

THE HIGH COURT

[2009 No. 6889P]

BETWEEN

PHONOGRAPHIC PERFORMANCE (IRELAND) LTD

PLAINTIFF

AND

EOIN FOYLE, JONATHAN BOURKE, and SOUTHLINCH THEATRES

DEFENDANTS

Judgment of Mr Justice David Keane delivered on the 3rd December 2015

Introduction

1. This judgment concerns an application for a *non-suit*, brought on behalf of the second named defendant at the conclusion of the plaintiff's case during the trial of the action.

Non-suit

2. I use the term "*non-suit*" in accordance with its current (and only extant) meaning, that is, to signify an application for a direction from the Court dismissing an action at the conclusion of the plaintiff's case on the basis that the evidence adduced is insufficient to make out the plaintiff's claim or claims against the relevant defendant(s). As the judgment of Clarke J. in *Moorview Developments Ltd v. First Active plc* [2010] IEHC 34 makes clear, the old common law right to a "non-suit", whereby a plaintiff could abandon his claim at his own election and without rendering the underlying dispute between the parties *res judicata*, has been abolished and the rules of court governing the "discontinuance" or "withdrawal" of an action by a plaintiff, currently embodied in Order 26 of the Rules of the Superior Courts, now represent a complete and exhaustive code governing a plaintiff's procedural entitlements in that regard.

The plaintiff's claims

3. The proceedings concern a claim for damages brought by the plaintiff, Phonographic Performance (Ireland) Ltd ("PPI"), arising out of the alleged infringement of the copyright in sound recordings that were played at premises known as the Savoy Nightclub and Theatre ("the Savoy nightclub") located on Patrick Street in Cork City. It is PPI's case that the third named defendant, Southlinch Theatres Limited ("Southlinch"), was the licence holder of the intoxicating liquor licence attached to the Savoy nightclub and that the first named defendant, Mr. Foyle, and the second named defendant, Mr Bourke, were directors of Southlinch at all material times. PPI pleads that each of the three defendants, whether solely or jointly, owned and managed, or directed and controlled the operation of, the Savoy nightclub at all material times.

4. In its statement of claim, PPI alleges that, on a date unknown prior to the 1st January 2001, each of the defendants, acting jointly or singly, infringed PPI's copyright in certain sound recordings licensed or assigned to it, by causing those recordings to be heard in public without either obtaining a licence to do so from PPI or paying equitable remuneration to it in accordance with the terms of s. 17(4)(b) of the Copyright Act 1963 ("the 1963 Act"). While the statement of claim also includes a recital that the defendants provided an undertaking, as envisaged under s. 17(5)(b), to pay the relevant remuneration as determined by the Controller of Industrial and Commercial Property, that aspect of the claim was expressly withdrawn at trial as having been included in that pleading in error. PPI further alleges that, since the 1st January 2001, each of the defendants, jointly or singly, or by their respective servants or agents, has infringed PPI's copyright in those recordings by breaching the exclusive right of PPI, under s. 37(1)(b) of the Copyright and Related Rights Act 2000 ("the 2000 Act"), to undertake to make available to the public, or authorise others to make available to the public, the works contained in those recordings. The 1st January 2001 was the appointed date under the Copyright and Related Rights Act 2000 (Commencement) Order 2000 (S.I. No. 4040/2000), upon which the relevant provisions of the 2000 Act came into effect. For ease of reference, from now on I will refer to the claims just described as "the infringement claims."

5. In the alternative, PPI alleges that, jointly or singly, the defendants wrongly and unlawfully authorised the copyright infringement already alleged. I will refer to this as the "authorisation of infringement claim."

6. In the further alternative, PPI pleads that Mr Foyle and Mr Bourke are joint tortfeasors with Southlinch (presumably, in respect of the infringement claims) on one or more of the following grounds: that Southlinch was the agent of Mr Foyle and Mr Bourke; that Mr Foyle and Mr Bourke procured or induced the relevant acts or omissions on the part of Southlinch; and that the relevant acts and omissions by Southlinch were committed with the consent, connivance or approval of Mr Foyle and Mr Bourke, or through their neglect, in circumstances where the former was under the control of the latter and was accustomed to acting under their instructions and directions. These, I shall refer to as the "joint tortfeasor claims."

7. Finally, PPI pleads that the defendants are each culpable in conspiracy (again presumably, by reference to an alleged agreement to carry out the acts of copyright infringement already alleged). I will refer to these as the "conspiracy" claims.

Status of PPI

8. PPI pleads that it is a company limited by guarantee, which holds, by reason of exclusive licences or assignments of subsisting copyright, the exclusive right in the State to licence the playing in public of sound recordings comprising the vast bulk of the modern sound recording repertoire. PPI further pleads that it is a "licensing body" within the meaning of that term under the 2000 Act, and that it holds a certificate to that effect issued pursuant to s. 175 (8) of that Act by the Controller of Patents, Designs and Trade Marks ("the Controller"). None of those matters has been put in issue by any of the defendants in these proceedings.

Reliefs claimed

9. PPI claims judgment against the defendants, jointly and severally, in the sum of €50,367.44 or an award of damages in that amount. The figure has been particularised in the following way. First, the amounts invoiced by PPI during the years 2000 to 2006 (inclusive) have been added together, providing a total of €116,948.83. For reasons that are unclear, no invoices appear to have been raised in the year 2004. Second, payments actually made during the relevant period, totalling €66,581.39, have been deducted,

leaving the figure already stated. No issue has been taken on behalf of any of the defendants with the calculation of that figure.

10. While PPI has pleaded a claim of continuing copyright infringement by the defendants and a claim to additional, aggravated or exemplary damages in respect of the alleged copyright infringement by the defendants generally, none of these claims was pressed at trial. Nor was the PPI's claim for an injunction restraining the continuing infringement of its copyright, in circumstances where it appears to be common case that the Savoy nightclub no longer operates.

Commencement of the proceedings

11. The plenary summons in this action issued on the 28th of July 2009 and a memorandum of appearance was entered on behalf of all three defendants on the 2nd October 2009. As PPI commenced the action in its capacity as exclusive licensee of the copyright entitlements of others, under s. 136(1) of the 2000 Act it was obliged to seek the leave of the Court to proceed further without joining the copyright owners. With the consent of the defendants, Murphy J. made an Order on the 2nd November 2009 granting that leave, after which the statement of claim already described was delivered on the 19th November 2009.

