

The Beatles and the Law

A Talk to the Liverpool Business and Property Courts Forum

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David Foxton

Introduction

It is my great pleasure this evening to be speaking to you about two of the great passions of my life. Those who live and work in this city will need no reminding of the incredible musical, cultural and social phenomenon which 1960s' Liverpool spawned. However, I hope you will not mind me beginning with a recent personal experience of the Beatles' enduring global legacy. This is a picture my eldest daughter, sent to me at the start of her summer holiday, posing with concrete facsimiles of the Fab Four in somewhere called "Beatles Square". The "Beatles Square" in question is in Ulaanbaatar in Mongolia. I am not sure why Paul is shown separately from the others. Perhaps they still subscribe to the late 1960s "Paul is dead" conspiracy there. Or are depicting the fall out over Allen Klein's management - of which more later.

When preparing this talk, I asked my friend Paul McGrath KC whether he had any advice for someone speaking to a Liverpool audience for the first time. He told me to remain strictly neutral between the Red and Blue halves of the city. Now Paul's advice is almost invariably to be followed, I have decided to risk not doing so on this occasion. While both have great merit, the superior quality of the Blue is undeniable. "*The Beatles/1967-70*" will always have the edge over "*The Beatles/1962-1966*".

To paraphrase Phillip Larkin's *Annus Mirabilis*, Beatles litigation began in 1963,¹ after the end of the "Chatterley" ban, and the Beatles' first LP. But while the golden age of Beatles music ended with the release of "Let it Be" on 8 May 1970, the golden age of Beatles' litigation was just beginning, and all of the cases which feature in this talk post-date the day when the music died. And's it time to start the musical history tour which is waiting to take us away with the first of those cases, the law suit commenced by Paul McCartney in 1970 which is often treated as marking the formal break-up of the band.

Paul McCartney v John Ono Lennon, George Harrison, Richard Starkey and Apple Corps Limited (1971)

The popular music historian is not short of events which can credibly be said to be the moment when The Beatles "broke-up". From 1968 onwards, there scarcely seems to have been a point-in-time in which one or other of them had not walked out. Ringo left during the "White Album" sessions, heading to Sardinia where the opportunity to observe crustaceans gathering shells inspired him to write "Octopus' Garden",² and George during the "Let It Be" sessions after Paul criticised his guitar playing. John had in fact informed the other Beatles

¹ Peter Doggett, *You Never Give Me Your Money: The Battle for the Soul of The Beatles* (London, 2010) ("Doggett"), 26 (proceedings against two Blackpool-based producers of unauthorised Beatles' memorabilia).

² Ian Macdonald, *Revolution in the Head: The Beatles' Records & The Sixties* 2nd (1997), 307 ("Macdonald").

that he was leaving the group before they all signed a 1969 multi-year recording deal with Capitol Records.³ The failure to mention this crucial fact to Capitol was later the source of some unease.⁴ However, the law had to wait for a further 31-years and the advent of “Girl Power” before the failure by members of a pop group to reveal the imminent departure of one of their number prior to signing a long-term contract was to be the subject of court proceedings.⁵ It is a sign of the significance society attaches to litigation between friends that it is the law suit commenced by Paul, and filed on 31 December 1970 as action M-165 in the Chancery Division, which is most frequently referred to as the moment the Beatles “Let It Be”.

A key theme of McCartney’s law suit can be traced back to the decision of the other three Beatles to appoint Allen Klein as the group’s manager over McCartney’s objections in 1969. Klein was later described by McCartney as a “New York Spiv”. He can be seen here alongside John Belushi playing Ron Decline, the character based on Klein in Neil Innes’ and Eric Idle’s *Beatles* parody *The Rutles*, where he famously said “You’re asking me ‘Where’s the money? Where’s the money? I mean, I don’t know where the money is. I’ve never been good with figures.” McCartney was later to suggest that it was Klein who inspired the *Abbey Road* track “You Never Give Me Your Money” in which McCartney lamented:

“You never give me your money
You only give me your funny paper
And in the middle of negotiations
You break down.”⁶

McCartney brought proceeding seeking “a declaration that the partnership business carried on by the plaintiff and the defendants under the name ‘The Beatles & Co’ ... ought to be dissolved and that accordingly the same be dissolved”, and the appointment of an official receiver to receive partnership income during the winding-up process.⁷

One of the features of the series of talks I have been giving in the Circuit Business and Property Courts is the extent to which the litigation frontier of popular culture lies in the Chancery Division. This application was no exception, McCartney’s motion coming before Sir Blanchard Stamp, who sounds as though he might have been a character from *Sergeant Pepper*. I am pleased to report that McCartney was represented by two future judges of the Commercial Court, David Hirst QC, and Andrew Leggatt, who both became Court of Appeal judges. The respondents were represented by Morris Finer QC, who became a judge of the Family Division.

The motion was adjourned by Stamp after the respondents gave undertakings⁸, and the hearing began on 19 February 1971. The delay proved beneficial for McCartney, as in the interim, Klein was found to have unlawfully failed to file tax returns in New York. With commendable understatement, Hirst told the judge that this news had “obviously not

³ Doggett, 101-103.

