Neutral Citation Number: [2013] EWHC 1873 (Ch)

Case No: HC11C01394

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building
Fetter Lane
EC4A 1NL

Date: 05/07/2013

Before :

MR JUSTICE NORRIS

- -

Between :

(1) Mark Forstater	**Claimant**
(2) Mark Forstater Productions Limited	
- and -	
(1) Python (Monty) Pictures Ltd	**Defendant**
(2) Freeway Cam (UK) Ltd	

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Tom Weisselberg & Mark Vinall (instructed by **Fladgate LLP**) for the **Claimants**
Richard Spearman QC & Amanda Michaels (instructed by **ENT Law**) for the **First Defendant**
Edmund Cullen QC (instructed by **Lee & Thompson**) for the **Second Defendant**

Hearing dates: 27, 30 November 2012, 3,4,5,6 December 2012, 22, 29 January 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NORRIS

Mr Justice Norris :

1. After the success of the three series of "Monty Python's Flying Circus" which ran from 1969 until 1972 Graham Chapman, John Cleese, Terry Gilliam, Eric Idle, Terry Jones and Michael Palin ("the Pythons") decided to write and perform a feature film. This case concerns the events which happened in 1973 and 1974 and form part of the pre-history of that film, which became "Monty Python and the Holy Grail" ("The Grail").

2. The Pythons had already made one feature film ("And Now For Something Completely Different…"). But that experience had taught them the importance of not only writing and performing the material but also of keeping control of the direction and production of the film. To that end the Pythons incorporated Python (Monty) Pictures Ltd ("PMP") as the film production company: and they identified Chippenham Films (a partnership between Julian Doyle ("Mr Doyle") and Mark Forstater ("Mr Forstater")) as the film production unit. In the credits for "The Grail" Terry Gilliam and Terry Jones are shown as the directors, all of the Pythons are shown as the writers, Mr Forstater is shown as the producer (along with John Goldstone as Executive Producer) and Mr Doyle is shown as the production manager and as responsible for special effects.

3. Two disputes have arisen between the Pythons and Mr Forstater. One relates to what entitlement Mr Forstater has to share in the continuing income stream generated by the success of "The Grail". The other relates to how much Mr Forstater has to pay by way of expenses in relation to the collection and distribution of that income stream. In broad terms Mr Forstater says that under the contracts he negotiated he should receive twice as much, and pay half as much, as the Pythons say he should.

4. The terms upon which Mr Forstater came to be the producer of "The Grail" are set out in an Agreement dated 25 April 1974 between PMP and himself ("the MF Agreement"). This entitled PMP to the exclusive services of Mr Forstater as producer from the 25 April 1974 until the 31 August 1974 and thereafter for such period or periods as PMP might require "for the purposes of completing principal photography"; and then to the non-exclusive services of Mr Forstater for such further period after the completion of principal photography as may be required in order to assist in the cutting, titling, editing and completion of "The Grail". In return the Claimant was to be paid £5,000 (of which £2,000 was to be deferred so as to be available for use by PMP towards the costs of completing the production of the film in the event that third party funding was exhausted, and either paid when the costs of production were certified or, if utilised, repaid out of the proceeds of distribution).

5. In addition to that fixed payment Mr Forstater was entitled under clause 3(a)(iii) to 5.6875% of "the profits of the film as defined in the Third Schedule hereto". The Third Schedule to the MF Agreement defined "Profits of the Film" as including the adjusted gross proceeds of distribution and exploitation and also

> "Any and all so-called "merchandising" and other "spin-off" rights arising therefrom"

subject to certain deductions. But there was a proviso relating to certain of the "merchandising" and "spin-off" rights. This action is about that proviso. It is common ground that Mr Forstater shares in the "merchandising" and "spin-off" profits governed by the proviso: the issue is: "To what extent?"

6. The MF Agreement was one of several agreements entered into simultaneously. The others were:-

   a) Agreements between PMP and each of the Pythons for their services as artists;

   b) Agreements between PMP and Terry Jones and Terry Gilliam for their services as co-directors;

   c) An agreement with John Goldstone ("Mr Goldstone") for his services as executive producer; and

   d) An agreement between PMP and Michael White Ltd ("the Funding Agreement") for the provision of a £75,000 advance to help fund the production of "The Grail" (additional third party funding also being required).

7. The Funding Agreement contained a term that PMP had to arrange a retention "from the moneys otherwise payable to the Pythons and to Mark Forstater" of a provision for overage. The deferred £2000 to which I have referred was Mr Forstater's contribution to that retention.

8. It was a term of the Funding Agreement that the investments being made by Michael White Ltd and by the third party investors should be made under a scheme run by the National Film Trustee Company Ltd ("NFTC"), and that PMP would, simultaneously with the making of those investments, enter into a Trust Deed with NFTC providing for the assignment by PMP to NFTC of the intellectual property rights in "The Grail" and the payment to NFTC of all the proceeds of exploitation of "The Grail". Under the Trust Deed NFTC would then pay out to Michael White Ltd and the third party funders repayment of their advances plus interest, and a participation in the profits of the film (according to their respective entitlements).

9. The respective entitlements were set out in the First Schedule to the Funding Agreement. There are two points to note about the entitlements. First, "the profits of the film" were defined in terms that included "merchandising" and "spin off" rights:

but certain "merchandising" and "spin-off" rights were to be treated in a special way. They were identified as those resulting "in the event only that the Pythons contribute materially to the making production or other the preparation of any such …..merchandise or other means whereby the Film may be exploited other than by its release for viewing". Second, in relation to the mainstream "merchandising" and "spin off" rights not subject to this separate treatment the First Schedule said that 22.455% of the profits should be payable to Michael White Limited and 39.8125% "to [PMP] and Mark Forstater", so treating that tranche of profits as if it were a joint share. If the joint share were divided equally between the Pythons and Mark Forstater then each would have 5.6875%: that is why that percentage is frequently referred to as "1/7th" in the correspondence, and it is the origin of the percentage figure found in the MF Agreement.

10. The Trust Deed ("the Deed") carrying into effect the obligations created by the Funding Agreement was entered into on the 30 September 1974 between PMP and NFTC. It recited that PMP intended to make arrangements for the exploitation of "The Grail" throughout the world. PMP then assigned to NFTC (amongst other things) the present and future copyright in "The Grail", its rights under a distribution agreement with EMI and in any of the contemplated further distribution agreements, and

> "All other rights and properties acquired or to be acquired by [PMP] in connection with the production of ["The Grail"]".

11. The Deed then provided for how the receipts deriving from the exploitation of these assigned rights should be divided up, dealing separately with the period during which loans made by Michael White Ltd and the third party financiers under the NFTC loan scheme remained outstanding, and the period after repayment. As to the period after repayment of the loans made by Michael White Limited and the third party funders, clause 8 of the Deed in its original form first provided for payment of the remuneration and expenses of NFTC (or its successor as trustee). It next addressed the proceeds of the "merchandising" and "spin off" rights that had to be separately treated. It provided for payment to PMP of 50% of the divisible receipts derived from the exploitation of the "merchandising" and other "spin-off" rights arising from "The Grail" (as the same were more particularly referred to in the Funding Agreement)

> "and in the event only that [PMP] certifies in writing to the Trustee that the Pythons have contributed materially to the making production or other preparation of the means whereby such "merchandising" and other "spin-off" rights have been exploited".

So the "merchandising" and "spin-off" income generated because of the Pythons' material contribution to its creation was specially treated: 50% was paid to PMP directly before the residue went into the pot for division amongst all of the participants (including the Pythons). This income payable directly to PMP was in argument called "the Top Half": and I shall adopt that term in this judgment. Subject to the special treatment of the Top Half, NFTC and its successor trustees were to hold

the assigned property and the proceeds of any sale or licensing of it and all other monies received from the exploitation of "The Grail" for the benefit of the profit participants in accordance with their stated percentages. PMP was entitled to 34.125% (and if divided equally between the Pythons that would have given each of them 5.6875%): and Mr Forstater was separately entitled to 5.6875%. So in the Deed the profit allocation was not treated as a joint share.

12. To summarise the position: if income from merchandising into which the Pythons had put special creative effort (over and above simple exploitation of the existing creative content of "The Grail") was treated as mainstream income then the Pythons would have received 34.125% of it. (This proportion was subsequently altered: but that is immaterial). Because it was specially treated, they received 50% ("The Top Half") for distribution between themselves and Mr Forstater in accordance with the terms of the MF Agreement, and they shared in the remaining 50% forming part of the mainstream income pot along with everyone else in their stated profit shares.

13. Although the Deed enables the NFTC to make an initial deduction in respect of its own remuneration and expenses, the definition of "divisible receipts" extends to "all monies received by the Trustees from the exploitation of ["The Grail]" and does not explicitly refer to the expenses of exploitation of the various rights and collection of the various revenues. That is because at the time of the Deed PMP alone bore the entirety of those expenses. Later there was an amendment to the Deed.

14. In December 1997 PMP engaged Fergus Spence Management Ltd ("FSM") as its sales agent and business manager to exploit the rights in the existing body of Python material (since the Pythons were not then writing as a group). Their remuneration was a commission of 10% on PMP's income. In relation to "The Grail" this meant that FSM would sell some rights to exploit the film, and in return took 10% of the Pythons' income (which, ignoring an immaterial adjustment, was 34.125% of the entire income). No commission was charged to the investors and others who received the balance of the income.

15. On 14 June 2007 an agreement was entered into between PMP, NFTC and FSM providing for different remuneration for FSM. Under that agreement FSM's charges were to be calculated not only upon PMP's share of the income from "The Grail" but upon all the divisible receipts. This meant that the profit participants under the Deed, who had hitherto been protected against the costs of generating the divisible receipts, would now have to bear a proportionate share of the expenses. FSM shared its increased remuneration with Mr Goldstone (who had hitherto not charged anything for the services he had rendered for generating income).

16. The foregoing is a sufficient description of the background to the issues that fall for decision in the claim brought by Mark Forstater and by Mark Forstater Productions Limited ("MFPL") against PMP and against NFTC (since 2010 renamed "Freeway Cam (UK) Ltd"). Those issues are:-

a) Is the true meaning of the MF Agreement so far as regards merchandising and spin-off income that Mr Forstater should share equally with individual Pythons in all that income? Or should he receive a lesser proportion of the Top Half? ("The construction argument").

b) If the true meaning is that he should receive a lesser proportion, should the MF Agreement be rectified so that he receives the same share of the Top Half as each of the Pythons? ("The rectification claim").

c) Who is now entitled to advance the construction argument and the rectification claim? ("The assignment issue").

d) Is the person or body able to advance that claim entitled to damages from PMP or equitable compensation from NFTC in respect of the alteration in the terms upon which FSM operated as sales agent? ("The expenses argument").

17. Since both the construction argument and the rectification claim require an examination of the background to the MF Agreement (though the same evidence is not material to both) I will set out my findings of fact before addressing the legal argument. I will deal separately with the assignment issue and with the expenses argument.

18. The MF Agreement was entered into in 1974. Memories of events from that time are bound to be hazy, and are bound to be recollected through the prism of subsequent events (both as regards developments in the relationships between the principal participants and as regards knowledge of the actual occurrence of events which might in 1974 have seemed distant hopes). A judge is bound therefore to place considerable reliance on contemporary documents (whilst recognising that at the time they would have been written from a particular standpoint, and that the mere chance of their survival, whilst others have been destroyed or lost, may have a distorting effect). A judge is bound also to have regard to the commercial probabilities (whilst recognising that "The Grail" was not a business, but a creative work capturing the genius of a tight-knit group of artists for whom commercial considerations were not paramount).

19. So far as the Claimants' witnesses are concerned:

a) Mr Forstater gave his evidence in a measured way, although it was clear that the events under consideration had been the absorbing focus of his attention since about 2005 to such an extent that it became extremely difficult to separate recollection from reconstruction;

b) Mr Olswang gave his evidence from Israel in somewhat trying circumstances in which he appeared on the video link but was questioned and answered by mobile phone. Perhaps because of those circumstances he gave his evidence in a rather casual way, and found it difficult to engage with apparent differences between his written evidence and the answers he was giving to questions from Counsel. But in fairness to him it was (as he several times said) "all 40 years ago".

c) Mr Remington gave written evidence (which I consider later).