Position of Southlinch

12. On consent between the relevant parties, by Order of Murphy J. made on the 22nd November 2010, PPI obtained a judgment in default of defence against Southlinch, subject to the later assessment of damages by the Court.

13. At the trial of the present action, the plaintiff produced, without objection, a copy of the *Form B1 Annual Return of Southlinch* to the Companies Registration Offices for the financial year from the 1st January to the 31st December 2006 and of both the *Abridged Financial Statements* and the *Financial Statements* of the company for that period. The annual return records that 100 ordinary shares have been issued in the company of which Mr Foyle holds 38, Mr Bourke holds 37 and one Joseph Kelly holds 25. Mr Foyle and Mr Bourke are recorded as the directors of the company, and Mr Bourke is identified as company secretary. The return purports to have been signed by both Mr Foyle and Mr Bourke. It may or may not be significant that, among the list of other directorships then held by Mr Foyle and Mr Bourke, is one held by each in a company described in respect of both as "Sherland Entertainment Limited." The Financial Statement identifies the registered office of Southlinch as 37, Drury Street, Dublin 2, and its principal place of business as the Savoy Complex, Patrick Street, Cork. The *directors' report* includes the statement that "the company had a difficult year in 2006 and ceased trading in 2007."

14. PPI also produced at trial a company report on Southlinch, based on CRO data last updated on the 25th May 2012. That report discloses that Southlinch's principal activity was the operation of arts facilities; that it was listed to be struck off the register of companies on the 6th February 2012; that it was struck off the register on the 23rd April 2012; and that it was dissolved, ultimately, on the 27th April 2012. The same report notes that, immediately prior to the dissolution of the company, Mr Foyle was both director and secretary, and Mr Bourke remained the only other director. The report also records that, on the 12th October 2001, a charge in the form of a mortgage in favour of Bank of Ireland over the company's property described as "part of the premises known as the Savoy Shopping Centre, Patrick Street, in the City of Cork..." had been registered, which charge was not then satisfied.

The defence

15. A defence was delivered, on behalf of Mr. Foyle and Mr. Burke, on the 19th of November 2010. In it, those defendants deny that either of them owned and managed, or directed or controlled the operation of, the nightclub, which they expressly plead was owned and controlled by Southlinch, and managed by another person appointed by Southlinch for that purpose.

16. Those defendants deny that they infringed the PPI's copyright; deny that they wrongfully or unlawfully authorised any such acts of infringement; deny that they are jointly liable for any such infringement by Southlinch; deny that Southlinch was their agent; deny that they procured any act or omission of Southlinch amounting to any such infringement; deny that Southlinch was managed or controlled under their instructions (presumably in respect of any act or omission amounting to an infringement of PPI's copyright, rather than in general); and deny that they engaged in any conspiracy to infringe PPI's copyright. In addition, the defendants plead that PPI's claim is statute barred.

Position of Mr Foyle at trial

17. As noted earlier, an appearance was entered by a firm of solicitors on behalf of all three of the defendants in this case, to include Mr Foyle, on the 2nd October 2009. A defence was delivered on behalf of both Mr Foyle and Mr Bourke on the 19th November 2010. At the commencement of the trial, Counsel appearing for Mr Foyle informed the Court that he (Counsel) was present "as a courtesy" to inform the Court that Mr Foyle did not have "the wherewithal to mount a defence." When pressed to clarify what this could mean in circumstances where Counsel was then present in court on Mr Foyle's behalf and there had been no application on behalf of Mr Foyle's solicitors to come off record, Counsel informed the Court, after some delay, that instructions had been obtained from Mr Foyle to the effect that he would not be opposing the plaintiff's claim. I have come to the conclusion that I must interpret that Delphic posture as one whereby Mr Foyle was (and is) standing over his defence as pleaded but was not proposing to (and did not in fact) test the plaintiff's evidence, and does not propose to call any evidence in his defence of the plaintiff's claim.

The plaintiff's evidence

18. The plaintiff called two witnesses. The first was Mr Seán Murtagh, Chief Operations Officer of PPI. Mr Murtagh described the purpose and role of PPI and provided a brief history of the development of a tariff system on behalf of copyright owners in connection with the playing of sound recordings to the public in commercial settings such as discotheques and nightclubs. It appears to be common case that the rates which were applied in respect of the operation of the nightclub in this case, those set out in a document entitled "Tariff No. 2", reflect the rates set out in the schedule to an Order made by Laffoy J. on the 24th June 2004 in a case entitled *Carrickdale Hotel Limited v. The Controller of Industrial and Commercial Property & Anor* [2004] 3 I.R. 410, which was an appeal, pursuant to s. 41 (3) of the 1963 Act, from an arbitrator's decision on the issue of what constitutes equitable remuneration in that regard.

19. Mr Murtagh was invited to comment on a range of documents, none of which were formally proved in evidence. The first such documents are two letters addressed to the Secretary of PPI and written on the headed notepaper of an entity named Sherland Entertainments Inc. They are each dated the 20th August 2003. While in neither letter is the signatory identified, the signature on each is very similar, if not identical, to that of Mr Foyle on the Southlinch 2006 Annual Return. The first letter is described on its face as a 'Notification Pursuant To Section 38 of the Copyright and Related Rights Act 2000' and the relevant part of the text states: "as and from the first day of January 2001 The Savoy, Patrick Street, Cork has played and intends to play in (sic) some of the sound recordings in the repertoire of [PPI]." The second letter contains the offer of a specific sum, payable quarterly in arrears, as fair payment in that regard.

20. The next documents drawn to Mr Murtagh's attention were copies of three cheques drawn on the account of "Southlinch Theatres Limited, The Savoy" and made payable to PPI. They are dated, respectively, the 8th September, 8th October, and 8th

November 2003. The first bears a signature similar, if not identical, to that of Mr Foyle on the Southlinch 2006 Annual Return. The other two each bear a signature similar, if not identical, to that of Mr Bourke on the same document.

21. Mr Murtagh was then asked to comment on another letter written to the Secretary of PPI on the headed notepaper of Sherland Entertainments Inc. This one is dated the 21st August 2003 and also bears a signature similar, if not identical, to that of Mr Foyle. That letter states in relevant part:

"We refer to our notification dated 20 August 2003 to [PPI] and to the Controller that as and from January 1st 2001 Jay Bourke and Eoin Foyle have played and intend to play in public sound recordings from the repertoire of PPI a copy of which is enclosed.