⁴ See Paul Muldoon (ed) and Paul McCartney, *The Lyrics: 1956 to the Present* (2021) Vol 2, 847: “We were living a lie, knowing that John had left the group” (“Lyrics”).

⁵ *Spice Girls Limited v Aprilia World Service BV* [2000] EMLR 478.

⁶ *Lyrics*, 847 although cf Macdonald, 308 suggesting that was a later reconstruction.

⁷ Doggett, 153-54.

⁸ Keith Badman, *The Beatles After the Break-Up: 1970-2000* (1999) (“Badman”), 23-36 for the following.

enhanced Mr McCartney's confidence in Mr Klein". After an 11-day hearing, McCartney succeeded in full – the winding-up order was made, Klein's evidence compared to "the irresponsible patter of a second-rate salesman" and Mr James Spooner appointed as the official referee. Klein was unhappy with the verdict, explaining it away on the basis that:

"The trouble was the establishment was against us ... I knew the partnership would be dissolved. I know the English law. The only reason for opposing it was the horrendous tax consequences that could result. But that old judge, Stamp, he didn't understand what it was all about. He got lost. He got Beatlemania."⁹

It took four more years' before the "long winding-up road" was complete, the partnership being formally dissolved on 9 January 1975 after Lennon had signed the necessary papers, appropriately enough on a trip to Disneyland.¹⁰

Each of Lennon, Harrison and Starkey had filed affidavits testifying to their faith in Klein's business acumen and integrity. But three years' later, the three of them were suing Klein in London challenging the 1969 management contract they had signed, while Klein counterclaimed for substantial damages and unpaid commissions in proceedings brought in New York. The two pieces of litigation kept five law firms in full-time employment¹¹ - McCartney later complained that "we put every lawyer's kid through school"¹² - before finally settling in 1977.¹³ This legal feeding frenzy was captured in the following account of the final business meeting of *The Beatles'* comic alter egos, *The Rutles* at which it was said:

"134 legal advisors and accountants entered an eight-by-ten-foot room. Only 87 came out alive."

The internecine battle which had left its first musical impression with "You Never Give Me Your Money" was to inspire two further compositions. George Harrison drew on his experiences when writing the "Sue You Sue Me Blues":

"You serve me and I'll serve you
Swing your partners, all get screwed
Bring your lawyer and I'll bring mine
Get together, and we could have a bad time
It's affidavit swearing time
Sign it on the dotted line
Hold your Bible in your hand
Now all that's left is to find yourself a new band."

And John Lennon immortalised his new-found enmity for Allen Klein in the surprisingly threatening "Steel and Glass" on his *Walls and Bridges* album:

"There you stand with your L.A. tan
And your New York walk and your New York talk

⁹ Doggett, 164-5.

¹⁰ Doggett, 228-29.

¹¹ Doggett, 214.

¹² Doggett, 114.

¹³ Doggett, 252.

Your mother left you when you were small
But you're gonna' wish you wasn't born at all

...

Your phone don't ring, no one answers your call
How does it feel to be off the wall?"

I think we can all agree that this piece of "Eine Klein Nastymusik" was not Lennon's finest work.

Bright Tunes Music v Harrisongs Music (1976, 1981, 1983, 1988, 1991)

As is well-known, it was George Harrison who enjoyed the greatest success in the immediate post-Beatles era, with his triple album *All Things Must Pass*, and its most successful single, "My Sweet Lord". John Lennon observed of the latter, "every time I put the radio on, it's 'Oh my Lord'. I'm beginning to think there must be a God."¹⁴ However, it was not long before similarities were noted between "My Sweet Lord", and The Chiffons' 1963 hit, "He's So Fine." So much so that on 14 June 1971, Bright Tunes Music, who owned the copyright in "He's So Fine", sued Harrison and his publishing company for plagiarism in the United States District Court for the Southern District of New York.¹⁵ Attempts to settle the dispute failed, and Allen Klein orchestrated Harrison's defence. However, the litigation was delayed when Bright Tunes was placed into receivership, and in the interregnum the fall-out between Klein and his three ex-Beatle clients occurred.

When settlement discussions resumed, Bright Tunes' demands had increased dramatically. It later emerged that this was because Klein had approached Bright Tunes with a view to purchasing the company, and was providing it with his own estimates of the royalties which the song was earning. The Klein-Bright negotiations were still ongoing when the trial began before Judge Richard Owen. Owen was an amateur composer, who had studied composition and written a number of operas. These included one about the life of Abigail Adams, wife of the second President of the United States, and mother of the sixth, as well as an opera called "Dismissed With Prejudice". Unfortunately for Harrison, Bright Tunes' plagiarism case was not dismissed with prejudice, but upheld on the basis that Harrison had "subconsciously plagiarised" "He's So Fine", finding that it was "perfectly obvious . . . the two songs are virtually identical".¹⁶ Owen's musical expertise is manifest in the judgments, which includes three sets of musical notation in its footnotes. That feat has since been emulated by Mr Justice Zacaroli in the Ed Sheeran "Shape of You" case.¹⁷

By the time the damages hearing took place, Allen Klein had purchased the copyright in "He's So Fine" from Bright Tunes, and it was Klein's company which Harrison found himself facing across the court room. This allowed Harrison to amend his pleadings to allege that Klein had acted in breach of fiduciary duty in purchasing the right to sue his former client. The Judge awarded damages for infringement of \$1.6m – a figure generally viewed as surprisingly high, because the Judge attributed 50% of the success of the three-album "All

¹⁴ Doggett, 147.

