists, ensembles and orchestras performing works

of classical music, or obtains the rights to exploit such recordings. It then offers those works for sale both on compact disc ("CD") and by digital download from its website www.classiconline.com, and from third-party websites such as iTunes, Amazon and others, and by streaming from its website www.naxosmusiclibrary.com.

[2] The pursuer claims to own the copyright in recordings of the following works to which this action relates:

- (1) The four Vivaldi violin concertos known as "The Four Seasons", which it has released under its catalogue number 8.550056. The recordings consist of all 12 movements of those works. The recordings were commissioned in 1987 by Pacific Music Co Limited (hereafter "Pacific Music"); and were made in that year in Bratislava, Czechoslovakia (now the Slovak Republic).
- (2) The song "Joy to the World", which it has released as the first track on an album entitled "Christmas Carols" under its catalogue number 8.550589. The pursuer's case is that that recording was commissioned by HNH International Limited ("HNH") and recorded at Worcester Cathedral on 22 and 23 September 1992 by the Worcester Cathedral Choir with conductor Donald Hunt.

Those works are referred to respectively as "The Four Seasons" and "Joy to the World", and collectively as "the Works". The recordings of those of the Works in which the pursuer claims to own the copyright are referred to in the singular as "the copyright recording" and collectively as "the copyright recordings".

[3] The first defender, Project Management (Borders) Limited, trades as a licensor of classical music recordings through the website www.royalty-free-classical-music.org. The second defender, Mr Salmon, is its sole director and shareholder. I shall refer to the website www.royalty-free-classical-music.org as "the defenders' website". The domain name is registered in the name of Mr Salmon as an individual. The defenders' website offered for sale recordings of works of classical music, which could be downloaded from the website in MP3 format or obtained from distributors in WAV format. It also offered for sale a licence authorising the use of such recordings for purposes such as wedding videos, websites and student films. For the payment of a further fee a commercial licence could be obtained authorising the use of such recordings in film and television and other media without the payment of further royalties, provided that certain credits were given.

[4] The pursuer alleges that, since around August 2005, the first defender has offered for sale and licence on its website, and on a digital album download available through iTunes and Amazon, a recording of The Four Seasons. It has also offered for sale and licence on its website a recording of Joy to the World. Further, the first defender has licensed the recordings for resale by other websites, where they are similarly offered on terms purporting to permit their use in film and television and other works without the payment of further royalties. It is the pursuer's case that the recordings of the Works being offered by the first defender are copies of the copyright recordings.

[5] In addition, the pursuer alleges that the acts done by the first defender have been done at the direction of Mr Salmon, so that he has authorised or procured infringement of the pursuer's copyright. Alternatively, it says that, since the first defender as a limited company can only act through the agency of its director, the infringing acts were carried out in practice by Mr Salmon, who is therefore jointly and severally liable with the first defender in respect of any damage that may be done as a result.

[6] The pursuer seeks a number of remedies against the defenders. The first conclusion is a conclusion for interdict against the defenders from infringing the pursuer's copyright in The Works. The pursuer concludes secondly for payment, in the nature of damages, of £25,000; thirdly, for additional damages of £50,000 in terms of s.97(2) of the Copyright, Design and Patents Act 1988 ("the 1988 Act"); with, fourthly, a conclusion for an accounting for profits as an alternative to conclusions (2) and (3). By its fifth conclusion, the pursuer seeks an order in terms of s.99 of the 1988 Act for delivery up of all infringing copies of the Works, together with an order for forfeiture in terms of s.114 of the 1998 Act. The sixth conclusion is for an order in terms of regulation 4 of the Intellectual Property (Enforcement etc.) Regulations 2006 ("the 2006 Regulations") for disclosure of details of licences granted and sales made of infringing copies of the Works. Finally, in the seventh conclusion, the pursuer seeks an order in terms of regulation 5 of the 2006 Regulations that the defenders disseminate and publish any judgment of this court finding that they have infringed the pursuer's copyright in the copyright recordings of the Works.

Procedural

matters

[7] A number of procedural hearings took place in an attempt to narrow the issues between the parties. This was partially successful, even though at the

proof certain matters appeared to be in dispute which had previously been thought to be undisputed. In the event, however, that caused no difficulties. Further, the experts for the parties were able to reach agreement that the recordings of the Works which were submitted to them by the pursuer for analysis - and which were said by the pursuer to have been downloaded from the defenders' website - were copied from the copyright recordings. This saved considerable time since it avoided the need for detailed expert evidence on these matters.

[8] In the event, there were essentially only two live areas of dispute which required to be resolved at the proof. These were:

- (1) ownership - whether the pursuer owned the copyright in the copyright recordings; and
- (2) infringement - in particular, whether the recordings of the Works which the experts agreed were copied from the copyright recordings were downloaded from the defenders' website.

I propose to take each of these two points in turn. Before doing so, however, I should mention the position of the first defender.

The first defender

[9] Shortly before the proof, agents for both defenders withdrew from acting (the defenders having previously been represented by solicitors and counsel at all stages). At the hearing of the pursuer's motion in terms of Rule 30.2, Mr Salmon told the court that he intended to represent himself, as he did. He applied also to be allowed to represent the first defender. That application was refused. The court has no power to allow a limited company to be represented in legal proceedings by its director: *UK Bankruptcy Ltd* 2010 SLT 1242. It followed that at that hearing Mr Salmon could not formally notify the court as regards the intentions of the first defender concerning its future representation in the action or the conduct of its defence. Accordingly, it was necessary for the pursuer to go down the route of serving on the first defender, pursuant to an order of the court, a notice in terms of Form 30.2. That form was duly returned by the first defender to the Deputy Principal Clerk of Session. Under the signature of Mr Salmon, the first defender intimated that it did not insist on its defence to the action. In those circumstances it was unrepresented at the proof.

[10] On the first day of the proof, Mr Lake QC, who appeared for the pursuer, moved the court to sustain the third, ninth and tenth pleas in law for the pursuer in so far as directed against the first defender and for decree against the

first defender in terms of the first, fifth and sixth conclusions, reserving to the pursuer the right to seek decree in terms of the remaining conclusions of the summons. In the absence of any appearance by the first defender, I granted decree against it in those terms.

