

29 June 2016

Before:

MR. N. LAVENDER QC

BETWEEN:

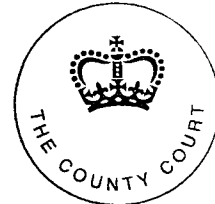
(1)  
(2)

NEWBRAN ENTERTAINMENTS LIMITED  
MARLON ANTHONY BROWN

Claimants

- and -

ASHLEY CHARLES



Defendant

David Ivison (instructed by Trainer Shepherd Philips Melin LLP) appeared on behalf of the Claimants

Harriet Gore (instructed by Prime Solicitors) appeared on behalf of the Respondents

## J U D G M E N T

1. I heard the trial of this action on 20 April 2016. There was insufficient time for closing submissions, and counsel helpfully provided their closing submissions in writing thereafter.

### **The Parties**

2. The Defendant, Ashley Charles, is, amongst other things, a singer known as “Amplify Dot” or “A.Dot”. The Second Claimant, Marlon Anthony Brown, runs a barber’s shop, but also does work in the music industry under the name “Newbran Entertainments”. The two met in 2006 and from time to time

thereafter until the end of 2011 Mr. Brown assisted in the promotion and development of Miss Charles' musical career.

3. It was common ground that Mr. Brown spent money during this period on matters such as arranging for recording sessions. There was an issue as to what, if any, was the basis on which he should receive a return on his investment. Dealing with the matter chronologically:

- (1) Mr. Brown alleged in the Particulars of Claim that he and Miss Charles made an oral agreement in 2007 that, inter alia, he would receive 50% of the income from record sales. However, when cross-examined he said that there was discussion, but no agreement, about how he was to recoup his expenses. Accordingly, I find that no contract was made in 2007.
- (2) In the alternative, Mr. Brown alleged that he was entitled to restitution of the sums which he paid from 2007 onwards. However, given my findings as to the contracts made in 2011, it is unnecessary to consider the alternative claim in restitution. It was always envisaged that any recoupment of Mr. Brown's expenditure would come from the income to be earned from Miss Charles' music, and the agreements made in 2011 gave Mr. Brown or his company a share in such income on terms proposed by Mr. Brown.
- (3) It is common ground that Mr. Brown and Miss Charles entered into an

agreement (“the Interim Agreement”) on 4 May 2011, pursuant to which Mr. Brown was to act both as Miss Charles’ manager and as her record label. As her record label, he was to receive 50% of all gross earnings from the exploitation of recordings, merchandise sales and royalties. As her manager, he was to receive 20% of “publishing, PRS, appearances, performances and every other off-spring of earnings.”

- (4) Mr. Brown’s solicitors drafted two separate agreements which were intended to replace the Interim Agreement. These were a Recording Agreement and a Management Agreement. The principal issue at trial was whether Miss Charles entered into the Recording Agreement with the First Claimant, Newbran Entertainment Limited, a company set up by Mr. Brown’s solicitors and incorporated on 31 May 2011 and of which Mr. Brown is the sole director and shareholder.

### **The Claims and Counterclaims**

4. The Claimants claim damages for what they allege was a repudiatory breach of the Recording Agreement (alternatively the Interim Agreement) and a declaration that they are the owners of the copyright of 22 recordings listed in Annex D to the Particulars of Claim.
5. As to copyright, it transpired that the only one of these recordings to which Miss Charles claimed the copyright was a recording called “King Kong”,

which was released on 7 January 2012. However, she accepted that, if I found that the Recording Agreement of 4 September 2011 was a valid agreement, then the copyright in King Kong also belonged to the Claimants.

6. Miss Charles counterclaimed for a declaration that the Claimants had infringed her copyright in King Kong, together with declarations that the Claimants had withheld fees due to her for live performances, public appearances, and merchandising, together with damages in respect of each of these items.