PPI and Jay Bourke and Eoin Foyle have failed to reach agreement as to the payment to be made under section 38(2) to PPI. On the contrary, Jay Bourke and Eoin Foyle believe that the amount claimed by PPI is grossly excessive and exorbitant. A dispute has therefore arisen as to the terms and conditions of payment.

In the circumstances Jay Bourke and Eoin Foyle hereby apply pursuant to provisions in the [2000 Act] for a determination of the dispute."

22. Counsel for PPI produced to Mr Murtagh for his comment a copy of a train of further correspondence between the PPI, the Controller and "Sherland Entertainments" concerning the fair payment dispute just described. For example, on the 15th September 2003, the PPI wrote to "Sherland Entertainments", for the attention of Mr Foyle and Mr Bourke, raising an issue about the validity of the notification of the 20th August 2003 by reference to an asserted disparity or shortfall between what was being tendered in that notification as fair payment for the prior playing of sound recordings and what had actually been paid in that regard. This elicited a letter dated the 23rd November 2003 from Mr Foyle on Sherland Entertainments Inc headed notepaper, asserting that the amount tendered as fair payment in the original notification had been miscalculated, setting out the basis of that error, and tendering a recalculated lesser figure. After some further exchanges between PPI, Sherland Entertainments Inc and the Controller, concerning the possible referral of the dispute by the Controller to an arbitrator, pursuant to the terms of s. 367 (1) of the 2000 Act, the train of correspondence concludes with a letter dated the 23rd January 2007 from the Patents Office on behalf of the Controller to Mr Foyle of Sherland Entertainments Inc., informing him that the Controller has been informed by PPI that settlement has been reached as regards the amount of remuneration payable in respect of the playing of sound recordings at The Savoy.

23. For completeness, reference must be made now to two other documents upon which, although not proved, PPI sought to place reliance in the course of the examination of its own witnesses. The first is a copy of an e-mail dated the 7th April 2009 from Ceara Heasley, Senior Collections Co-Ordinator in PPI to Mr Foyle concerning The Savoy, to which was attached a pdf file comprising copies of the various invoices raised to cover the period at issue, each of which is addressed to "Savoy Theatre and Nightclub, Patrick Street, Cork." The second is a copy of each of two letters written by the PPI's solicitor on the 23rd May 2007 in identical terms to Mr Foyle and Mr Bourke respectively, referencing two outstanding accounts between PPI and Sherland Entertainments Limited (the larger of which was that for the Savoy nightclub) and calling upon Mr Foyle and, separately, Mr Bourke to either settle those accounts or explain their difficulty in doing so, failing which proceedings were threatened. It appears to be common case that there was no response to that letter from either Mr Foyle or Mr Bourke.

24. Under cross-examination on behalf of Mr Bourke, Mr Murtagh accepted that, insofar as he was aware, Southlinch, rather than Mr Bourke, owned the nightclub premises at all material times, and Southlinch, rather than Mr Bourke, held the liquor licence attached to the premises. Mr Murtagh further accepted that all of the relevant invoices were addressed, and had been sent, to the Savoy nightclub premises and that no invoices were addressed to, or sent to, Mr Bourke.

25. Mr Murtagh accepted the suggestion put to him by Counsel for Mr Bourke that Mr Bourke's company did engage with the PPI in relation to the fair payment due from the former to the latter for the exercise of a licence as of right to play sound recordings in public. Mr Murtagh agreed that, to the best of his knowledge, no one from the PPI had any dealings directly with Mr Bourke in relation to the Savoy nightclub.

26. By way of re-examination, Mr Murtagh was invited to comment on the letter of claim, dated the 1st October 2007, written to Mr Bourke by the PPI's solicitors, notifying him that it was also intended to proceed against Southlinch and Mr Foyle, and employing the usual O'Byrne letter formula to the effect that, if necessary, an application would be made at the conclusion of the trial to fix any unsuccessful defendant or defendants with the costs of any successful defendant or defendants.

27. The second and last witness called by PPI was Mr Derek Lynch. Mr Lynch stated in evidence that he is, and was at all material times, a licensing executive with the PPI, having specific responsibility for nightclubs in the Munster region in general and those in Cork in particular. Mr Lynch stated that he first had dealings with the Savoy nightclub in the year 2000 when he met a gentleman named Joe Kelly, who represented himself as the manager of the premises and informed Mr Lynch that the only persons who could deal with the claims of the PPI in respect of that premises were Mr Bourke and Mr Foyle. Mr Lynch further stated that he had negotiated the figures set out in the various invoices now at issue when he met with Mr Foyle in Dublin in 2006.

28. Mr Lynch was invited to comment on an e-mail that he had received from Mr Foyle on the 10th December 2009, which states in material part:

"As we discussed at our meeting there appears to be an issue of monies owed to PPI from over the last few years of our ownership of the Savoy, Cork. The amount discussed was €50,367.44.

As you know, we no longer own the Savoy having sold on the lease in 2006. Also our company, Southlinch Theatres Ltd, is no longer trading and has no funds as such. Furthermore our company is actually still owed money from the sale of the Savoy which, at this stage, it is unlikely to recover due to the current economic climate.

So the only way we can see ourselves ever paying this bill would be over at least 6 years as it will have to come out of other earnings. I would suggest a monthly Direct Debit of some €700 over this period. If we do recover the monies owed to us then we will be in a position to settle the full amount sooner.

I hope that this is acceptable to you as it is the only way for us in these difficult times."

29. Mr Lynch stated that, in relation to Mr Foyle's use of the terms "we" and "our" in that e-mail, it reflects the understanding that he had always had that he was dealing with Mr Foyle and Mr Bourke. He repeated that Mr Kelly had told him at the outset that he

would have to deal with Mr Foyle or Mr Bourke and that he had always done so.

30. On cross-examination, Mr Lynch accepted that companies own most of the nightclubs that he deals with. When asked when, if ever, he became aware that he was dealing with a company in this case, he replied: "If I am dealing with a person and I agree figures and I am not told who the company is I have no idea." When it was put to him that he could have found out relatively easily that the Savoy nightclub was owned by a company, Mr Lynch acknowledged that that was so but repeated that he had been dealing with Mr Foyle as a representative of the Savoy nightclub and felt he had no need to pursue the matter any further.

31. Mr Lynch was asked to explain the basis of his knowledge that Mr Bourke was involved with the Savoy nightclub and replied that, initially, his knowledge was based upon what Mr Kelly told him and, subsequently, it was based on what he was told by Mr Foyle.

