

MUSIC LAW UPDATES

The Doctrine of Restraint of Trade in Relation to Music Industry Agreements

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In this article Andrew looks at the decisions of the UK courts which have, over the last thirty years, developed a body of law under the doctrine of restraint of trade which will, in certain circumstances, allow artists to ask courts to hold their exclusive recording contracts and exclusive music publishing contracts unenforceable where the provisions of such contracts are unreasonable.

All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Unless the unreasonable part can be severed by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant or the entire contract unenforceable. With the case of *Nordenfelt v Nordenfelt*, it was decided as a matter of policy that although general restraints were prima facie void, such restraints may be considered valid provided that the party alleging its validity could prove it reasonable as between the parties and in the public interest. The decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*, although directly applicable to 'solus agreements', paved the way for both a further re-evaluation of restraint of trade and an opportunity to expand the doctrine in areas that had traditionally been beyond its ambit.

In relation to the music industry, it has been seen that the courts do not interfere lightly with bargains between artists and management, publishers or record companies. As Lord Reid said in *Esso Petroleum -v- Harpers Garage* "in general unless a contract is vitiated by duress, fraud or mistake, its terms will be enforced though unreasonable or even harsh and unconscionable in the ordinary case the court will not remake a contract". The parties generally are held to the agreement entered into no matter how unbalanced the terms may appear.

The doctrine of restraint of trade is an exception to this approach developed by the court. It is important to consider what the court is doing when it applies the doctrine of restraint of trade to an agreement. It is generally accepted the aim is not to protect the weak or vulnerable from transactions the court considers unfair, that is the role of the doctrine of undue influence. In the music industry there has been a blurring of the distinction between the doctrine of restraint of trade and undue influence. This reflects the fact that both doctrines are used to protect the interests of artists who enter into restrictive agreements when in a position of poor bargaining power.

Normally the doctrine of restraint of trade has no application to exclusive contracts and requires no justification but "if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, they must be justified before they can be enforced". An artist may seek to challenge a contract not because it restricts him from carrying on his business once the agreement has ended (although there may be post-contractual restrictions) but because during the agreement the artist is exclusively committed to another party (i.e. the record or production company) and the other party is not committed in the same way.

The company may not be obliged to record, exploit, publish or release an artist's compositions or recording. During the agreement the artist cannot carry on his business and provide services for whoever he wishes. The artist may argue he is prohibited from earning a living. Typically an artist's recording contract will commit the artist to the record company for an initial period which may be extended for a number of option periods. In each period there is usually a product delivery

requirement. The total period of such contracts may be between one to ten years and involves the artist in a continuing obligation to provide recordings for the recording company to exploit if it wishes.

The last definitive statement concerning the way in which the doctrine applies to music industry agreements, was contained in *Schroeder -v- Macaulay* in 1974 in the House of Lords. In the cases which have followed Schroeder such as *ZTT -v- Johnson* (the Frankie goes to Hollywood case), *Silvertone -v- Mountfield* (the Stone Roses case), *Panayiotou -v- Sony Music* (the George Michael case) and *William Nicholl -v- Shaun Ryder* (the Shaun Ryder case), the courts have applied the principles stated in Schroeder rather than developing any new principles of law. Considering the scope for the doctrine to apply in the music industry, with young inexperienced individuals pitched against large multinational corporations, comparatively few cases have reached the courts. Many cases will settle long before they ever get near the courts.

The Nordenfelt Test

The mechanism the court uses to determine whether a restriction is an unenforceable restraint of trade is what is known as the Nordenfelt test. This was set out by the House of Lords in its definitive analysis of the doctrine of restraint of trade. Lord Macnaghten identified a two stage approach to be applied, to the effect **that a restriction will only be enforceable if such a restriction is both reasonable between the parties and does not offend public policy** (*emphasis added*). When Should the Test be Applied? Before applying the Nordenfelt test the court must first decide whether the contract in question attracts the restraint of trade doctrine at all. The George Michael case showed the approach taken. The doctrine only applies to contracts which are in restraint of trade in the sense that this is used “as a term of art covering those contracts which are to be regarded as offending a rule of public policy”. There are two elements: the contract must (1) be in restraint as the term is used in ordinary parlance and, if it is, the court must then consider (2) whether there is some reason to exclude the contract from the application of the doctrine. The Nordenfelt test will only be applied if the contract passes this two stage test.