¹⁵ See Joseph C Self, "The My Sweet Lord/He's So Fine Plagiarism Suit" first published in 1993 in *The 910* magazine.

¹⁶ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd. et al* 420 F. Supp 177 (1976).

¹⁷ *Sheeran v Chokri* [2022] EWHC 827 (Ch).

Things Must Pass” to this one song, together with a further amount from “The Best of George Harrison”.¹⁸ However, Harrison’s counterclaim succeeded, on the basis that Klein’s intervention in the case had been to Harrison’s “probable detriment” and that Klein had acted improperly in providing Bright Tunes with financial information about “My Sweet Lord”. As a result, all that Harrison was required to pay Klein was the \$587,000 Klein had paid to acquire the copyright, and this was later reduced to \$270,000. That decision was upheld on appeal, although Harrison’s challenge to the finding of copyright infringement was rejected.¹⁹ Proceedings in England by the holder of the English copyright were settled, after the case had been opened before Mr Justice Slade with the playing of both songs.²⁰ The final settlement between Harrison and Klein gave Harrison the rights to both “My Sweet Lord” and “He’s So Fine” in the UK and North America, and Klein the rights to both songs in the rest of the world.²¹ In the final hearing, in the Second Circuit Court of Appeals in 1991, Judge Cardamone referred to the finding of liability at the 1976 hearing before Judge Owen and stated:

“Today over 15 years’ later, the damages issue flowing from this infringement is still being litigated, giving true meaning to those involved of the Beatles’ ‘It’s Been a Hard Day’s Night.’”²²

Harrison found the litigation extremely bruising. When interviewed by Radio 1 DJ Annie Nightingale on 5 February 1977, he said of Judge Owen:²³

“The Judge ... said to my attorney, ‘Actually I like both of the songs’. My lawyer said to him, ‘What’d you mean, both of the songs? You said in your decision, that’s it’s the same song’. And he said ‘Oops!’”

That seems a little unlikely. But Harrison was able to derive another hit single from his experiences, “This Song”, which was accompanied by a video providing a blended Anglo-American legal setting in which a red jug in a wig presided over a Los Angeles courtroom:

“This song has nothing tricky about it
This song ain't black or white and as far as I know
Don't infringe on anyone's copyright, so

This song, we'll let be
This song is in E
This song is for you and

This tune has nothing Bright about it
This tune ain't bad or good and come ever what may
My expert tells me it's okay

As this song came to me
Unknowingly”

¹⁸ *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 508 F.Supp. 798 (S.D.N.Y. 1981).

¹⁹ *ABKCO Music, Inc. v. Harrisongs Music, et al.*, 722 F.2d. 988 (1983) 841 F.2d. 494 (1988), 944 F.2d 971 (1991).

²⁰ Badman, 210.

²¹ Badman, 454.

²² *ABKCO Music, Inc. v. Harrisongs Music, et al.*, 944 F.2d 971 (1991).

²³ Badman, 203.

Big Seven Music Corp v Lennon (1976)²⁴

The lyrical resemblance between the opening of John Lennon's "Come Together" and Chuck Berry's "You Can't Catch Me" was an intentional act of homage by one great rock n' roller to another. Unfortunately, the resemblance between the two songs did not end there. McCartney suggested slowing "Come Together" down, and adding a heavy bass riff to reduce the similarity. However this did not prevent the owners' of the copyright in "You Can't Catch Me" – Big Seven Music Corp – from suing Northern Songs Ltd for infringement of copyright.²⁵ The case was settled on 12 October 1973, in return for Lennon's agreement to record three songs owned by Big Seven on his next album. That should have been a relatively straightforward exercise, because at the time of the settlement Lennon was recording an album of and roll standards with legendary producer Spector: known both for the "wall of sound" and "the wall of hair". However, the Lennon-Spector sessions ground to a halt and Lennon moved onto an album of new material, which became "Walls and Bridges".

Lennon did not include the three Big Seven Songs on that album, and to add insult to injury, he included a 1 minute-6 second version of one Big Seven song – "Ya Ya" – with his 11-year old son Julian on drums, and which Lennon introduced by saying "We'll do sitting in the La La – that will get us that." Big Seven's owner – a colourful businessman named Morris Levy – was not amused. He met Lennon at Club Cavallero in New York, where Lennon assured him the rock n' roll album would be his next release, and gave him the demos of the work done with Spector so far. Levy then released those rough tapes as a mail order album entitled "Roots", claiming that there had been an oral agreement reached in the Club Cavallero that he could do so. Lennon finished recording the 1950s standards and Capitol rushed to release them as the "John Lennon: Rock n' Roll" album. This included two Big Seven Music songs, but not the promised third, and omitted Lennon's sleeve notes which had explained the album's genesis in characteristically cryptic terms:

"The behind-the-scenes story on this long unwinding road will be revealed by a congressional committee to investigate psycho-drama in the music business, but only after a period of grateful silence."²⁶