### **The Recording Agreement**

7. The Recording Agreement consists of 12 numbered pages. Page 12 is the signature page. Unhelpfully, that page does not contain any of the text of the provisions of the agreement. It merely contains the spaces for signature by Mr. Brown and Miss Charles. Against the space for Mr. Brown's signature appear the words "Signed by Marlon Brown for and on behalf of Newbran Entertainments Limited (Manager)."
8. Both Mr. Brown and Miss Charles signed page 12 of the Recording Agreement. It was common ground at the trial that they did so on 4 September 2011, when Mr. Brown visited a recording studio where Miss Charles was working.
9. Miss Charles' case at trial as to how she came to sign the Recording Agreement was that:

- (1) Mr. Brown brought with him copies of both the Recording Agreement and the Management Agreement.
  - (2) The pages of the two agreements were not stapled together, but were loose.
  - (3) They discussed whether she would sign the agreements, and she said that she would only sign the Management Agreement.
  - (4) He gave her a page for signature, and she read the words on it, including the word “(Manager)” after the First Claimant’s name. (It is relevant to note that the signature page of the draft Management Agreement was identical to that of the Recording Agreement, save that: (a) the page was numbered 8, not 12; and (b) the name of the contracting party was “Newbran Entertainments (Management) Limited (Manager).”)
  - (5) She signed the page believing that it was the signature page of the Management Agreement.
10. Mr. Brown’s evidence was that Miss Charles intended to sign the Recording Agreement. He called two other witnesses who were present when the parties signed, Mr. Sher Agha and Mr. Marcus Dawes, but they could not confirm which document was signed. However, Mr. Dawes took a photograph of Mr. Brown and Miss Charles. In the photograph, Miss Charles is seated and Mr. Brown is standing, holding pages 5 and 6 of the Recording Agreement. Both

are smiling. The photograph confirms that the pages of the agreement were not stapled together.

11. Two witnesses, Mr. Alan Kasiirye and Mr. Cem Akdeniz, made statements which were relied on as hearsay evidence, but which did not shed any more light on events on 4 September 2011.
12. There was a dispute between the parties as to whether Mr. Brown gave a copy of the Recording Agreement to Miss Charles. He said that he gave the signed original to his solicitors.
13. I was referred to the email exchanges both before and after 4 September 2011 and it was suggested that they provided some evidence as to what Miss Charles intended to sign and thought she had signed. However, they were inconclusive. There was no document in which Miss Charles clearly stated that she would not sign the Recording Agreement, or that she thought that she had signed the Management Agreement. Equally, however, there was no document in which she clearly said that she would only sign the Recording Agreement, or that she thought that she had signed the Management Agreement.
14. What one can see from this correspondence, however, is that:
  - (1) Miss Charles was intelligent and articulate, which is how she appeared in the witness box.

- (2) Miss Charles read the draft agreements carefully, as evidenced by her comments of 29 July 2011 on the draft Recording Agreement.
- (3) Miss Charles had concerns about Mr. Brown's performance, and these related in particular his performance as a manager: see, for example:
  - (a) her emails of 12 and 16 August 2011;
  - (b) the provisions inserted in paragraph 3(i) and (ii) of the draft Management Agreement in response to her comments; and
  - (c) her email of 13 November 2011, in which she said "NewBRAN are to act SOLELY as a label and therefore activity should be limited to: ..."

15. It seems that, logically, there are three possibilities as to how Miss Charles came to sign the signature page of the Recording Agreement:

- (1) The first is that, as the Claimants allege, that is what Miss Charles intended to do.
- (2) The second possibility is that she only agreed to sign the Management Agreement, but that Mr. Brown accidentally gave her the signature page for the Recording Agreement and she signed it believing that it was the signature page for the Management Agreement.
- (3) The third possibility is the same as the second, save that Mr. Brown

acted deliberately so as to trick Miss Charles.