Ownership of the copyright in the copyright recordings of the Works

[11] It was not in dispute that the recordings of the Works qualified for copyright protection in terms of the 1988 Act. They were both first published in Germany. The provisions of Part 1 of the 1988 Act were applied to sound recordings first published in Germany, amongst other countries, by regulation 2(2) of The Copyright and Performances (Application to Other Countries) Order 2012 and the Schedule thereto: see s.155 of the 1988 Act. It also applied the provisions of Part 1 of the Act to Hong Kong. That Order, as from 6 April 2012, superseded and re-enacted the relevant provisions of The Copyright and Performances (Application to Other Countries) Order 2008, which was current when these proceedings were commenced.

[12] On the issue of ownership of the copyright in the copyright recordings, the main evidence for the pursuer came from Mr Klaus Heymann, its chairman. He gave evidence under reference to three Affidavits lodged in process, which were adopted by him as part of his evidence in chief. Mr Heymann was until 1989 the Managing Director of Pacific Music, and after 1989 was the managing Director of HNH. He was an impressive witness who spoke with knowledge and authority about these matters.

The Four Seasons

[13] Mr Heymann gave evidence that Pacific Music was a Hong Kong registered company. It was a wholly owned subsidiary of another Hong Kong company, Pacific Operations Limited ("Pacific Operations"). In 1987 Pacific Music commissioned and paid for a recording of the twelve movements of The Four Seasons. It engaged a chamber orchestra, the Cappella Istropolitana, which was based in Bratislava, a violin soloist, Takako Nishizaki, and a conductor, Stephen Gunzenhauser, to perform the works for the purpose of the recordings. Mr Heymann, who, as I have said, was Managing Director of the pursuer, was present during the recording sessions. He is married to Takako Nishizaki - I do not know whether he was at the time - and clearly had a familiarity with the recordings made by her. Pacific Music published the recording by releasing it on CD in Germany under the Naxos catalogue number 8.550056. Pacific Music

was therefore the first owner of the copyright in this recording of The Four Seasons.

[14] By an Asset Transfer Agreement dated 31 March 1989, signed by Mr Heymann for both parties, Pacific Music agreed to sell its rights in "the Pacific Music Businesses" to Pacific Operations. The Asset Transfer Agreement was lodged in process. So far as is material, it provided by clause 2.1 that, with effect from the Effective Date, which was 31 December 1988,

"Pacific Music shall sell and Pacific [i.e. Pacific Operations] shall buy the Pacific Music Businesses" (emphasis added)

for a price equal to the net book value of the businesses. The use of the future tense gave rise to an argument to which I shall refer below. The Pacific Music Businesses were defined as meaning:

"...(i) all of the businesses hitherto carried on by Pacific Music in the exploitation of ... the Retained Labels ... and also such part of the undertaking, goodwill and all other property and assets whatsoever and wherever situated owned or leased by Pacific Music as shall relate specifically thereto including (without prejudice to the generality of the foregoing) all equipment, stock-in-trade, master recordings (on whatever media) and rights thereto, commercial motor vehicles, *licence and distribution agreements and agreements with performers, copyright, trade marks and other intellectual property rights whatsoever*, together with the benefit (subject always to the burden) of all subsisting contracts, book debts and other receivables due or accruing due to Pacific Music in respect of such businesses ..." (emphasis added).

The definition of Retained Labels included the Naxos label on which the copyright recording of The Four Seasons had been released.

[15] On 9 May 1989 Pacific Operations changed its name to HNH International Limited ("HNH").

[16] Some years later, by two separate Asset Transfer Agreements both dated 31 July 2003, HNH assigned all its intellectual property rights to Mr Heymann personally and Mr Heymann assigned those same rights to the pursuers (then still called Bramwell). Those intellectual property rights in each case included the rights in the copyright recordings.

[17] The Asset Transfer Agreement between HNH and Mr Heymann provided that on completion HNH would deliver or cause to be delivered to Mr

Heymann or to his direction assignments of the intellectual property rights in the agreed form. Similarly, the Asset Transfer Agreement between Mr Heymann and Bramwell provided that on completion Mr Heymann would deliver or cause to be delivered to Bramwell or to its direction assignments of the intellectual property rights in the agreed form.

[18] Mr Heymann explained that in implementation of these agreements, and at his direction, HNH assigned the intellectual property rights directly to Bramwell. That was done by a Deed of Assignment also dated 31 July 2003, which assigned "all of the music sound recordings and tracks in HNH's entire catalogue of music recordings comprising classical, jazz, world, popular, Chinese and other music." That wording was wide enough to include the copyright recording of *The Four Seasons*.

[19] Mr Salmon cross-examined Mr Heymann on this evidence. His cross-examination was courteous and to the point, as were his submissions at the end of the proof. He had two principal arguments in support of his case that the pursuer could not show good title. The first concerned the commissioning of the work in 1987, while the second related to the events around the time of the Asset Transfer Agreement of 31 March 1989.

[20] Mr Salmon's point about the commissioning of the work in 1987 was that in all of the agreements relating to the recording and production of works in Bratislava for Pacific Music during the period in question, there was no reference to *The Four Seasons* being one of the works to be recorded. There was therefore no proof that it was recorded then and that Pacific Music ever obtained the copyright in any recording of it. This point was not foreshadowed in the various Notes of Arguments narrowing down the issues. There is no merit in it either. In para.[13] above I have set out in outline how the copyright recording in *The Four Seasons* was commissioned, arranged and recorded. It appeared from Mr Heymann's Supplementary Affidavit that the commissioning of the Work involved a number of agreements, including the following: (i) an agreement between Pacific Music and Mr Gunzenhauser, the conductor, dated 4 June 1987; (ii) an agreement between Pacific Music and Slovalt Limited ("Slovalt") of 16 April and 17 May 1987; (iii) an agreement between Pacific Music and Slovalt of 17 July and 3 August 1987. No doubt there were other agreements too. The agreement between Pacific Music and Mr Gunzenhauser was signed by Mr Heymann on behalf of Pacific Music. It indicates that Pacific Music arranged for Mr Gunzenhauser to record *The Four Seasons* and another work from 12 - 15 July 1987. According to Mr Heymann, who was present at the

recording sessions, those dates could not be met and the recordings were made instead between 12 and 22 July 1987. The agreements between Pacific Music and Slovarit provided that over a period of two years Slovarit would produce a number of digital recordings of Cappella Istropolitana and another orchestra for Pacific Music, with Pacific Music acquiring the rights in the recordings. Slovarit was referred to in passing (in the context of certain practical arrangements) in the agreement between Pacific Music and Mr Gunzenhauser. It is true that in the agreements with Slovarit there is no list of the music to be performed and recorded. But I would not expect there to have been any such list. However, clause 3 of the agreement with Mr Gunzenhauser states that the repertoire to be recorded includes *The Four Seasons*. Mr Heymann confirmed that he was there when the music was recorded. I accept his evidence on this point.