Big Seven sued Lennon for breach of contract, and Capitol and others for conspiracy to interfere in that contract, Lennon and Capitol counterclaimed for infringement of copyright, misappropriation of property and Lennon for unauthorised use of his name and image. The case came before Judge Thomas Grisea and a jury.²⁷ However, the jury had to be discharged, after Levy's attorney showed them the album cover of Lennon and Yoko Ono's "Two Virgins" album, showing the artists' naked, and the case proceeded before the judge alone.²⁸

The judge rejected Levy's claim that a contract had been concluded that evening at Club Cavallero, but awarded him \$6,795 for Lennon's failure to record the third Big Seven song required by the "Come Together" settlement. The defendants' counterclaim succeeded in full. Lennon was awarded a total of \$145,000.

²⁴ See Joseph C Self, "Lennon v Levy: The 'Roots' Lawsuit" first published in 1992 in *The 910* magazine.

²⁵ *Big Seven Music Corp. v. MacLen Music, Inc., Northern Songs, Ltd. and Apple Records, Inc.* (S.D.N.Y.) 70 Civ. 1348

²⁶ Doggett, 231.

²⁷ *Big Seven Music Corp. and Adam VIII, Ltd. v. John Lennon, et al* 409 F. Supp. 122 (1976).

²⁸ Badman, 175.

Levy appealed and Justice Oakes began the appeal judgment²⁹ by quoting some of the lyrics from Lennon's "Nobody Loves You (When You're Down and Out)" from *Walls and Bridges*:

"Ill scratch your back and you scratch mine
All I can tell you is its all show biz."

The court refused to interfere with the Judge's finding that no contract had been concluded. However, the damages award in Lennon's favour was reduced to \$85,000. That reduction in damages was not Lennon's only disappointment. He had ordered a copy of "Roots" during the three days when the TV advertisements were aired before they were pulled at Capitol's insistence. And it took nearly a month to arrive.³⁰

Apple Corp Ltd v EMI Ltd and Apple Records Inc v Capitol Records Inc

The contract Brian Epstein was so pleased to have secured for The Beatles with EMI in 1962 paid them the princely royalty of 1d per record sold on 85% of UK sales, half that for records sold overseas, and with no royalty on the other 15% "to cover records returned and/or damaged in transit and/or used for demonstration and/or advertising purposes". EMI owned all the recordings and rights of reproduction. The royalty payable increased on each contract extension, EMI having the right to extend the original one year contract for three one year periods.

A new contract was signed on 26 January 1967, and as we have seen, Allen Klein agreed an improved contract with EMI's US subsidiary, Capitol Records Inc, on 1 September 1969, when the contract with EMI was also revised. The amendments gave The Beatles an unprecedented 25% of the wholesale price of any record sold. That percentage would increase in 1972 if the last two Beatles-related albums issued at that point had sold at least 500,000 copies.

Recording contracts in the 1960s were rather more rudimentary affairs than their modern counterparts, with ample scope for dispute as to their terms. In addition, recording artists had limited visibility into what records had actually been sold, and for how much. By the end of the 1970s, the former Beatles began to suspect that EMI and Capitol may not have paid them everything to which they were entitled. They retained the firm of Prager & Fenton to perform a royalty audit for sales outside North America for the period 1966-1974. On 25 April 1977, the auditors reported that there had been significant under-accounting.

In 1979, the English and US Apple companies commenced court proceedings in London and New York against EMI and Capitol respectively. The style of the two sets of proceedings reflects the traditional characters of two legal systems divided by a common heritage.

In England, those proceedings took the form of a claim by Apple Corps Limited for an account of sales, which came before Mr Justice Gibson in the Chancery Division in 1984.³¹ Apple was joined as plaintiff by John Lennon (and, after his murder, Yoko Ono representing his estate), George Harrison and Richard Starkey, but notably not Paul McCartney, although

²⁹ *Big Seven Music Corp. and Adam VIII, Ltd. v. John Lennon, et al* 554 F.2d. 504 (1977).

³⁰ Badman, 151.

³¹ *Apple Corps Limited and others v EMI Records Limited* [1984] Lexis Citation 1193.

he did stand to benefit to the extent of 25% of Apple's recoveries. David Hirst QC had gone onto the bench by this point, but his son, the late Jonathan Hirst QC, was junior counsel for Apple Corps, led by future Commercial Court judge Robert Gatehouse QC. They were opposed by Leonard Hoffmann QC.