20. So far as PMP's witnesses are concerned:

a) Michael Palin was a balanced and trustworthy witness. He acknowledged that his recollection was hazy and dependent to a significant degree upon his diary (some of the entries in which had jogged his memory); and he several times adverted to the difficulty of distinguishing between "independent recollection" and "recollection" derived from some document. He made every effort to give me a truthful account of the relevant events.

b) Terry Jones was with Terry Gilliam a proponent of Mr Forstater's involvement in "The Grail", and so absorbed in the creation of the film that he appears to have paid little attention to what he called "the comings and goings of financing and investing". His evidence was therefore principally a reflection upon what he would have thought at the relevant time. For example, that "Python is very jealous", that they did not think that Mr Forstater would have any part in the creative process, and that he had no idea why Mr Forstater was given a share in the Top Half; but that he would have trusted Mr Forstater as regards his own deal. I consider him too to be a trustworthy witness, though I noted that his evidence was suffused with a sense that Mr Forstater had done very well out of his brief connection with the Pythons.

c) Eric Idle was frank enough to acknowledge that he now disliked Mr Forstater: but he expressed the hope that in his evidence he was being honest and that his dislike did not affect his honesty. I think he largely achieved that aim so far as conscious effort could take him. He undoubtedly regarded Mr Forstater as ungrateful.

d) Julian Doyle was of all the witnesses the least interested in money, and his artistic commitment shone through. He was the one who mortgaged his house to provide the seed capital that enabled filming to get under way (in contrast to Mr Forstater): and whilst he was undoubtedly surprised and somewhat disappointed by what the case revealed about how Mr Forstater had dealt with him, he transparently bore Mr Forstater no ill-will. He was a fair and reliable witness to events.

e) Ian Miles (of FSM) was a satisfactory witness as to events; but I was wary of his evidence on other matters (such as states of mind). His business partner Mr Saunders (of FSM) presented well as a witness, being unfazed by thorough cross-examination and giving answers that appeared authentic and not contrived. But I have treated his evidence with a degree of caution because in one important instance he had clearly treated what he thought might have happened as if it actually had happened.

f) Mr Goldstone gave reliable evidence.

g) Terry Gilliam and John Cleese gave written evidence but did not attend for cross-examination. I do not place much weight on their evidence on that account.

21. So far as NFTC's witnesses are concerned:

a) Louisa Bewley (Managing Director of NFTC at the time of the FSM negotiation) was an open and straightforward witness who erred on some of the detail, acknowledged gaps in recollection (for she was not assisted by any contemporaneous notes), but provided a fundamentally reliable account of events and an honest assessment of knowledge and motives (though her assessment, of course, falls to be cross-checked by what appears from documents and from the probable commercial realities).

b) Gretta Finer (in-house lawyer to NFTC) gave evidence both of events and of the common arrangements in the film rights industry in a fair way, and I accept her as a witness of truth.

22. These are my findings of fact, based principally upon the transactional documents and such other documentary material as I regard as reliable. The written and oral evidence (save in relation to the FSM claim) constitutes a generally less reliable source because of the distance of time over which it is recollected.

23. In 1973 the manager of the Pythons was John Gledhill ("Mr Gledhill"). The Pythons were not happy with the service that they were receiving from him. Terry Gilliam had prepared a preliminary draft script for "The Grail", and the Pythons were seeking funding for the proposed film. The Pythons had worked with Chippenham Films on short features and advertisements and had been impressed with the service provided. Terry Gilliam and Terry Jones (the intended directors) approached Chippenham Films to see if Mr Forstater would become the producer of the "The Grail" and if Mr Doyle would undertake the film production.

24. Although no terms had been agreed, by the early autumn of 1973 Mr Forstater had prepared a budget for "The Grail" and was himself actively seeking funding alongside Mr Gledhill (who was in contact with NFTC and with third party funders). Michael Palin records in his diary an account of a script meeting on 22 September 1973:-

> "Tensions flared at the end of the meeting when Terry [Jones], in passing, mentions that Mark Forstater is fulfilling a kind of producer's function on the film - John [Cleese] reacts strongly, simply and aggressively "Who is this Mark Forstater?" etc etc. John has a way of making it sound like a headmaster being crossed by a junior pupil rather than equal partners in a business disagreeing."

25. The objective was to get the film project seriously underway by November 1973. Mr Forstater himself sought funding and negotiated with other funders (in particular Michael White and Mr Goldstone, who had some involvement with a successful Monty Python stage production then running in Drury Lane). But Mr Forstater was becoming anxious as to his standing in the project. Michael Palin's diary for 28 October 1973 paints the picture:-

> "About to sit down to lunch with all the Herberts in our little kitchen, my stew and dumplings already on the table, when the phone rings - it is Mark Forstater. He is anxious to find out exactly how he is to be connected with the film, now the deal is almost complete. He wants us to employ himself and Julian [Doyle] as co-producers of the film. It seems easy enough, but John Goldstone also wants 12 ½% of producer's profit … and there is a danger that if we pay Mark a percentage as well we are into…overstaffing on the production side … But there is seething jealousy and rivalry below the surface. Mark Forstater was brought in primarily by Terry [Jones] but with the tacit agreement of myself, Graham [Chapman] and Terry Gilliam … Mark, whose honesty I respect, claims a considerable amount of credit for the [NFFC] deal and for the introduction of Python to White and Goldstone…..In order to get back to my stew and dumplings I promised Mark that I would set up a Python meeting when his future with Python would be discussed".

26. That meeting took place on 1 November 1974: Michael Palin described it as "cordial, relaxed, totally constructive" and recorded:-

> "Mark explained the film deal, thoroughly and efficiently, and also gave us a rundown on how he would hope to be involved in the film, and how much of a cut he would like. … Mark was so straightforward and free of cant that we soon found ourselves all talking together on the assumption that Mark would be the producer … So at the end of what I had expected to be a bitter and acrimonious Python power struggle we had an easy and complete agreement for Mark as producer…".

Any agreement in principle at this stage would not have involved the Top Half. That seems to me to be a later refinement.

27. There was then a meeting with Mr Gledhill on 5 November 1974 (to examine critically an agreement that Mr Gledhill had negotiated with Mr Goldstone) which Michael Palin's diary chronicles in this way:-

> "…as Mark ran through the clauses, it was increasingly clear that we be were being asked to sign away our copyright on the film – which is tantamount to signing away every bargaining counter Python ever had… the point seemed to have finally been made, that as far as we are concerned Mark is handling the film. From that moment on, John Gledhill went quiet, and Mark took over. He will draft a new agreement, with his solicitor, and we will present it to Goldstone later in the week".

Terry Jones' diary contains a shorter (but confirmatory) account: and records that the Pythons were "all pretty keen on [Mr Forstater] producing".

28. There is no documentary evidence of what "cut" it was agreed that Mr Forstater should have. But I accept his evidence that by the end of 1973 it had been agreed that he should receive (not necessarily for his own account) a profit share equivalent to whatever an individual Python received, at least so far as mainstream profits were concerned.

29. With the film finance apparently nearing completion the Pythons gave instructions to Mr Olswang of Brecher & Co, Solicitors, to incorporate PMP. At Mr Olswang's request the Pythons wrote to his firm on 30 November 1973:-

> "We would also like you to act on our behalf on behalf of the company when formed in connection with a proposed film provisionally entitled "Monty Python meets the Holy Grail" and also to take instructions from Mark Forstater in connection with such film".

This told Mr Olswang who had authority to act on behalf of PMP in relation to "The Grail". Apart from the Board, it was Mr Forstater: and he alone.

30. It is clear from the correspondence that, although there were no formal agreements in place, Mr Forstater remained very active in seeking finance for "The Grail" (though there is no documentary evidence that he had any creative input into the screenplay): and that when he corresponded he did so on the notepaper of Chippenham Films. The available material does not suggest that anyone gave any thought at this stage to drawing a distinction between Mr Forstater the individual acting in his personal interest, and Mr Forstater the partner in Chippenham Films. Both were in some sense involved in the promotion of "The Grail" as a film project.

31. In early 1974 there was an addition to the cast list. The Pythons (or more precisely, Python Productions Ltd, another Python company) appointed Henshaw Catty & Co as their accountants. The persons at the firm who dealt directly with the Pythons' affairs were the accountant Michael Henshaw and (to a greater degree) his wife Anne Henshaw (who was thought to have some legal experience but was not qualified as an accountant or a lawyer). There was a dispute on the evidence as to her precise role. It was suggested on behalf of Mr Forstater that she was not simply performing an accountancy or book-keeping function on behalf of the newly appointed firm, but was supplanting Mr Gledhill and had by April 1974 assumed the role of "manager of the Pythons" (and in particular was giving instructions to Mr Olswang).

32. The Pythons did not accept this analysis. None of them accepted that in April 1974 Anne Henshaw was their manager. Eric Idle said that she was the Pythons' secretary, organising meetings and producing agendas and minutes for what was "otherwise a chaotic group of comedians". I consider that to be a more accurate picture, though perhaps underplaying the contribution of her experience.

33. It is clear from an invoice from Henshaw Catty that their retainer began on 19 January 1974, from which date they began to attend meetings with Mr Gledhill "in order to take over the day-to-day running of Python Productions Ltd". What this day-to-day running involved appears from a later part of the invoice to be

> "…general bookkeeping, including VAT invoicing and supplying the directors' accountants with full information regarding payments … photocopying… correspondence and telephone calls with third parties, including banks, publishers and record companies etc, dealing with the payment of bills and receipt of income … ".

This summary presents an accurate narrative of what the firm (and in particular Anne Henshaw) was doing. It was providing administrative support of a routine nature, and advising on the issues that needed to be addressed. It was not taking the initiative in the promotion of the Pythons' or PMP's affairs.

34. On 11 March 1974 Michael Palin recorded in his diary:-

> "Full marks to Anne [Henshaw] who is working hard to try and sort us out".

It was suggested that this was an indication of the breadth of the scope of Anne Henshaw's work: but it is clear from the context that the "sorting out" that was being done was sorting out the relationship between the Pythons and Mr Gledhill as the latter withdrew from such close involvement with their ordinary affairs and Henshaw Catty began to collect and to provide the financial information that the Pythons sought. It cannot be taken to mean that she was "sorting out" funding for "The Grail" or that she was "sorting out" intended transactions between the Pythons and others relating to the production of "The Grail".

35. From a narrative on the Henshaw Catty invoice it can be established that representatives of the firm (probably Anne Henshaw) met with the Pythons on the following dates prior to the signing of the MF Agreement:-

a) 21 February 1974: There is a Memorandum prepared by Henshaw Catty for this meeting which shows that what was considered was the mechanics of transfer of the day-to-day running of Python Productions Ltd to that firm (bill payments, VAT returns, queries on the accounts, audit, change of registered office). In essence, at this stage Henshaw Catty were to provide "backroom" services to Mr Gledhill. The "film company" was to be discussed at the next meeting.

b) 28 February 1974: A note of this meeting shows that the Pythons had decided that any future films would be made through PMP and with Mr Forstater (not through Mr Gledhill): and the meeting focussed upon the future relationship with Mr Gledhill (who was to concentrate on Python Productions Ltd, another Python company, and negotiate contracts when requested). This records the adoption of a policy to shift work from Mr Gledhill to Mr Forstater (not to Anne Henshaw).

c) 4 March 1974: Michael Palin's diary records that this meeting dealt with the potential responsibility of a Nancy Lewis for the Python's new music publishing venture (Kay-Gee-Bee Music Limited) and for records, recordings and all future music contracts "now that Mark is in charge of our film section".

d) 6 March 1974: A note of this meeting indicates that there was further discussion of Mr Gledhill's position and remuneration.

e) 11 March 1974: Both an Agenda for this meeting and the accompanying notes (confirmed by an entry in Michael Palin's diary) show that this meeting concentrated on arrangements with Mr Gledhill, and upon the appointment of an agent or business manager for merchandising sales in America: and that there were preliminary discussions about the production of a book, a calendar and a record and about the incorporation of separate companies. One copy contains handwritten notes (in whose hand was not established by the evidence): but those notes contain no reference to any deal between PMP and Mr Forstater. Michael Palin's recollection (which I accept) was that at this meeting Anne Henshaw was discussing figures that she had found, was providing information to the Pythons, and was explaining the financial consequences of proposed commission arrangements with Nancy Lewis. But it is to be noted that if separate record and music publishing companies were to be established that might well raise a question about the impact of the merchandising and spin-off rights relating to "The Grail".

f) 2 April 1974: There is no note of this meeting. But there is an account in the diary of Terry Jones from which it is apparent that this was the first occasion for some while that all of the Pythons had been together.

36. Michael Palin's and Terry Jones' diaries supplement the account of meetings given in the Henshaw Catty invoice. In particular they establish a meeting at the house of Terry Jones on 23 April 1974 in circumstances which both Michael Palin and Eric Idle describe as "chaotic". The Pythons and their support staff were trying out costumes and make-up in preparation for the imminent filming. Then Mr Forstater and Mr Olswang arrived (together with Jim Beach, Eric Idle's personal solicitor). Some of the agreements were then certainly still under discussion, and were considered at this meeting.