In George Michael the court held the recording agreement between the artist and his record company was a “compromise agreement” i.e. an agreement settling a dispute. For reasons of public policy the court considered compromise agreements to be beyond the scope of the doctrine of restraint of trade and therefore decreed in this instance the doctrine did not apply - so the artist’s case fell at the first hurdle. The court did go on to express what its decision would have been if the doctrine had applied, thus providing further guidance on the way in which the courts approach the enforceability of music industry agreements. If the court considers the doctrine applies to a contract, it will go on to apply the first limb of the Nordenfelt test, namely, are the restrictions reasonable between the parties? The burden of proof that as between the parties the restraint is reasonable lies on the party seeking to enforce the contract i.e. the manager, publisher or record company who must show the restrictions are reasonable between the parties. The restrictions are therefore presumed unreasonable unless the manager, publisher or record company can demonstrate the contrary. However, the burden of proving that as far as the public interest is concerned the restraint is unreasonable lies on the party seeking to avoid the contract.

The court will look at two areas: whether the restrictions go further than providing adequate protection for the legitimate interests of the party in whose favour they are granted i.e. the manager, publisher or record company and whether they can be justified as being in the interests of the party restrained i.e. the artist.

Esso -v- Harper formulated a two stage test to determine whether a situation attracted the doctrine. Firstly, what are the legitimate interests of the party seeking to enforce the contract which it is entitled to protect? Secondly, are the restrictions more than adequate for that purpose? These are questions of fact depending on the business and circumstances of the case in question. It is established that restrictions are examined as they would have applied to both parties at the date of formation of the contract. The court should consider from the standpoint what may happen under the contract rather than look at what actually has happened.

The legitimate interests of a record company seeking to rely on restrictions contained in a recording agreement have been set out in the Frankie goes to Hollywood and George Michael cases. In the

Frankie goes to Hollywood case, the court was not particularly impressed by the legitimate interests raised and thought that any validity that they might have possessed was outweighed by the one sided bias of the contract. In the George Michael case, the court commented that all of the interests listed were valid aspirations for any record company. The court thought that the restrictions in the contract went no further than was necessary to protect the record company's legitimate interests. The court will consider whether the restrictions were justified in view of the artist's interest in obtaining the benefit to him under the contract in question. The aim is to balance the parties' interests - the artist will wish to obtain the benefit of the contract without restricting himself unduly, while the manager, publisher or record company in question will want to maximise its own benefit under the contract.

The Effect Of An Agreement Being In Restraint Of Trade

The decided cases use various terms to describe the effects of contracts that constitute an unreasonable restraint of trade. They have variously been described as being "void", "voidable" or "unenforceable". The distinction is important, if a contract is void it will be of no legal effect whatsoever. If it is voidable, it will be enforceable until a right of avoidance is exercised. If it is unenforceable, the contract will be valid in all respects for the exception that one or both parties cannot be sued over it. An offending clause may be severed from the contract, this involves separating the void part of the contract from the valid part. In reality the courts only apply "the blue pencil test" if the contract makes sense without the restrictive part.

The effect of an agreement being declared to be in restraint of trade also brings about a number of considerations insofar as copyright is concerned. The declaration granted in *Schroeder* was that the agreement was contrary to public policy and void. Normally agreements in restraints of trade are voidable and not void - it may be better to describe the agreement as unenforceable. The writer is not bound by the agreement from the moment it is held to be in restraint of trade and it will follow any assignment in the copyright or future works is not effective to vest in the publishers the copyright in the works brought into existence after the agreement was held in restraint of trade. The position of copyright in works already brought into existence at that date is far from clear. If such an agreement is truly void, it would follow no assignment of such copyright would have taken place but if, as it is thought, such agreement is merely voidable as to future works, then the position may be that the legal title to such works in existence before the agreement is avoided is effectively assigned to the assignee at law by such agreement. Notwithstanding subsequent avoidance of the agreement, it remains vested in the assignee, subject to the court ordering in exercise of its equitable jurisdiction the re-assignment of copyright in such work. The question is particularly important in the case of any work which the publishers already at the date have exploited, either themselves or by granting rights to others. A further problem arises in connection with any separate assignment of copyright in particular works in which a songwriter, engaged under such an agreement, is asked by the publishers to execute. Such assignments are often taken for no further consideration than the publishers promising to pay royalties on the work being published, usually in the same terms as in the principal agreement.