EMI soon conceded Apple's entitlement to an account. A number of disputes of contractual interpretation were identified, which Mr Justice Gibson decided in order to give guidance as to the basis on which the account should be taken. The judge noted that "happily this is not a case in which the veracity of any of the witnesses is challenged." Mr Gatehouse QC was at pains to make it clear that no allegations were made of actual dishonesty against EMI, and the judge rejected any suggestion of unconscionable behaviour on EMI's part. The net effect of the audit was that a further £2.8m in royalties was paid, and The Beatles were given the right to carry out further investigations.³² Linda McCartney greeted the news by bringing a New York twist to her husband's response to the 1971 litigation:

"All I know is, with all the advisers and lawyers and parasites, we're putting a lot of kids through prep school and buying a lot of swimming pools"³³

The New York action began with similar claims, but went onto become a little more lively. Apple was represented by Leonard M Marks, one of New York's leading entertainment lawyers. By amendments introduced in 1982 – at a stage when a defence had yet to be served! - Apple alleged that Capitol had "a pervasive practice of lining their own pockets at the expense of [The Beatles] through improper and fraudulent accounting practices" and accused Capitol of "an unconscionable distortion of the language of the manufacturing and distribution agreement in order to deprive [The Beatles] of the amounts to which they are entitled." Apple also alleged that 19 million records which had been removed from Capitol's inventory had been sold "out the back door" to deprive The Beatles of any royalties. One of the issues in the New York case was whether the increased royalty payment had been triggered, which depended on whether or not John Lennon and Yoko Ono's "Sometime in New York City" album counted as a Beatles-related album. It has sold comparatively poorly, and so Capitol said it did, and the increased royalty had not been earned. Apple said it did not, describing the album as a "non-commercial experimental double album, intended as a controversial political statement". Apple also claimed that Capitol had fraudulently induced it to agree to the release of "Sometime in New York City", in an attempt to avoid paying the higher royalty.

Capitol drew first blood, Judge Michael J Dontzin striking out the fraud claim on 1 May 1987. However, the fraud claim was reinstated by the Supreme Court, Appellate Division, the following year.³⁴ Apple Inc brought further claims alleging that Capitol had deliberately delayed releasing The Beatles on compact disk to punish them for bringing their law suit (a suit dismissed by the Manhattan court).³⁵ By November 1989, there were nine sets of legal proceedings underway between the two Apple companies, EMI and Capitol, in London, New York and California. And, one suspects, a lot of lawyer's children being put through school. However, on 9 November 1989 the claims were settled under a deal which it has been

³² Doggett, 285; Badman, 369

³³ Doggett. 286.

³⁴ *Apple Records Inc et al v Capitol Records Inc et al* 137 A.D.2d 50, 529 NYS 2d 279 (1988).

³⁵ Badman, 408.

suggested involved EMI/Capitol paying \$100m in royalties and giving The Beatles control over future releases and cover art.³⁶

That, you would have thought, might be The End. However, the English and New York courts had not seen the last of the dispute. On 11 July 1993, Apple brought proceedings in England against EMI, and obtained an injunction from Mummery J preventing the release of the Red and Blue albums on CD, either individually or as a boxed set, without The Beatles' consent. Apple also succeeded before Chadwick J at the trial, which lasted 22 days. EMI's claim to rectify the contract if its interpretation was rejected was dismissed.

Nourse LJ in the Court of Appeal noted that "the dispute resolved around the meaning of five words in a contract",³⁷ but that did not prevent it occupying the Court for 9 days. The question was whether Apple's consent was required for any release of material in a particular format which had not been released in *that format* before, or whether it was only necessary where the material had not been released *in some format* before. The Court of Appeal, like Mummery J, preferred the former construction. They also rejected the argument that putting the Red and Blue albums in a package together was sufficient to bring them within the "Boxed Set" exception to the consent requirement, stating that "it would be quite absurd if EMI was able to avoid the prohibition ... merely by placing its products in a box and selling them that way".

The settlement did not prevent Apple from exercising its right of audit. An audit of sales for the period from 1994 to 1999 generated fresh proceedings in both London and New York in December 2005. Apple sought \$25m in damages, and to reclaim all rights to The Beatles' master recordings, alleging that EMI/Capitol had:

- designated millions of items as "scrap," but then resold them;
- classified distribution of certain recordings as "promotional", but then sold them;
- entered into licenses with third-parties without consent;
- failed to disclose money received from third-party exploitation;
- under-reported the number of units sold and
- failed to make interest payments on certain settlement proceeds.

Capitol sought to strike the New York suit out, and the claim came before Justice Karla Moskowitz.³⁸ But neither side had any great appetite to revisit what by now was very much a litigation "golden oldie". The case was settled on 12 April 2007, finally bringing this long playing dispute to an end, after a "fade out" that rivalled that on "Hey Jude."

Apply Corps Ltd v Apple Computer Inc/Apple Inc (1990-2006)

³⁶ Badman, 465.

³⁷ *Apple Corps Limited v EMI Records Ltd* [1994] EMLR 73.

³⁸ *Apple Corps Ltd v Capitol Records Inc* 2006 NY Slip Op 51785(U).

As with the group's name – a nod to Buddy Holly's backing band, The Crickets - The Beatles chose the name of the recording company they established in 1967 - Apple Corps Ltd – as a joke. "It's a pun you see", McCarney explained.³⁹ Steve Jobs and Steve Wozniak are said to have chosen the name "Apple" for their computer company after Jobs had visited an apple orchard in Oregon. Wozniak is on record as saying that the first thing which came out of his mouth when Jobs came up with the suggestion was "What about Apple Records?"⁴⁰ The origin of the *Apple v Apple* litigation is variously attributed to Apple Corps Limited's chief executive reading about a California computer company using the Apple name and logo in 1978, or George Harrison spotting the Apple Computer trademark.⁴¹ Whichever is correct, at this point the scope for a planetary collision between these two icons of twentieth century culture seemed very limited. The proceedings commenced by Apple Corps ("Corps") were settled in 1981. Apple Computer Inc ("Computer") agreeing to pay Corps \$80,000. It also agreed that it would use the name and logo only on computing products, and would not enter the music business. In return, Corps agreed not to enter the computer business, sparing us the Apple Macca and the LennOno Thinkpad. Finally, each party agreed not to lodge opposition to or apply for the cancellation of the other's trade marks: a so-called "No Cancellation" clause.