37. In this documentary record of the period from 19 January 1974 until the signing of the MF Agreement there is no mention of negotiation of terms between PMP and Mr Forstater, or of any amendment to those terms allowing for a separate treatment of the Top Half and for Mr Forstater's participation in it. Indeed there is no mention of the genesis of the Top Half (and its impact upon the return to Michael White Ltd and the third party investors) at all. So the documentary record cannot be regarded as complete. That may in part be accounted for by the fact that at the time the merchandising income relating to "The Grail" was (as Eric Idle put it) "a dream in the future…we looked at what we were being paid". But it is right to record that in 1973 the Pythons had generated significant "spin-off" income from the TV series, so that there were grounds for thinking that the dream would be fulfilled.

38. Mr Forstater's oral evidence was that "the merchandising profit just came up". His written evidence suggested that it came up because one of the third party investors had suggested the release of a soundtrack of the film. That is entirely credible. It led to a change in the terms on which Michael White and the third party investors participated (through the introduction of the Top Half): and it led to a change in the terms of his own agreement, which in addition to giving him a profit participation in the mainstream income pot gave him (uniquely amongst other profit participators) a profit share in the Top Half.

39. It was on 25 April 1974 that the MF Agreement was signed. The MF Agreement itself was signed by Terry Jones on behalf of PMP and by Mr Forstater, those signatures being witnessed by Mr Olswang. But the Third Schedule dealing with Mr Forstater's profit participation (which contained manuscript alterations) was initialled by Michael Palin on behalf of PMP and by Mr Forstater, their initials being un-witnessed. This suggests that this initialling may well have been done on an occasion other than the signing of the MF Agreement itself: and I would deduce probably afterwards. Someone must have thought that the MF Agreement was improved (or made more accurate) by the manuscript alterations

40. As I have said, the MF Agreement provided for Mr Forstater to receive a fixed fee (part of which was to be deferred) and to participate in 5.6875% of "the profits of the

Film as defined in the Third Schedule hereto". The Third Schedule defined profits of the Film" as

> "the balance remaining of the gross proceeds of distribution and exploitation of the Film and any part or parts thereof and any and all so-called "merchandising" and other "spin-off" rights arising therefrom throughout the world less the merchandising profits hereunder defined and after deduction of distribution fees or commissions distribution expenses and the certified costs of production with interest thereon as agreed between the Company and persons investing in the Film PROVIDED ALWAYS that in respect of the exploitation of the said "merchandising" and "spin-off" rights and in the event and to the extent that under the terms of the Companies (*sic*) agreements with persons investing in the Film it is entitled to receive 50% (fifty per centum) of the proceeds of exploitation of such rights (such share being hereinafter called "merchandising profits") prior to the division of such proceeds amongst the persons entitled to participate in the profits of the Film [Mr Forstater] shall be entitled to receive 7.1429 per centum of such merchandising profits in addition to his said shares of the profits of the Film".

So Mr Forstater is entitled to 5.6875% of the profits of the Film excluding the Top Half: and in relation to the Top Half he is entitled to receive "7.1429 per centum of such merchandising profits in addition". That is his profit participation.

41. Mr Forstater's account as to how that came to be is this. Once he learned of the proposed creation of the Top Half he became concerned that it would reduce his own entitlement to below that of individual Pythons at a time when he was regarded (at least by Mr Olswang) as "the seventh Python". According to his written evidence he therefore raised the issue of his receiving $1/7^{th}$ of the Top Half, he believes ("fairly sure") by writing to Anne Henshaw. He says that he was then invited by Anne Henshaw to attend the next meeting of the Pythons where he could make his proposal directly. That meeting took place ("sometime in late February or in March or April 1974") at her house, and was attended by Michael Palin, Terry Jones, Terry Gilliam and Anne Henshaw (and possibly Graham Chapman). Mr Forstater put his proposal to the meeting, and left whilst that proposal was discussed. He cannot now recall whether he waited for the result or whether Anne Henshaw rang later that day or the next day to deliver the result. But he is absolutely clear in his recollection that she informed him that the Pythons had agreed to his proposal and acceded to his request to receive $1/7^{th}$ of the Pythons' share of the Top Half. He did not give any instructions to Mr Olswang as a result of these events, and assumes that it was Anne Henshaw who did so.

42. Mr Forstater acknowledged that he had given a number of different accounts of the making of this agreement. He explained that

> "the entire picture is not there: but the fragments are, and they are pretty good".

He acknowledged that there was "a fluidity" to his account, but maintained that his position had not really changed. The fundamentals were that he put the point, it was approved, it was put into the agreement, and for 30 years he had invoiced for 1/7th.

43. Michael Palin had no recollection of how the Top Half came to be created or of how and when it was put to Michael White and the other investors, or indeed of how and when it was put to him. He could only recall that there had been a big issue about how much the Pythons should receive for added value: and that the Pythons would not have agreed a reduction in their percentage without everyone being in agreement. Nor has Terry Jones or Eric Idle any idea how Mr Forstater "got to be in there", both agreeing that it would not have been contemplated that Mr Forstater might have assisted with a book or a record; the latter describing the notion as "absurd". Terry Gilliam's evidence recorded that he regarded it as "peculiar" that Mr Forstater should be entitled to a share of the merchandising income: and that until the making of the claim he had not realised that the MF Agreement provided for Mr Forstater to have *any* share of the Top Half. John Cleese had no recollection of any agreement that Mr Forstater should share in the Top Half, considered it a "ridiculous idea", and expresses the view that if he had been consulted he would have vetoed it.

44. On 23rd November 2009 Mr Olswang made a witness statement: in it he said that he took day-to-day instructions on matters concerning "The Grail" from Mr Forstater "although I do recall having some direct contact with Anne Henshaw". He added:-

> "I clearly recall that it was the intention of the parties that Mr Forstater would be treated the same as all the other members of Monty Python here such that where they were to be entitled to deduct their 50% off the top, he was entitled to receive one 1/7th of this. In effect, he was to be treated as "the 7th Python", a phrase I recall the other members of Monty Python using to describe him"

45. His oral evidence, however, was that although he could not remember any of the Pythons referring to Mr Forstater as "the seventh Python", it was "a phrase that was around", though he could not say who used it when. From that, and from a comparison of key terms of the MF Agreement (level of salary and deferment for "overage") Mr Olswang had an understanding that generally Mr Forstater was to be treated in the same way as each of the Pythons, saying that after 40 years he could say exactly where that understanding had come from, but suggesting that it may have been Anne Henshaw. It was his view that he would not have included in any agreement a provision which came from Mr Forstater without checking with Anne Henshaw what PMP wanted to be done.

46. The documents do not in fact support the close involvement of Anne Henshaw in the giving of instructions to Mr Olswang. Thus on the 11 April 1974 Mr Olswang wrote to NFTC enclosing some documents "at the request of Mark Forstater"; and he copied the letter to Mr Forstater, but not to Anne Henshaw. On 18 April 1974 Mr Olswang had received some enquiries from NFTC: on the 2 May 1974 Mr Olswang responded to those by saying that, in relation to the insurance cover of PMP, he was "seeking these particulars from Mark Forstater". He did not seek details of PMP's insurance from Anne Henshaw. On 13 June 1974 was dealing with some provisions in a distribution agreement with EMI: he explained that "Mark Forstater is rather concerned with the provisions of this clause": there is no suggestion that Anne Henshaw had been consulted, even though the agreement plainly affected PMP. Each of these events relating to the creation of the Top Half, its impact on Mr Forstater and the agreement with the Pythons fell within the period covered by the Henshaw Catty invoice: but the invoice makes no reference to that firm dealing with Mr Olswang. I refer to these instances because they give a partial insight into the allocation of responsibilities shortly before and shortly after the MF Agreement was entered into.

47. In fact if one looks at the surviving transactional documents, Mrs Henshaw did not contact Mr Olswang until 3 October 1974 when (acting on behalf of Python Productions Ltd, another Python company) she writes (addressing him formally as "Dear Simon Olswang") to explain why Mr Olswang's firm has not been appointed solicitors to Kay-Gee-Bee Music Ltd (another Python company formed to exploit a record of "The Grail"). Yet there must have been some earlier dealings: for in his response Mr Olswang said he had enjoyed working with her.

48. I shall express my concluded view on these issues when determining the rectification claim.

49. I return to the main narrative and pick matters up immediately after the signature of the MF Agreement. It is apparent from the documents that almost immediately after signature of the MF Agreement Mr Forstater made an approach to Eric Idle about "whether the directors' percentage should be reduced": an issue that was put on the Agenda for a meeting to discuss PMP business on 5 June 1974. At that meeting it was decided that no reduction should be taken. It is not clear to what exact proposal this related. But the suggestion of a reduction in "the directors' percentage" was apparently for the benefit of Mr Forstater: and from the fact of the request it appears that Mr Forstater was not happy with what he had secured under the MF Agreement. He wanted more. From the terms in which this event was subsequently discussed I think it likely that he wanted an increase in his percentage of the mainstream profits.

50. Part of the context may have been that whatever Mr Forstater had secured by way of profit participation was from the outset not intended to be for his sole benefit. As he wrote to the Pythons on 17 February 1975:-

> "At the moment 5.6875% is in my name, equal to the percentage of each of you. However, it was my intention, and it was also the desire of the two Terrys, to give Julian Doyle a

> percentage of the profits, taken from my share… I do not feel that I can fall behind the two Terrys in terms of eventual profits. I feel that I must at least keep up with you in that… I would like to suggest to you that it would be possible to give Julian his 1% by taking only 0.1428% from each of our shares…".

This proposal was not acceptable: and Mr Forstater assigned "2.5% (of 100%) out of his 5.6875% share of the profits" to Julian Doyle on 18 April 1975 or thereabouts, by which he meant (according to the letter from Brecher & Co) "2.5% of the profits as they are defined in the relevant documentation". (Mr Doyle was not at this stage aware that Mr Forstater was entitled to share in the Top Half: this he only discovered in 2011). This left Mr Forstater with 3.1875% of the mainstream distributable profits. Mr Forstater was not content with his "return", which he described as "£5000 plus 3.2%". Through Anne Henshaw he sought to renegotiate his return with the Pythons. That attempt was resisted. Michael Palin wrote

> "We took on Mark and Julian as a team – a production team – and all along it was understood by me, at any rate, that they would sort out how they shared their combined percentage themselves. I think it is totally unfair to expect any of the Pythons… to give up any of their percentage".

So the percentages as between the Pythons and Mr Forstater remained unaltered. There was in this exchange no mention of the Top Half. But it is plain that by this time there had been a fundamental change in the relationship between the Pythons and Mr Forstater: as Michael Palin put it:-

> "…it is now clear that the general consensus amongst Pythons is that Mark [does] not work sufficiently well with us for us to involve him in any other Python films".

51. On 8 August 1975 Mr Forstater wrote to NFTC enquiring whether it would be possible for his percentage of "the equity" in "The Grail" to be held by MFPL. This was evidently agreed, and on 15 August 1975 Mr Olswang gave notice to NFTC that Mr Forstater's interest of 3.1875% in the profits of "The Grail" was the subject of a formal assignment to MFPL. The documents do not suggest that there was any separate treatment of Mr Forstater's entitlement to participate in the Top Half. Equally, there is no suggestion that participation in the Top Half was excluded from the scope of the assignment.

52. In 1976 the Pythons produced a soundtrack album of "The Grail". On 8 April 1976 "Mark Forstater Productions" invoiced PMP

> "for 1/7th share of record album revenues … 1/7th of £1232.51 reported by NFTC to March 31st 1976".

Although the supporting statement from NFTC is not available the form of the invoice suggests that this was Mr Forstater invoicing PMP in respect of what it had received as the Top Half. This is supported by the invoice rendered by MFPL in August 1977 which was

> "For 1/7th share of Python (Monty) Pictures 50% share of music royalties as reported in the NFTC statement of July 31 1977".

On 8 December 1977 MFPL invoiced PMP for

> "1/7th share of book royalties on 50% allocation to [PMP]."

It is convenient at this point to record that there are many such invoices going from April 1976 up to December 2006 rendered by MFPL to PMP which contained this description of the amount being invoiced or some variation of it (such as "1/7th of ancillary revenues to [PMP]"). Although the amounts were initially small they certainly increased in size. An invoice of 14 September 2005 was in the sum of £40,706 (including £2560 in respect of "Spamalot").

53. In 1977 the Pythons decided to produce a book version of "The Grail". This required substantial additional creative input. Anne Henshaw was uncertain what the consequence of this was for PMP. So she asked the NFTC "to explain the position under the documentation if a book based on the script of the film is published with further contributions from the Pythons". A letter of explanation as to the general position was sent (but this did not address the particular position of Mr Forstater).