16. This third possibility would involve a serious allegation against Mr. Brown. It appeared from paragraph 13 of her Defence that Miss Charles intended to advance such an allegation at trial. However, this is not how her case was put at trial and, in particular, Miss Gore did not put to Mr. Brown the allegation that he had sought to trick Miss Charles at the signing on 4 September 2011. Accordingly, I dismiss this third possibility.
17. That leaves the first two possibilities. Of these, the first seems to me to be the more likely, and I find on the balance of probabilities that this is what happened. I reach this conclusion in the light of all of the evidence, including, particular, the following:
  - (1) Mr. Dawes' photograph suggests that the parties were marking the signing of the Recording Agreement, and I note that the page of the Recording Agreement which was open before Miss Charles was that which showed the amounts of the advances to be paid to her. (Miss Charles claimed that this was only one of many photographs that day, but she did not obtain disclosure of any others and this claim was not put to Mr. Dawes.)
  - (2) If Mr. Brown had given Miss Charles the wrong signature page, then he must surely have realised this later, perhaps when he gave the signed



agreement to his solicitor. He could then have asked Miss Charles to sign the correct agreement. The fact that he did not do so could be taken as indicating that he did not believe that he had made a mistake, or alternatively that he was deliberately covering up the mistake and seeking to enforce what he knew to be the wrong agreement. However, this latter suggestion was not put to him when he was cross-examined.

(3) Miss Charles' insistence in her email of 13 November 2011 that "Newbran" was to act solely as a label suggests that she considered that she had an agreement with one of the Claimants under which they were acting as her label. This could perhaps have been the Interim Agreement, but it was Miss Charles' case that the Interim Agreement expired after 120 days. So it was more likely that she had in mind the Recording Agreement.

(4) Miss Charles' evidence in relation to the alleged fee for the "Bigga Fish" Tour, to which I will refer, indicates that her recollection was not entirely reliable.

18. Accordingly, I find that Miss Charles intended to sign the Recording Agreement and that she did so. The Recording Agreement was a valid agreement between Miss Charles and the First Claimant.

### **Alleged Repudiation of the Recording Agreement**

19. The Claimants allege that Miss Charles repudiated the Recording Agreement by her email of 9 December 2011, which read, inter alia, as follows:

“It has become glaringly obvious that you do not have the capacity to handle a project of this magnitude so I will now be handling my own affairs under AmpedUP starting with the release of King Kong.

I have an in house distribution manager who will take the reins on all Ice Kid and A.Dot releases, liaising directly with Custom House Management, TuneCore and Cadiz so our grip on iTunes should be strong.

I have also offered Patrick a role as Managing Partner as it is clear he has been the glue holding this falling setup together and it is only fair that his expertise be put to good use under a thriving label and alongside industry veterans like Richard and Kate.

...

On too many occasions have I let your empty promises talk me out of parting ways with NewBran but I’m afraid this stops today. The fact that you cited a “hectic day” as the reason you couldn’t get back to me on the week’s objectives tells me all I need to know. If a website being developed by a team of professionals is enough to put you in meltdown then you certainly do not have what it takes to deal with the rigorous demands of the industry. This is only the beginning so if you are already out of your depth I think it is best for you to bow out with some grace as opposed to ending it in ruins.”

20. As set out in *Chitty on Contracts*, 23rd Edn., para. 24-018, an “anticipatory repudiation” or renunciation of a contract:

“occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by

its provisions.”

21. I find that the email of 9 December 2011 was a renunciation of the Recording Agreement. Miss Charles made clear that she was “parting ways with NewBran” and that “this stops today”. She said that she would be handling her own affairs “starting with the release of King Kong”, a recording which she accepted belonged to the Claimants under the terms of the Recording Agreement. The third paragraph made clear that she intended to have a new, “thriving” label in place of the First Claimant. She subsequently objected to the release of “King Kong” on 7 January 2012 and her email of 8 January 2012 confirmed that “I do not want anything being released under your “label” ...”
22. It is also relevant to note that it was Miss Charles’ pleaded case that her email of 9 December 2011 was intended to terminate a contract, albeit that she alleged that it was intended to terminate the Management Agreement (which I have found was not entered into) by reason of Mr. Brown’s allegedly poor performance as a manager.
23. It was open to the First Claimant to accept Miss Charles’ renunciation of the Recording Agreement and to claim damages. I find that the First Claimant did accept Miss Charles’ renunciation by Mr. Brown’ email of 10 December 2011, which began:

“Good Morning, I’ve read your email and if your request is how you wish to go forward I wish not to stand in your way, but we need to conclude our business in a proper manner.”

