McPhail (aka Fitzgerald) and another v Bourne and another [2008] EWHC 1235 (Ch)

CHANCERY DIVISION

MORGAN J

26, 27, 28, 29 FEBRUARY, 3, 4, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19 MARCH, 15, 16, 17 APRIL, 6 JUNE 2008

6 JUNE 2008

Contract — Intention to create legal relationship — Inference of intention from circumstances — Four teenagers attempting to form band — Two members leaving — Settlement agreement concluded regarding songs — Remaining members forming successful band — Whether settlement agreement entered into as result of misrepresentation or undue influence — Whether contract existing requiring equal rights to all songs

T Penny for the Claimants

I Mill QC and T Weisselberg for the Defendants

Hamlins LLP; Forbes Anderson Free

MORGAN J:

THE PARTIES

[1] The First Claimant is Kiley McPhail. He is also known as Kiley Fitzgerald. This is because his father, Scott McPhail, a professional singer, is professionally known as Scott Fitzgerald. I therefore refer to the First Claimant as Kiley Fitzgerald, rather than Kiley McPhail. Kiley Fitzgerald's first name was routinely shortened to “Ki”. At the trial, the First Claimant and also the Second Claimant and the Defendants were generally referred to by their first names and so in this judgment I will refer to the First Claimant as Ki. Ki was born on 25 September 1983 and turned eighteen on 25 September 2001. Accordingly, for a substantial part of the time which is central to this dispute, Ki was under eighteen, that is he was a minor. The Claimants say that Ki made two very important contracts as a minor, first, a contract of partnership and, secondly, a contract between himself on the one hand and the Second Claimant and the Defendants on the other hand concerning the ownership of song copyrights.

[2] The Second Claimant is Owen Doyle, to whom I will refer as Owen. Owen was born on 2 May 1981 and so was over eighteen at the time of the events subject of this dispute.

[3] The First Defendant is James Bourne, to whom I will refer as James. James was born on 13 September 1983 and turned eighteen on 13 September 2001. Accordingly, he also was under eighteen at the time of some of the events which are of importance in the present dispute.

[4] The Second Defendant is Mathew Sargeant. He is professionally known as Mathew Willis. His first name was routinely shorted to “Mat” and I will so describe him in this judgment. Mat was born on 8 May 1983 and turned eighteen on 8 May 2001 and so he was under eighteen during the earlier part of the period which is now relevant for the purposes of this dispute.

[5] At the time of the events which are relevant for this judgment, the Claimants and the Defendants were referred to as “the boys” or “the four boys” or in a similar way. At the trial, the parties were also described as “the boys” or by a similar expression. Accordingly, in this judgment, I will from time to time refer to the parties as “the boys” even though they are now no longer minors.

MR RASHMAN

[6] A central figure in the events which have given rise to this dispute is a Mr Richard Rashman. Mr Rashman is an American who has a law degree and MBA from UCLA. He remains registered as an active attorney under the State Bar of California Membership Rules but has not been employed as a lawyer since 1980.

[7] It is not necessary to recite Mr Rashman's various business interests in the United States. He was connected with an American corporation, Rashman Corporation. One of the activities of Rashman Corporation was the management of pop music bands. That activity was carried out under the trading name, Prestige Management. In this judgment, for the sake of simplicity but at the risk of occasional inaccuracy, I will not distinguish between Rashman Corporation, Prestige Management or Mr Rashman personally but I will generally refer to Mr Rashman as encompassing both or all or those entities.

[8] It is common ground that Mr Rashman entered into a formal management agreement with the Claimants and the Defendants on 15 March 2001. Mr Rashman says that his management contract with the Claimants came to an end on 8 October 2001 but the Claimants say that the management contract between them and Mr Rashman continued for some considerable time after that date. After 8 October 2001, Mr Rashman continued to manage the Defendants and, indeed, when the Defendants were joined by a third person Charlie Simpson, in the way I will describe below, Mr Rashman managed the Defendants and Charlie Simpson. Mr Rashman was originally a Defendant in these proceedings but the Claimants' claim against Mr Rashman has been settled on terms which have not been disclosed to the other Defendants or to the court.

REPRESENTATION

[9] At the trial, Mr Tim Penny appeared on behalf of the Claimants and Mr Ian Mill QC and Mr Tom Weisselberg appeared on behalf of the Defendants. I am grateful to all of them for the clarity and helpfulness of their submissions and for the way in which they conducted the trial. It

is clear that counsel and their instructing solicitors have done a great deal of hard work by way of preparation for, and during the conduct of, the trial and I appreciate all the efforts that have been made in those respects.

THE RIVAL CASES: A SUMMARY

[10] At this point, it is convenient to give a summary of the rival cases being put forward. I will first describe the case put forward by the Claimants. The story begins, essentially, in December 2000. At that time, as a result of an introduction effected by Mr Rashman, Ki and Owen were introduced to James. In January 2001, Ki and Owen and James were introduced to Mat. Almost immediately from the time that Ki and Owen and James and Mat came together, they entered into a contractual relationship under which the four boys formed a pop group or band, agreed to write songs to be performed by the band and agreed to take steps to obtain a recording contract in the hope of succeeding in the pop music industry. The Claimants say that the contractual relationship between the four boys was a partnership at will. The Claimants also say that the four boys agreed that any song written by any one or more of the four boys would be owned beneficially by the four boys in equal shares. The four boys entered into a formal management contract with Mr Rashman on 15 March 2001. Before and after 15 March 2001, the four boys or one or more of them wrote a large number of songs and they rehearsed those songs and took steps to obtain a recording contract. From late April 2001, the band used the name “Busted”. The band did not obtain a recording contract and by October 2001, the four boys were dissatisfied with the services of Mr Rashman. On 3 October 2001, the four boys wrote to Mr Rashman purporting to determine the management contract with him. However, almost immediately, the attempt to end the management contract was withdrawn and the management contract continued as before and essentially unaffected by what had occurred. However, on 8 October 2001, the band split up. In particular, Ki and Owen separated from Mat and James. Ki, in particular, seems to have wanted to pursue a solo career. James and Mat stayed together and invited Charlie Simpson to join them as a third member of a new band. There was a dispute between the Claimants and the Defendants about ownership of some of the songs written prior to October 2001. The dispute concentrated on six songs in particular. The dispute was, on the face of it, settled by a written settlement agreement entered into by the four boys on 22 March 2002. Under the settlement agreement, Ki and Owen obtained the rights to two of the songs and James and Mat obtained the rights to four of the songs. This present dispute is principally about the four songs which, under the settlement agreement, were acquired by James and Mat to the exclusion of Ki and Owen. Ki and Owen say that the settlement agreement should be set aside by the court. They say that the court should set aside the settlement agreement on three different grounds. The first is that the settlement agreement was entered into by Ki and Owen as a result of undue influence exercised upon them by Mr Rashman and by another person, a John McLaughlin. The undue influence was actual undue influence and/or presumed undue influence. Further, Mr Rashman and Mr McLaughlin made misrepresentations to Ki and Owen and the latter are now entitled to rescind the agreement for misrepresentation. In the further alternative, because the settlement agreement was arrived at as part of the process of winding up a dissolved partnership, James and Mat were under a duty to disclose certain relevant matters to Ki and Owen and James and Mat broke that duty of disclosure, entitling Ki and Owen to seek an order setting aside the settlement agreement. If the settlement agreement is set aside in this way then the ownership of the songs will be governed by the agreement made in early 2001 that the songs should be beneficially owned by the four boys. Alternatively, the copyright in these songs will be owned by the joint authors of the songs and the court is asked to determine disputes of fact as to who were the joint authors of the songs. In addition to these claims, Ki and