In 1986, Computer added a sound chip to one of its computers, and it began to take steps to challenge Corps' trade marks in some jurisdictions. In response, in 1989, Corps commenced proceedings alleging that Computer had breached the 1981 settlement agreement, and sought an injunction to prevent further breaches. Computer accepted that its applications involved a breach of the "No Challenge" clause in the settlement agreement but contended that the agreement was unenforceable for various reasons, including breach of Article 85 of the Treaty of Rome. The first significant battle in this 17-year litigation war came when Corps applied for an interim injunction to prevent Computer from pursuing its trademark cancellation proceedings.

The *Apple v Apple* litigation gave rise to over 20 interim judgments.⁴² The first was the "No Challenge Interlocutory."⁴³ Corps was represented by Sir Sydney Kentridge QC, and Computer by Christopher Carr QC. Hoffmann J held that the injunction application was to be decided on *American Cyanamid* principles, albeit greater caution was required because any injunction would indirectly interfere with proceedings before foreign courts. He was invited to adopt what he described as a new conflict rule "which would give effect to the putative foreign rules of unenforceability, despite the express choice of English law in the contract". Hoffmann J observed of this point that:

"All these propositions are, to a greater or lesser extent, revolutionary. I admire the fertility of the imagination with which they were produced and I am far from saying that they are unarguable. But it would, in my judgment, be quite inappropriate to pronounce upon them at this stage."⁴⁴

³⁹ Doggett, 28.

⁴⁰ Steve Wozniak, *iWoz: Computer Geek to Cult Icon: How I Invented the Personal Computer, Co-Founded Apple, and Had Fun Doing It* (2006).

⁴¹ Doggett, 275.

⁴² I am very grateful to Daniel Alexander KC for sharing his memories of the litigation.

⁴³ *Apple Corps Ltd v Apple Computer Inc* ("No Challenge Interlocutory") [1992] RPC 70.

⁴⁴ *Apple Corps Ltd v Apple Computer Inc* ("No Challenge Interlocutory") [1992] RPC 70, 78.

The application of the lower *American Cyanamid* test to what was essentially an anti-suit injunction does not accord with the modern “high probability of success” test now generally applied to anti-suit applications, and the decision is now treated as one turning on its particular facts.⁴⁵

The trial began before Ferris J in October 1990. But it soon became apparent that Computer intended to advance a case challenging the validity of Corps’ trademarks. Ferris J ruled that the argument was not open on the pleadings, and refused Computer permission to serve a rejoinder raising it. The case was soon back in the Court of Appeal, my former Head of Chambers Gordon Pollock QC now representing Corps. The Court of Appeal upheld Ferris J’s conclusion that the validity of the trademarks was not an issue in the action,⁴⁶ and his decision to refuse Computer leave to serve a rejoinder. Corps’ appeal against Ferris J’s refusal to strike out parts of Computer’s defence on the basis that the foreign law allegations of illegality were inadequately pleaded also succeeded.

Following the appeal, there was a further preliminary issues hearing before Ferris J to determine whether the allegations of foreign law were relevant at all, in circumstances in which the “No Challenge” clause was governed by English law. Ferris J held that they were not – the validity of the contract was a matter for English law as the applicable law of the 1981 settlement agreement.⁴⁷ That made the expert evidence which the parties had prepared in relation to the law of various jurisdictions irrelevant. Ferris J observed of Computer’s argument to the contrary, in a model of judicial understatement:

“If Mr Carr is right ... enforceability would depend upon the law of each country where the restraints are to be implemented. I was told during the course of the trial that there are over 140 different countries in the world. It may be said, therefore, that the defendants have been mercifully restrained in pleading common law restraint of trade in relation to only four countries beside England and in seeking (albeit unsuccessfully) to rely upon the competition laws of only a further 11 countries.”⁴⁸

He also rejected Computer’s contention that, the Treaty of Rome and the doctrine of restraint of trade arguments apart, there was any rule of English law which arguably rendered the “No Challenge” clause unenforceable.

All of this might suggest that Computer was taking something of a beating in the case. But the litigation was being fought with a significant and barely hidden agenda. While Corps and Computer had originally made a joint request to the European Commission for negative clearance of the 1981 settlement, which the Commission had stated that it was minded to grant, Computer subsequently informed the Commission that it no longer supported the application. In the month the trial started, the Commission informed the parties that it was now minded to refuse negative clearance. It suited Corps to seek to bring the English litigation to a conclusion before any Commission decision, and Computer to do the very opposite. The pleadings skirmish had halted the trial, and the application to the Court of Appeal led to its adjournment. There were also suggestions that Corps was not above seeking to slow down the Commission process – for example when the Commission arranged an oral

⁴⁵ *BRG Noal GP S.à r.l., Noal SCSp v Stefan Kowski, Bastiutan Lueken* [2022] EWHC 867 (Ch), [111(viii)].