32. Mr Lynch acknowledged that he addressed the invoices that he raised on behalf of PPI to the venue rather than any person. Mr Lynch agreed that he had never directed an invoice to, or made a request for payment from, Mr Bourke.

33. Mr Lynch said that he had a good working relationship with Mr Foyle and accepted that, over the years, approximately €70,000 had been paid to the PPI in connection with the operation of the Savoy nightclub. Mr Lynch said that he did not know the source of those payments as they were made by standing order and he did not believe that the relevant information (concerning the identity of the payer) was available from the bank. Counsel for PPI intervened at that point to indicate that it is accepted by his client that those payments came from a bank account held by Southlinch.

34. Thus concluded PPI's case, at which point Counsel for Mr Bourke applied for a non-suit.

The test for a non-suit

35. In pressing his application for an Order dismissing PPI's claim on the ground that it had failed to satisfy the evidential burden placed upon it to make out a *prima facie* case, Counsel for Mr Bourke confirmed that it is Mr Bourke's intention to go into evidence should that application be refused.

36. I have decided that I should exercise my discretion to consider that application now, rather than deferring it until the conclusion of the evidence. In that regard, it is apposite to note that this is not a multiple defendant case of the kind identified by Finlay C.J. in *O'Toole v. Heavey* [1993] 2 IR 544 as giving rise to any risk of the patently unjust anomaly whereby, should the case against one defendant be dismissed, the remaining defendant might then seek to escape liability by affixing blame to the successful defendant in his absence from the trial thereafter. That is not only because there are no claims or cross-claims for contribution between the relevant defendants here but also because no such claim can arise between them in practice on account of the position that Mr Foyle has adopted.

37. I must therefore decide whether PPI has made out a *prima facie* case on any of the four alternative grounds of liability on the part of Mr Bourke asserted by it, namely: that Mr Bourke infringed its copyright; that Mr Bourke authorised the infringement of its copyright; that Mr Bourke is a joint tortfeasor with Southlinch or Mr Foyle, or both, in respect of the breach of PPI's copyright; or that Mr Bourke conspired to infringe its copyright, either with Southlinch or Mr Foyle, or both.

The 2000 Act

38. While part of PPI's claim relates to the period prior to the commencement of the 2000 Act, the argument between the parties on the present application focussed exclusively on the position under that Act.

39. S. 17 (1) of the 2000 Act provides, in relevant part, that the owner of copyright in a work may undertake or authorise other persons to undertake acts in respect of that work that would be otherwise restricted by that right. S. 17 (2) (b) provides that copyright subsists in, amongst other things, sound recordings. S. 21 (a) defines the author of a work as the person who creates it, and includes, in the case of a sound recording, the producer. S. 23 (1) provides that, subject to certain exceptions of no relevance here, the author of a work is the first owner of it.

40. S. 37 (1) of the 2000 Act provides that, subject to certain exceptions, the owner of copyright in a work has the exclusive right to undertake or authorise others to undertake various acts, including "to make available to the public the work." S. 40 (1) defines "the making available to the public of a work" to include playing a copy of the work in public. S. 37 (2) states that:

"The copyright in a work is infringed by a person who without the licence of the copyright owner undertakes, or authorises another to undertake, any of the acts restricted by copyright."

41. Against that background, PPI contends that Mr Bourke is liable for the primary infringement of copyright in that he undertook, or authorised another to undertake, the playing of sound recordings in public at the Savoy nightclub without the authorisation of the PPI, as the licensing body entitled to act on behalf of the producers of those recordings.

Section 38

42. In order to properly address that claim, it is necessary to consider the provisions of s. 38 of the 2000 Act. That section states (in material part):

"(1) Notwithstanding the provisions of *section 37*, where a person proposes to –

(a) play a sound recording in public...

...

he or she may do so as of right where he or she-

(i) agrees to make payments in respect of such playing...,

and

(ii) complies with the requirements of this section.

(2) A person may avail of the right to play a sound recording in public..., where he or she –

- (a) gives notice to each licensing body concerned of his or her intention to play sound recordings in public...,
 - (b) informs each of those bodies of the date on and from which he or she intends to play sound recordings in public...,
 - (c) makes payments to the licensing body at intervals of not less than 3 months in arrears,
 - (d) complies with any reasonable conditions relating to payments under this section as may be notified to him or her by the licensing body from time to time, and
 - (e) complies with any reasonable requests for information from the licensing body to enable it to calculate and manage payments under this section.
- (3) A person who satisfies the conditions specified in *subsection (2)* shall be deemed to be in the same position as regards infringement of copyright as if he or she had been the holder of the licence granted by the owner of the copyright in question at all material times.
- (4) Where a person intending to play sound recordings in public...and the licensing body fail to reach agreement as to fair payment under *subsection (2)* within a reasonable time, the terms of the proposed agreement shall be referred to the Controller for determination of the amount and terms of payment.
- (5) In the case of a dispute referred to the Controller under *subsection (4)*, a person shall not exercise the right conferred under *subsection (1)* unless he or she –
- (a) gives reasonable notice to the Controller that he or she has commenced or intends to commence the playing of sound recordings in public and that a dispute has arisen between him or her and the licensing body concerned as to the terms of payment and the exercise of the right; and
 - (b) applies to the Controller for a determination under *sub-section (4)*.
- (6) Where the terms of a proposed agreement are referred to the Controller under *subsection (4)* a person shall not exercise a right conferred by *subsection (1)* unless he or she –
- (a) gives notice in writing to the Controller of his or her intention to exercise the right, and of the date on which her or she proposes to begin to do so, and
 - (b) applies in writing to the Controller for a determination under *subsection (4)*.
- (7) On an application to settle the terms of payment being referred to the Controller, he or she shall consider the matter and make such order as he or she may determine to be reasonable in the circumstances and that order shall take effect on and from the date on which the applicant begins to exercise the right, and any necessary repayments or further payments shall be made in respect of amounts which, in consequence of the terms of the order, have fallen due.
- (8) Where no request for payment has been made by the licensing body, or where the amount requested by the licensing body is disputed by the person exercising the right then, pending the making of an order by the Controller under *subsection (7)*, the person exercising the right shall pay to the licensing body such amount as he or she considers reasonable, and shall notify the licensing body and the Controller of his or her intention to do so.
- (9) A person exercising the right conferred by *subsection (1)*, or who has given notice to the Controller of his intention to do so, may also refer to the Controller the question of –
- (a) whether any condition relating to payment, notice of which has been given to him or her by the licensing body concerned is a reasonable condition, or
 - (b) whether any licence condition, notice of which has been given to him or her by the licensing body in question, is a reasonable condition, or
 - (c) whether any information required by the licensing body is information which the licensing body can reasonably require him to provide.
- (10) Where a reference is made under *subsection (9)*, the Controller shall consider the matter and make such order as he or she may determine to be reasonable in the circumstances.”