Owen claim an account of certain profits made by James and Mat. In March 2002, just before the settlement agreement of 22 March 2002, James and Mat entered into a lucrative recording contract with a substantial recording company. The new three piece band of James, Mat and Charlie Simpson, also called “Busted”, was very successful. The entry into the recording contract and the many gains made by the three piece Busted were the result of improper use, without the informed consent of Ki and Owen, of partnership assets and in particular the four songs (which the settlement agreement had provided would be owned by James and Mat), the goodwill in the name Busted and certain trademarks in relation to the mark Busted. Although the quantum of these claims has not been explored at the trial of the matter, the Claimants say that the Defendants will be obliged to pay very substantial sums of money to the Claimants.

[11] The Defendants' case is radically different. The Defendants say that the collaboration between the four boys which began in December 2000 and January 2001 was a somewhat informal affair. Three of the four boys were seventeen years old at the time. James was still at college. The four collaborated in writing songs but only some of the time. They were not in each other's company every day and when they were together they naturally indulged in a great deal of socialising so that they did not spend long or sustained periods of time working hard writing songs. The four boys did enter into a written management agreement with Mr Rashman, as he required them to do so, but the management agreement was with the four boys jointly and severally. The Defendants say that there was no contractual relationship between the four boys and certainly not a partnership between them. The Defendants also say that they did not make an agreement with the Claimants as to ownership of the songs and certainly not an agreement to the effect that the songs would be beneficially owned in four equal parts, irrespective of who had contributed to the composition of a particular song. It is agreed that on 3 October 2001, the four boys attempted to terminate the management agreement with Mr Rashman. Mr Rashman accepted the termination of the management agreement and, from around 8 October 2001, Mr Rashman no longer was a manager or in any kind of contractual relationship with Ki and Owen. The Claimants, and in particular Ki, were determined in October 2001 to sever their relationship with Mr Rashman. The band did split on 8 October 2001. The dispute about songs was settled by the settlement agreement of 22 March 2002. That settlement agreement was generous to Ki and Owen and it gave them ownership of two songs; in relation to one of those two songs, neither Ki nor Owen had made any contribution. After the settlement agreement, James and Mat, together with the new band member Charlie Simpson, were entitled to make use of the four songs which were acknowledged to be James and Mat's under the settlement agreement. There was no goodwill in the name Busted and no benefit in the trademark Busted. James and Mat and Charlie, the new Busted, were indeed very successful pop musicians but in the course of their career they did not break any obligation owed to the Claimants nor misuse any property in which the Claimants had any right or claim. As regards the Claimants' attempt to set aside the settlement agreement of 22 March 2002, there was no undue influence or misrepresentation and the question of disclosure or non-disclosure does not arise because there was no relevant duty to disclose anything to the Claimants, in the course of arm's length contractual negotiations which led to the making of the settlement agreement.

THE PRINCIPAL WITNESSES

[12] As one might deduce from the above statements of the rival positions of the parties, there was a considerable dispute of fact. I heard oral evidence from the Claimants and the Defendants and indeed from Mr Rashman and Mr McLaughlin to whom I have already referred. I also heard evidence from Ki's parents. These were the principal witnesses and it is not necessary at this

stage to list all of the witnesses who gave oral evidence or who prepared witness statements which were received into evidence.

[13] The submissions made to me at the end of the evidence were very far apart as to how well the evidence contained in the various witness statements had survived the test of cross examination. The Claimants submitted that Ki's evidence had been proved to be correct time and again and that he was a witness with a clear recollection of important events. It was submitted that Owen and also Ki's parents gave open honest and truthful evidence to the court. Conversely, the Claimants said, James' evidence was unimpressive and he was stubborn, arrogant and dismissive. Mat had little or no useful recollection at all. The Claimants submitted that Mr Rashman had lied in certain respects in his evidence to the court and in other respects his evidence was untrue, unreliable and incredible. As to Mr McLaughlin, the Claimants said that his evidence was inaccurate and his recollection not strong.

[14] The Defendants' submissions as to the upshot of the lengthy oral evidence were very different. The Defendants began their submissions to me by describing these proceedings as opportunistic and unmeritorious brought about as a result of the Claimant's feelings of resentment at the Defendants' success and the Claimants' greed. The Defendants' submissions ended (at para 819 of detailed written submissions) with the contention that these unmeritorious claims were the result of sour grapes and financial opportunism.

[15] The Defendants submitted that each and every one of the witnesses called on behalf of the Claimants who had given oral evidence was unsatisfactory and the Claimants' case was in tatters. It was submitted that the Claimants had sunk to unacceptable depths to put pressure on the Defendants both prior to the trial and during it. Ki was described as a most unsatisfactory witness and, indeed, a fantasist. He was guilty of extreme exaggeration and self pity. Owen was described as having an evident lack of intellect and totally unreliable. Ki's mother, Mrs McPhail, was rambling, at times untruthful, a fantasist in some respects and prone to exaggeration. Ki's father, Mr Fitzgerald, adopted positions which were manifestly false and incredible.