54. Although all of the intellectual property rights relating to "The Grail" had been vested in NFTC the Pythons decided to try and exploit the book rights through Python Productions Limited ("Python Productions") (not PMP). In principle the effect of this would be that the book profits would go to Python Productions, and the Pythons would receive 100%. If the Pythons had produced the work through PMP then the profits would have been governed by the Deed, and (a) they would have shared the Top Half with Mr Forstater and (b) the balance would have fallen into the pot to be shared with Mr Forstater, Michael White Limited and the other investors (the Pythons getting only 34.125% of it). I say "in principle" because in fact the Pythons were proposing only that the top slice of 60% should go to Python Productions, with the balance of 40% being treated as originally intended. (Although less well documented there was a similar arrangement entered into in relation to a record that had been produced by Kay-Gee-Bee Music Ltd).

55. It appears that Michael White Limited and the other investors were prepared to accede to this new arrangement. So was Mr Forstater. But he realised that he was in some measure losing out. So he sought to restore his position. On 23 June 1977 he wrote to Mrs Henshaw:-

> "However, this new deal does affect me directly, since in the original deal negotiated I was allocated 1/7th of the Python's share of any spin-offs. Under this proposed deal I lose that share. Would the Pythons be willing to bring me in on the Pythons Productions side so that this 1/7th share remains the same….".

56. Anne Henshaw promised to bring this matter up with the Pythons in early July. I find that she probably did so, and that the Pythons rejected the suggestion: there was a meeting on 22 July 1977 the note of which records that Michael Palin, Terry Jones and Eric Idle had already considered the request and rejected it. On 23 July 1977 Mrs Henshaw wrote:-

> "The Pythons are not aware of any exceptional circumstances which might suggest that you should receive part of Pythons' share. You will after all be receiving your investor's share plus 1/7th of 50% of the amount paid to NFTC which will be Python (Monty) Pictures' share".

In my judgment the reference to "the investor's share" is a reference to the 5.6875% share given to Mr Forstater by the Fourth Schedule to the Deed: it included the mainstream income and the 50% of the "merchandising" and "spin-off" income generated by the special efforts of the Pythons that fell into the general pot for distribution. The reference to "50% of the amount paid to NFTC which will be Python (Monty) Pictures' share" I consider must refer to the Top Half (since this was the way the accounting was in fact done).

57. On 8 December 1977 MFPL rendered an invoice

> "For 1/7th share of book royalties on 50% allocation to Python Monty Pictures Ltd".

This was in accordance with what Anne Henshaw had suggested was Mr Forstater's entitlement. The invoice was paid without being challenged. So were many others.

58. In September 1979 PMP's accountant seems to have raised some questions on the accounts for the year ending the 31 December 1977 to which Anne Henshaw replied. One question related to Mr Forstater. The answer given by Anne Henshaw was:-

> "I confirm that with regard to spin-off rights Mr Forstater receives in addition to his share of the profits from the film pot, 1/7 of the 50% payable to PMP."

That must be a record of what was actually happening: and there is no suggestion that it ought not to be happening.

59. On 25 April 2002 MFPL (which then held a 3.1875% participation in the distributable profits of "The Grail") assigned 0.6875% to Mitsuko Forstater, so reducing its holding to 2.5%.

60. In the winter of 2001 Eric Idle had begun work on "Spamalot", the stage musical adaption of the "The Grail". Over the next 3 years he produced drafts of the text, co-wrote 15 songs, recorded a demo, and found a producer; all before seeking the collaboration of the other Pythons. Under the arrangements worked out it was agreed that "Spamalot" should be treated as a "spin-off" of "The Grail", but one to which the Top Half provisions applied.

61. By September 2005 "Spamalot" was doing huge business, regularly playing to full houses and rapidly recouping its costs. In the statements prepared by NFTC the show's income was reported to profit participants under more than one heading. When this was pointed out to Mr Forstater he believed that he might not be receiving his full entitlement. He wrote to FSM to explain his position in these terms:-

> "My deal with [PMP] is that I invoice a 1/7th share of all merchandising and spin-offs that are earned by [PMP], such as the book and record revenues, and have been doing this since 1976. The deal is that [PMP] retains 50% of this merchandising income and I invoice for 1/7th share of it."

In a subsequent e-mail he explained the rationale for this arrangement:-

> "[PMP] and I agreed that as the producer of the film (i.e. a co-creator of the material) I should be entitled to a share of the 50% of the income that [PMP] was going to retain from ancillary sales. I put the point (and it was accepted) that I should be alongside the Pythons as a 7th Python therefore should be entitled to 1/7th of the ancillary and merchandising income this is how the one seventh share was calculated and agreed."

The claim to be a "7th Python" and to be "a co-creator" of the material was a great mistake: for the Pythons are and were very jealous of "the brand" and very protective of their creative genius. Terry Gilliam described the claim as "utterly laughable": John Cleese said it was "ludicrous". Mr Forstater spent much of the trial trying to undo the damage which he had done to his cause by presuming to be one of "the Pythons", saying that he presumed membership only in a financial sense.

62. The claim however sent Mr Saunders of FSM to the original documents. When he read the MF Agreement he accepted that Mr Forstater was entitled to be paid a percentage of the Top Half but added

> "…according to my reading that should be 7.1429% i.e. a fourteenth rather than the seventh".

According to Michael Palin, Mr Saunders was the first person to suggest this in such terms.

63. Forced to look at the Third Schedule, and to take account of the handwritten amendment, Mr Forstater said in correspondence :-

> "Now I don't recall why this rewritten change was made, or the circumstances around it, (it was after all over 30 years ago), but I certainly did not believe that it reduced my share by half. The proof of this is that I have been sending invoices for a 1/7th share for the past 30 years, and these have never been questioned."

64. Mr Saunders explained to Mr Forstater how it was that, as a matter of fact, in the past he had been paid a 1/7th share of the Top Half earnings derived from the book and the record (and not 1/14th). Mr Saunders said that in each case the "top slice" of the income went first to a Python company before being made subject to the provisions of the Deed (including the provision relating to the Top Half): he suggested that Mr Forstater had in fact received one seventh of the Top Half to compensate him for the fact that a "top slice" had already been removed in favour of a Python company. Mr Saunders later told Mr Forstater's solicitor that he had spoken to Mrs Henshaw and she had confirmed that this was the case. But in cross-examination he said (1) that when he approached Anne Henshaw in about October 2005 she had no explanation for why Mr Forstater should be receiving "1/14th"; (2) that his account was a speculative attempt to explain a discrepancy; (3) that the furthest Anne Henshaw had gone was to agree that the speculative account was "possible"; and (4) that he accepted that it was not what had in fact happened. Michael Palin simply could not recall such an arrangement. For Mr Forstater, it was the first time he had ever heard this "allowance" argument.

65. I find that Mr Saunders' speculation is not the explanation for Mr Forstater's invoices for 1/7th being paid. The explanation must lie elsewhere.

66. Over this period the issue of how Mr Forstater had become (as he claimed) entitled to a 1/7th share was debated in correspondence and eventually in pleadings. Mr Forstater gave a number of differing accounts.

67. Mr Forstater's first explanation (on 28 September 2005) was that his participation in the Top Half was agreed in side letters subsequent to the making of the MF Agreement.

68. When no such letters could be found his second explanation (on 30th September 2005) was that the arrangement was very possibly done purely verbally (a response which he acknowledged in evidence showed that he was "floundering around").

69. The third account (put forward on his behalf by his solicitors on 11 October 2005) was that the 7.1429% of income entitlement provided for in the Third Schedule did not apply to the Spamalot income at all, but that his entitlement to participate in the Top Half arose "pursuant to a totally separate deal that he made 30 years ago in respect of ancillary income retained by the Pythons".

70. The fourth basis for his claim was advanced in a letter to Michael Palin on 31 October 2005 in these terms:-

> "I made the point at the time that as the producer of the film, I should share in [PMP's] share of this revenue as if I were a Python i.e a 7th member of the team, and should therefore be entitled to a 1/7th share of the [PMP] revenue. This was accepted and enshrined in an Appendix to my agreement…..[T]he true nature of our agreement at the time was that I should be treated as a 7th Python…. "

71. His fifth account (given on 28 July 2006 and having seen Mrs Henshaw's letter of the 28 July 1977 quoted above) was that the matter had been "agreed with Anne [Henshaw] (approved by the group)". He reinforced this when in correspondence with Michael Palin he objected that neither Mr Saunders nor the lawyers were around in 1975:

> "However Anne [Henshaw] was, and she knows where the bodies are buried. Have you ever asked her frankly to tell you the truth in this matter?"

72. His sixth account was contained in his pre-action protocol letter of 4 July 2008, and was that the agreement

> "..was made orally between Mr Forstater on the one hand and Anne Henshaw and several of the writer-performers making up the Pythons on behalf of [PMP] on the other at a meeting between about November 1973 and 25 April 1974 at Anne Henshaw's house…..[O]ur client believes that Mr Palin, Mr Jones, Mr Gilliam and Mr Chapman were all present….. "

73. His seventh account (given in a letter dated 4 December 2008 to Michael Palin) was that there had been a meeting at the Henshaws' house in March or April 1974 at which at least three or four of the Pythons were present and at which the Pythons agreed that Mr Forstater should have a 1/7th share, and Mrs Henshaw asked Mr Olswang to put the arrangement into a schedule to the MF Agreement. He put down this challenge:-

> "Stop hiding behind your lawyers and ask Anne [Henshaw]. She was there at the time and knows the truth of the matter.

> What would she say in court regarding our agreement and correspondence?"

It was this account (that the agreement was made at a meeting attended by himself but some only of the Pythons) that was embodied in his original Particulars of Claim (in April 2011) and in the Amended Particulars of Claim in April 2012.

74. His eighth account was contained in his witness statement dated 28 September 2012, was elaborated upon in his witness statement of 21 November 2012, and embodied in a re-amendment to his statement of case permitted at the opening of the trial. Faced with the argument that some only of the Pythons could not bind PMP and that consensus was required, Mr Forstater's case became that the relevant agreement was not reached at a meeting between himself, some of the Pythons and Anne Henshaw, but it was his proposal that was put at that meeting, was subsequently agreed by all Pythons, and the fact of agreement was communicated to himself by Anne Henshaw.

75. I can now turn to the issues.

The construction claim.

76. It is well to set out the relevant provision again. Clause 3(a)(iii) of the MF Agreement gave Mr Forstater at 5.6875% of the profits of the film "as defined in the Third Schedule.." The Third Schedule provided:-

> " "Profits of the Film" shall mean the balance remaining of the gross proceeds of distribution and exploitation of the Film and any part or parts thereof and any and all so-called "merchandising" and other "spin-off" rights arising therefrom throughout the world *less the merchandising profits hereunder defined and* after deduction of distribution fees or commissions distribution expenses and the certified costs of production with interest thereon as agreed between the Company and persons investing in the Film PROVIDED ALWAYS that in the respect of the exploitation of the said "merchandising" and "spin-off" rights and in the event and to the extent that under the terms of the Companies agreements with persons investing in the Film it is entitled to receive 50% (fifty per centum) of the proceeds of exploitation of such rights (*such share being* hereinafter called "merchandising profits") prior to the division of such proceeds amongst the persons entitled to participate in the profits of the Film [Mr Forstater] shall be entitled to receive 7.1429% of such merchandising profits in addition to his said shares of the profits of the Film".

(The words in italics are handwritten in the original MF Agreement).

77. Mr Forstater was to receive 5.6875% of the income produced by "The Grail" except for the Top Half. In the Third Schedule what I have called the Top Half is defined as "merchandising profits" : that is the effect of the words

> "…50%....of the proceeds of the exploitation of such rights (such share being hereinafter called "merchandising profits")…".

The Third Schedule says that Mr Forstater shall be entitled to receive 7.1429% of "the merchandising profits" (or Top Half). The question is whether the clause is to be read as giving Mr Forstater 7.1429% of the sum that represents the merchandising profits, or whether it is to be read as giving Mr Forstater 7.1429% of the 50%, leaving 42.8571% for PMP (which, if divided between the Pythons, would give them 7.1428% each)

78. The literal and grammatical reading is that Mr Forstater receives 7.1429% of the share of the proceeds received by PMP as the Top Half.

79. Mr Weisselberg and Mr Vinall submit (building on Chartbrook v Persimmon Homes Limited [2009] 1 AC 1101 at paragraph [25]) that it is clear that something has gone wrong with the language of the Third Schedule, and from the surrounding circumstances it is clear what a reasonable person would have understood PMP and Mr Forstater to have meant: namely that he should have the same interest in the Top Half as each of the Pythons would get from PMP's participation. This is because:-

a) There were six Pythons;

b) In relation to the mainstream income (i.e. the profits of the film other than the Top Half) the Funding Agreement provided that Mr Forstater and PMP were together entitled to 39.8125% (which divided amongst the individuals would give each of them 5.6875%); and the Deed provided that Mr Forstater should receive 5.6875% and that PMP should receive 34.125% (which divided between the individual Pythons would have given each of them 5.6875%);

c) It is clear that Mr Forstater was supposed to share in the Top Half;

d) There is no obvious commercial reason why Mr Forstater's share in the Top Half should be proportionately different from his entitlement to share in the mainstream income i.e. on an equal footing with any individual Python;

e) It is clear that the original text was amended to remedy a perceived flaw and (as it was put in their skeleton argument) "it is to be inferred

that the change from one-fourteenth of 100% to one-fourteenth of the Top Half was an unintended consequence".