In themselves such individual assignments are clearly not within the principles applied in *Schroeder* in that the only reason for their execution is the pre-existing obligation under the principal agreement. But if the latter agreement is subsequently found to be unenforceable, it is argued the same should apply to any such individual assignments.

The Application of the Doctrine of Restraint of Trade in the Music Industry

Music Publishing

Schroeder Music Publishing Company Limited –v- Macaulay (formerly Instone) . The case involved a young and unknown song writer who entered into an agreement for his exclusive services with a publishing company for five years. It was their standard form agreement. The song writer assigned the full copyright for the whole world in each of the original songs created at any time during the agreement. The publisher paid £50.00 as a general advance against royalties and when the first £50.00 was recouped from royalties they would advance a further £50.00 to be recouped from royalties. The advances were to continue throughout the initial five year period. However if the total royalties advanced equalled or exceeded £5,000.00 then the agreement was automatically extended

for a further five year period. The publisher could terminate the agreement by giving one months written notice, the song writer was unable to terminate in such a way. The publishers were under no obligation to publish any of the songs and were merely obliged to pay royalties and to make modest advances against them. The song writer sought a declaration that the agreement was contrary to public policy as an unreasonable restraint of trade and was therefore void. This was an exclusive agreement that allowed the publishers to do as they wished with the copyright. The song writer could not assign any of the copyrights elsewhere during the term. The agreement was in the publisher's standard form and expressed to be non-negotiable. The court held all the terms of the contract had to be considered and to decide if the bargain made was fair. It had to decide if the restrictions contained in the agreement were both reasonably necessary for the protection of the legitimate interest of the publisher and commensurate with the benefits Macaulay received. It held the restriction was not fair and reasonable, there was a lack of obligation on the part of the publishers with total commitment from the song writer. The publishers were not required to publish any compositions and the song writer could earn nothing if the works were not published.

In reaching the decision, the court noted, under the agreement originally drafted, the song writer was tied to the publishers and could not recover the copyrights in works the publishers refused to publish. Although the court did not consider for the agreement to be reasonable the publishers should enter into a positive commitment to publish future works by an unknown song writer, it felt there should be a general undertaking to use reasonable or best endeavours to promote the work. There should also be some provision to enable the song writer to terminate the agreement. The comments made about the standard form of contract by Diplock LJ was that it was "a take it or leave it" contract. It had not been the subject of negotiation between the parties or approved over the years by way of negotiation.

Recording Contracts

Zang Tumb Tuum Records Limited and Another –v- Holly Johnson . This case involved an action brought by a recording company ZTT and its sister music publishing company Perfect Songs against the defendant Holly Johnson who was the lead singer of Frankie goes to Hollywood. When Holly Johnson wanted to leave the group, the claimants issued proceedings claiming the contracts were valid and Holly Johnson was bound by a "leaving member" clause to enter into a new recording agreement with the company and could not sign a contract with any other company. The agreement had been signed in 1983, it was made clear at the outset that the offer of the recording contract was intimately bound up with the publishing agreement with the sister company Perfect Songs. There was no suggestion the claimants exercised any undue influence over the group or the defendant, or they had acted fraudulently or in bad faith. Holly Johnson resisted the proceedings on the basis the contracts were so one-sided and unfair they could not stand and be enforced. At first instance (10 February 1988) the Judge (Whitford J) held the agreements were unenforceable and ZTT/Perfect appealed. The case came before the Court of Appeal and judgment was handed down on 26 July 1989. The case was significant, as whilst Schroeder demonstrated the doctrine of restraint of trade applied to publishing contracts, this was the first case where the doctrine was considered in relation to recording agreements.