Arguments

43. In submitting that it has surmounted the prima facie case hurdle on the 'infringement' ground, PPI relies on the broad scope of that statutory tort as provided for by s. 37 of the 2000 Act. It is true, for example, that in relation to undertaking an act restricted by copyright, such as making available a work comprising a sound recording by playing it in public, there is no defence of innocent infringement. That is to say, the absence of any intention to infringe copyright (save where a defendant did not know and had no reason to believe that any copyright whatsoever existed in the work concerned) is irrelevant to the commission of the tort: *Mansell v. Valley Printing Co* [1908] 2 Ch. 441.

44. Moreover, PPI submits that the verb "to undertake" as it is used in s. 37 should be given its plain and ordinary meaning, which is to "commit oneself to and begin (an enterprise or responsibility)", thereby capturing not only the physical playing of the sound recordings in this case but also the putting in place, and carrying out, in the Savoy nightclub of the arrangements whereby those recordings were to be played in the ordinary course of business there.

45. On the 'authorisation of infringement' ground, PPI points to the settled law, whereby the tort of authorising another person to undertake an act restricted by copyright is a separate tort to that of undertaking such an act.

46. In relation to both the 'authorisation of infringement' and 'joint tortfeasor' grounds, PPI relies on the decision of Kitchen J. in the

47. On the tort of authorisation of infringement, at paragraph 89 of his judgment, Kitchin J. quoted from the judgment of Lord Templeman in *CBS Songs Ltd v. Amstrad Consumer Electronics plc* [1988] A.C. 103, who in turn drew attention to the acceptance by Bankes L.J. in *Falcon v. Famous Players Film Co* [1926] 2 K.B.474 (at p. 491), following *Monckton v. Pathes Frere Pathephone Ltd* [1914] 1 K.B. 395 and *Evans v. Hulton* (1924) 131 L.T. 534, that, for the purpose of the Copyright Act 1911, the expression 'authorise' meant 'sanction, approve and countenance', and the following dictum of Atkin L.J. in the same case (at p. 499):

"to 'authorise' means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor;...."

48. In relation to the definition of the term 'authorise' ventured by Bankes L.J., viz. 'sanction, approve or countenance', it is important to acknowledge the note of caution struck by the authors of *Copinger and Skone James on Copyright* 16th ed, 2011, (at para. 7-148) insofar as the word 'countenance' may be – wrongly, it is suggested – considered equivalent to 'condone'. In that regard, both those authors and Kitchin J. in *Twentieth Century Fox Film Corp* cite the following qualification offered by Whitford J. in *C.B.S. Inc v. Ames Records and Tapes Ltd.* [1982] Ch. 91 (at p. 106):

"[A]uthorisation can only come from somebody having or purporting to have authority and an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act."

49. Having conducted the analysis just described, Kitchin J. set out his conclusions on the meaning of the term 'authorisation' as follows (at para. 90):

"In my judgment, it is clear...that 'authorise' means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all of the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending on all the other circumstances."

50. In considering who is the 'primary infringer', for the purpose of the application of the definition just cited to the circumstances alleged in the present case, the following is the view expressed by the authors of *Copinger and Skone James on Copyright*, supra, (at para. 7-107): "[w]here recorded music is played in a club it will be the operator of the equipment who is primarily liable for the performance of the lyrics and music, and the playing of the sound recording." I will return to the implications of that analysis later in this judgment.

51. On the "joint tortfeasor" and "conspiracy" ground in respect of its claim against the relevant defendants, PPI also calls in aid the judgment of Kitchin J. in *Twentieth Century Fox Film Corp.* The relevant passage commences (at para. 103) with the following observations:

"It is well established that a person who procures an infringement of copyright is liable joint and severally with the infringer. Similarly, two or more persons may participate in a common design to infringe rendering them jointly liable."

52. The same portion of the judgment continues with a survey of the relevant authorities, including the following statement of Hobhouse L.J. in *Credit Lyonnais Bank Nederland NV v. Export Credits* [1998] 1 Lloyd's Rep. 19 (at 46):

"Mere assistance, even knowing assistance, does not suffice to make the 'secondary' party liable as a joint tortfeasor with the primary party. What he does must go further. He must have conspired with the primary party or procured or induced the commission of the tort...; or he must have joined in a common design pursuant to which the tort was committed."

53. Kitchin J. concluded on this point (at para. 108):

"I derive from these passages that mere (or even knowing) assistance or facilitation of the primary infringement is not enough. The joint tortfeasor must have so involved himself in the tort as to make it his own. This will be the case if he has induced, incited or persuaded the primary infringer to engage in the infringing act or if there is a common design or concerted action or agreement on a common action to secure the doing of the infringing act."

54. In asserting that it has made out a *prima facie* case against Mr Bourke, PPI places particular reliance on two Irish cases. The first is the decision of Carroll J. in *Tommy Hilfiger Europe Inc. v. McGarry* [2005] IEHC 66, in which the Court found a company director jointly liable with two companies in which he held directorships for the tort of infringement of the plaintiffs' trade marks on the express basis that the director concerned had authorised those acts and had carried them out. In reaching that conclusion, Carroll J. invoked the principles governing the circumstances in which a director might be held liable as a joint tortfeasor with a company that were recognised by the English Court of Appeal in *MCA Records Inc v. Charly Records Ltd* [2003] 1 BCLC 93. In that case, Chadwick L.J. explained (at pp. 116-7):

"[48] It is because there is a balance to be struck on the facts of each case that it is dangerous for an appellate court to appear to attempt a formulation of the principles which may come to be regarded as prescriptive. But I think it can be said with some confidence that the following propositions are supported by the authorities to which I have referred.

[49] First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company – for example by voting at general meetings and by exercising the powers to appoint directors. Aldous L.J. suggested in *Standard Chartered Bank v Pakistan National Shipping Corp* (No 2) [2000] 1 Lloyd's Rep 218 at 235 – in a passage to which I have referred – that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director

liable. For my part, I would hesitate to use the word 'never' in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort, as Aldous L.J. recognised at paras [16] and [17] of his judgment in the *Pakistan National Shipping case*.