### **The Claim for Damages**

24. The First Claimant claims damages for the wrongful termination of the Recording Agreement. Damages are to be assessed on the basis that the First Claimant is to be put into the position it would have been in if the Recording Agreement had not been terminated.
25. I have considered whether I should order an inquiry as to damages. However, I bear in mind the overriding objective and, in particular, the provisions of CPR 1.1(2)(b), (c), (d) and (e). Sufficient evidence was called at the trial to enable me to assess damages and it would not be proportionate to prolong these proceedings further.

### ***The Term of the Recording Agreement***

26. Clause 2.1 of the Recording Agreement provided that the term of the Recording Agreement was to be for a Contract Period (i.e. 12 months: see clause 1.1) from 4 May 2011, i.e. until 4 May 2012, unless extended by the First Claimant pursuant to clause 2.2. That clause provided that the First Claimant would have four separate options to extend the term of the Recording Agreement for a further Contract Period. The First Claimant contended that, if the Agreement had not been terminated, it would have exercised this option at least once, and I accept that the First Claimant would have extended the term of the Recording Contract once, so that it lasted until 4 May 2013 (or perhaps

longer, if Miss Charles had not within that time complied with the Minimum Commitment as defined in clause 1.1).

### *Sources of Income*

27. Had the Recording Contract remained in force, then the First Claimant would have received income from the exploitation of any recordings made pursuant to it, and would have been liable to account to Miss Charles (pursuant to clause 6) for 50% of the “Net Royalty Receipts”.
28. However:
  - (1) It does not appear that any recordings made by Miss Charles before September 2011 were commercially successful.
  - (2) There was no evidence before me that Miss Charles has released any commercially successful recordings since the Recording Agreement was terminated in December 2011:
    - (a) Mr. Brown said that only £100-£200 was received from the release of King Kong. I will take the upper figure of £200 as the income from King Kong.
    - (b) Mr. Brown referred in his witness statement to one mixtape (entitled “Spare Parts”) released in 2012, one track of which was used on the soundtrack to the FIFA 14 videogame. However, this

was released after Miss Charles signed the agreement with Virgin Records Limited (“Virgin”) to which I will refer.

- (3) Given the history of the relationship between Mr. Brown and Miss Charles, there is no reason to believe that Miss Charles’ recordings after December 2011 would have been any more commercially successful if the Recording Agreement had remained in force than they were in fact.
- (4) Miss Charles received some income when, in June 2012, she signed a recording contract with Virgin. As to this:
  - (a) She did not disclose this contract, on the (mistaken) basis that it was privileged, but she did disclose a few clauses, including clause 12(P)(i), which provided that she was to receive £65,000 as a non-returnable sum by way of advance.
  - (b) She also disclosed her invoice to Virgin for £32,500, being the first half of this advance, and acknowledged that she received £32,500.
  - (c) She denied receiving the second half of her advance, and said that this was because Virgin was taken over. In itself, however, this was plainly not a good reason for Virgin or its successor in title not pay the second half of the advance, and her claim was not supported by any correspondence with Virgin or any other

documents. Given that evidence, on the balance of probabilities I am satisfied that she either received or was entitled to receive the second half of her advance.