ASSESSMENT OF THE PRINCIPAL WITNESSES

[16] Before embarking on detailed findings of fact on the many disputed matters of fact, I will describe my own assessment of the principal witnesses.

[17] Ki was not a reliable and convincing witness. He quite plainly exaggerated and distorted the real events. It is not, in the end, necessary for me to make an express finding as to whether he believed all of the evidence he gave or whether he was prepared from time to time to give self-serving evidence which he knew to be untrue. If he did believe the evidence he gave to the court, it can only be because he has indulged in very extensive self-serving reconstruction in the period between the relevant events and the time of the trial and has now convinced himself that his reconstructed version of events really happened. I approach his evidence with very great caution and as will be seen, in many cases I am simply not prepared to accept his version of events and I prefer the evidence of others.

[18] Owen was not a reliable witness either. He manifested a high degree of confusion and a failure to grasp the detail in relation to many of the significant events. I do not regard his evidence as reliable and where it conflicts with evidence of other witnesses whom I describe as credible below, I prefer the evidence of the other witness.

[19] Conversely, I regard James as an essentially credible and reliable witness. He had a very good and clear recollection of points of detail and the content of his evidence appeared to be credible and was given in a credible way. The only qualification on my assessment of him is that it is possible he was a little ungenerous towards Ki and Owen in describing the contribution that Ki and Owen may have made to the composition of some of the songs. I do not however think that he was seriously wrong even in that respect. It is not altogether surprising that his evidence lacked generosity towards Ki and Owen. I think that towards the end of their relationship in October 2001, it was already the case that James did not altogether like Ki and the way in which the Claimants, and in particular Ki, have conducted this litigation ever since would not have done anything to encourage James to look kindly on Ki.

[20] Mat's evidence was much more Ltd than the evidence of James as regards his description of the detailed events. In some respects, Mat was inclined to adopt the evidence given by James rather than set out to describe his own independent recollection of matters. On the whole, I find that Mat was setting out to give reliable evidence and in so far as he adopted what James had to say this was attributable to the fact that James had a good clear recollection, which was better than Mat's own independent recollection, of most of the matters that needed to be investigated.

[21] Ki's mother, Mrs McPhail was a loyal and passionate defender of her son. Her maternal feelings are wholly admirable but given my findings of the reliability of Ki's evidence, I fear I also have to find that Mrs McPhail's loyalty to her son was at the expense of the accuracy of her recollection. In a large number of respects her evidence is not acceptable and I can not regard her as a safe and reliable witness on whom I can rely.

[22] Ki's father, Mr Fitzgerald was also a very solid defender of his son and proponent of his son's case. On a number of occasions, his evidence was contradicted by the contemporaneous documents which exist. Again, his loyalty to his son, whilst commendable, was at the expense of his own reliability.

[23] As regards Mr Rashman, I was prepared before hearing his evidence to be very much on my guard as to what he had to tell me. Mr Rashman is a mature man with business and legal experience. I was prepared to make allowances (in favour of the Claimants) for the fact that Mr Rashman would appear more mature, and possibly rather more impressive as a witness, than the four boys. In view of some of the things said about him by the Claimants, I was prepared to watch out for the use by him of skilful presentation, charm and advocacy. Given the serious allegations of undue influence against him, I was also ready to examine critically the dealings he had with the Claimants who were only boys or young men at the time of the settlement agreement of March 2002. Having adopted that approach to Mr Rashman's evidence, I am able to say that I found his evidence reassuring in relation to the serious allegations made against him. I consider that his evidence was entirely credible. By the time he gave his evidence, he was no longer a party to this litigation. Although it may be the case that if the Claimants had succeeded in their claim against the Defendants, then the Defendants might have brought a claim against Mr Rashman, I am persuaded that such a possibility had really no part to play in Mr Rashman's approach to his task of giving evidence to the court. So far as his relationship with the four boys in 2001 and 2002 was concerned, I find that Mr Rashman was understanding and helpful to them and he spoke generously of the talents of all four boys, expressly including the Claimants in his remarks.

[24] I can deal quite shortly with the evidence of Mr McLaughlin. Mr McLaughlin was in my assessment straightforward and truthful in all respects. He was on the whole completely reliable although he could not be expected to have a complete recall of details of the matter which were not important to him at the time, nor since, and he did not profess to remember matters which it is likely he would not have remembered.

[25] There is one other witness to whom I will refer in this review of the witnesses. That is Mr Fletcher, known as “Fletch”. Mr Fletcher gave evidence by video link from Sydney, Australia. I found his evidence to be straightforward and reliable. Indeed, his evidence was of great utility in assessing the reliability of the evidence of Ki in particular. There was an irreconcilable conflict between Ki's evidence and the evidence given by Fletch about the events of 4 October 2001. Having heard both Ki and Fletch I have no hesitation in accepting Fletch's version of the events which means that I have to find that Ki's version of the events was wrong. In view of the fact that Ki's evidence on a significant point was seriously wrong, this passage in the evidence was a major contributor to my ultimate conclusion that Ki's evidence as a whole should be treated with great caution.

FINDINGS OF FACT

[26] I will now set out my principal findings of fact as to what happened in this case. I will add some brief commentary from time to time during that recital of my findings of fact. When I later come to consider the issues which fall to be decided, I will need to make further findings and I will state those further findings at that later stage.

[27] James first met Richard Rashman in about November or December 1999 when James unsuccessfully auditioned for a band being managed by Mr Rashman. Mr Rashman kept in touch with James during the following year. Mr Rashman was keen for James to develop his song writing and to write songs with as many people as possible.

[28] Mat also first met Mr Rashman as a result of unsuccessfully auditioning for the same band managed by Mr Rashman in November or December 1999. As with James, Mr Rashman kept in contact with Mat in the following year and tried to set Mat up with others to see whether Mat could work with them.

[29] Ki and Owen together met Mr Rashman in December 2000. At that time, Ki and Owen were part of a four piece boy band. Mr Rashman was not interested in managing this band and preferred Ki and Owen to the two other members of the band. Ki and Owen then ended their relationship with the other two members of the band and asked Richard to manage Ki and Owen.