[21] Mr Salmon's second point was that, although Pacific Music may have had copyright in the copyright recording of *The Four Seasons*, the Asset Transfer Agreement of 31 March 1989 was not effective to transfer that copyright from Pacific Music to Pacific Operations. There was therefore a break in the chain by which it is alleged that the pursuer owns the copyright. His argument involved drawing a distinction between, on the one hand, the 2003 transactions, where the transfer of copyright which was the subject of the Asset Transfer Agreements had been perfected by a written Deed of Assignment from HNH to Bramwell, and, on the other, the Asset Transfer Agreement of 31 March 1989, which was not accompanied or followed by a Deed of Assignment or anything comparable. He pointed to the statutory requirement (then contained in s.36(1) of the Copyright Act 1936, but now in s.90 of the 1988 Act) that an assignment of copyright be in writing signed by or on behalf of the assignor, in the absence of which it was of no effect whatsoever. His point was a simple one. The Asset Transfer Agreement provided that Pacific Music shall sell and Pacific Operations shall buy, all in the future tense, but there was nothing in writing to effect that future transfer.

[22] There is, to my mind, a fairly straightforward answer to this argument. It is not in dispute that the ordinary rules of construction apply to the Asset Transfer Agreement of 31 March 1989 as they apply to other contracts. A document transferring copyright does not have to be in any particular form or use any particular words: see e.g. *Cray Valley Limited v Deltech Europe Limited* (2003) EWHC 728 at paras.66-70. The test is whether, on a proper construction of the agreement, viewed in its context, the parties thereto

intended that copyright was to pass thereunder. The applicability of that test was accepted on behalf of the defenders by counsel in an earlier Note of Argument lodged on their behalf. If that was the intention, the use of the future tense in the agreement is of no importance.

[23] In the particular circumstances of this case, the Asset Transfer Agreement can itself be regarded, despite the infelicitous use of the future tense, as an agreement transferring the relevant businesses, including the copyright recording of The Four Seasons, from Pacific Music to Pacific Operations. Though the Asset Transfer Agreement was dated 31 March 1989, the effective date of the transfer was 31 December 1988. Further, the context in which the agreement was entered into provides clear support for this. Pacific Music was a wholly owned subsidiary of Pacific Operations. Mr Heymann was Managing Director of both companies. As he explained in his Further Supplementary Affidavit, the asset transfer was linked to a deal with Bertelsmann Music Group ("BMG") in terms of which Pacific Music and its subsidiaries in Singapore, Malaysia and Thailand were sold to BMG Ariola Musik GmbH ("BMG Ariola") in 1989. I need not go into this transaction in any great detail. BMG did not consider that the Naxos label had much of a future and were not willing to offer what Pacific Operations regarded as an adequate price for that label. It was agreed that the Naxos label, and one or two other labels run by Pacific Music, would be excluded from the sale. To achieve this, they were to be transferred from Pacific Music to Pacific Operations. The sale of Pacific Music to BMG Ariola was effected by a Share Sale and Purchase Agreement dated 28 February 1989. Clause 8 of that Agreement provided that, before the date of completion, Pacific Music would transfer to Pacific Operations certain assets including the Retained Labels, which included the Naxos label and the copyright in the recordings published on the Naxos label. That was achieved by the Asset Transfer Agreement between Pacific Music and Pacific Operations dated 31 March 1989 to which I have referred. BMG Ariola was joined as a party to that Asset Transfer Agreement to confirm its knowledge of and agreement to that arrangement. This explanation gives meaning to the term "Retained Labels" in that agreement. Mr Heymann, who signed both agreements on behalf of Pacific Operations, signed the 31 March 1989 agreement also on behalf of Pacific Music, and was personally a party to the 28 February 1989 agreement with BMG Ariola, gave evidence that it was the intention of all parties that the Retained Labels and the other assets which were to be excluded from the sale of Pacific Music to BMG Ariola should in fact be

transferred to Pacific Operations at that time, and not at some unknown time in the future. That makes sense. Any other agreement would simply not be effective.

[24] This is not a case of the construction of the agreement being influenced by the subjective intention of one party. Rather it was the intention of each party to the agreement, formed by the one and known to the other through the person of Mr Heymann, and objectively referable to the factual matrix in which the agreement was made, that the copyright was transferred with immediate effect.

[25] Accordingly, I consider that the Asset Transfer Agreement of 31 March 1989 between Pacific Music and Pacific Operations was effective to achieve that transfer without the need for a further agreement of deed of assignment.

[26] It was, I think, suggested that, on the above analysis, the assignment of the copyright to Pacific Operations took place not by reason of the signed Asset Transfer Agreement but by the separate agreement of the parties, not contained in that document, to effect the transfer immediately. I do not consider this to be correct. It was the Asset Transfer Agreement, properly construed in the light of the surrounding facts known to all parties, which was effective to transfer the copyright and other rights attaching to the Retained Labels. I was referred to *Crosstown Music 1 LLC v Rive Droite Music Limited* [2012] Ch 68, a decision on a "reverter clause" of the type commonly included in publishing agreements, where copyright passes to the transferee (e.g. the publisher) subject to the condition that, in certain circumstances, such as material breach of contract, it will revert to the transferor (e.g. the writer). Other instances of automatic termination or reverter clauses are mentioned in para.38 of the judgment of Mummery LJ. It is clear from such cases that such a clause is effective to transfer copyright notwithstanding the requirement of s.90(3) of the 1988 Act that an assignment of copyright be in writing. The reason is that the later reversion is referable to the prior written agreement of the parties. For the same reason, in the present case it seems to me that if copyright was transferred to Pacific Operations not solely by the Asset Transfer Agreement of 31 March 1989 but also by reason of a separate agreement between the parties, that is an agreement in implement of the written Asset Transfer Agreement and the transfer can be considered to be in writing for the purpose of the requirements of the relevant Act.