Dillon LJ for the Court of Appeal determined a number of clauses stringent but three provisions were crucial. These were relating to the length of term, the minimum recording commitment and the leaving member provisions.

(a) Group members were bound collectively and individually for up to seven "option periods" and the agreement could have lasted eight to nine years.

- The claimants were free to terminate the obligations at any time but the group were bound to record only for the claimants.

(c) The claimants had the last word on all matters, including approval of compositions and expenditure on recording costs.

- The claimants had an absolute discretion to refrain from releasing records, even if the records were not released, copyright in them would remain in the claimants

- Although the group and individual members were bound exclusively to the companies, the companies were not exclusively bound to them.

The court found both the recording and publishing contracts not a fair bargain and in restraint of trade.

Silvertone Records –v- Mountfield (the Stone Roses case) . The Stone Roses formed in Manchester in 1985. The band signed a recording deal with Silvertone Records (the original agreement was signed with Zomba Productions Limited and assigned to Silvertone) and Zomba Music Publishing in April/May 1998. The recording and publishing agreements were a joint package, it was clear one could not be signed without the other. The defendants were advised by their manager and a lawyer at the time when they signed the contract. However, their manager was inexperienced and the lawyer appeared to have little or no experience of the music industry. By 1990 the group's progress had become stifled and by the end of the year they were involved in litigation. The litigation, following unsuccessful negotiations, revolved around claims that the publishing and recording contracts signed by the band members were an unreasonable restraint of trade and unenforceable. The companies Zomba and Silvertone sought declarations from the court that the contracts were valid and enforceable together with injunctions to uphold the agreement. The case came before Mr. Justice Humphries in March and April 1991 and he handed down judgment on 20 May 1991. An important preliminary point was whether the agreements were caught by the doctrine of restraint of trade. Relying on dicta in *Esso –v- Harper*, the judge held as a matter of construction that the contracts were in restraint of trade. Two clauses within the recording contract allowed the company sole use of all masters in perpetuity and included the right to commence or discontinue production of records. The clause meant the company did not have any positive obligation to release or distribute any records at all throughout the territory covered by the agreement – encompassing “the world and its solar system”. Additionally, the re-recording clause prevented the group from re-recording any musical works embodied on masters owned by the company and also performing them live when performance might be recorded “in any form”. As the contract was able to effectively sterilize the output of the group the judge found the recording contract operated in restraint of trade and would therefore be considered by the court.

Once the contract was considered in restraint of trade, the court needed to ask whether the restraint was unreasonable. The length of the agreement was crucial, the term was calculated on a basis of an initial period of one year, to be followed by six possible option periods, to be exercised at the whim of the company. This could amount to a minimum seven year term. The judge on this basis considered the recording agreement unenforceable and only briefly analysed the more minor points which were equally one-sided. The judge said “suffice to say in almost every clause it is the name of Zomba which is being provided for”

The publishing agreement also fell as being an unjustifiable restraint of trade even though it did not contain all the flaws of the recording contract. The relationship between the two agreements was such that one could not be signed without the other. Given the conclusion on both contracts the two companies requested the unfair elements to be severed, leaving those parts of the contract which were fair intact. The judge found two objections to this. As each of the periods were arguably indefinite due to the provisions for release of minimum recording commitments in the USA, any severance would make little difference. The first period could still last for such length as to render the agreement unfair. Secondly the whole process would involve the court in determining a crucial element, the term being a key feature in determining the overall fairness of the contract.

The judge was only prepared to consider the contract in its entirety. Severance was also rejected as a means to fix the publishing agreement as both were held unenforceable. The declarations and injunctions sought by the claimants were refused. The case took its toll and it was 3½ years before any new material was released by the group.