⁴⁶ *Apple Corps Ltd v Apple Computer Inc* [1994] 3 CMLR 49.

⁴⁷ *Apple Corps Ltd v Apple Computer Inc* [1992] FSR 431.

⁴⁸ *Apple Corps Ltd v Apple Computer Inc* [1992] FSR 431, 442.

hearing of the application for negative clearance, Corps tried unsuccessfully to fix the date of that hearing after the trial. Corps then applied for permission to provide the Commission with a substantial volume of Computer's discovery before the hearing took place. That application was allowed by Ferris J⁴⁹, but observed:

“If I thought that the substantive reason why the plaintiffs seek to be allowed to produce the relevant documents to the Commission was the tactical one of obtaining a postponement of the hearing date the plaintiffs' application would itself be an abuse, but I discern no motive of this kind in the plaintiffs.”

Perish the thought. Pollock and Carr appeared at the one-day hearing before the Commission, Pollock's junior. Daniel Alexander, giving him a copy of “EEC Law for Dummies” in preparation, which met with a predictable response. One wonders whether the Commission has ever seen the like of it, before or since.

The trial before Ferris J lasted 125 days. It was one of the great litigation *causes célèbres* of the 1990s between two heavyweight barristers, in which lawyers across London waited eagerly for news of their latest spat. Pollock took various steps in court to manifest his frustration with what he saw as Carr's timewasting, including rather theatrical readings of the London *Evening Standard* during Carr's submissions. Carr responded in kind. After Pollock had taken the judge through a day long academic lecture, reviewing case law from the seventeenth to the nineteenth centuries on one issue in the case, he said in a lugubrious and not so *sotto voce*:

“Can we go home now, Sir?”

And then one day, to everyone's surprise. Pollock informed the judge that the case had been settled. Ferris J responded:

“I don't know whether my surprise at this development at this stage outweighs my relief at not having to write a definitive judgment.”

After four years on the bench, I can make an educated guess as to the answer.

The settlement was effected by two agreements, both dated 9 October 1991, under which the line of demarcation between the two Apple's orchards was redrawn to Computer's advantage, and Computer paid Corps \$26.4m.⁵⁰ However, the provision of musical content was to remain the exclusive preserve of Corps.

For a period, Computer was very cautious about provoking further litigation. Computer sound designer Jim Reeks developed various sounds for the Apple Mac, including the famous “start up” noise and the alert which sounded when an erroneous instruction was given. The latter file was originally called “Chime” but Computer's lawyers insisted that it be renamed in case it was treated as an excursion into musical content production and a breach of the 1991 settlement. Reeks was asked for an alternative name, and suggested “Let it Beep”. Unsurprisingly, that too was vetoed, but the lawyers were not sufficiently on their guard to reject Reeks' supposedly Japanese-inspired alternative: “sosumi”. You have to say it slowly.

⁴⁹ *Apple Corps Limited v Apple Computer Inc* [1992] 1 CMLR 969, [106].

⁵⁰ For the insurance dispute when Computer unsuccessfully sought to recover the settlement see *Industrial Indemnity Co v Apple Computer Inc* 79 Cal App 4th 823 (1999).

But then came the era of the iPod, and the iTunes music download service. And thirteen years on, Corps and Computer found themselves litigating again. The case first came before the court when Computer sought to challenge the service of the proceedings out of the jurisdiction.⁵¹ Geoffrey Vos QC was now appearing for Corps, Lord Grabiner QC for Computer. Now you might be surprised to learn that the two heavily lawyered agreements entered into to settle complex multi-million dollar litigation did not address the jurisdiction in which any disputes were to be determined, and the law which was to be applied in doing so. But this was no accident. As Mr Justice Mann recorded:

“The evidence before me showed that each of the parties was overly adamant that it did not wish to accept the other’s jurisdiction or governing law, and could reach no agreement on any other jurisdiction or governing law. As a result it contains no governing law clause and no jurisdiction clause. In addition, neither party wanted to give the other an advantage in terms of where the agreement was finalised. If their intention in doing so was to create obscurity and difficulty for lawyers to debate in future years, they have succeeded handsomely.”⁵²

The question of where the contract was entered into – one of the jurisdictional gateways relied upon – involved a detailed analysis of the history of the settlement negotiations through the prism of the law of offer and acceptance. Mann J was persuaded that there was a good arguable case that the contract was concluded in England, and he was also persuaded that it was possible, in certain circumstances, for a contract to be concluded at two different places at the same time, and that this was such a case.⁵³ Some of the difficulties with which Mann J had to wrestle have now been removed by the amendment to Practice Direction 6B para. 3.1(6)(a) which came into force in October 2022, the gateway now applying to contracts “(i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction.”

On the issue of governing law, Mann J said that the settlement agreement had no characteristic performance, and concluded that the contract was marginally more closely connected with England than with California, so that it was governed by English law.⁵⁴ He was also persuaded that England was the proper place for litigation. The result was that the Chancery Division found itself hearing another *Apple Corps Ltd v Apple Computer Inc* trial in 2006.