29. Accordingly, I proceed on the basis that Miss Charles' only income from her recordings released between January 2012 and May 2013 was the £65,000 received or due from Virgin and that the First Claimant would (by entering into an agreement with Virgin) have earned this amount, but would not have earned any more, from Miss Charles' recordings (beyond the £200 earned from King Kong) if the Recording Contract had remained in force.
30. The First Claimant would have been entitled to retain the total sum of £65,200, subject to:
  - (1) paying Miss Charles 50% of the "Net Third Party Advance", pursuant to clause 5.3 of the Recording Agreement; and
  - (2) accounting to Miss Charles for 50% of the Net Royalty Receipts, pursuant to clause 6.1 of the Recording Agreement, if and insofar as that amount exceeded the amount payable pursuant to clause 5.3.

***Net Third Party Advance***

31. The expression "Net Third Party Advance" is defined in clause 1.1 of the Recording Agreement as meaning:

“advances paid by a third party record company solely and identifiably in respect of the Recordings, after deduction of:

- (a) VAT or other applicable sales taxes; and
- (b) any part of such advances designated for recording costs or other costs to be incurred or reimbursed in the production or promotion of the Recordings, provided that the part of such advances designated for such costs shall be deemed to be the first 60% of the total advances payable for the relevant Recordings unless otherwise designated by such third party record company or agreed otherwise between the parties.”

32. The First Claimant accepts that the payment from Virgin to the First Claimant would have been an advance of the kind to which this definition applies. Sub-paragraph (a) is inapplicable. As to sub-paragraph (b), it was not argued before me that there was any reason for disapplying the deeming provision. Accordingly, the First Claimant would have been obliged to pay £13,000 (i.e. 50% of 40% of £65,000) to Miss Charles. However, pursuant to clause 5.4, this amount would have been recouped out of the royalty paid to Miss Charles pursuant to clause 6.

### ***Net Royalty Receipts***

33. This expression as defined in clause 1.1 of the Recording Agreement as meaning:

“all income (excluding any Label Advances, VAT and any of the Company’s share of income from PPL and any other collecting society) received by the Company arising directly and identifiably from the exploitation of the Recordings after deduction of all bona fides expenses incurred by the Company, including any expenses incurred prior to the date of this agreement, any expenses paid to the Artist pursuant to clause 7.3, and/or any expenses which are reasonably anticipated to be incurred



by the Company in the next accounting period in connection with the agreement. Such expenses shall include the costs of manufacture, distribution, promotion, video promotion, mechanical royalty payments, sample clearance, artwork and any legal fees pursuant to negotiating any agreements relating to the Artist (including, but not limited to, the exploitation of the Recordings).”

34. The First Claimant contended that the Net Royalty Receipts should be calculated by deducting from its hypothetical income:

- (1) the expenses (said to amount to £43,324) incurred by Mr. Brown on promotional and recording activities between 2008 and August 2011; and
- (2) the expenses (said to amount to £13,258) incurred by the First Claimant on management, promotional and recording activities between September and December 2011.

35. This gives rise to a number of issues.

*Expenses incurred by Mr. Brown to August 2011*

36. The definition of Net Royalty Receipts allows for the deduction of “all bona fide expenses incurred by the Company” (i.e. the First Claimant). The natural and ordinary meaning of these words is not such as to extend to expenses incurred by Mr. Brown for his own account, i.e. the £43,324 said to have been incurred by Mr. Brown down to August 2011. The Claimants argued that I should construe the definition so as to include such expenses, but I am not persuaded by this submission. The Recording Agreement refers expressly to

Mr. Brown (in recital (A) and on the signature page). If the draftsman had intended to refer to “all bona fide expenses incurred by the Company or Mr. Brown”, he could and would have done so. He did not.

*The Nature of the Alleged Expenses*

37. The alleged expenses incurred by the First Claimant and listed in Annex C to the Particulars of Claim consist primarily of expenses relating to the release of the King Kong recording. These, and the expenses said to relate to the Bigga Fish tour, are expenses of the kind referred to in the definition of Net Royalty Receipts.
38. Also included in the list, however, is the sum of £1,800 in respect of “Production and Management Agreement by Chris Phillips at Bolt Burden.” This appears to relate to the Claimants’ solicitor’s fees for drafting the Management Agreement and the Recording Agreement. In my judgment, this item is not within the scope of the definition. Deducting £1,800, therefore, from the total of £13,258, the potentially relevant expenses amount to £11,458.