[50] Second there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control. As I have said, it seems to me that this is the point made by Aldous J (as he then was) in *PLG Research v. Ardon International Ltd* [1993] FSR 197.

[51] Third, the question whether the individual is liable with the company as 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] 2 All ER 484, [1988] AC 1013 and *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v Amstrad* [1988] 2 All ER 484 at 496, [1988] AC 1013 at 1058 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 Mustill L.J. pointed out in *Unilever v. Gillette*, procurement may lead to a common design and so give rise to liability under both heads."

55. The other decision upon which PPI relies is not a reserved judgment at all but, rather, a note of a short *ex tempore* decision given by Charleton J. on the 23rd November 2007 in an application that arose in High Court proceedings entitled *PPI v. Kelliher and Millcastle Taverns Ltd*. According to the note that has been furnished, Charleton J. identified the application then before him as one for judgment in default of defence. Having done so, he identified the nature of the claim as relating to the playing of sound recordings in a nightclub, before concluding, in material part:

"...I give judgment against both defendants jointly and severally as both Mr Kelleher (sic) and his company were involved in the playing of the music and I can see no reason why he should be allowed to hide behind the company."

The evidence relied upon by PPI

56. Counsel for PPI submits that there is a mosaic of evidence now before the Court sufficient to make out a *prima facie* case against Mr Bourke. The tiles that make up that mosaic are said to be the following four key pieces of evidence.

57. First, there is the fact that, in late 2003, PPI received at least one cheque, and perhaps as many as two other cheques, apparently signed by Mr. Bourke on behalf of Southlinch in respect of what was asserted to be fair payment for the licence of right claimed to play sound recordings at the Savoy nightclub. PPI seeks to rely on this as evidence for the propositions both that Mr Bourke was adopting a management role in Southlinch (by signing cheques on its behalf) and that Mr Bourke was (in authorising a payment or payments by Southlinch for a licence to play sound recordings) involving himself directly in the playing of sound recordings by Southlinch. However, the fact that Mr Bourke performed the role just described in assisting Southlinch to discharge the obligations associated with the exercise of a licence of right to play sound recordings in 2003 is not easy to reconcile with the proposition for which, according to PPI, it is evidence, namely, that Mr Bourke procured or induced the infringement by Southlinch of the copyright in those sound recordings, or that he joined in concerted action with Southlinch to that end, or that he authorised the commission of that tort by Southlinch. After all, it might be said of any director of a company the sole enterprise of which was, or is, to operate a single nightclub premises that he or she must, by necessary implication, sanction, approve and countenance the playing of sound recordings to the public at that premises.

58. Second, PPI relies on the terms of the *O'Byrne letter* written to Mr Bourke on the 1st October 2007, asserting his personal liability to PPI in an amount broadly equivalent to the sum now claimed in these proceedings. PPI points to the fact that the said letter did not elicit any response, much less a formal denial of liability, and suggests that the Court might draw from that fact an inference of liability on the part of Mr Bourke. However, it seems to me that I must not ignore the principle that 'he who asserts must prove' and, more fundamentally, that I cannot overlook the fact that a defence has since been delivered on behalf of Mr Bourke containing a comprehensive denial of liability. Moreover, the said letter of claim does not specify whether the nature of the PPI's claim against Mr Bourke is that he has infringed (or authorised the infringement of) its copyright or, as the demand for the immediate payment of liquidated sum more strongly suggests, that he is liable to it in that sum by way of fair payment (for the exercise of a licence as of right to play the relevant sound recordings) or for breach of a compromise agreement in relation to the calculation of that sum for that purpose.

59. Third, PPI points to the contents of the affidavits of discovery sworn by both Mr Bourke and Mr Foyle in these proceedings in response to a request made by PPI in 2011 that they make such discovery voluntarily. Discovery was sought of four categories of documentation to cover the relevant period: first, all accounts and records concerning events, cover charges and attendances at the Savoy nightclub; second, all records pertaining to the operation of the Savoy nightclub; third, all documents evidencing the playing of sound recordings at the Savoy nightclub; and fourth, all documents comprising promotional or publicity materials for the Savoy nightclub. Mr Bourke and Mr Foyle each swore an affidavit averring that he had no such documents in any such category to discover.

60. PPI contends, as I understand the submission, that it is innately implausible that this should be the position, particularly in light of the obligations on a company's directors to ensure that proper books and records are maintained under the Companies Act code. However, it is not clear to me how this situation, even if interpreted as 'evidence of absence', is capable of contributing in any meaningful way to a finding that Mr Bourke authorised or engaged in the tortious acts alleged against him. Even if, for the sake of argument, it were to be inferred from the fact that neither Mr Bourke nor Mr Foyle were in possession of any documents within the categories sought in 2011 that there had been a failure to maintain proper books and records on the part of the relevant directors in breach of the duties of each as a director (and it is by no means clear to me that that must necessarily follow), the suggestion that this, in turn, constitutes evidence that Mr Bourke infringed (or authorised or procured the infringement of) copyright in sound recordings by Southlinch appears to me to be a non sequitur.

61. The fourth piece of evidence relied upon by PPI to establish a *prima facie* case against Mr Bourke, if evidence it be, is the fact, already noted, that, at the commencement of the trial, Counsel on behalf of Mr Foyle indicated that Mr Foyle would not be opposing PPI's claim. That occurrence does not seem to me to be capable of amounting to evidence in support of PPI's claim against Mr Bourke.

The issues

62. I can find no evidence in this case that Mr Bourke engaged in a conspiracy with either Southlinch or Mr Foyle to breach PPI's copyright, nor do I understand that claim to be seriously pressed. Equally, I can find no evidence whatsoever that Southlinch acted as Mr Bourke's agent, rather than as principal in its own interest, in playing sound recordings at the Savoy nightclub. While PPI pleads that the infringing acts alleged were committed by Southlinch with the consent, connivance, approval and/or neglect of Mr Bourke and Mr Foyle, insofar as those words invoke the test for establishing the criminal liability of a corporate officer in respect of the commission of a criminal offence by the company, as provided by s. 12 of 2000 Act, I do not believe they are of any relevance to the issues of civil liability that I am required to determine in these proceedings.

63. To the extent that it is accepted that, where music is played in a club, it is the operator of the equipment who is primarily liable for the infringement of copyright concerned, it is clear that Mr. Bourke has no such primary liability.