Commercial parties expend large amounts of blood and treasure on jurisdictional battles because the experience and expertise of their lawyers is that where a dispute is tried matters. That is very often the case, but it is always satisfying when it proves not to be so. In *UBS AG v Kommunale Wasserwerke Leipzig GmbH*,⁵⁵ Mr Justice Males observed of that case:

“I note that the outcome here and in Germany may be said to illustrate that the money and effort expended on jurisdictional disputes are sometimes misdirected. KWL fought hard to resist the jurisdiction of the English court and to have all these issues decided in Germany. There is therefore some irony in the fact that, as events have

⁵¹ *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch).

⁵² *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch), [5].

⁵³ *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch), [42]-[43].

⁵⁴ *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch), [64].

⁵⁵ *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm), [922].

turned out and although there are good reasons why this is so, it lost the case in Germany against LBBW and has substantially, although not entirely, succeeded here. Litigation is not like football. It is not always an advantage to play at home.”

Computer, too, was to triumph in the jurisdiction which it had sought so hard to avoid, through the application of the law it had sought to exclude. At the trial,⁵⁶ in a decision which surprised some, Mr Justice Mann held that there had been no breach of the 1991 settlement agreements. He had to consider whether Computer was using the trade mark “on or in connection with” music content. He held that this required the use of the trade mark to indicate the commercial origin of that content.⁵⁷ That conclusion was reinforced by a clause in the agreement which recognised that there might be cases in which content falling with Corps’ field of operations was delivered through services which fell within Computer’s field of operations, and which expressly permitted Computer’s use of the trade mark in such delivery systems. He held that the trade mark was not being used by Computer to suggest the commercial origin of the content which was available to be streamed. He also held that a clause intended to prevent Computer using the trade mark for the delivery of musical content on physical media did not apply to use in connection with the streaming service – the 1991 agreement had to be construed by reference to the circumstances existing at the time.

Mr Justice Mann’s judgment is highly technically accomplished. It came as no surprise, therefore, that news organisations reporting on the decision looked to experts to explain the judgment to their audience. BBC News booked computer expert Guy Kewney. Unfortunately Mr Kewney was not the only “guy” at the BBC that day. Guy Goma, a Congolese-French business studies graduate, was there to be interviewed for a job as a data cleanser. BBC News got the “wrong guy”, with Mr Goma finding himself interviewed by Karen Bowerman on the significance of the decision.

Corps launch an appeal against the decision, but the case was settled in February 2007, with Computer gaining control of the trademark, which was then leased back to Corps for use in connection with its musical recordings.⁵⁸

The End?

Beatles’ fans will know that “The End” is not quite the end. On *Abbey Road*, “The End” is followed by an originally unlisted track, Paul McCartney’s ode to Queen Elizabeth II, “Her Majesty”. In my case, it is followed by something a little more self-indulgent, for which I ask your forgiveness in advance. The Foxtons arrived in Liverpool from County Wexford at some point before 1864. The earliest record we have of them is when William Foxtan, of Glenranie, Wexford, married Ellen Thorpe, of Newtown Barry, Wexford, in January 1864 at the Church of St John’s, Old Haymarket in the parish of Liverpool. In his song about the places he remembered, “In My Life”, John Lennon noted that “some have gone, and some remain”. St John’s Church falls into the former category - it closed in 1898 and was then demolished. Henry Peet, a Fellow of the Royal Society of Arts, did not lament its passing, observing:

⁵⁶ *Apple Corps Limited v Apple Computer, Inc* [2006] EWHC 996 (Ch).

⁵⁷ *Apple Corps Limited v Apple Computer, Inc* [2006] EWHC 996 (Ch), [72].

⁵⁸ Doggett, 344-45.

“For more than a century, this unsightly structure has been allowed to disfigure the landscape ...As an example of ecclesiastical art, the Church of St John has not a single redeeming feature.”⁵⁹

It is now the site of St John’s Gardens.

Three of their children, including my great grandfather Samuel Foxton, were baptised in St Peter’s Church, and lived in Jefferson Street, long since knocked down. Samuel married Emma Crawford at St George’s Church in Everton in 1892, a building which is happily still with us, and they lived in the now demolished Poplar Street. Samuel was a publican on the dock road, and Emma ran a grocer’s shop in Langton Road, Litherland, also long demolished. The family then moved to Scarisbrick Avenue in Litherland, which I am pleased to say survives.

My grandfather, Fred attended Beech Road School, long gone, and then the Waterloo and Seaforth Grammar School, now the South Sefton Adult Education Centre. From there, he became the first member of our family to go to university, the university in question being our hosts this evening, Liverpool University. There he completed both a BSC and an MSC. For the latter he worked in the now demolished Muspratt Laboratory, before moving to London and bringing the residence of my branch of the Foxton family in Liverpool to an end.

And so it has been a particular pleasure for me to talk to you this evening. About this subject. In this building. In this university. And in this city.

Thank you.

⁵⁹ Henry Peel FSA, “Brief Historical Notes on the Churches of St George’s and St John’s, Liverpool”, a reading of 2 March 1899, 38