[30] In December 2000 or January 2001, Mr Rashman told James that he wanted James to meet Ki and Owen to see whether the three could write songs together. James contacted Ki and Owen who came to see James at his parents' house in Southend.

[31] The Claimants have described this initial meeting between Ki and Owen on the one hand and James on the other as an audition of James by Ki and Owen. The Claimants' suggestion is that Ki and Owen wanted to see if James was suitable to join a band that Ki and Owen were forming. James, in his evidence, did not agree that this was a fair representation of the nature of

the initial meeting. This conflict of evidence had a number of features which were to be repeated elsewhere in the disputed evidence. The case presented by the Claimants was that Ki and Owen (and especially Ki) were the more significant and dominant persons in the relationship as they had had the idea of forming a band and were recruiting others to join the band. Conversely, James regarded himself as a talented song writer and musician with greater creativity and talent than Ki and Owen.

[32] In my judgment, it is wrong to regard the initial meeting between Ki and Owen and James as an audition. There were other occasions, referred to in the evidence, when one or more of the four boys did attend auditions and the description of those auditions was nothing like the initial meeting between Ki and Owen and James. Accordingly, I accept James' description of the initial meeting. The Claimants' case as to the initial meeting also inappropriately played down the significance of Mr Rashman in setting up that meeting. Although the three boys were to collaborate with each other, each of the three was dependant on that person's relationship with Mr Rashman who was making suggestions and guiding them.

[33] The Particulars of Claim refer to this initial meeting between Ki and Owen and James and seek to describe the events of that first meeting as giving rise to a binding agreement between the three boys. The Claimants say that a contractual relationship between the three boys was formed at that first meeting. Later in this judgment I will consider the Claimants' case that there was a contractual relationship between the three boys but the pleaded case appears to me to be wholly improbable as a matter of fact. Before this meeting of the three boys, Ki and Owen knew each other but did not know James and James did not know them. It is one thing for three boys meeting for the first time to get on well together socially and to discover shared interests and ambitions but it is a fundamentally different thing for the three to enter into a contractual relationship at such a first meeting.

[34] Ki and Owen stayed at James' house in Southend for a few days. Not long afterwards, Mr Rashman introduced Ki, Owen and James to two other young men, namely, Aaron Buckingham and Mat. Ki, Owen and James sang songs and played instruments together with Aaron Buckingham but Ki, Owen and James decided they did not want to collaborate with him

[35] Mr Rashman suggested to Mat that he should travel to Southend to meet Stu Hannah, from another band called Skeat, to see whether Mat might be interested in joining Skeat. After Mat auditioned for Skeat, he met Ki, Owen and James at James' house in Southend. Mr Rashman had told Mat about “James from Southend” but did not mention Ki and Owen. That suggests that in Mr Rashman's mind he was not sending Mat to audition for a pre-existing band of three members. The four boys, Ki, Owen, James and Mat spent time together and sang songs together. Mat did not write any songs with the other three. When Mat left Southend he did not understand that he had auditioned for a band comprising Ki, Owen and James nor that he had agreed to anything with Ki, Owen and James.

[36] The Claimants' case, as pleaded in the Particulars of Claim, was that Ki, Owen and James auditioned Mat and immediately following such audition they offered Mat a place in the band and Mat accepted the offer there and then. As is the case with the suggested audition of James, I do not accept that it is fair or accurate to describe the first meeting with Mat as an audition. The meeting between the four boys was very much less formal than an audition suggests. Further, I find that when the four boys parted after their first meeting, no agreement was made between them. I will refer later in this judgment to the Claimants' case that a contractual agreement was

made at that first meeting. However, I can comment at this stage that on the facts I have found the suggestion that the four boys made a contract at that first meeting is wholly improbable, given my findings as to the character of that meeting.

[37] There is a major dispute of fact as to whether the four boys entered into a contractual arrangement as to the ownership of songs written by one or more of them.

[38] At the end of the trial, the Claimants' case as to the existence of, and the terms of, a song writing agreement or a song split agreement was as follows. There was, in the first instance, a three way song split agreement between Ki, Owen and James. Mr Rashman had advised one or other of the three in a telephone conversation from the United States, on the various arrangements song writers could come to as between themselves. Following the discussion with Mr Rashman, Ki, Owen and James agreed to share song writing equally between the three of them, no matter who contributed what to a particular song. The agreement was made “then and there” as the Claimants put it, immediately following Mr Rashman's advice. The agreement meant that each one of the three had equal ownership of, or rights in, a song even if it was written by one only of the three or two only of the three. The Claimants' case is that when Mat joined the band, as they described it, all four members of the band (now including Mat) agreed on the identical song split agreement, that is, each of the four would have equal ownership of or equal rights in any song written by any one or two or three or all of the members of the band. The Claimants' case is that there was a later agreement which looked forward to the time after the band's first album was released. At that time, in relation to any song written then or thereafter for the second album the rights in any such song would be in accordance with song writing contributions.

[39] At the end of the trial, the Claimants accepted that the boys did not discuss what would happen if the band split up before signing a record deal or releasing an album. It was therefore submitted that “on a proper construction of the agreement” the court should find that the boys had agreed that the ownership of and the rights in the songs would be shared equally between the four members of the band irrespective of the contribution of each to the song. It was contended that the legal effect of the agreement was that the copyright in the songs, which vested at law in the joint authors of the songs, was held on trust for the four members of the band in equal shares.

[40] The Defendants' case is that whilst Mr Rashman did explain to the four boys the range of agreements that might be made in relation to songs written by one or more of them during their collaboration, and whilst the boys may have discussed what Mr Rashman had told them, there was no concluded consensus as to what would happen, there was no contractual arrangement made as to what would happen and there was certainly no contract which provided for the events which turned out, namely, that the four boys split before obtaining a recording contract.

[41] Although I have described the Claimants' case at the end of the trial, it is right to comment that the Claimants' account of the facts has shifted considerably over time both as to the content of the alleged agreement and the timing of the making of the alleged agreement.