[27] Mr Lake QC also sought to rely upon the presumption in s.105(1) of the 1988 Act. In view of my findings on the evidence, I do not need to consider this issue.

Joy to the World

[28] None of these problems arise in respect of Joy to the World. Indeed, it appeared on the basis of what was said at the Procedural Hearings that the pursuer's title to the copyright recording in Joy to the World was conceded. It became clear at the proof that this was not the position and that title was in dispute after all.

[29] Mr Heymann explained that HNH commissioned the copyright recording of Joy to the World in 1992. It was recorded at Worcester Cathedral on 22 and 23 September 1992 by the Worcester Cathedral Choir conducted by Donald Hunt. HNH made all the arrangements necessary for the recording of the Work and was the first owner of the copyright. The agreement between HNH and the choir dated 27 November and 10 December 1991 was lodged in process. The copyright recording was first published in 1993 in Germany as the first track on a CD entitled "Christmas Carols".

[30] Thereafter, by an Asset Transfer Deed dated 31 July 2003, HNH assigned all its intellectual property rights to Mr Heymann personally. By another Asset Transfer Deed, also dated 31 July 2003, Mr Heymann assigned those same rights to the pursuer (then called Bramwell). Those rights included the copyright in Joy to the World. I need not go into any further detail of the contractual chain by which ownership of the copyright in the copyright recording passed to the pursuer because that is not challenged by Mr Salmon.

[31] Mr Salmon's argument on the question of ownership of the copyright in the copyright recording of Joy to the World turned on the fact that the contract between HNH and the choir stated that the recording dates were to be 15 - 17 January 1992, whereas the inlay sleeve of the CD states that the recordings were made on 22 and 23 September 1992. My Heymann explained that the original recording was made on the January dates, but it was later discovered that there were moments of bad intonation, the sound quality was poor and extraneous noise could be heard throughout. The tracks were re-recorded in September 1992, but it was thought to be unnecessary to enter into a new agreement to cover this re-recording. I see no reason to doubt his evidence on this matter.

[32] For the above reasons, I am satisfied that the pursuer is, and at all material times was, owner of the copyright in the copyright recordings of the two Works.

Infringement

[33] The pursuer's case is that there has been infringement by copying and issuing copies of the copyright recordings to the public. The defenders have offered downloads on the basis that the customer need pay no further royalties and is generally free to use the recordings as he wishes, including by incorporating them into other works or by making further copies and issuing them to the public.

[34] Mr Salmon does not deny that The Four Seasons and Joy to the World were available for download from the defenders' website, www.royalty-free-classical-music.org, and through distributors. His case is that the recordings of these Works on his website and offered through distributors were not taken from the copyright recordings. He said that they were recordings of performances commissioned by the defenders. On being contacted by the pursuer, however, with allegations of breach of copyright, he took them down from the website and also had them taken down from the sites of distributors. It is clear that this occurred after the downloads were purchased from those sites in late August and early September 2010, as referred to below.

Expert evidence and agreement

[35] Both sides instructed experts to compare the copyright recordings with the recordings available for download on the defenders' website. The pursuer instructed Peter Reynolds and the defenders instructed Joe Bennett. There was no dispute as to their qualifications. Mr Reynolds gave oral evidence. Mr Bennett did not, but it was agreed in the Joint Minute lodged at the beginning of the proof that his report could be taken to be his evidence.

[36] To enable him to compare the copyright recordings with the defenders' downloads, Mr Reynolds was given (a) the two Naxos CDs containing the copyright recordings, (b) two CDs, each signed and dated 22 July 2011, containing recordings of all twelve movements of The Four Seasons (identified as tracks 9-11, 12-14, 26-28 and 29-31) said to have been downloaded from the defenders' website, and (c) a CD, signed and dated 3 October 2011, containing a recording of Joy to the World said to have been downloaded from the defenders' website. Since both the pursuer and the defenders in these proceedings have placed reliance on recordings which are claimed to represent the downloads available on the defenders' website, I shall refer to (b) and (c) above as "the pursuer's version of the downloads from the defenders' website" or, for short, "the pursuer's version of the downloads", to differentiate them from those emanating from Mr Salmon, to which I refer in due course.

[37] Mr Reynolds considered four different methods of comparison, namely: (i) audio, including analysis of studio and performance anomalies; (ii) playing times; (iii) waveforms; and (iv) RepliCheck.

[38] In terms of audio comparison, Mr Reynolds examined the recordings in his studio using very high quality audio and computer equipment. He ascertained from listening to the recordings of The Four Seasons that, compared with the copyright recording, the pursuer's version of the downloads had the left and right channels reversed, and had had adjustment made both to the treble and bass and to the left and right volume balance (the right channel being louder by about 4dB). The pursuer's version of the download of Joy to the World was of poor quality, but did not have the channels reversed. Having corrected the left/right balance and orientation, Mr Reynolds compared the two recordings and found them to be "remarkably similar in pitch, tempo and performance". Not content to rest his comparison on that, he proceeded to look at audible anomalies in the recordings, such as bowing scrapes and crunches in the string section, rattles from the harpsichord, unexplained random noises and disturbances within the recording venue, breathing sounds, clicks and other noises. He looked first for such anomalies in the pursuer's version of the downloads, which were in MP3 format and therefore, because of quality loss, might have eliminated or obscured some of the anomalies in the original. Having found an audible anomaly in the pursuer's version of the download, he checked whether the same anomaly was present in the copyright recording at the same place in the music. From this exercise he concluded that the pursuer's version of the downloads were copied from the copyright recordings. He also carried out a similar exercise in checking for inaudible low frequency anomalies caused by aeroplanes, trains or traffic, and found a similar consistency between the two sets of recordings. His finding that the pursuer's version of the downloads were copied from the copyright recording was endorsed separately in a letter from the violin soloist, Takako Nishizaki, who carried out a somewhat similar exercise comparing the stylistic touches on the two recordings.