80. I do not accept this submission. First, it is not apparent that something has gone wrong with the language. The provision is coherent and rational. One fourteenth is the mid-point between the $1/7^{th}$ claimed by Mr Forstater and the complete absence of entitlement to share in something he did not create: so it is not obviously irrational. Second, whilst the existence of the manuscript amendments does indicate that the draftsman thought the clause could be made clearer, the amendments themselves do not clearly indicate what the draftsman thought the original doubt was. Under the Third Schedule as originally drawn the term "mechandising profits" appears to mean "the proceeds of exploitation of such rights [sc. "the said "merchandising" and "spin-off" rights arising from the exploitation of the Film]". Mr Forstater was to receive 7.1429% of that income. The effect of the amendment is clearly to redefine "merchandising profits" to mean only 50% of that sum. But there is no material admissible on construction to help one decide whether it was the original or the amended version which embodies the suggested "mistake" so as to enable the Court to say that in the final version something has clearly gone wrong with the language. Third, there is no obvious commercial reason why Mr Forstater *should* receive one-seventh of the Top Half. In relation to the mainstream income (to the generation of which he made a significant contribution as producer) Mr Forstater receives 5.6875%. The Top Half is 50% of an income stream to the generation of which he made no significant contribution. He already benefits by receiving 5.6875% of the special merchandising income that falls to be treated as mainstream income. As a matter of pure commercial logic why should he receive one-seventh (14.285%) of the Top Half? On that logic, the less he does the more he gets. I do not think that commercial logic necessarily points in the direction that Counsel submitted.

81. I therefore decide the construction issue against Mr Forstater. The MF Agreement means what it says.

82. Of course, the position for which Mr Forstater contends might have been reached by agreement in circumstances where commercial considerations were not paramount: and the MF Agreement may not truly record that agreement.

The rectification claim

83. The period in relation to which the rectification claim arises starts in November 1973 and ends with the entering of the MF Agreement, or at least the initialling of the Third Schedule (though the implementation of that agreement may illuminate what was agreed).

84. I have set out the evidence and some of my findings above, save in relation to the evidence of Mr Remington, because that evidence can conveniently be dealt with outside the main narrative.

85. Part of the work undertaken by Brecher & Co in relation to "The Grail" was undertaken by Mr Remington. His written evidence (which was not challenged) was that for the purposes of the firm's instructions Mr Forstater was to be regarded as "a seventh Python", and that that phrase was used by Mr Olswang. This evidence does not assist me. Even though the recollection is unchallenged, it remains a recollection of routine conversations in a professional context occurring nearly 40 years ago: and the descriptions used within a solicitors' firm are not communications which (as it is sometimes put) "cross the line" so as to be reliable objective indicators of how matters were viewed on each side of the negotiations. His evidence also confirms that Brecher & Co took their instructions from Mr Forstater, but states that Mr Olswang spoke to Anne Henshaw on the telephone "on more than one occasion".

86. There was no real dispute as to the applicable law: the contest was as to its application to the facts of this case. For present purposes it is sufficient to indicate that the principles I have applied are (in summary) these:-

a) The burden lies on Mr Forstater:

b) The standard of proof is the ordinary civil standard, but because parties (particularly those acting with the benefit of legal advice) will be presumed to have taken care in expressing their agreement in a written document, convincing evidence is required to persuade the court that on the balance of probabilities the final document embodies a mistake:

c) Mr Forstater must show that he and the human agents having authority to act on behalf of PMP shared an objectively ascertainable common intention as to a particular matter (namely his entitlement to participate in the Top Half):

d) That objectively ascertainable common intention must have existed at the date when the MF Agreement was signed:

e) By mistake the MF Agreement did not reflect that common intention.

87. By the term "objectively ascertainable" I mean no more than that the common intention has to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be from what they said and did in the light of their shared knowledge.

88. This summary is meant to replicate, and to apply to this case, the law as stated in Daventry District Council v Daventry & District Housing Association Limited [2011] EWCA Civ 1153: and it is by reference to the Daventry decision itself that I have directed myself.

89. There is no evidence relating to any detailed negotiations or to the preparation of the document that was ultimately signed. So the issue in the present case is simple and stark: is there convincing evidence that establishes to the requisite standard an agreement different from the one actually embodied in the Third Schedule?

90. Although the Pythons (some more than others) expressed puzzlement that Mr Forstater should participate at all in the Top Half, there is no Counterclaim to rectify the MF Agreement to exclude him entirely. So the logical starting point is that the MF Agreement correctly includes Mr Forstater as entitled to *some* participation in the Top Half. It was suggested in argument that this was not the logical starting point: and that PMP was entitled to say that Mr Forstater's inclusion at all was a mistake but not one of which PMP wished to take advantage; so he could keep his $1/14^{th}$ but not enlarge it into $1/7^{th}$. There are two difficulties with this approach. The first is that it is grounded upon hindsight. The Pythons are effectively saying: "Looking back on it, we cannot understand how he came to be included in the first place, and we do not now think that we would then have intended to include him". But that present assessment is informed by all sorts of events that have occurred since the signing of the agreement 40 years ago. Second, no alternative account is offered for why the Third Schedule allows Mr Forstater to participate in the Top Half. There is no suggestion that he improperly tricked anyone in order to secure his participation in the Top Half. To their great credit the Pythons do not suggest (as they could so easily have done) that Mr Forstater abused his position of trust as producer to secure for himself a secret advantage which he concealed from the Pythons (even though that is exactly what Mr Forstater appears to have done in taking advantage of Mr Doyle). So one is simply left with the undoubted fact that the agreement does provide *some* participation for Mr Forstater in the Top Half, and no basis for presuming that that is other than what was intended.

91. The question then is whether the documented participation embodies a mistake that would have been objectively ascertainable by an observer from the dealings of the parties. This rests upon Mr Forstater's evidence. In reaching my conclusions I shall consider first the oral evidence, then the documentary evidence, then consider the role of Anne Henshaw, and finally express my conclusion.

92. The following points can be made about the oral evidence relevant to the rectification issue:-

    a) It is clear that although to others Mr Forstater appears to have done very well out of his short connection with "The Grail", in his own view he has "sold himself short" and "ripped himself off". These respective assessments undoubtedly colour the recollection on each side, and in weighing that evidence I have been alert to that risk.

    b) The only evidence as to how Mr Forstater came to be entitled to participate in the Top Half at all comes from Mr Forstater himself. There is no competing account. The only question is whether that

account is sufficiently convincing (taking into consideration supporting evidence and contrary indications).

c) To say that Mr Forstater gave "an account" is not entirely accurate. On a detailed analysis there are 8 accounts: though the degree to which they differ from one another is itself variable. As I commented (when giving Mr Forstater permission at the opening of the trial to further alter his pleaded case in order to align it with that set out in his witness statement served shortly before trial) by late amendment he undoubtedly delivered into the hands of the Defendants a powerful weapon: and they have deployed it to the full. They accuse him of "changing his story to fit the documents".

d) The strength of that criticism is moderated by the fact that in 2005 Mr Forstater was called upon to recollect how a bargain had been made in 1973 or 1974, and to so do unexpectedly (after 30 years' of acceptance of his invoices) and without the assistance of documents. I do not find it surprising that his initial recollection had to be modified as further pieces of the jigsaw came to light. But fair criticism can be made of changes in story after the service of the Particulars of Claim (themselves prepared nearly six years after the issue had arisen).

e) That criticism is not entirely avoided by saying that "the basics of the story have remained the same". If by "the basics" one means that Mr Forstater has always said that there was an agreement that he should have a one seventh share of the Top Half, then that is true. But to say that the agreement was made at a meeting at which Mr Forstater *was* present, and then to say that it was made at a meeting at which he *was not* present but the result of which was communicated to him by telephone is beyond "a minor factual inaccuracy". The question is whether the willingness to make these late changes so undermines the reliability of the version settled upon in the Particulars of Claim that it ceases to be credible. In that regard I have borne in mind the observation of Lord Hoffman in Chartbrook [2009] UKHL 38 (concerning agreements resulting from oral negotiations) at [65] that

> "A party may have a clear understanding of what was agreed without being able to remember the precise conversation or action which gave rise to that belief".

f) Mr Forstater's memory is demonstrated to be less than wholly reliable in other contexts, in particular in relation to the various assignments of his interests to MFPL and others. First, when confirming the truth of his original Particulars of Claim he plainly failed to recollect that any assignments had taken place. Second, when he proposed to enter an IVA (the details are unnecessary) he again appears to have forgotten all about the assignments or been willing to distort the truth. Third, when

terminating payments of merchandising income to Mr Doyle (on the grounds that it was a revocable payment instruction) he had either forgotten the assignment to Mr Doyle or was dishonestly distorting the truth. Neither possibility encourages confidence in the reliability of Mr Forstater's evidence.

g) As to other witnesses, neither the evidence of Mr Olswang or that of Mr Remington addresses the actual making of the agreement about the Top Half, nor does it specifically address the occasion and nature of the instructions received following the making of the alleged agreement. The only length to which this evidence goes is that there was a general sense that Mr Forstater was to be treated in some way as "a seventh Python". But this evidence is not of assistance since it cannot be shown that this understanding derives from something which the Pythons said or did, or from the Pythons' failure to challenge the suggestion of Mr Forstater's status in circumstances where challenge was to be expected. Nor does a general understanding of the relationship between Mr Forstater and the Pythons assist on the issue of whether in a particular document Mr Forstater was intended to be treated in exactly the same way as an individual Python. So no witness corroborates what Mr Forstater says.

h) Finally it is said by Counsel for Mr Forstater that the evidence does not establish that the approval of all Pythons was required before an arrangement was approved (so that it is convincing to say that Mr Forstater put a proposal and it was then swiftly approved). Whilst that may be true of certain formal letters (the example selected to illustrate the proposition was the way in which the location of the registered office of PMP would be fixed at a meeting that was not attended by all Pythons) I am satisfied that on something as immediate and important as the appointment of Mr Forstater as producer or the sharing out of income, true consensus was required. But, of course, that consensus did not need to occur at a formal meeting.

i) Taking into account these considerations I would describe the oral evidence called on behalf of the Claimant as capable of belief but not particularly convincing. It is the *only* account as to how Mr Forstater came to be entitled to share in the Top Half: but the final account emerges only 7 years after the issue is raised (and 38 years after the events in question), is given by a witness whose memory is demonstrably at fault in some respects, and whose evidence must on that account be approached with real caution.