[42] Taking the description of the agreement from the Claimants' pleaded case, the original averment was that the agreement was to the effect that the copyrights in any songs in the writing of which any of the boys had participated and which were included on a first album would be shared equally. That version of the agreement appears to apply only to songs on a first

album by the four boys and not all the songs written by the four boys. The second version of the agreement, described in Further Information provided by the Claimants, was that all forms of income from the first album would be shared equally. Within that agreement was a term that all the songs on the first album would be split four ways. Again, this agreement refers to the songs on the first album and not all songs written by the boys.

[43] In Re-Amended Particulars of Claim, the Claimants' case was that the parties agreed that all income from songs, in the writing of which any group member had participated, should be shared equally “at least as far as the first album was concerned”. Again, this seems to focus on songs on the first album of the group rather than all songs written by one or more of the boys.

[44] The final version of the Particulars of Claim has deleted the suggestion of an agreement to share all “income” and has been replaced by an alleged agreement to share “song writing credits for songs in the writing of which any group member participated”. This agreement as to song writing credits is no longer linked to those songs which appeared on the first album although the use of the word “credit” might have been directed principally, if not exclusively, at songs on an album.

[45] The Claimants' recollection as to when the song writing agreement was allegedly made has also varied over time. In the Claimants' initial pleadings, they contended that the agreement was reached shortly after the signing of the management agreement (which was on 15 March 2001 and to which I will later refer). The pleadings were then amended to allege that the agreement was reached in February 2001. In Ki's first witness statement he said that the agreement was reached by all four boys “after a few weeks of writing together”. However, in Owen's witness statement, he suggested that the song writing agreement was reached between Ki, Owen and James in January 2001 before Mat joined the group. When cross examined, Ki also put forward this version of the facts.

[46] Mr Rashman gave detailed evidence as to comments he had made on two occasions, in particular, about the options open to song writers in respect of agreements they might make between themselves. The first conversation was early in the boys' relationship. He was asked about how he would recommend that song writers should share songs they were jointly writing. He said that there were usually two options. The first option was to keep track of what everybody wrote on a line by line or verse by verse basis. The second option was to split the song equally between those people who were writing the song. He went so far as to recommend, if the boys were happy to accept his recommendation, that they split the song between whoever was writing the song. In closing submissions, the Claimants submitted that the agreement they contended for of equal song writing splits was “a consequence” of Mr Rashman's advice at that time. However, there is an important difference between Mr Rashman's advice at that time and the suggested agreement. In accordance with Mr Rashman's advice, one only had a share in a song if one contributed to the song. On the Claimants' case, each of the four has an equal share in every song written by one or two or three of the four.

[47] Mr Rashman gave evidence as to a second occasion on which he discussed song writing splits with the four boys. This was in the Forum Hotel in March 2001. On that occasion he had a long conversation with the boys about many features of the music industry and the conversation turned to song writing. Mr Rashman gave very full evidence as to the possibilities he tried to explain to the four boys in March 2001. He was able to give detailed evidence on that point because he explained that the advice he gave to the four boys in March 2001 was the standard

advice he always gave. He explained in his evidence that the possible arrangements he was describing in March 2001 only applied in a case where a group had secured a recording contract and the songs on the record had been written by some of the group. He explained the desirability in those circumstances of each member of the group, including a member of the group who had not contributed to the writing of a particular song, having a share, but not necessarily an equal share, of song writing income. He explained that it was only sensible to make an agreement of that kind when a group got a recording contract and the songs to be recorded were identified and the line up of the group at that time was known. He was not recommending that a group which secured a recording contract would then agree to give a share of a recorded song to a former member of the group who was no longer a member of the group at the time of the recording contract and who had not contributed to a particular song.

[48] Both James and Mat gave evidence and did not accept that they had made an agreement with the Claimants, either with the content or at the time alleged by the Claimants.

[49] There are various matters or incidents which are said by one party or the other to assist in finding the facts on this disputed issue.

[50] Ki and his mother referred to a proposal to send songs to a Mr Renee Froger, who is a recording artist in Holland and a friend of Ki's parents. The idea was said to be that Mr Froger would record one of the boys' songs. It was said that Ki discussed this with Mr Rashman and the latter had said that the songs sent to Mr Froger should show the four boys as equal contributors to the songs which were sent. However, when he gave his evidence, Ki could not remember very much, if any, detail as to what songs were sent to Mr Froger. Further, Mrs McPhail's evidence suggested that one song was sent to Mr Froger and that song was History Repeated. However, when Ki made his mini-disc on or about 29 August 2001 he claimed 100% of the song writing credit for this song. Although Ki's evidence was that Mr Rashman had given specific advice about sending songs to Mr Froger, Mr Rashman was not cross-examined about this subject.

[51] The Claimants also rely on the fact that after the four split up on 8 October 2001, the Claimants referred to the existence of the agreement in November 2001. It is correct that the Claimants did refer to the existence of a song writing agreement of some kind as early as November 2001. However, the Claimants in November 2001 are likely to have remembered the advice and explanations given by Mr Rashman in March 2001. Although the Claimants asserted in November 2001 the existence of an earlier song writing agreement, it remains for me to determine whether such an agreement was in fact ever entered into.

[52] The Claimants also rely on correspondence which took place between Eddie Seago of Champion Management and Music Ltd and Mr Rashman in December 2001 and January 2002. Eddie Seago was a long-standing friend of Ki's father. At one time, when the four were becoming dissatisfied with Richard Rashman's management, the four had gone to discuss their future with Eddie Seago. After the split on 8 October 2001, Ki sought advice and assistance from Eddie Seago in relation to the dispute which emerged as to authorship of the songs. On 5 December 2001, Mr Seago wrote to Mr Rashman referring to an agreement between the four boys that the songs would be split equally between the four of them. There was then a conversation between Mr Seago and Mr Rashman. In that conversation, Mr Rashman said in his evidence to the court that he explained to Mr Seago what he had explained to the four boys in the Forum Hotel in March 2001. On 15 January 2002, Mr Seago wrote again to Mr Rashman

saying that he had discussed the matter with Ki and Owen and Ki's father and that they did not agree that the agreement to split the songs four ways was “in any way conditional”. It was therefore put to Mr Rashman that he must have said to Mr Seago in the conversation which preceded the letter of 15 January 2002 that the four boys had indeed made an agreement and that the agreement was a conditional agreement. It was then put to Mr Rashman that he was indeed right that an agreement had been made and his only mis-description of the matter was in attempting to say the agreement was conditional. Having heard Mr Rashman's detailed evidence as to the explanation he gave to the boys in March 2001 and as to the repetition of that explanation to Mr Seago, I do not see any incompatibility between Mr Rashman's evidence and the very short description used by Mr Seago referring to the agreement being “conditional”. It was not inaccurate for Mr Seago to describe what Mr Rashman was saying as that the boys would be well advised to enter into an agreement in the event of there being a recording contract for all of them. I do not regard the letter of 15 January 2002 as throwing any doubt on Mr Rashman's evidence as I find it to be compatible with his evidence.