[39] Different orchestras under different conductors will play music with different interpretation and tempo, which will result in widely varying playing times. A comparison of playing times can therefore be a useful pointer to the fact that one recording has been copied from another. Mr Reynolds did not place much weight on this, but regarded the comparison in the present case as adding further support to the conclusion reached from his audio comparison.

[40] Mr Reynolds carried out a waveform comparison. He concluded that the waveforms were similar, though different in amplitude and confused in part due to the switching of channels.

[41] RepliCheck is one of a number of systems - another is MyRightsView - which use computer software to analyse sound recordings and produce a data file (or "fingerprint") from the analysis. The fingerprint is then registered on a database. A search of the database can then retrieve such information, and if a recording has been used on multiple releases, each usage should appear on the report. The system is only as good as the information fed into it and stored on the database. Attempts to find a match for the first movement of Spring (part of The Four Seasons) returned a result of "System Error". However, the pursuer's version of the download of the first movement of Autumn reported matches with the copyright recording as well as a release by RFCM Symphony Orchestra Ltd ("RFCM" standing for Royalty Free Classical Music) . A similar match was found for Joy to the World.

[42] Mr Reynolds' conclusion was as follows:

"My conclusion from an examination of the [pursuer's version of the downloads] and the [copyright recordings] is that they are the same and differ only by technical interference. I conclude that the recordings downloaded from the internet website www.royalty-free-classical-music.org were generated from the Naxos recordings and are not coincidentally similar recordings of a different soloist and orchestra performing in a different venue."

[43] I should emphasise that that conclusion is based on a comparison between the copyright recordings and the pursuer's version of the downloads. In mid to late 2011, the defenders submitted to their solicitors, to be passed on to their expert, Joe Bennett, CDs containing copies of the recordings of the Works which they said were the recordings which had been on their website before being taken down. In his witness statement, Mr Salmon said this about the CDs supplied for this purpose:

"6. I have been asked to detail the origin and nature of the recordings first supplied by me to Joe Bennett for comparison with the Pursuers' published recordings. I was initially asked to supply copies of these recordings on 29 September 2011. My solicitor advised that the pursuers' solicitors had requested copies of these for comparison. I sent these to my solicitors on 30 September 2011. The recordings of Vivaldi's Four

Seasons were supplied on CD in WAV format. I sent copies of both the recordings licensed by [the first defender] and a copy of the tracks I had previously been supplied with on behalf of [the pursuers] These were marked disc A and disc B. Unfortunately there was some confusion as to which disc was which and so these were returned to me by letter on 2 November 2011. I sent further copies of the first defender's recordings of Vivaldi's Four Seasons on a CD on 4 November 2011 along with the actual CD that had been supplied to me on behalf of [the pursuer]. I understand that the CD containing my recordings was subsequently supplied to Mr Joe Bennett. I was asked by my solicitor on 18 November 2011 to provide a copy of the CD in audio format rather than WAV format. I offered to provide two CDs in both formats and sent these out on 18 November 2011. I understand that both CDs were provided to Mr Bennett.

7. I had previously sent a copy of 'Joy to the World' in MP3 format by email to my solicitor on 11 May 2011. However, I was asked to supply a further copy of this on CD by email on 28 October 2011. I provided this recording in WAV format.

8. As mentioned above, I had taken the version of Vivaldi's 'Four Seasons' down from the Website in autumn 2010 and the version of 'Joy to the World' after the litigation commenced. However, the original website files in MP3 format still existed as copies on my hard disk on my PC. I set up two subdirectories (called Naxos and RCFM) within a folder called Naxos litigation. The subfolders contain the WAV files. Each time I needed to supply CDs of both sets, I simply went to each folder in turn and copied the files onto a CD. That way there was no possibility of me making a mistake.

9. I can confirm that the RCFM Vivaldi 'Four Seasons' recordings and the recording of Handel's 'Joy to the World' supplied to my solicitors were indeed the tracks that were available on [the defenders' website] ... I know this because both sets of files ('Four Seasons' and 'Joy to the World') as MP3s exist on a folder on a disk which is the sole source from which all files have been uploaded to my website. I converted them to WAVs, copied them to a subfolder called SCFM, within the directory called Naxos litigation and then burned them to CDs which I supplied to my solicitors. ..."

I shall refer to the versions which Mr Salmon claims to have been the versions of the Works available to be downloaded from the defenders' website (until they were taken down) as "the Salmon versions of the downloads".

[44] Mr Reynolds and Mr Bennett both considered that with two exceptions, the Salmon versions of the downloads were different from the copyright recordings. The two exceptions were (a) the first movement of Autumn, from The Four Seasons, and (b) Joy to the World. In both of these versions, the recording on the Salmon version of the downloads matched the copyright recording, though, on the Salmon version, Joy to the World had been digitally time-stretched to play back at a slower tempo.

[45] Faced with this difficulty, and the need to compare identical source files, Mr Bennett asked Mr Reynolds to send him copies of the pursuer's version of the downloads. This was done. They were received by Mr Bennett on 17 December 2011. Once they were both satisfied that they had both analysed the same sets of recordings, they were able to reach agreement. A copy of the agreement between the experts was lodged in process.

[46] So far as concerned the Salmon version of the downloads, in paras.2 and 6 of their agreement they confirmed that the first movement of Autumn (being part of The Four Seasons) and also Joy to the World matched the copyright recordings. In para.6 they agreed that the Salmon version of Joy to the World was a copy of the copyright recording, albeit digitally time-stretched. It is, I think, implicit in their agreement that the defenders' version of the download of the first movement of Autumn was also a copy of the equivalent copyright recording. Certainly, Mr Bennett in his report considered that both Joy to the World and the first movement of Autumn in the Salmon version of the downloads had been deliberately copied from the copyright recordings and that it appeared that attempts had been made to disguise the copying. I accept this evidence. The finding that these two tracks which Mr Salmon admits were on the defenders' website were copied from the copyright recordings, and that attempts were made to disguise the copying, reflects poorly on Mr Salmon's credibility.