64. In reality, the arguments on this application have focussed on two specific questions. The first is whether a *prima facie* case has been made out that Mr Bourke authorised the infringement of PPI's copyright by the playing of sound recordings at the Savoy nightclub. The second is whether a *prima facie* case has been made out that Mr Bourke is a joint tortfeasor with either Southlinch alone or with both Southlinch and Mr Foyle, in relation to that alleged infringement, in circumstances where the liability of Southlinch has been established.

Discussion

65. The facts of the present case do not fit easily within the parameters of the test for authorisation of infringement developed in the case law. There is no evidence before the court of any express grant or purported grant to Southlinch by Mr Bourke of a right to infringe copyright. What are the circumstances that would allow such a grant by him to be implied?

66. In *Twentieth Century Film Corp v Newzbin Ltd*, Kitchin J. refers to cases involving an allegation of authorisation by supply. The case he was then deciding was one such. The defendant operated a search engine, available through a website upon subscription, whereby users could find indexed the names and locations of unauthorised digital copies of films, including those made and distributed by the plaintiff. Having analysed the nature of the service offered by *Newzbin*, Kitchin J. concluded that a reasonable subscriber would deduce from its activities that it was purporting to possess the authority to grant any required permission to copy any film identified through its search engine and that it had, therefore, sanctioned, approved and countenanced the copying of the plaintiff's films.

67. In *Falcon v. Famous Players Film Co* [1926] 2 K.B. 474, the defendants were film distributors who had hired out to a cinema a film based on the plaintiff's play, which was shown without the plaintiff's authorisation. As already discussed, in determining that the defendants had authorised the cinema's infringement of the plaintiff's exclusive rights in respect of the play, Bankes LJ construed the term "authorise", in accordance with a number of already established authorities, to mean "sanction, approve and countenance." One of those authorities was *Monckton v. Pathe Freres Pathephone Ltd* [1914] 1 KB 396, in which the English Court of Appeal (*per* Buckley LJ) concluded that the seller of a record authorises the use of the record. The other was *Evans v. E Hulton & Co Ltd* [1924] 131 L.T. 534 in which Tomlin J. held that "where a man sold the rights in relation to a manuscript to another with a view to its production and it was in fact produced, both the English language and common sense required him to hold that this man had 'authorised' the printing and publication."

68. A more recent line of cases dealing with the authorisation of infringement appear not quite so far away from the position established by the evidence so far presented in this case, though still some distance from it. Of those, the most far reaching in their conception of the meaning of 'authorise' are those of the High Court of Australia. In *Moorhouse v. University of New South Wales* [1976] R.P.C. 151, which dealt with the photocopying facilities available in a library in the defendant university. Gibbs J. stated (at p. 159):

"[A] person who has under his control the means by which an infringement of copyright may be committed – such as a photocopying machine – and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use."

69. In *RCA Corporation v. John Fairfax & Sons Ltd* [1982] RPC 91, Kearney J. approved a passage in *Laddie, Prescott & Vitoria, The Modern Law of Copyright* (1980) para. 12.9, p. 403, in the following terms (at 101):

"a person may be said to authorise another to commit an infringement if the one has some form of control over the other at the time of infringement or, if he has no such control, is responsible for placing in the other's hands materials which by their nature are almost inevitably to be used for the purpose of infringement."

70. The foregoing decisions, which have not met with universal approval, appear to represent the high water mark for a broad conception of the authorisation of copyright infringement, perhaps amounting to an implicit finding in each case that a purported grant of right to infringe copyright could be implied on the particular evidence presented. In *CBS Songs Ltd v. Amstrad Consumer Electronics plc* [1988] A.C. 1013, the English House of Lords (*per* Lord Templeman at p. 1055) expressed the view that the proposition in *RCA Corporation* just cited is stated much too widely, preferring the view of Whitford J. in *CBS Inc. v. Ames Records and Tapes Ltd* [1982] Ch. 91, a case in which a record lending library that also supplied blank recording tapes at a discount was found not to have authorised infringement of copyright.

71. In my view the evidence adduced against Mr Bourke falls well short of establishing a *prima facie* case that he authorised the infringement of PPI's copyright by the playing of sound recordings at the Savoy nightclub. While I prefer the conception of 'authorisation' articulated by the House of Lords in the *Amstrad* case to that expressed by the High Court of Australia in *John Fairfax & Sons* as regards the limits of authorisation by supply, I do not believe PPI has succeeded in making out a *prima facie* case that would bring Mr Bourke within either. As regards authorisation through control, I do not accept that by signing a small number of cheques on behalf of Southlinch, as purported fair payment for its licence of right to play sound recordings at the Savoy nightclub, Mr Bourke could be said to be exerting control over Southlinch in respect of its infringement of copyright by playing those sound recordings in exercise of that right but failing to make a further payment that fell due some three years later. Nor do I accept that, otherwise, Mr Bourke's 37% shareholding in, or directorship of, Southlinch are sufficient to establish that he controlled it and, therefore, sanctioned, approved or countenanced its infringement of copyright through the exertion of that control.

72. I turn finally to the issue of whether a *prima facie* case has been made out that Mr Bourke is a joint tortfeasor with either Southlinch alone or with both Southlinch and Mr Foyle.

73. In *MCA Records Inc v Charly Record Ltd* [2003] 1 BCLC 93, the decision relied upon by Carroll J. in *Tommy Hilfiger Europe Inc v. McGarry* [2005] IEHC 66, Chadwick L.J. cited with approval the following dictum of Le Dain J, giving judgment for the Federal Court of Appeal in Canada in *Mentmore Manufacturing Co Inc v. National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 on the 'very difficult question of policy' whether, and if so in what circumstances, a director should be held liable with the company as a joint tortfeasor (at 202):

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

74. Having cited the foregoing passage from *Mentmore*, Chadwick L.J. then added (at p. 116) that this was a balance to be struck on the facts of each case. In that regard, there are several aspects of the facts of this case that I consider of particular significance in attempting to strike the appropriate balance.

75. If I take the view urged on me in submissions by Counsel for Mr Bourke that much of the material on which PPI seeks to rely is simply not admissible in accordance with the strict rules of evidence, then I am left with little evidence concerning the essential facts of this case beyond so much of the testimony of Mr Murtagh and Mr Lynch as dealt with matters within their own direct knowledge and, perhaps also, the contents of the company report on Southlinch insofar as those contents are drawn from publicly available records.