[53] The Claimants also rely on the fact that the evidence before the court included a number of lyric sheets, that is, sheets on which the words of some songs were written. Some of theses sheets, probably the earlier ones, show the authorship of songs, whereas the later ones do not. The Claimants say that this fact shows that the boys must have made an agreement that the songs were to be shared equally between the four of them and that is why they stopped writing down the names of the authors of the songs. I do not accept that conclusion. First of all, the fact that the authors of the songs were identified in the early sheets is difficult to square with the Claimants' case at the end of the trial which was that the agreement on song writing splits was entered into virtually at the beginning of the history in January 2001. Further, the lyric sheets without authors' names on them were written so that the boys would have the words of the songs for the purpose of rehearsing and learning the songs. For that purpose, it was immaterial to record the names of the authors of the songs.

[54] The Defendants point to various matters which they say should lead the court to reject the Claimants' case about a song writing agreement.

[55] The first point made by the Defendants is that Mr Rashman was never told by the boys that they had made any such agreement. I accept Mr Rashman's evidence on this point.

[56] Secondly, at some point prior to 5 April 2001, James prepared a document that he labelled “the termites index of smash hits!!!” I should explain that the name “The Termites” was the name originally used by Mr Rashman to describe the four boys. I will refer later in this judgment to the time when the boys referred to themselves by the name Busted from late April 2001.

[57] The Termites index of smash hits lists eighteen songs. After each song, the list gives the names of one or other of the boys. The position is very varied. Sometimes there is only one name but in the case of other songs there may be two or three or four names. The list plainly refers to a time after Mat had joined the boys as his name is included in relation to some of the songs. If the Claimants are right as to the making of a song writing agreement at the time they allege it was made, it is difficult to see why James bothered to prepare a list which referred with obvious care to the names of the boys. There was no suggestion that the names were the names of the boys intended to perform the songs so the names must have been used to indicate the authorship of the songs. The Claimants did not put forward any explanation for this list. The Claimants tried to suggest that the list had been prepared “early on”. The difficulty with

that as an explanation is that the Claimants' case at the end of the trial was that the song split agreement was made in January 2001 before Mat joined and was then extended to all four boys when Mat later joined. In my judgment, the Termites index of smash hits is an independent indicator that the Claimants' evidence about the making of a song split agreement is not correct.

[58] Another possible pointer is the event concerning Ki making and posting to himself a mini disc on or about 9 August 2001. Just before 29 August 2001, Ki was at James' house in Southend. James had an eight track recorder at his house. On the eight track recorder were songs performed by the four boys. Ki transferred some of these recordings onto a mini disc. He then went to his aunt's house in Kentish Town and he posted the mini disc addressed to himself at the Fitzgerald family home in Herne Bay. In the envelope with the mini disc was a hand written note intended to identify the authors of the songs on the mini disc. The hand written note stated that the song “She Knows” was written by James, Ki and Mat. The song “History Repeated” was written by Ki alone. The note referred to “the rest of the songs” which were written by James, Ki and Mat. The note was dated 29 August 2001. The note appeared designed to prove, in the event of any later argument, that Owen had not contributed to the writing of any of the songs and that Ki had contributed to the writing of all of the songs on the mini disc. It is difficult to see why Ki wanted to establish anything as to the authorship of the songs in view of his case that from the outset all four boys had agreed that the ownership of and rights in the songs would be shared equally. In his evidence, Ki attempted to explain away his reasons for recording the mini disc. He tried to explain that he had omitted Owen from the hand written note because he was in a terrible rush. There was no reason, in all the evidence I heard, why I should conclude that Ki was under any time pressure of any kind. I reject the suggested explanation. Ki's desire to deal with the authorship of the songs in August 2001 appears to me to be incompatible with the alleged song writing agreement.

[59] The Defendants also relied on a number of documents which showed what Ki must have told Eddie Seago following the split in October 2001. These documents include the following. The Bad B Music draft publishing agreement of 13 November 2001 is inconsistent with the alleged song split agreement. Eddie Seago's letter to Mr Rashman of 30 November 2001 again is inconsistent with a song split agreement. The Bad B Music draft publishing agreement of 1 January 2002 is inconsistent with the song split agreement. So is the letter from Bad B Music of 18 April 2002. Further, Eddie Seago on behalf of Ki and Owen submitted a notification form to MCPS/PRS on 12 October 2001. The song splits referred to in that notification are inconsistent with the alleged song split agreement.

[60] In my judgment, I have no hesitation in rejecting the Claimants' case that there was a contract between the four boys as alleged by the Claimants. The existence of such a contract is incompatible with the number of other independent and reliable pieces of evidence. The existence of the contract is denied by James and Mat whose evidence I regard as reliable on this point. The existence of the contract is supported by the evidence of Ki and Owen whom I regard as unreliable on this point. Beyond that, the alleged agreement made in January 2001 is inherently improbable for a number of reasons. The first reason is that that date is so very early in the collaboration between the boys and it seems most surprising that they would have committed themselves contractually in a significant way at such an early stage. Secondly, I find that James regarded himself (I think with justification) as a significant song writer and I find it very hard to believe that he would have agreed, particularly at the very outset, to give away shares in songs to others who had not contributed anything to a particular song. Thirdly, although the agreement in January 2001 is alleged to be in consequence of Mr Rashman's

advice in January 2001, the agreement significantly differs from anything Mr Rashman had described because the Claimants' version of the agreement is that each of the boys had a share in a song even if that boy had made no contribution to the song.