[47] So far as concerned the pursuer's version of the downloads, i.e. those which, pursuant to Mr Bennett's request, were supplied to Mr Bennett by Mr Reynolds on 17 December 2011, the experts' agreement was in the following terms:

"2. ... although JB [Mr Bennett] has not yet been instructed by his client to provide a report regarding these recordings, JB and PR [Mr Reynolds] have discussed these recordings (as analysed in PR's initial report), and JB does not disagree with any of the findings of

PR's report, having conducted his own tests to check the findings of PR's tests.

- ...
4. Both experts agree that of the test methodologies undertaken, 'Waveform analysis' and 'Audio tests' are the most reliable. Both experts favour the identification of performance anomalies (in audio and in visual waveforms) as the best method of identifying whether any two recordings share the same source.
 5. Both experts agree that the audio supplied by the Defenders contains audible evidence of digital manipulation (i.e. undesirable audio qualities or 'artefacts' introduced by editing or copying) and that the audio supplied by the Pursuers does not contain such artefacts.
- ...
10. In summary, there is no respect in which the experts disagree with each other's findings or methodologies in this matter."

In a Joint Minute lodged at the Bar at the beginning of the proof, it was agreed that this "joint statement" prepared by the experts was to be taken as their evidence. In the course of the proof, Mr Salmon made it clear that he accepted the conclusions of the experts in this joint statement.

[48] The position, therefore, is as follows. If the recordings which were available on the defenders' website were those which I have identified as the pursuer's version of the downloads, then it is agreed that they match, and were copied from, the copyright recordings. On the other hand, if the recordings available on the defenders' website were those which I have identified as the Salmon version of the downloads, then only two tracks (the first movement of Autumn, from The Four Seasons, and Joy to the World) match and were copied from the copyright recordings. The key question, therefore, is as to the derivation of the pursuer's version of the downloads. Were they taken from the recordings available for download on the defenders' website?

Derivation of "pursuer's version of the downloads" which were analysed by the experts

[49] It is necessary to set out and analyse the evidence as to how the pursuer's version of the downloads were obtained. I shall do so in the reverse order, i.e. first in respect of Joy to the World and then in respect of The Four Seasons.

Joy to the World

[50] Anthony Anderson is the managing director of Select Music and Video Distribution Limited, an associated company of the pursuer which, as I understood it, has the exclusive European rights in respect of Naxos recordings. According to his evidence, on 20 March 2011 he downloaded onto his home computer several tracks from the defenders' website www.royalty-free-classical-music.org, including Joy to the World. He forwarded these tracks by e-mail from his home computer to his office computer, and copied them onto the hard drive of his office computer. Receipts and a debit card statement produced by Mr Anderson together with a royalty statement produced by the defenders confirmed the purchase and downloading of the tracks. On 3 October 2011, from those tracks stored on his office computer, he burned Joy to the World (and nothing else) onto a CD, signed and dated the CD, and sent it to the pursuer's solicitors. That CD was sent to Peter Reynolds, the expert instructed on behalf of the pursuer. From the photocopy of the CD appended to Mr Reynold's first report, Mr Anderson was able to confirm that the CD containing the track Joy to the World, which was analysed by Mr Reynolds on the assumption that it came from the defenders' website, was indeed the CD onto which he had burned the track Joy to the World which he had downloaded from the defenders' website.

[51] I have no reason to doubt this evidence. Mr Anderson was an honest and straightforward witness. His evidence that he purchased and downloaded Joy to the World from the defenders' website is supported by the paper trail which I have described, which includes the defenders' own royalty statement. This is, of course, not conclusive. It is, I suppose, possible that in the process of copying the track from one computer to another and then burning it onto a CD he may have made a mistake (it was not suggested to him that he deliberately mixed up the tracks). But I think it unlikely. His account of what he did was very precise, and reflected the taking of great care. Further, I cannot leave out of account the fact that the Salmon version of the download of Joy to the World was agreed by the experts to be copied from the copyright recording of that track. It was not made clear in the experts' agreement whether or not the Salmon version was the same as the pursuer's version of the download - but it is clear that they were both copied from the copyright recordings. It follows that the defenders' website had on it available for download a recording of Joy to the World which had been copied from the copyright recording. On that basis it is entirely probable that the pursuer's version of the download of Joy to the World which was examined by Mr Reynolds (and subsequently by Mr Bennett) was indeed

downloaded by Mr Anderson from the defenders' website. I find that to be proved.

[52] By reference to his second witness statement, Mr Salmon gave evidence that the recording of Joy to the World which was available for download on the defenders' website was not a copy of the copyright recording but was a copy or an original recording made at Soundmill Studios near Keighley in Yorkshire in October 1999 by James Martin on his instructions. He produced no contract or other material to support this, either in detail or more generally about the fact of him having commissioned a recording (of something) from Mr Martin at that time. I do not accept that evidence. It is completely at odds with the expert evidence of Mr Bennett that the defenders' version of the download of Joy to the World, supplied to him by the defenders, was a copy of the copyright recording. Mr Salmon's attempt to avoid liability by making up a story which was false is another matter which does not reflect well on his credibility.

The Four Seasons

[53] Mr Anderson carried out a similar exercise with respect to The Four Seasons to that which he had carried out with Joy to the World. On 24 August 2010, at the request of the pursuer or its agents, he downloaded onto his home computer from the defenders' website, www.royalty-free-classical-music.org, a recording of the first movement of Spring from The Four Seasons. He forwarded this track by e-mail from his home computer to his office computer, and copied it onto the hard drive of his office computer. Receipts and a debit card statement produced by Mr Anderson together with a Royalty Statement produced by the defenders confirmed the purchase of the tracks. On 1 December 2011, at the request of the pursuer's agents, he burned that track from the hard drive on his office computer onto a CD, signed and dated the CD, and sent it to them. That CD was later sent by the pursuer's agents to Peter Reynolds, the expert instructed on behalf of the pursuer. From the photocopy of the CD appended to Mr Reynold's supplementary report, Mr Anderson was able to confirm that the CD sent to Mr Reynolds by the pursuer's agents, which bore to contain the recording of the first movement of Spring as downloaded from the defenders' website, was the CD on to which he had burned that track which originated from the defenders' website. In other words, the "defenders' recording" of the first movement of Spring analysed by Mr Reynolds had indeed come from the defenders' website.