Panayiotou –v- Sony Music Entertainments (UK) Limited (the George Michael case): In this case, the artist George Michael alleged his exclusive recording agreement dated 4 January 1988 with Sony (the 1988 agreement) was void or unenforceable (insofar as it remained unperformed) as being in unreasonable restraint of trade. He also alleged the agreement was prohibited by Article 85(1) of the Treaty of Rome. Although it was only the 1988 agreement which was in issue, the background was important. The claimant and Andrew Ridgley were both young and inexperienced in the music

industry when they entered into an exclusive recording agreement on 25 March 1982 with Melody Shire Limited trading as Inner Vision (the 1982 agreement). The agreement was for their exclusive performances for up to four singles and ten albums. Inner Vision had a licence agreement with Sony and the 1982 agreement incorporated Sony's then standard artists conditions. In 1983 the claimant and Ridgley were in dispute with Inner Vision claiming the 1982 agreement was unenforceable as restraint of trade. The basis was that Innervision had a licensing deal with CBS. Inner Vision commenced proceedings which in due course were compromised by the Innervision agreement being revoked and the claimant and Ridgley entering into a recording agreement with CBS (Epic) (the 1984 agreement) on CBS's then standard form of recording contract. The 1984 agreement bound Wham! to deliver eight albums should the record company decide to take up all the options.

The claimant and Ridgley ceased to perform as a group and in 1986 CBS exercised its option against the claimant, acquiring the exclusive right to his performances as a solo artist. The claimant renegotiated the terms of his recording agreement with Sony (who took over CBS towards the end of 1988) and entered into the 1988 agreement. The 1984 agreement thus ceased to have effect. The claimant was obliged to deliver three albums in the initial period of the 1988 agreement, "Faith" was treated as the first and "Listen Without Prejudice" was the second in July 1990. Further variations were negotiated and agreed to the 1988 agreement. Before delivery of the third album, the present dispute arose and the claimant was advised on 14 February 1992 it was open to him to contend the agreement was in restraint of trade. However one week later on 20 February 1992 George Michael's accountant wrote to Sony to ask for payment of an advance of eleven million dollars due under the same agreement. This money was repaid two months before proceedings were issued in October 1992 so as not to be seen to have affirmed the contract (this ploy was unsuccessful). The EC element was groundbreaking, the significance was that if the European argument was successful then the agreement would be void rather than unenforceable as under the common law doctrine of restraint of trade.

As regards restraint of trade, Parker J. adopted an innovative approach to the application of the doctrine of restraint of trade and public policy. Traditionally courts have first determined whether or not the contract before them is a contract that attracts the doctrine. Parker J. carried out this process and concluded the terms of the 1988 agreement were held to contain a restraint of trade as understood for the purposes of the common law doctrine. However rather than proceed directly to the 'reasonableness' test, Parker J. considered that public policy prevented the claimant from challenging the contract at the outset. The judge held the 1988 agreement had to be considered as a renegotiation of the 1984 agreement. This itself was a compromise of proceedings which raised issues of the enforceability of the 1982 agreement. The claimant had expressly not sought to assert the enforceability of the 1984 agreement in the current proceedings. The court concluded the 1984 agreement had to be treated for the purposes of the current proceedings as an enforceable agreement. The court accepted Sony's argument that public policy relating to compromise of disputes precluded the claimant from alleging the 1988 agreement was in restraint of trade. For this reason alone the claimant's claim failed. Whilst the principle was directly applicable to the current dispute, the circumstances leading to the 1984 agreement are clearly distinguishable. The parties to the original 1982 agreement, from which all future agreements evolved, were Wham! and Innervision, and not the defendant company. Although there was a licensing agreement between Innervision and CBS, the former was a separate corporate and commercial entity and did not merely act as agents on behalf of the defendant. Parker J.'s application of estoppel may have been more convincing had the 1984 agreement been offered by Innervision.