93. So far as the documents are concerned the following observations may be made:-

a) The diaries, agendas and memoranda do not mention any proposal or agreement to the effect alleged by Mr Forstater. But this cannot be taken as an indication that no such agreement was reached. First, these documents do not record the genesis of the Top Half at all: yet it undoubtedly was created. Second, as a matter of commercial reality the Top Half must have been created on the initiative of the Pythons themselves: none of the profit participators was likely voluntarily to offer it to the Pythons, and it was Mr Gledhill's failure to protect the interests of the Pythons that led to his downfall. Yet the discussion amongst the Pythons that must inevitably have preceded the request for the creation of the Top Half goes entirely unremarked. This makes a failure to record discussion about the extent of Mr Forstater's right to participate in the Top Half less significant. One cannot infer from the absence of a record that the event did not occur when there are no records of events we know must have occurred.

b) The documents do record a very significant shift between November 1973 and June 1975 in the attitude of the Pythons to Mr Forstater, part of which is attributable to Mr Forstater's persistent requests for more money. In rejecting the June 1975 request Michael Palin wrote that he did not want to rush for the Python cheque-book but

> "….as we are a soft lot and not at all businesslike, I think it would be in the finest traditions of Python irrationality if we gave Mark an extra £1000 and a silver tray with some cut glass sherry glasses and told him to stop writing to us for more money. Beyond that even *I* am not prepared to go. Oh, all right, some cheese straws to go with the sherry glasses".

c) From 1976 until 2005 Mr Forstater (and then MFPL) rendered invoices the narrative on which made clear (in my judgment) that what was claimed was one seventh of the Top Half. These invoices were paid, apparently without question.

d) The thrust of the point is not weakened by the facts (1) that the amounts initially claimed were very small, and were dealt with by book keeping staff (and not by the Pythons personally): or (2) that once payment had become routine the invoices would not have invited scrutiny by anyone who took over the administration of the accounts. The real question is how they came to be approved in the first place and why they were accepted by the auditors of PMP in the early years.

e) It is common ground that the book keeping for PMP was, in the early years done by Anne Henshaw. I regard it as likely that she would have seen the invoices and (since no one has any recollection of any query being raised) presumably saw no reason (arising from her involvement

in the Pythons' affairs in the early part of 1974) to query them. We know that in September 1979 someone raised a query about PMP's accounts and that Anne Henshaw confirmed that Mr Forstater was in fact receiving a 1/7th out of the Top Half (without suggesting that there was anything odd about that fact). The raising and payment of the invoices is therefore properly regarded as relevant conduct of the parties (Mr Forstater and PMP).

f) The documents show that in many respects Mr Forstater was to receive the same financial benefits (and be subject to the same financial obligations) as individual Pythons (albeit not always through the same mechanisms). His share of the mainstream income is the same. His liability to accept deferment of his fee is the same.

g) But the weight of that point is somewhat reduced by three matters. First, the arrangements addressed in this claim were not mainstream arrangements. The Top Half was a special income stream deriving from particular efforts of the Pythons. The fact that the mainstream income is dealt with in a particular way is not necessarily a guide as to the treatment of the special income stream. Second, others (in particular Mr Goldstone and Mr Doyle) were either treated more favourably or assumed greater work responsibilities than Mr Forstater so that the case for his treatment in some special way is somewhat weakened. Third, it is plain that although the MF Agreement was technically with Mr Forstater, the actual benefits it conferred were to be shared with Mr Doyle. Again, the case for treatment of Mr Forstater personally in a special way is weakened. None the less, there remains some weight in the point that he was treated in much the same way as an individual Python.

h) The documents disclose that the Pythons established separate book and music publishing companies the effect of which was to reduce the income that fell to be treated as part of the Top Half. Counsel for Mr Forstater submitted that the mere fact of these companies being created shows that the Pythons recognised that Mr Forstater was entitled to a full participating share in the Top Half (because that was the only way of doing him out of his full participation). But in my judgment that point goes nowhere. It shows only that the Pythons did not want their income to be shared with any other participators (Mr Forstater in respect of whatever interest he had in the Top Half, and Mr Forstater and the other participators as regards that part of the special income that fell to be treated as part of the mainstream profit pot). The creation of these companies says nothing about the status of Mr Forstater in particular.

i) The correspondence with Anne Henshaw in 1977 proceeds on the footing that Mr Forstater is entitled to "one seventh of 50% of the

amount paid to NFTC which will be [PMP's] share". If Anne Henshaw had been party, three years earlier, to negotiations in which Mr Forstater had asked for and the Pythons had refused a one seventh share, it is unlikely that the letters would have been written in these terms (which seem to arise directly out of the consideration of the issue by the Pythons). The manner in which this request is dealt with may therefore again be considered as subsequent conduct of the parties.

j) Subsequent conduct of the parties (the rendering and payment of invoices; the summary of current arrangements) is relevant to the testing of recollection of an oral contract: Maggs v Marsh [2006] EWCA Civ 1058 at paragraph [24]. Logically, I think it must also be relevant to the objective ascertainment of any common intention which preceded the making of a contract that was itself recorded in writing even if subsequent conduct has no real part to play in the construction of the written agreement: Whitworth Street Estates Limited v Miller [1970] AC 583 at 603.

94. In my judgment (1) the rendering and payment of invoices plainly claiming 1/7th of the Top Half in the period immediately following the making of the MF Agreement; (2) the continuation of that practice for almost 30 years (3) the rejection of Mr Forstater's claim to special treatment in relation to the music and publishing companies on the grounds that he was already entitled to 1/7th of the 50% that was payable to PMP and (4) the confirmation to PMP's accountants that that was the actual arrangement in place (without suggesting that the actual arrangement was incorrect) are (on their face) strong corroboration of the oral evidence tendered by Mr Forstater.

95. I must now consider the significance of Anne Henshaw, both in relation to the making of the MF Agreement itself, in the subsequent administration of the MF Agreement, and in relation to this trial itself.

96. I have already described the competing cases as to the role of Anne Henshaw in the early part of 1974, with Mr Forstater asserting that she was the Pythons' manager, and the Pythons saying that she was a book keeper. I have set out in paragraphs 32 and 33 above my assessment of the general position as to what she was doing: what label is applied to that activity ("manager", "book-keeper" or "secretary") is not important. I must now address two specific questions. Do I accept that Anne Henshaw is likely to have been the channel of communications from the Pythons to Mr Olswang for the purpose of giving instructions about the Third Schedule? What do I make of her absence as a witness?

97. Despite the absence of any specific entry on an invoice recording it as a chargeable item, it is in my judgment likely on the evidence adduced that Anne Henshaw would have been the means of conveying instructions from PMP to Brecher & Co. I am persuaded for the following reasons:-

a) Although Mr Forstater was undoubtedly the only person formally authorised to give instructions on behalf of PMP to Mr Olswang, I think it is probable that Mr Olswang would not have been content to accept instructions from Mr Forstater alone in relation to benefits to be conferred on Mr Forstater by PMP. Confirmatory instructions from another source are likely to have been sought, and that other source was likely to have been Anne Henshaw (for there appears to have been no direct line of communication between Mr Olswang and any of the Pythons).

b) The evidence of Mr Olswang and Mr Remington provides a small degree of support for this. The evidence is not positive evidence that such an event occurred. The highest Mr Olswang's evidence can be put is what "would have" been expected to happen and what he "would have" done. The highest Mr Remington's evidence can be put is that on one or more occasions there was a telephone conversation between Anne Henshaw and Mr Olswang about something. But it supports (rather than undermines) what prudent practice would suggest.

c) The documents support a level of dealing by October 1974 such that Anne Henshaw was then able to write on legal matters on behalf of PMP (without a formal letter of authority) and Mr Olswang was able to refer (without being contradicted) to having been "working with" Anne Henshaw in the period before October 1974. So there were "dealings": and they were not about routine film production matters such as insurance.

d) Terry Jones gave entirely open evidence to the effect that if Anne Henshaw had given instructions to Mr Olswang concerning acceptance by the Pythons of something proposed by Mr Forstater, then it may be taken as read that she had received such instructions from the Pythons, because she was not a person who would have taken such a step without securing authority from them.

e) The fact that Mr Gledhill may have negotiated a creation of the Top Half with the investors (which was the evidence of Mr Goldstone) does not undermine the likelihood of Anne Henshaw being a channel of communication on the PMP side as to how the Top Half should be divided up.

98. I do not regard Mr Forstater's evidence about the actual role of Anne Henshaw as undermining the credibility of his final account of the reaching of the consensus that he says ought to have been recorded in the MF Agreement. (The lateness of his recollection as to her particular role is a separate question which I have already addressed, and which I have taken account).

99. I turn to consider what (if anything) should be made of the absence of Anne Henshaw at the trial of the action. She herself fell out with the Pythons as a group in an acrimonious split in 1997. But she remained a friend of Michael Palin and of Terry Jones, and a Director of two of Mr Palin's companies. No real account was given as to why PMP did not call her to give evidence, given her continued friendship with Michael Palin and Terry Jones.

100. That she may have relevant evidence to give was apparent from the original pleaded case (though the real significance of that evidence was only brought on to the face of the pleading by the re-amendment at the start of the trial). But a challenge to call her had been squarely put in correspondence by Mr Forstater himself, and I must examine the consequences of PMP choosing to duck that challenge.

101. Counsel for Mr Forstater say that I should infer that if called she would have supported Mr Forstater's case. They rely (as is now routinely done) on the decision of the Court of Appeal in Wisniewski v Central Manchester HA [1998] PIQR 324. Of itself, the failure by a defendant to call a witness cannot prove a claimant's case. The claimant must establish a prima facie case, capable of being displaced: if that is done then it is a matter of inference (not a matter of legal presumption) that the absence of the evidence is to be accounted for by the fact that if adduced it would not have been strong enough to displace the prima facie case. The principles were stated in this way (at p340 of the report):-

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, then they go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might have reasonably been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified".

102. In my judgment those principles fall to be applied in this case in this way:-

a) Mr Forstater's oral evidence was capable of belief, though not convincingly strong.

b) That evidence would receive corroboration from the invoices and from the 1977 correspondence (unless those matters are capable of explanation).

c) The person best able to explain the conduct of PMP in paying the invoices (and why that was treated as unremarkable) and in refusing to treat Mr Forstater in a special way in relation to the new music and publishing companies (on the ground that he was already entitled to a one seventh share of the Top Half) was Anne Henshaw.

d) When the issue arose in 2005 (after the acrimonious split) Anne Henshaw was prepared to accept as possible Mr Saunders' speculative account of why Mr Forstater was in fact paid a one seventh share of the Top Half.

e) Anne Henshaw retained close personal contacts with Michael Palin and with Terry Jones (even though she had years ago fallen out with the other Pythons): she knew of the dispute and was contactable, but was not called.

f) I may at the least infer that Anne Henshaw had no evidence that she could offer or which PMP wished to adduce to displace the inferences that might plainly be drawn from the terms of the invoices and the fact of their payment and the terms of the 1977 and 1979 correspondence.

g) This undoubtedly strengthens Mr Forstater's case because it means that that subsequent conduct can be treated as strongly corroborative of his oral account.

h) The failure to call her also means that there is no evidence-based challenge to Mr Forstater's assertion that he was told by Anne Henshaw that his request for a one seventh share of the Top Half had been approved by the Pythons; and that also strengthens his case.

103. I therefore find and hold that there is evidence of a sufficiently convincing quality to persuade me on the balance of probabilities that immediately prior to the signature of the MF Agreement there was a consensus that Mr Forstater should be entitled to a $1/7^{th}$ share of the Top Half. The Third Schedule to the MF Agreement does not so provide. That is not because there was any change of mind. As I assess the evidence the Pythons continued at that point to be "a soft lot and not at all business-like" and to be genuinely enthused at having secured the services of Mr Forstater: and Mr Forstater continued to be concerned that he got the maximum from his relationship with the Pythons and that what he had obtained should not be whittled away. So the consensus was intended to be recorded in the MF Agreement. It was not so recorded because of a mistake in the drafting by Mr Olswang or his firm. The MF agreement

should be rectified (by doubling the percentage of the Top Half to which Mr Forstater is entitled).

The assignment point

104. Mr Forstater undoubtedly assigned whatever was his then entitlement to participate in the mainstream profits to MFPL on 8 August 1975. If Mr Forstater had already assigned 2.5% to Mr Doyle then that was an assignment of a 3.1875% participation. That is what the contemporaneous documents record. On 15 August 1975 Mr Olswang wrote to NFTC

> " Please take this letter as formal notice that Mr Forstater's interest of 3.1875% in the profits of ["The Grail"] which is payable to him pursuant to the Trust Deed of 30th September 1974 … has been held by Mr Forstater on behalf of [MFPL] to which company Mr Forstater has now formally assigned the legal interest in his entitlement."

105. On 25 April 2002 MFPL then assigned 0.6875% to a third party. On the same assumption that would have left MFPL with a 2.5% participation in the mainstream income arising under the Deed. That represents MFPL's interest in the expenses claim. Mr Forstater never had any interest in the expenses claim.

106. Mr Forstater suggested in his evidence that there was some doubt as to whether he had in truth assigned 2.5% of the mainstream income to Mr Doyle, or whether he had merely given what he called "a revocable payment instruction" to NFTC, enabling him to cancel payments to Mr Doyle (as at one stage he did). But on the evidence I have recounted it is plain that the transaction was an assignment (as had been intended from the outset).

107. On 18 April 1975 Mr Olswang wrote to NFTC to advise that Mr Forstater had

> "agreed that out of his entitlement to profits from ["The Grail"] 2.5% (of 100%) should be paid to his colleague Julian Doyle."

Mr Olswang suggested that no formal alteration to the Deed was required.

108. A question arises as to whether these assignments (which in terms appear only to deal with rights arising under the Deed) carried with them an assignment of the right to participate in the Top Half. That right arises not under the Deed but under the Third Schedule to the MF Agreement (so that if formal notice of any assignment relating to participation in the Top Half was to be given then it would need to be given to PMP (and not NFTC)). But the case was opened, argued and closed for the Claimants on the basis that the letter of 15 August 1975 indicates that it is likely that Mr Forstater did assign his rights under the MF Agreement to MFPL, so that *any* relief should be

granted to MFPL. PMP did not argue that Mr Forstater remained personally entitled. So I shall dispose of the issue as regards the 8 August 1975 assignment to MFPL in that way: I hold that whatever interest Mr Forstater had in the Top Half on 8 August 1975 passed to MFPL.