[54] Mr Anderson shared his concerns about recordings on a large number of websites with Mr Heymann, in two e-mails of 1 and 2 September 2010. Mr Heymann passed those e-mails on to Andy Leung, the IT Manager of HNH. A number of websites were thought to be offering recordings in which the pursuer owned the copyright. On 2 September 2010, at the request of Mr Heymann, Mr Leung downloaded the following music from the following websites onto the hard drive attached to his WorkStation in his office at Hong Kong Cyberport:

- (a) the third movement of Autumn (part of The Four Seasons) from all 11 websites listed by Mr Anderson in his first e-mail, including www.royaltyfreeclassicalmusic.co.uk, www.royaltyfreemusic.com and www.2b-royaltyfree.com;
- (b) the first three movements of Winter (part of The Four Seasons) from the website www.2b-royaltyfree.com;
- (c) all twelve movements of The Four Seasons from the website www.royalty-free-classical-music.org.

On 3 September 2010, also at the request of Mr Heymann, Mr Leung downloaded onto that hard drive:

- (d) the third movement of Autumn (part of The Four Seasons) from the websites www.neosounds.com and www.beatsuite.com.

Mr Leung produced the credit card statements and e-receipts confirming all these downloads and prepared a schedule matching the statements to the receipts. He also prepared a schedule ("Leung 7") listing the playing times of the recordings of the movements of The Four Seasons which he had downloaded from the various websites. Leung 7 is an important document for purposes of comparison of the playing times of the recordings.

[55] On 22 July 2011, at the request of Mr Heymann, Mr Leung burned all the tracks which he had downloaded on 2 and 3 September 2010 onto two CDs, which he signed and dated. He also created a track list for each CD corresponding to the credit card entries and e-receipts. The CDs and the track list were sent to the pursuer's lawyers. Tracks 9-14 and 26-31, both inclusive, on the two CDs contain the recordings of the twelve movements of The Four Seasons downloaded by Mr Leung from the defenders' website www.royalty-free-classical-music.org (tracks 9-11 being Autumn 1, 2 and 3, tracks 12-14 being Spring 1, 2 and 3, tracks 26-28 being Summer 1, 2 and 3 and tracks 29-31 being Winter 1, 2 and 3).

[56] Mr Leung confirmed from an examination of the photocopies of the two CDs attached to Mr Reynolds' first report that the CDs sent to Mr Reynolds by the pursuer's lawyers for examination were the two CDs which he had burned, signed and dated.

[57] I found the evidence of Mr Anderson and Mr Leung to be persuasive. I have already described Mr Anderson as an honest and straightforward witness. The same description applies equally to Mr Leung. In cross-examination, Mr Salmon did not question their honesty. If their evidence is not to be accepted, it has to be on the basis that they made a mistake. But there are a number of pointers to the contrary, in addition to my assessment of them as careful and conscientious in the exercise of downloading and copying which they undertook. First, there is the paper trail supporting their evidence that the tracks were downloaded from the defenders' website. Second, it was not suggested to Mr Anderson that he did not download the first movement of Spring from the defenders' website on 24 August 2010. Mr Leung says that on 2 September 2010 he downloaded all twelve movements of The Four Seasons from the defenders' website. According to the evidence of Mr Reynolds, which was not disputed, the version of the first movement of Spring which Mr Leung downloaded (as part of his downloading of all twelve movements) matches exactly the version downloaded by Mr Anderson from that website nine days earlier. That tends to confirm that Mr Leung downloaded the Work from the same site. Third, a similar point can be made about the first movement of Autumn, where the Salmon version of the download of this track matches the copyright recording. That means that, even on the defenders' case, the defenders' website did contain a version of this track which was a copy of the copyright recording and, therefore, was probably identical to that which Mr Leung claims to have downloaded from that website. Fourth, the track timings noted by Mr Leung in Leung 7 (see para.[54] above) match very closely the track times for the recordings on the defenders' website given by Mr Salmon in correspondence with solicitors acting for the pursuer in September 2010. None of this is necessarily conclusive, but it calls for an answer.

[58] In cross-examining Mr Leung, Mr Salmon raised a question about the dates on certain computer files containing the tracks which Mr Leung claimed to have copied. They were dated 2005 and 2006, suggesting that the files had been placed on the pursuer's computer then rather than in 2010, the date of the alleged download, and therefore that the pursuers' version of the downloads could not in fact have been taken from the defenders' website. The problem

with this line of cross-examination is that it was unsupported by any evidence showing precisely what the dates represented - they might have been dates on which the files were created, or modified, or last accessed, or possibly, as Mr Leung thought might be the case, the date when the files were decompressed from the ".zip" format. If so, the date would tie in with the time when the defenders first set up their website. Mr Leung could not explain the dates, but neither could Mr Salmon. I can take nothing from this line of enquiry to undermine Mr Leung's evidence.

[59] Mr Salmon gave evidence of what he claimed to be the provenance of the Salmon version of the downloads. He said that the recording of The Four Seasons available on the defenders' website for download at the material time was a recording commissioned by him in 1995. His evidence was that in 1994 he travelled to Bulgaria and met a Dmitri Nikolov of Nikolov Records. They worked together from 1995 to about 2002. Between them they arranged a number of recordings of classical music in Bulgaria. Mr Salmon attended a number of recording sessions and personally conducted recordings in Bulgaria of works by Mozart, Beethoven, Brahms and (possibly) others. He claimed that in 1995 he paid Mr Nikolov \$5,500 to have a recording made of Vivaldi's Four Seasons. Mr Nikolov provided him with a non-exclusive licence to the recording. Subsequently he entered into an agreement with the first defender to allow it to sell those tracks on his behalf. This recording of The Four Seasons was the recording put on the defenders' website in about 2005 and made available for download thereafter. Mr Salmon added that this arrangement applied also to other classical music recordings made by Mr Nikolov over a period of about three years. Mr Salmon also acquired rights in other classical music recordings made by orchestras in former Soviet republics.