The court then went on to consider whether the contract would have passed the reasonableness test as in Nordenfelt. Although it initially appeared these interests must be proprietary, Parker J. accepted that Sony Music had 'commercial' interests to protect and regarded them as legitimate. (see *Appendix 1* for list of interests advocated by Sony and accepted by Parker J.) He then addressed the reasonableness of the restrictive terms. Whilst the contractual terms should be looked at as a whole when evaluating the reasonableness of any restraint, it is clear the individual issues of duration, exclusivity and territory have proved to be critical considerations. He turned his attention to the length of the deal and concluded: 'The duration of the 1988 agreement is to some extent within Mr Michael's own control, in that it is up to him to shorten the duration of the agreement by delivering albums more speedily.' The agreement was divided up into an initial period in which three albums were to be delivered and five ensuing option periods exercisable at the discretion of Sony. The agreement was further subject to the 'capping provision' which provided a maximum duration of fifteen years if the

minimum delivery commitment was not complied with. Whereas previous cases looked at agreements of this length and concluded the truncated nature of careers meant that such long terms were unreasonable, Parker J. based his analysis on the fact that the option periods would not be exercised unless George Michael was successful in his career. In taking this approach Parker J. appears to have disregarded issues of sterility and public policy as established in *Schroeder* by looking solely at remuneration and commercial success. Whilst it could be argued that George Michael was distinguishable from Holly Johnson or the Stone Roses in being an international superstar - if the relevant date for George Michael is taken at the date of his signing his first record deal with Innervision, which he believed was still enforceable at the date of his re-negotiations with Sony, his 'stature' would perhaps be similar to the aforementioned artists. Secondly, even if his stature was akin to a 'superstar artist', it is clear the doctrine of restraint of trade had begun to attach itself to contracts of this nature and afforded artists in his position with some protection. Consequently his contentions were based upon comments explicit in *Esso* and *Schroeder* relating to sterility of artistic talent.

It was evident from George Michael's contract that Sony had vital control over his creative output with their ability to stifle his artistic development on grounds of lack of commercial appeal. Clause 5.01 of his contract provided that: 'The Service Company (Robobuild Ltd were the production company owned by George Michael who would be responsible for recording, editing and mastering material) will deliver the Master recordings in the form of fully edited stereophonic Master recordings. A master recording will not be considered satisfactory under this agreement unless it is technically satisfactory for manufacture and sale of Phonograph Records and it embodies performances that are at least the quality of the Artist's prior recorded performances.' The possible effect was even if George Michael wished to change direction and alter his musical style in accordance with his perception of himself as a 'serious artist', Sony could reject the recordings as part of his delivery commitments on the premise of 'quality' even though their concerns may be based upon sales considerations and the effect on their investment. The court held the terms of the 1988 agreement were justified and the agreement was fair. The restrictions were reasonably necessary for the protection of the legitimate interests of Sony and commensurate with the benefits secured to the claimant under the agreement.

A more recent case involving an artist alleging restraint of trade was the case of *Shaun Ryder –v- William Archibald Nicholl and Another*. Here it was held that pleas of estoppel and/or affirmation were both available by way of answer to an allegation that an agreement was unenforceable by reason of undue influence or an unreasonable restraint of trade.

The case involved Shaun Ryder, formerly of the band Happy Mondays, where he claimed he was able to repudiate a management agreement on the grounds the agreement had been procured by the exercise of undue influence and was unreasonably in restraint of trade. The grounds of voidability had been known to Ryder's solicitor from almost the very beginning. That knowledge was to be imputed to Ryder and in continuing to honour the agreement thereafter, Ryder was estopped from asserting the voidability and/or had affirmed the validity of the agreement. Negotiations in relation to the agreement were initially conducted by Ryder's solicitor (who the judge found to be Ryder's unofficial manager) and the respondent's solicitors. The first respondent was unhappy with the terms proposed by Ryder's solicitor and decided to approach Ryder directly with a view to procuring his signature to the agreement in the form the respondents desired. He knew that Ryder was dyslexic, abusing drugs and unable or unwilling to concentrate on paperwork. Ryder signed the agreement, this fact soon came to Ryder's solicitor's knowledge. The solicitor considered the agreement as drawn was unreasonably in restraint of trade but made no objection at the time, believing the respondents were the best prospects Ryder had for reviving his career. In due course Ryder and the respondents fell out. Ryder refused to continue to be bound by the agreement. The respondents brought an action for damages for breach of agreement. Ryder initially defended the action on the basis the agreement was void as unreasonably in restraint of trade. The plea of undue influence was subsequently added. The judge found both defences made out on the evidence, but nevertheless went on to hold Ryder as having honoured the agreement in circumstances where his solicitor's knowledge of voidability of the agreement was properly to be imputed to Ryder. On appeal, Ryder contended unsuccessfully the agreements were in restraint of trade and obtained by undue influence and were offensive to public policy and could not be rendered enforceable by a plea of estoppel or affirmation.