109. But that leaves unanswered the question: what interest did Mr Forstater have in the Top Half as at 8 August 1975? Was it the entirety of the participation arising under the Third Schedule? Or had he already assigned part of it to Mr Doyle on 18 April 1975?

110. The letter giving notice to NFTC referred to the assignment relating to "2.5% of the profits as they are defined in the relevant documentation" and asked NFTC to account for that to Mr Doyle. This language, the request to account, and the absence of any notice to PMP (against whom Mr Forstater's rights under the Third Schedule to share in the Top Half lay) all suggest that the assignment to Mr Doyle did not affect Mr Forstater's rights under the Third Schedule. At trial Mr Forstater recognised that if Mr Doyle was to be treated as an equal partner then it was probably true that he should share in the Top Half: but he said that he regarded it as his "personal arrangement as producer", and so he did not give Mr Doyle any part of the merchandising income arising under the Top Half. For his part, Mr Doyle himself did not know that Mr Forstater had any such rights. At trial Mr Doyle said that whilst he thought he was entitled to a share in Mr Forstater's interest in the Top Half, "Who cares? I have enough money and he is in trouble".

111. In these circumstances I must have regard to the rights at law. Mr Forstater's rights arose under the Third Schedule to the MF Agreement. Choses in action arising under that contract belong to Mr Fostater. PMP has never received notice of any assignment of Mr Forstater's rights: so it is from Mr Forstater that they could have obtained a good receipt and to Mr Forstater that they were bound to account for payments due under the Third Schedule. So on 8 August 1975 Mr Forstater was entitled to the entirety of those rights: and they now vest in MFPL.

112. So I decide the assignment point in the sense that relief in respect of the MF Agreement must be granted to MFPL.

The expenses argument

113. As I have recounted, Mr Forstater complains that NFTC has in breach of duty agreed (and PMP in breach of contract acceded to) a change in the fee structure by which FSM is remunerated. The claim was not intimated to NFTC until 19 April 2011 (at which point NFTC was given two working days to deal with it before the proceedings were issued): and no other profit participant has joined Mr Forstater (now MFPL) in making it. It relates to a small sum of money. It is something of an afterthought: but it must still be addressed on its merits.

114. I should begin by noting that shortly after the execution of the Deed it was amended. As I have recorded in the main narrative, the Pythons established Kay-Gee-Bee Music Ltd to produce a record and in effect took a first charge over a portion of the income which that record produced, the balance falling into the "pot" for distribution. The question arose whether the Pythons should bear the whole of the expenses even though they were sharing the income. This led to an amendment to clause 8 of the Deed. In its amended form the income "waterfall" became (1) NFTC's remuneration and expenses; (2) recoupment of all costs and expenses incurred by Michael White Limited or PMP in arranging for the exploitation or licensing of rights in "The Grail"; (3) the creation of the Top Half; (4) distribution amongst profit participants. It is in relation to that amended scheme that NFTC had to discharge its duties.

115. Since its initial engagement to manage the intellectual property rights (including the administration of existing licences) and to sell the back catalogue FSM had been remunerated by taking 10% of the share of the profits earned by the Pythons alone. They were thus taking an overall commission of about 4%, with those entitled to 60% of the income contributing nothing directly. FSM sought to negotiate alternative arrangements. The context in which they sought to do so was that they had recently secured two outstanding deals for the profit participants. One was the renewal of a distribution arrangement with Sony (in which they secured a significant uplift in royalty rates and very substantial non-repayable advances): this led to what Mr Goldstone described as "totally amazing, very, very serious income that had never been generated on that scale before". The other was for the Broadway production of "Spamalot" (under "the Ostar Agreement" dated 6 December 2002), which the specialist firm of theatrical lawyers advising FSM described as "the best underlying rights deal in Broadway history". In neither case was FSM (or Mr Goldstone, who assisted FSM) directly remunerated for this work (though both stood to earn something from the revenue stream).

116. The success of these deals did, however, generate increased work which had to be done by FSM. Mr Miles told me that some 1800 statements had been generated in relation to the Broadway production of "Spamalot" alone, all of which needed to be verified and the appropriate payments made. That is why they sought to renegotiate what Mr Miles described as "a completely wrong and unfair agreement", both to provide reasonable remuneration for themselves and to be able to look to all profit participants as the source of their fee.

117. The process of renegotiation began on the 21 December 2006 when Mr Miles of FSM wrote to Louisa Bewley, the managing director at NFTC, pointing out that a number of major deals had been done (in particular with Sony and relating to "Spamalot") from which the investors in "The Grail" benefited but for which they did not pay. He suggested that FSM should charge a 10% fee in respect of all sources of revenue generated since 2000, to be levied on the entire "pot".

118. Ms Bewley was not surprised by the request. NFTC then looked after some 450 films: Ms Bewley had caused a review of them to be undertaken. The arrangements relating to "The Grail" stood out as very odd and uncommercial. In fact, Ms Bewley had never

seen any other "agent" charge 0% commission, yet that was the rate effectively charged by FSM to non-Python participants in the profits from the exploitation of rights in "The Grail". So the request to regularise the arrangement and align it with commercial arrangements in the market came as no surprise. But it struck her that back-dating a revised commission regime to 2000 was wrong.

119. Ms Bewley took the advice of Gretta Finer (NFTC's in-house lawyer). She felt that although under the Deed NFTC had the final power of decision, with "a change of this magnitude" NFTC would like the comfort of notifying the beneficiaries and considering such objection as any beneficiary raised. She commented that the current remuneration arrangements must have been the subject of agreement with PMP, and the other beneficiaries would want to know what justified a change. But no process of consultation was opened by Ms Bewley, partly because the controversial proposal to "clawback" commission to 2000 was dropped, and partly because she saw the role of a trustee company (and a main reason for its very involvement) as shouldering the burden of decision (rather than running to the profit participators after a gap of 30 years).

120. Ms Bewley's experience told her that a commission rate for "a second cycle film" could go as high as 35%. So she rang two other agents to find out what they would charge for a "big" film of comparable age. She did not identify "The Grail", but suspects that one of the agents would have guessed the subject matter of the enquiry. Both said that 25% would be reasonable for a "second cycle sale" because the older the film the harder the agent had to work to make new sales: but Ms Bewley appreciated that "The Grail" was a successful film with "a fantastic second cycle" and that a commission lower than 25% was to be expected. But she still regarded 10% as "a very,very low and reasonable rate".

121. Although there was (ultimately) no challenge to the 10% rate as such, this was tested in cross-examination. It was suggested that since "The Grail" was already such a substantial success a 10% commission was unreasonably high. Ms Bewley's answer was that the commission rate applied to the catalogue (not to a single item in the catalogue). I accept that answer.

122. Ms Bewley accepted in oral evidence that she had to look out single-mindedly for "the beneficiaries" and recognised that FSM was clearly seeking more than it had originally agreed. She and Ms Finer were cross-examined in detail as to this assessment of their task. This was to a degree unfair, because there was no pleaded case that they had misunderstood their roles as the agents of the trustee: so they had given no thought to the issue put to them, and they expressed their answers in a variety of ways (which enabled Counsel for Mr Forstater in closing to pick out a number of phrases and deploy them to his client's advantage). In my judgement the picture that emerged was (a) that they were there to look after "the beneficiaries"; (b) that (in accordance with the originally recited arrangements) they regarded the principal negotiation as lying between PMP and FSM (who were the existing contracting parties, with PMP being interested in every tranche of the income), with the question for Ms Bewley being whether she could properly consent to the proposed

deal; (c) that the job was not to re-examine the commercial reasonableness of the deal freely negotiated between PMP and FSM but to ensure that as regards the profit participators it was "robust"; (d) in that sense the re-negotiation was "a three-way thing" and that "the trustee sits in the middle"; (e) that they regarded it as important to achieve an outcome that was fair and reasonable ("you have to have an agent and you have to pay fairly"); (f) that an agent had to be incentivised; (g) that a disgruntled agent was no good to the profit participators as a class; (h) that the task was to get the best deal going forward (and not to agree a reward for past work); (j) that the deal "going forward" included FSM being entitled to charge the new commission rate even on deals that had been previously negotiated if those deals produced a continuing income stream, but that entitlement to commission on existing deals was an entirely normal feature: (k) that an advantage of having a single regime covering all agreements and all rights was that it facilitated "bundling" and avoided all dispute about what was actually being done was within or outside the original agreements.

123. In January 2007 (possibly on the 3rd or 4th) Ms Bewley rejected outright the suggestion that any revised terms should be retrospectively applied as from 2000 (though FSM did not immediately abandon the request). She invited the submission of detailed proposals on the other arrangements, which she was in principle prepared to accept.

124. There was no response to this until 7 March 2007 when FSM promised to send an agreement setting out the proposals. In the meanwhile NFTC agreed to hold back 10% of the distributable income (i.e. on the PMP share and on the share distributable to others) as from 1 January 2007. (This NFTC did by retaining £146,544 from the total revenue of £1.465 million generated in the period 1 January 2007 - 30 April 2007).

125. The promised agreement was being negotiated between the lawyers for PMP and the lawyers for FSM: and the involvement of lawyers gave Ms Bewley some comfort. When produced the draft agreement dealt with all sums received by PMP or NFTC directly or indirectly from the exploitation of "The Grail" (less NFTC's charge) ("Gross Receipts"). Subject to any distribution or similar agreements already existing as at 1 January 2007, it appointed FSM the sales agent and sole distributor in respect of the exploitation of the Rights (a term for which there was an extensive and detailed definition) in "The Grail" and any "spin-offs", and required FSM to exploit the Rights to the best of its ability in order to maximise potential Gross Receipts. In return FSM was to receive 10% of the Gross Receipts from 1 January 2007.

126. This draft was carefully considered. Apart from drafting points NFTC raised fundamental questions. How had FSM's existing agency arrangements come into being? What were the "Prior Agreements" to which the proposed contract was to be subject? (They turned out to be agreements that FSM and Mr Goldstone had themselves negotiated). Which had been entered by PMP, and which by FSM? Was there any intention that the new 10% should be in addition to any charge that could be levied by PMP under the second stage of the "waterfall"? How did the proposed agreement relate to any management agreement between PMP and FSM?

127. It is also evident that careful thought was also given to the mechanics of the Agreement, to ensure that NFTC received all payments in respect of the exploitation of the Rights and was obliged to pay out only in respect of such as were indefeasibly received.

128. The ultimate agreement was signed on 14 June 2007 and provided:

a) By clause 1.1 that it took effect from 1 January 2007 (when "the Term" commenced);

b) By clause 1.1 that it extended to receipts from income derived from sales transactions entered into during the Term and also any income from " the Prior Agreements" (by which was meant any agreement for the exploitation of rights in "The Grail" entered into prior to commencement of the Term);

c) By clause 2 that FSM was appointed to act as exclusive sales agent (clause 8 providing a mechanism for the termination of the arrangement);

d) In clause 3 that FSM was obliged to exploit the rights in "The Grail" to the best of its ability in order to maximise potential gross receipts, with eight sub-clauses imposing specific obligations and limitations on FSM (supplemented by a three-page definition of the relevant rights);

e) By clause 4 that NFTC was to pay FSM 10% of the gross receipts received as a sales fee.

129. Mr Forstater first says that the entry of such an agreement is a breach of one or other of two terms to be implied into the MF agreement.

130. The first implied term alleged is that (in order to give business efficacy to the MF Agreement) in determining "the profits of the Film" any deduction in respect of "distribution fees or commissions [or] distribution expenses" had to be reasonable and/or had to be made under arrangements with third parties which were themselves reasonable and/or in the best interests of the profit participants in "The Grail".

131. The second implied term alleged is that (in order to give business efficacy to the MF Agreement) PMP would do nothing to prevent performance of the MF Agreement or prevent Mr Forstater from recovering the sums to which he would have been entitled thereunder.

132. In the Third Schedule the definition of the term "Profits of the Film" is:-

> "the balance remaining of the gross proceeds of distribution and exploitation of the Film … after deduction of distribution fees or commissions distribution expenses and the certified cost of production with interest thereon as agreed between the Company and persons investing in the Film".

Nobody argued that the natural construction of those words is that control over the amount of the deductions is exercised by the need for agreement between the Company and persons investing in the Film (acting through NFTC) rather than through the imposition of some objective standard of reasonability. If that were so then the terms proposed by Mr Forstater could not be implied since they would conflict with the express terms of the agreement.

133. Indeed, since there are no contractual provisions relating to the making of any deductions at all, it is quite difficult to see where an implied obligation (in effect) only to deduct reasonable amounts could fit into this contract. The only mention of deductions is contained in the definition, and the argument seems to me really to be that as a matter of construction the word "reasonable" should be put in the definition (when the parties chose not to put it in). Of course, the implication of terms is now recognised as part of the process of construction, but one to be approached according to certain settled principles.