[60] I have difficulty in accepting Mr Salmon's evidence on this. I have already noted that I had serious doubts about his credibility for reasons which I have explained. Furthermore, even on his own case, it is clear that he has been involved in copying at least two tracks of the copyright works (Joy to the World and the first movement of Autumn) and in attempting to disguise that copying. These are not the acts of someone whose word cries out to be relied upon. More generally, I accept the submission made by Mr Lake QC, on behalf of the pursuer, that Mr Salmon was in many ways an unsatisfactory witness, often evasive in his answers and with a seemingly selective memory. Mr Heymann, who had considerable knowledge of the music industry in Bulgaria and had worked with conductors there, had never heard of Mr Nikolov. I accept his

evidence on this, and that evidence casts doubt on Mr Salmon's account. But the fatal blow to Mr Salmon's account came from his own evidence. It was he who produced what I have referred to as the Salmon version of the downloads, i.e. the version of *The Four Seasons* which he said was the version on the defenders' website at all material times. As I have already pointed out, even on this version, the first movement of *Autumn* was established beyond argument to have been copied from the copyright recordings. Mr Bennett, the defenders' own expert, confirmed this. It clearly could not also have been a recording made by Mr Nikolov in Bulgaria in 1995, or indeed any other recording commissioned by Mr Salmon. It was put to Mr Salmon in evidence that this was wholly inconsistent with his account of how the recordings came about. He refused to accept that, but was not able to explain why. I reject this part of Mr Salmon's evidence.

[61] I find the pursuer's case on infringement made out both in respect of *Joy to the World* and in respect of *The Four Seasons*.

The position of Mr Salmon

[62] As I observed at the beginning of this Opinion, the pursuer seeks decree not only against the first defender but also against Mr Salmon personally. As was to be expected, Mr Salmon relied on the principle in *Saloman v Saloman and Co. Ltd.* [1897] AC 22: the acts done by the first defenders were not his acts but those of the company for which he was not liable. However, Mr Lake argued that this did not protect him in circumstances where (a) he procured the breaches of copyright by the company and (b) he and the company, both separate legal entities, were acting in concert with one another pursuant to a common design in the infringement. He referred me to the judgment of Arnold J in *L'Oreal SA v eBay International AG* [2009] RPC 693 at paras.346-352 and to the judgment of Kitchin J in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at paras.103-111, for a summary of the case law on these points. The fact that he was a director of the company does not place him in some protected category. This was discussed in some detail in the judgment of Chadwick LJ in *MCA Records v Charly Records Ltd* [2002] FSR 26 at paras.29-53. At paras.49-52, Chadwick LJ identifies the following four principles which are supported by the authorities:

"49 First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company - that is to say, by voting at board

meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company - for example by voting at general meetings and by exercising the powers to appoint directors. ... I would hesitate to use the word 'never' in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. ...

50 Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control.

...

51 Third, the question whether the individual is liable with the company as a joint tortfeasor - at least in the field of intellectual property - is to be determined under principles identified in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 and *Unilever Plc v Gillette (UK) Limited* [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v Amstrad* at page 1058E to which I have already referred, the individual 'intends and procures and shares a common design that the infringement takes place'.

52 Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does 'intend, procure and share a common design' that the infringement should take place may be liable as a joint tortfeasor. As Lord Justice Mustill pointed out in *Unilever v Gillette*, procurement may lead to a common design and so give rise to liability under both heads."

[63] Applying these principles, I have no doubt that Mr Salmon should be held personally liable for the infringements of copyright which I have found to be established. His own account in relation to The Four Seasons set out at para.[59]

above (where he said that he had commissioned the recording in Bulgaria and had subsequently entered into a licence agreement with the first defender to sell the tracks on his behalf) shows that he did not consider himself to be acting only as director of the company - he was purporting to deal with the company as a separate entity. Though I have rejected that account of the recording of the Works, it is nonetheless illustrative of the way in which Mr Salmon claimed to be acting in relation to the company. It was an account of dealings between himself and the company to which he adhered throughout his evidence, and on this aspect I see no reason to disbelieve his evidence. Mr Salmon accepted in his pleadings that the defenders' website domain name was registered in his name as an individual. However, he said that it was "operated" by the first defender. As the evidence was led, I did not understand that point to be insisted upon by Mr Salmon but in any event the evidence satisfies me that the website was in fact operated together by the first defender and Mr Salmon. Each appears to pretend to different interests, though the lines are often blurred. The website includes a statement purporting to come from Mr Salmon who, in addition to describing himself as the director of the first defenders, states that "I own the copyright to all of my recordings". This is consistent with his evidence to the court, that he owned the copyright and entered into agreements with the company for it to exploit it in return for some remuneration. Sales receipts exhibited by Mr Leung to his first Affidavit and spoken to by him in evidence record the distributor sometimes as the company and sometimes as "Keith Salmon", in both cases alongside the name of the defenders' website. On those in the name of Keith Salmon, it is Keith Salmon who, along with "2Checkout.com Inc" thanks the customer for its business.

[64] The true position is, in my view, that Mr Salmon was acting not only as a director of the company but also as an individual setting up the website and putting or causing to be put infringing material on it for sale. This makes him liable as a principal, not only for his own acts but also for those of the company on the basis both of procurement and of acting in concert with the company for a common purpose.

Disposal

[65] In the circumstances, I shall sustain the third, ninth, tenth and eleventh pleas in law for the pursuer in so far as directed against the second defender and grant decree against the second defender in terms of the first, fifth, sixth and seventh conclusions, reserving to the pursuer the right to seek decree

against the second defender in terms of the remaining conclusions of the summons. At one point I considered putting the case out by order for discussion of the wording of the fifth conclusion, but having considered the matter I see no need to do so.

[66] Mr Lake QC moved for the expenses of the action against the first and second defenders jointly and severally, and for the expenses of the proof against the second defender alone. This was opposed by Mr Salmon. I see no reason to depart from the usual principle that expenses follow success. I shall make an order in the terms sought.