The cases referred to above illustrate the application of the doctrine of restraint of trade in relation to music business agreements. Whilst each case turns on its own facts and the terms of the agreement entered into by the performer, the principles developed in Schroeder will be applied by the court.

In Schroeder certain terms were singled out pointing to the conclusion that the agreement was unduly restrictive. These were set out in the speech of Lord Reid:

The relative bargaining power of the parties and the consideration paid: In the Stone Roses and Holly Johnson cases, these were young inexperienced and unknown artists who entered into agreements capable of operating in a one-sided and oppressive manner. The court emphasised the difference between the parties in the Stone Roses case in terms of experience and expertise. Thus the Court was willing to set aside the agreement. George Michael was an experienced and successful performer who was able to renegotiate on favourable terms. The George Michael case was decided mainly on public interest in upholding genuine compromises.

The duration of the term – which includes any possible extension whether automatic in certain events or at the option of the publisher . In The Frankie Goes to Hollywood case, the court thought a possible eight or nine year duration was unreasonable and that five years was too long in relation to the publishing agreement. In the Stone Roses case there was a potential period of seven years or possibly even an indefinite period of duration, coupled with no release commitments. In the George Michael case, duration was defined by the artist's obligation to deliver masters within various options periods, subject to a 15 year cap. The court did not consider this potential duration to be unreasonable. In the Shaun Ryder case a management contract for a seven year term (comprising an initial term of three years and two two year options) was considered unreasonable.

The exclusivity of services and the extent of works covered by the agreement – are all outlets for the writer's creative talents covered or only certain fields, leaving him free to exploit his talents in other fields? Furthermore are all the writer's past and future works created during the term covered by the agreement? The narrower the scope of the restriction in these two respects, the less likely it is to be found unreasonable.

The right to assign the benefit of an agreement . An unqualified right on the part of the publishers, coupled with a qualified right or express prohibition against assignment by the writer, may be unreasonable. In the Stone Roses case the court was critical of the record company's right to assign its interest. In George Michael it decided the right of assignment involved a remote risk of detriment to the artist.

Whether the publishers under any meaningful obligation to publish or exploit any of the writer's works . If not practicable, this may give the writer the right to terminate the agreement and to call for a reassignment of copyright in unpublished works if they are not published. In the Schroeder case, the court thought some positive obligation on a publisher was necessary, not going so far as a positive commitment to publish the work of an unknown composer but a "best endeavours" clause to promote the composer's work. In the Frankie Goes to Hollywood case, the court criticised the absolute discretion given to the record company whereby it could refuse to release records and still have the copyright in unreleased recordings assigned to it. In the Stone Roses case, the record company would not have been saved by a proposed amendment requiring it to allow a third party "chosen by mutual agreement" to release records if it had later declined to do so. In the George Michael case the record company's only obligation was to release three singles in the UK and the USA. If it did not release the albums in the UK George Michael could serve notice requiring release and if not done the contract would terminate. Elsewhere the artist could compel the record company to enter into good faith negotiations with third parties to licence unreleased albums. The court took the view there was no real risk the record company would not release George Michael's records and to recognise such risk would be a "distortion of commercial reality".

The availability of legal advice . The fact that an artist has taken expert independent advice will not itself render restrictions reasonable. The court must ask in each case whether the contract was fair at the time it was concluded. If the lawyer is not experienced in music industry matters it will not represent an equal bargaining power. In the Stone Roses case, the court stressed the knowledge of music industry lawyers would extend to the state of the market and an appreciation of the impact of

various terms and the state of law of entertainment contracts generally. In the George Michael case, the terms were renegotiated for him by specialist lawyers and a clause in the contract said “I am not a minor and I have taken legal advice in relation to this agreement prior to entering the same”.