[61] I accept Mr Rashman's evidence as to the discussions he had in January 2001 over the telephone and in the Forum Hotel in March 2001. I find that the explanation given in March 2001 is the source of the idea which led the Claimants to make the allegation that something had been agreed in relation to song writing. However, it is clear to me that Mr Rashman's explanations in March 2001 are not compatible with the boys having made an agreement prior to the split because Mr Rashman's explanations were restricted to something that should happen at a future time and only in the event of the boys entering into a recording contract.

[62] The above discussion as to the alleged song split agreement related to an alleged agreement in January 2001. For the purpose of making my findings of fact as to whether such an agreement was or was not entered into in January 2001, it has been necessary to take into account subsequent events. It is now, however, desirable to go back to the chronology and the next relevant episode concerns the negotiations for, and the entry into, the management agreement with Mr Rashman.

[63] It is relevant to consider the way in which the management agreement was entered into as well as the terms of the concluded agreement. The negotiations on a management agreement start with a letter from Mr Rashman to the solicitors, Clintons, on 2 February 2001. The driving force behind the making of a management agreement was Mr Rashman and not the four boys. Mr Rashman had insisted that if he was going to help the four boys develop their careers musically or otherwise, he required them to enter into a formal agreement. In particular, Mr Rashman did not wish to effect introductions to others in the music business unless Mr Rashman had the boys under contract with him in the first place.

[64] Mr Rashman's lawyers were Statham Gill Davies. Ki's father had previously used the firm of Clintons and so Clintons was chosen as the firm which would give advice to the boys for the purpose of discussing and entering into a management agreement with Mr Rashman.

[65] The terms of the letter of 2 February 2001 are, or may be, relevant when considering other areas of dispute. For example, in judging how formal and business-like and contractual were other arrangements between the four boys themselves, it is certainly relevant to take into account the fact that the negotiations for the management agreement were conducted in a formal, business-like and legal way. The Claimants are entitled to submit that the formality and business character of the negotiations on the management contract could support the case that the arrangements between the four boys themselves were also business-like and sufficient to show an intention to create a legal relationship in their dealings between themselves. That submission certainly deserves to be given proper weight. However, the rival submission is that the formality and business character of the negotiations for the management contract were attributable to Mr Rashman's requirements rather than any requirements on the part of the four boys. It was Mr Rashman who required the contract to be made for his protection. Further, although the management contract was done in a formal way with a written agreement following legal advice, two other contracts which are asserted by the Claimant, the first relating to a contract of partnership between the four boys and the second relating to a contract as to song splits did not involve anything being written down, did not involve the taking of legal advice and did not involve any parental approval, written or otherwise, to the alleged contracts.

[66] Returning to the letter of 2 February 2001, Mr Rashman told Clintons that he had a new project, called “the Termites for the moment” which was moving “on a fast track”. Mr Rashman suggested that the management contract to be entered into should be essentially the same as an identical management contract he had already entered into with another band he managed, namely, Skandal. Mr Rashman agreed to pay Clintons' fees for advising the four boys and he sent a cheque for £1,000.

[67] On 12 February 2001, Mr Rashman wrote to James' father, Peter Bourne. The letter started with the phrase “God save the Termites”. The letter explained the proposal to have a management contract based on the contract with Skandal. Mr Rashman stated that they might wish to use his own lawyers (Statham Gill Davies) “eventually when we shop and do a deal for the guys”. That must have been a reference to the possibility of a future record deal for the four boys. Mr Rashman invited Peter Bourne to raise any questions he had. He explained that the manager under the proposed contract commissioned the income that actually went to the four boys “sort of like being another member of the group”. That seemed to be a reference to the fact that the rate of commission under the draft agreement was 20%.

[68] Clintons met the four members of the group prior to 23 February 2001 and then wrote to Mr Rashman that Clintons were still taking instructions. Clintons appear to have spoken directly to Mr Rashman around this time. Mr Rashman had “very strong feelings” about the length of the proposed term of the contract. Clintons involved at least two of the boys in what was happening in that they notified them of a draft letter intended to be sent to Mr Rashman.

[69] On 2 March 2001, someone on behalf of the four boys telephoned Clintons to say that they approved the draft letter with suggested changes to the draft agreement. On 5 March 2001, James' father signed a letter confirming that James had been given a copy of the proposed management agreement and had taken legal advice and indeed James' father undertook to use all reasonable endeavours to ensure that James would abide by the terms of the agreement and would ratify the terms thereof on attaining his majority.

[70] On 7 March 2001, Clintons wrote to Mr Rashman apologising for the delay in getting back to him but stating they had received full instructions regarding the draft agreement. The letter enclosed a mark up of the agreement showing Clintons' amendments. The letter explained the thinking behind the amendments.

[71] Clintons discussed the amendments with Richard Rashman before 15 March 2001. Mr Rashman agreed a number of the proposed amendments but not all. Clintons wrote to the four boys on 15 March 2001 reporting on the state of play.

[72] The management agreement, without all of the amendments proposed by Clintons, was entered into by Mr Rashman and the four boys on 15 March 2001. I will return to the detailed terms of that agreement later in this judgment. It seems that the agreement was entered into on 15 March 2001 although the document is not dated. On 16 March 2001, Ki's father signed a parental letter in the same terms as that earlier signed by Peter Bourne.

[73] Clintons were not immediately informed that the management contract had been entered into and they continued to correspond on the basis that the agreement was still at the drafting stage. On 2 April 2001, Clintons became aware that the contract had been entered into and

expressed surprise. On 7 April 2001, Mr Rashman wrote to Clintons explaining the circumstances in which the parties became prepared to commit to management agreement without going back to Clintons. On 9 April 2001, Clintons expressed concern to Mr Rashman at the way the matter had been completed.

[74] Initially, my reaction to these events and, in particular, the fact that Mr Rashman had proceeded to completion of the management agreement by bypassing Clintons and going straight to completion with the four boys direct led me to wonder whether Mr Rashman might indeed have been the type who is prepared to get his own way and, if necessary, put pressure on others for that purpose. Given that a central allegation made by the Claimants is that Mr Rashman used actual undue influence on them for the purpose of securing the settlement agreement of 22 March 2002, I was prepared to be alert to the possibility that Mr Rashman may indeed have used undue pressure for the purposes of the settlement agreement. I will make my findings in detail on the allegations of undue influence later in this judgment.