*Whether the Alleged Expenses were Incurred*

39. Mr. Brown was not good at record-keeping and I was not shown receipts for the expenses claimed. However, his evidence was that they were incurred. While Miss Charles did not accept this, she did accept that, for example, Mr. Brown arranged for a video to be made for King Kong. In her witness

statement, Miss Charles questioned whether the amounts claimed were too high, but this allegation was not pursued at trial or put to Mr. Brown. On the balance of probabilities, therefore, I find that the expenses claimed were incurred.

40. However, Mr. Brown produced during the trial an email which indicated that the organisers of the Bigga Fish tour had agreed to pay £100 as a contribution towards expenses. This sum falls to be taken into account, reducing the amount of the relevant expenses from £11,458 to £11,358.

*Whether the Alleged Expenses were Incurred by the First Claimant*

41. Miss Charles contended that these expenses were incurred by Mr. Brown, and not the First Claimant. It seems that payments were made by Mr. Brown, using his personal bank account where necessary, and that Mr. Brown subsequently filed statutory accounts for the First Claimant on the basis that it was dormant.
42. On the other hand, Mr. Brown said that he regarded himself as incurring these expenses on behalf of the First Claimant, and that is understandable once the Recording Agreement had been signed by Miss Charles and the First Claimant. Although not correct, it is also understandable that Mr. Brown should have filed accounts which said that the First Claimant was dormant once the Recording Agreement had been terminated.

43. On the balance of probabilities, therefore, I find that expenses of £11,358 were incurred by the First Claimant and should be deducted from the hypothetical income of £65,200 to arrive at Net Royalty Receipts of £53,842. 50% of this (i.e. £26,921) would have been payable to Miss Charles.

***Damages: Summary***

44. If Miss Charles had not repudiated the Recording Agreement, then the First Claimant would have received additional income of £65,000 and would have been obliged to pay £26,921 of that to Miss Charles. Thus, the First Claimant's net loss is £38,079 (i.e. £65,000 - £26,921).

**Copyright**

45. In the light of my finding that the Recording Agreement is a valid agreement, it was not disputed that the copyright in all of the recordings listed in Annex D to the Particulars of Claim belongs to the Claimants. I will make a declaration to this effect, so that the agreed position is recorded.

**The Counterclaims for Damages**

46. Given my findings in relation to copyright, Miss Charles' counterclaim for damages for breach of copyright is dismissed.
47. There was little evidence in relation to Miss Charles' disputed claim that the Claimants had withheld fees due to her. One instance, however, was provided

by the Bigga Fish tour. Miss Charles claimed that she was paid a fee for this tour, but an email to Mr. Brown dated 15 September 2011 indicated that no fee was payable. Since this email was produced during the trial, I gave Miss Charles the opportunity to respond to it in written submissions. Miss Charles did not accept that the email was genuine, but did not produce any other documents to substantiate her claims about the Bigga Fish tour.

48. Accordingly, on the balance of probabilities, I find that there are no sums due to the Claimant in respect of fees and I dismiss the counterclaim for unpaid fees.

### **Summary**

49. For the reasons set out above, I will give judgment for the First Claimant in the principal amount of £38,079 and I will declare that the First Claimant is the owner of the copyright in the recordings listed in Annex D to the Particulars of Claim.
50. I invite the parties to agree a form of order which addresses these and any consequential matters, such as interest and costs.
51. In the event that the parties are unable to agree, then I direct that:
- (1) each party must within 28 days of receipt of this Judgment file and serve a draft order and written submissions in relation thereto;

- (2) any written submissions in response must be filed and served within 14 days of receipt of the submissions to which they respond; and
- (3) any disputes will then be resolved without a hearing, unless the Court determines that a hearing is necessary.