76. On the other hand, the train of correspondence and related documentary materials that PPI has sought to rely upon (although without strictly proving them in evidence) provide a much fuller picture of the matrix of fact surrounding the infringement of copyright in this case. In particular, that correspondence and those documents establish that a licence of right to play sound recordings in public at the Savoy nightclub, under s. 38(1) of the 2000 Act, was invoked by the delivery of a notice of intention to do so dated the 20th August 2003; that a dispute in relation to fair payment in that regard was referred to the Controller under s. 38 (4), where it seems to have languished for some time; and that, in January 2007, the Controller confirmed his understanding that a settlement had been reached in relation to the appropriate payment for the playing of sound recordings at that venue. In the written submissions produced on its behalf, PPI asserts that "when there ceased to be a dispute as to fair payment, the defendants did not make payment of that amount and accordingly are liable", thereby acknowledging that the relevant amount fell due when the dispute between the parties was resolved, presumably either late in 2006 or in January 2007. PPI has produced in court the company's Financial Statement for the year ending the 31st December 2006, including a *directors' report* containing the statement that "the company had a difficult year in 2006 and ceased trading in 2007."

77. A further aspect of the factual matrix in this case is the acknowledgment on all sides that Southlinch made payments to PPI between 2000 and 2006 totalling €66,581.39, and that it was only upon the resolution of the dispute concerning fair payment that fresh or further invoices were raised in the aggregate sum of €116,948.83, creating a shortfall of €50,367.44, which is the subject of the present action.

78. A notable feature of the evidence in the case is the absolute confusion on all sides concerning the identity of the legal or natural person or persons invoking a licence of right to play sound recordings at the Savoy nightclub in accordance with the provisions of s. 38 of the 2000 Act. The confusion on the part of PPI in this regard is perfectly understandable in light of the following matters: the notice it received from Sherland Entertainments Inc, drafted in terms that made it appear the right was being invoked on behalf of the premises rather than any person; the subsequent correspondence purportedly emanating from the same source, apparently signed by Mr Foyle, and stating that Mr Bourke and Mr Foyle were exercising the right; and the information readily available to PPI, whether or not actually obtained by it, that Southlinch owned the premises, Southlinch held the liquor licence attached to the premises, and Southlinch was the source of the monies transmitted by standing order during the relevant period as fair payment for the exercise of the right. However, it is impossible to absolve the PPI of all blame for the confusion that was allowed to persist for so long (and which, perhaps, to some extent still continues) because I cannot ignore the fact that, under s. 38 (2) (e) of the 2000 Act, a person can only avail of a licence of right to play sound recordings in public on condition, *inter alia*, that he or she complies with any reasonable request for information from the licensing body to enable it to manage payments. There is no evidence before me of any request for clarification of the identity of the person seeking to avail of the right in respect of the Savoy nightclub.

79. One final significant feature of this case is the nature of the claim that is being made. PPI has elected to bring a claim for damages for copyright infringement instead of, and not in addition to, either a claim for damages for failure to make fair payment or a claim for breach of the settlement agreement by reference to which the fair payment dispute between the parties had been resolved. In pursuing the former claim only, PPI is obliged to rely on the argument that failure to make the relevant payment in respect of that compromise is equivalent to failure to make a payment ordered by the Controller under s. 38 (7) of the 2000 Act or to failure to make the appropriate payment to PPI under s. 38 (2) (c) of that Act, thereby breaching a statutory requirement equivalent to a *condition subsequent* in respect of the licence as of right to play the relevant sound recordings, in turn rendering the said statutory licence void *ab initio*, and, consequently, retrospectively making the playing of the relevant sound recordings an infringement of copyright, sounding in damages in an amount equivalent to the fair payment that might otherwise have been directly claimed. In short, this is not a simple claim for the infringement of copyright.

80. Bearing those facts in mind, I must now address the question whether PPI has established a *prima facie* case that Mr Bourke procured or induced the infringement of copyright by Southlinch or Mr Foyle, or both, or whether he engaged in a common design with either of those persons pursuant to which copyright was infringed.

81. In that regard, I have come to the view that the facts of the present case are clearly distinguishable from those addressed by Carroll J. in *Tommy Hilfiger Europe Inc v. McGarry* [2005] IEHC 66. The latter was a trademark infringement and passing off case. The defendant director was directly involved in the acts complained of – the promotion and sale of infringing items of clothing. He sourced the clothing; he promoted it at a trade fair; he sold it to retailers. It is unsurprising that Carroll J. was able to conclude on the facts presented that the defendant director 'both procured and directed the wrongful acts and carried them out.' There is no question in this case of Mr Bourke carrying out the act of playing sound recordings to the public in the Savoy nightclub (leaving aside any issue concerning whether such playing might have represented the lawful exercise of a licence of right). Nor is there any evidence that, as a 37% shareholder and director in Southlinch, the company operating that nightclub, Mr Bourke procured or directed Southlinch (or his fellow director Mr Foyle) to do so. While I accept that, in signing a limited number of cheques as fair payment for the exercise of a licence of right to play sound recordings in public, Mr Bourke was, to that limited extent, going beyond the mere

exercise of constitutional control as a director, I do not accept that those limited actions (the purpose of which can only be construed as to avoid infringement) would have made him liable for the tort of infringement were he not a director.

82. The other principal authority relied upon by PPI in support of the contention that Mr Bourke is liable to it as a joint tortfeasor is the note of the judgment of Charleton J. delivered on the 23rd November 2007 in the case of *PPI v. Kelliher and Millcastle Taverns Ltd*, supra. In relevant part, Charleton J. is recorded as stating that it was appropriate to give judgment against both defendants jointly and severally as both the first defendant in that case and his company, the second defendant, were involved in the playing of the music and there was, therefore, no reason to permit the former "to hide behind" the latter. Unfortunately, in the context of the brief *ex tempore* ruling on that uncontested application for judgment in default of defence, there is no information concerning the nature and extent of the first defendant's control of the company concerned, nor is there any information concerning the nature and extent of his personal involvement in the playing of the music. For those reasons, I find the note of no assistance in the resolution of the question I must decide, and it does not alter my conclusion that there is no evidence in this case that Mr Bourke directed or procured the infringement of copyright by the company, or that he engaged in a common design with any other person to that end.

Conclusion

83. For the reasons that I have set out, I accede to the application on behalf of Mr. Bourke for a non-suit. I will, therefore, make an Order striking out the claim against him.