The rights of consultation with the artist concerning the choice of material to be exploited and the choice of producer, recording budget and acceptance of masters .

The leaving member provisions – namely any clause requiring a leaving member’s new band to be acceptable to the record company and to be required to enter into an agreement on the same terms as the band. Also where any new member could only be allowed to join if approved by the record company and if he signed same deal as the rest of band.

Post termination provisions – namely post termination restrictions on re-recording and in management contracts where the manager has a right to commission on product recorded and released after end of the term of the management agreement. The court will ask, looking at it as a whole, will the agreement result in the sterilization of the earning output of the writer for a considerable time? If so, it will be for the party imposing the restrictions to show it is both reasonably necessary for the protection of the parties’ legitimate interests and commensurate with the benefits secured to the party restricted.

The publishers in *Schroeder* were held not to have discharged the onus and Lord Reid stated “any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during the period of the common law right to exercise any lawful activity he chooses in such manner as he thinks fit”. Normally the doctrine of restraint of trade has no application to such restrictions. They require no justification, “but if contractual restrictions appear unnecessary or unreasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.

Conclusions

The range of cases from *Schroeder* to *George Michael* illustrate a number of similarities both with respect to terms and also bargaining processes. Whilst the remuneration terms between *Schroeder* and *George Michael* were vastly different, many of the basic principles are similar. It is these common terms that form the heart of publishing and recording agreements - the key elements are exclusivity, duration and territory, ownership of material, provisions for exploitation and the right to terminate and assign. Even successful artists have to accept they have only a limited ability to alter basic terms of agreement, although they may be able to negotiate greater rewards with higher royalty rates and larger advances. The key points of exclusive performance over a wide geographical area for potentially long periods are unassailable. Despite the decisions in *Schroeder* and *Holly Johnson*, the very terms the court found so objectionable when gathered together have reappeared in later cases. The music industry has taken a number of pragmatic responses to cases dealing with issues of control and there are emerging signs of increased “transparency” whilst acknowledging the “employer” holds the upper hand which makes sound financial sense to keep the artist happy. This has translated into an openness about contractual negotiation and terms that may pay long term dividends by fostering a closer and more trusting relationship between the parties.

As a result of the *Holly Johnson* case, record contracts now contain a clause committing the record company to releasing records in at least the home country (also the term and number of options to extend the term has been shortened by one to two years). If records are not released, then the contracts give the right to end the contract and for the artist to get the recordings back in return for an override royalty being paid to the record company.

In the *Schroeder* case, there was a change in publishing contracts whereby the length of term is limited and there is a maximum backstop, usually no more than three years per contract period. There is usually a requirement to do something with the songs and a contract often says if the publisher has not granted either a mechanical or synchronisation licence for a song, or has not printed the sheet music or it is not performed in public, say within one to two years of the song being delivered, then the artist has the right to ask the publisher to do something positive. If nothing is done within a further

three to six month period then the artist gets the copyright in the song back. Also, the songwriter has a say on what happens to the songs delivered, this is usually to say that there is to be no major change to the music or to any change in the lyrics made without the writer's approval. Furthermore, criticism of the 65/35 split between the artist and the publisher has led to the average publishing royalty rate rising to 70% in the songwriter's favour, with the publisher keeping no more than 30%. Arising from the George Michael case, there is a need to take care where previous disputes have been settled and new contracts entered into.

The courts should be prepared to accept that artistic work has a value that is more than purely fiscal. The historical development of the doctrine of restraint of trade was firmly tied to notions of public interest in connection with unfettered trade. This has emerged into a twin test of reasonableness both between the parties and the public interest. What the doctrine has not done is to emerge from its narrow economic base to protect artistic integrity and creativity. Nevertheless, the courts have recognized that the relative bargaining position of the parties to such contracts should necessitate consideration of the fairness of the process to which agreements are formulated, and may thus protect as Dillon LJ said "young men in fairly humble circumstances and of little business experience".

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