134. According to Crema v Cenkos Securities [2010] EWCA Civ 1444:-

> "The principles are: (1) The court cannot improve the instrument it has to construe to make it fairer or more reasonable. It is concerned only to discover what the instrument means. (2) The meaning is that which the instrument would convey to……. "the reasonable person". That person will have all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. (3) The question of implication of terms only arises when the instrument does not expressly provide for what is to happen when some particular (often unforeseen) event occurs. (4) The default position is that nothing is to be implied in the instrument. In that case, if that particular event has caused loss, then the loss lies where it falls. (5) However, if "the reasonable addressee" would understand the instrument, against the other terms and the relevant background, to mean something more i.e. that something *is* to happen in that particular event which is not expressly dealt with in the instrument's terms, then it is said that the court implies a term as to what will happen if the event in question occurs. (6) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means."

135. In this case "the particular event" was a change in the terms of the rights management agreement. I know virtually nothing of the terms of the rights management agreement contemplated at the time when the MF Agreement was entered in 1974 (which must be the basis for the implication of any term into the MF Agreement or the construction of the Third Schedule). I know only that under the Funding Agreement it had originally been proposed that Michael White should negotiate the agreements for the distribution and exploitation of "The Grail" according to what he *in his absolute discretion* considered to be in the best interests of PMP and subject to consultation with Mr Forstater, who could not unreasonably withhold his consent. In the light of that it seems to me inherently improbable that a reasonable person having all the background knowledge which would reasonably be available to PMP and Mr Forstater in 1974 would have understood them to be agreeing that PMP would subordinate its own interests to those of Mr Forstater in order to maximise his profit participation, and would for ever and a day only allow a sales agent to obtain commission on the part of the income to which PMP was entitled (and hold harmless all other profit participators), and would personally absorb any increase in collection costs. The reasonable person would expect any arrangement entered into or deduction made in bad faith to be a breach of obligation: but subject to that, he would expect the expenses actually incurred under arrangements so made to be deductible in a commercially usual way (especially given the intended role of NFTC).

136. The fact that under the arrangements that evolved over the next 30 years the MF Agreement might have been improved by the inclusion of some objective standard for the measurement of deductible expenses does not assist Mr Forstater. He does not say that the MF Agreement was varied, only that in its original form it is to be read in a particular way.

137. I therefore hold that the MF Agreement is not to be read as including either of the implied terms for which Mr Forstater contends. I would further find that if such terms were to be implied, then they were not breached.

138. Mr Forstater secondly says that the entry of the FSM agreement was a breach of duty by NFTC.

139. It is common ground that both under the general law and under the Deed NFTC was bound to exercise reasonable skill and care in the performance of its obligations and the exercise of its powers as trustee. As to the general law, section 1 of the Trustee Act 2000 required a specialist trustee like NFTC

> "[to] exercise such care and skill as is reasonable in the circumstances having regard in particular…. To any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession .. ".

As to the Deed, Condition 16(J) said that NFTC would not be liable for anything whatsoever save only a breach of trust fraudulently committed, but a proviso then said that

> "nothing in any of the foregoing provisions of this Condition shall in any case in which the Trustees have failed to show the degree of diligence and care required of them as trustees……. exempt the Trustees from….. any liability which by virtue of any rule of law would otherwise attached to them in respect of any negligence… of which they may be guilty in relation to their duties".

Read together these provisions make it unnecessary to consider whether there were other common law or fiduciary duties (as pleaded in paragraph 18 of the Amended Particulars of Claim) because NFTC would only be liable for breaches of such duties if they had been negligent.

140. The power being exercised was the power to concur in the appointment of FSM as rights managers under the FSM agreement. For that FSM were entitled to reasonable remuneration.

141. Mr Forstater says that NFTC has been negligent and makes criticism of particular terms (as he is bound to do). But it is well to remember that those particular terms cannot individually be assessed as "reasonable" or "unreasonable" in isolation: the FSM Agreement was entered as an entire contract and the assessment of whether NFTC acted in breach of trust in entering it must be measured by looking at the agreement as a whole. The case was correctly pleaded in paragraph 46 of the Amended Particulars of Claim viz. that the conclusion of the FSM Agreement was a breach of duty.

142. The pleaded case is that the terms of the FSM Agreement were unreasonable in that :

a) They conferred on FSM rights to a 10% share of income received pursuant to the Ostar Agreement;

b) They took effect from a date six months earlier than the agreement itself;

c) They did not confer a benefit proportionate to the remuneration given.

It had also been pleaded that the effect of the FSM Agreement was to shift the burden of remunerating FSM from PMP onto all profit participants: but this case was not pursued at trial because it was recognised that in the light of the amendment to clause

8 of the Deed the effect of the FSM Agreement was neutral so far as PMP was concerned.

143. At trial a further case was put to Ms Bewley and Ms Finer viz. that they had fundamentally misunderstood what their obligations were and had therefore not adopted a proper process of negotiation. This was said to establish a separate (unpleaded) failure to exercise skill and care, and (in reliance upon Rubinstein v HSBC Bank [2012] EWCA Civ 1184 at [83]-[93]) to deprive them of the benefit of "the professional margin" normally accorded to those called upon to exercise a professional judgment. It was submitted that it was difficult to understand how someone who did not realise what they were meant to be doing could serendipitously have achieved a reasonable bargain.

144. I will address first "the Prior Agreements" point (pleaded in relation to the Ostar agreement alone, but argued more widely). The argument is that NFTC were negligent in accepting an agreement under which FSM could obtain commission upon an income stream deriving from an agreement entered into before the date of the FSM agreement. It was pleaded that this was "not usual or appropriate". Mr Forstater asserts (1) that reliance upon the hard work that FSM had done in the past is irrelevant to the question of whether they should be entitled to commission on the continuing income stream and (2) that the provision enabling an incoming rights manager to take a commission on an income stream deriving from an agreement which had been entered into prior to his appointment was an "unusual" provision. He called no evidence as to what is the "usual" practice in relation to incoming rights managers. The evidence of Ms Finer was that it was "normal" to allow a sales agent commission on deals that were not done during the time of his appointment. The answer is not surprising when one appreciates that the term "commission" is not wholly accurate. The incoming rights manager takes a "commission" on the continuing income stream deriving from the prior agreement not as a reward for having procured the agreement, but as compensation for the continuing obligations to administer and enforce the terms of that prior agreement: this was the explanation provided by Ms Bewley. Mr Miles's evidence about the Ostar Agreement and the paperwork it generated illustrates the point. (In fact, the Prior Agreements had been largely negotiated by the FSM/Goldstone team in any event, including the Ostar Agreement itself).

145. In my judgment Mr Forstater that has not established that there was anything unreasonable (in the sense of being either abnormal or inappropriate in the particular circumstances of the PMP case) in the FSM agreement providing for Mr Miles, Mr Saunders and Mr Goldstone to share a low rate of commission on agreements that were in existence at the time when the FSM Agreement took effect.

146. I will address next the "backdating" point. Mr Forstater's complaint is that the agreement took effect from 1 January 2007 although it was not negotiated and signed until 14 June 2007. He says Ms Bewley should have struck a harder bargain. The amount actually involved so far as Mr Forstater is concerned is about £1200.

147. Is it unreasonable for a person in a fiduciary position to abide by an agreement in principle reached with a professional with whom there has been a long standing arrangement and with whom a new professional arrangement is to be reached? Mr Cullen QC submitted that a prudent man of business does not resile from agreements reached "in principle" merely because there has been a delay in the production of documentation: Mr Weisselberg submitted he was negligent if he did not resile. Because the arguments were put in this way I invited submissions on one issue.

148. In Buttle v Saunders [1950] 2 All ER 193 trustees felt themselves honour bound (and that all considerations of commercial morality required them) to complete a sale in the face of a very late higher offer. But the Court held that they could not properly be actuated by that motive: though what they should do must, of necessity, depend on the facts of the case.

149. In Cowan v Scargill [1985] 270 Megarry V-C held (at 288B) that trustees may have to act dishonourably if the interests of their beneficiaries require it, and that since they were acting in a fiduciary capacity they cannot "make moral gestures", being bound to use the powers conferred upon them for the legitimate purposes of the trust and for the benefit of the beneficiaries and not so as to accomplish any ulterior purpose. But he went on to note (at 288G) that:

> "…"Benefit" is a word with a very wide meaning and there are circumstances in which arrangements which work to the financial disadvantage of a beneficiary may yet be for his benefit"."

150. I invited argument on this principle because I thought it bore upon the issues I had to decide. But on further consideration I do not think that it assists. I am not considering the fiduciary obligations that were being addressed in those cases. I am considering whether NFTC was *negligent* (in breach of its statutory duty and outwith the exoneration clause in the trust). Negligence and breach of fiduciary duty are different. It is perfectly possible to be in breach of fiduciary duty and yet to act honestly and reasonably (and, for example, on that account to be entitled to be relieved from the consequences of the breach under s.61 Trustee Act 1925 if it is fair to do so, even in the case of a paid trustee).

151. In my judgment it was not negligent to enter into an agreement that took legal effect from about the date on which an "in principle agreement" was reached. First, the agreement has to be looked at as a package (not as a series of discrete obligations amongst which NFTC could pick and choose). The question is not: "Was it negligent not to reject the backdating term?" The true question is: "Was it negligent not to reject an agreement which contained the backdating term?" Second, the FSM Agreement has to be seen as the start of what was envisaged to be a long term relationship heavily dependent upon trust and a good working relationship: "if you are not paying them a decent sum of money for the work they are doing then we end up with a disgruntled sales agent and that's not good for all the beneficiaries". Third, the burden of negotiation had been borne by a party with a major interest in the Gross

Receipts: and in return for the detailed obligations imposed on FSM from 1 January (and the benefit of "bundling") that party was prepared to grant FSM a commission on Gross Receipts from the same date. Neither as a matter of principle nor on the evidence do I think it can be said that any reasonably competent trustee would of necessity have taken a different view. No evidence was called to challenge what Ms Bewley and Ms Finer told me was normal and that the offered terms were "more than reasonable from what [she] knew of the film industry". Fifth, the beneficiaries whose interests NFTC was concerned to protect were not in any event insulated from whatever remuneration arrangements were agreed between PMP and FSM (because of the amendment to the Deed). Sixth, I do not agree that NFTC are to be deprived of a "margin of professional judgment", because I do not accept that Ms Bewley "fundamentally misunderstood the role of a trustee" (as was submitted on behalf of Mr Forstater). In her evidence (on issues for which she was not prepared) it is possible to alight on the occasional phrase which can be deployed in support of such an argument. But that is not fair: I consider that she knew precisely where she stood, understood that her job was to look after the beneficiaries, and was sufficiently informed and took appropriate advice to enable her to judge where the balance of benefit lay for the profit participators.

152. I turn to the level of remuneration. From her cross-examination the impression might have been gained that what was under attack was Miss Bewley's acceptance of a commission rate of 10% (in place of the existing 4%). But in closing Mr Weisselberg and Mr Vinall made clear that they did not attack the rate as such: what they attacked was the revenue base to which the rate was applied. Their submission was that because Ms Bewley regarded 10% as a somewhat low commission rate she failed to appreciate that it was being applied to the whole of the gross income (instead of just PMP's proportion of their income) with the result that in terms of pounds and pence FSM were being extremely handsomely remunerated. As it was put in the statement of case:

> "…the likely benefit to the beneficiaries of FSM's activities as sales agent after the date of the FSM Agreement was clearly not proportionate to the likely amount of FSM's share of the Gross Receipts."

153. In my judgment insofar as this point is different from the inclusion of "Prior Agreements" or from the effective date of the agreement being 1 January 2007 I do not think there is any evidence to sustain it. It seems to me that Ms Bewley well understood that FSM would be charging commission on all income generated by the exploitation of rights under agreements which FSM negotiated after the signature of the FSM Agreement (not simply the share to which PMP was entitled). Her view was that for a sales agent to charge commission on part only of the income generated was very unusual and not commercial: and there is no evidence from MFPL or Mr Forstater to suggest otherwise. That may well yield the agent a sizeable sum: but if the sum is too large, the remedy is to reduce the commission rate not to reduce the commission base. The Claimants do not complain about the rate: and adduce no examples of a reduction in the commission base.

154. For these reasons I dismiss the claim against Freeway CAM (UK) Ltd.

155. I shall formally hand down this judgment on 5 July 2013. I do not expect the attendance of the parties or of their legal representatives. Consequential matters arise which must be addressed at a further hearing. I will extend the time for seeking permission to appeal until that further hearing (and the time for filing an Appellant's Notice will start at the conclusion of that further hearing).