[75] I now turn to consider the terms of the management agreement. The parties are Prestige Management, said to be a division of Rashman Corporation, a California corporation, as the manager of the four boys. The agreement with the four boys was stated to be with them jointly and severally. The four boys are referred to as “you” or “your” as the context permitted.

[76] By cl 1 of the agreement, the four boys appointed the manager to act as the sole and exclusive manager throughout the world during the Term in connection with all their activities in the entertainment industry. Those activities were then described as including without limitation certain activities. The listed activities certainly include the recording of pop music and the performance of pop music and indeed the composition of musical works. The activities also extended to activities in connection with film, merchandising, advertising and sponsorship and also acting, performing, directing and writing in the fields of theatre, film, radio, television and publishing. Clintons had advised the four boys to limit the range of activities covered by the agreement but the agreement as executed is not Ltd in the way advised.

[77] Clause 2 of the agreement deals with the Term. The Term was to commence on 15 March 2001 and to continue for five years. However, the agreement contained a number of provisions which provided for the possibility of the agreement ending earlier than the expiry of the five year term. Clause 2(b) referred to what might happen if there had not been a recording agreement within one year of 15 March 2001. The boys would then be entitled to terminate the five year term by thirty days' written notice. Clause 2(c) dealt with a case where there was a recording agreement but there was a later a release from the recording agreement and no new recording agreement or publishing agreement. The issue of termination of the agreement was also dealt with in cl 14(b), to which I will later refer.

[78] Clause 3 set out the manager's obligations. The manager agreed to use all reasonable endeavours to enhance and develop the boys' careers in the areas of activity referred to in cl 1, in which areas of activity the boys should reasonably wish to participate. The manager agreed to keep the boys regularly informed as regards negotiations with third parties. Further, the manager agreed to have due regard to the wishes and aspirations of the boys and to act in good faith towards them.

[79] Clause 4 dealt with the manager's rights to commission on certain monies. The rate of commission was to be 20%. As one would imagine, the provision is detailed but it is not

necessary to set out that detail in this judgment. Clause 4(g) of the agreement provided that recordings of musical works made prior to the date of the agreement should be deemed to have been made during the Term and musical compositions written prior to the date of the agreement and exploited during the Term should be deemed to be written during the Term.

[80] Clause 8 of the agreement dealt with expenses. The manager was to be responsible for certain of its own expenses but other expenses were recoverable by the manager from the boys. There were certain provisions as to limits on expenditure and it was agreed that no more than 50% of the net income (being the gross income less commission) should be applied towards recoupment of the permitted expenses.

[81] Clause 9 provided for certain obligations on the part of the boys and warranties given by the boys. By cl 9(a)(iii), the boys were to notify the manager of enquiries as to their services in the entertainment industry. The boys were to inform any such third party that Prestige Management was the sole manager. The boys were to use reasonable efforts to carry out all engagements reasonably approved by them. By cl 9(vi) the boys were not to enter into any other management or agency agreement for their services within the entertainment industry without the prior consent of the manager.

[82] Clause 10 provided for determination of the agreement in the event of a material default. The innocent party was not entitled to terminate the agreement summarily but was required to give the defaulting party notice in writing of such default and the right to terminate arose if the defaulting party failed to remedy in accordance with the notice within thirty days after its receipt.

[83] Clause 12 stated that nothing in the agreement gave rise to a partnership between the manager and the boys. The manager was entitled to assign the benefit of the agreement to a third party subject to the key man provisions in cl 13. The key man provisions essentially identified Mr Rashman as the person who would provide his personal services to the manager. Clause 14 of the agreement spelt out that in relation to the four boys, the agreement was joint and several. The relevant part of cl 14(a) was in these terms:

> "You acknowledge that in this Agreement the singular shall include the plural and vice versa and that this Agreement applies to you both in your capacity as a member of the group called, for the moment, 'The Termites' ('the Group') and in respect of all your other activities in the entertainment industry whether as an individual, a member of any other group or groups or otherwise howsoever. You acknowledge that each of the terms and conditions of this Agreement apply to you jointly and severally."

[84] Clause 14(a) went on to provide that the four boys would not permit any other person or persons to become full-time royalty earning members of the Group unless they had used best endeavours to procure that such person or persons should enter into an agreement with the manager in precisely the same terms as in the management agreement.

[85] Clause 14(b) referred to the possibility that any one of the four boys might cease to be a member of the Group. Clause 14(b) provided that if that happened and certain further criteria were satisfied then the leaving member could terminate the Term of the management agreement by notice in writing but such termination would be in respect of the leaving member only and not in respect of the remaining members of the Group. It is not necessary to set out the full terms of cl 14(b). The criteria referred to in cl 14(b) referred to the existence or non-existence of a relevant agreement with a record company.

[86] There did not appear to be any dispute between the parties at the trial as to the operation

of the management agreement. The management agreement did not regulate the relations of the boys between themselves. So far as the terms of the management agreement were concerned, there was nothing to prevent a boy leaving the group at any time. If the leaving member was not able to terminate the management agreement under cl 14(b) then the management agreement would continue for five years or until it was terminated under cl 2. Thus if Ki left the group to go solo and was not in a position to terminate the management agreement under cl 14(b), the management agreement would continue to apply as between Ki and Mr Rashman. Mr Rashman would be entitled to take a commission on Ki's earnings on the activities specified in cl 1 of the agreement. If the manager incurred expenses on Ki's behalf then the same could be recovered from Ki but expenses incurred by the manager on behalf of any one of the other three boys could not be recovered from Ki.

[87] The evidence was conflicting as to how much time the four boys spent together after January 2001 and as to what precisely they did when they were together.

[88] The four boys lived in different places. James lived with his parents in Southend. Mat lived with his mother in Molesey, Surrey. Ki lived with his parents in Herne Bay, Kent although he also spent some time at the flat of his aunt in Kentish Town. Owen lived in Birmingham. Ki and his parents suggested that the boys spent large amounts of time at Ki's family home at Herne Bay, Kent. Conversely, James could only recall three occasions on which he stayed in Herne Bay. This recollection was not seriously challenged and I accept it. James and Mat referred to one occasion in particular when they say they co-authored a song at Mat's house at Molesey, Surrey. It was not suggested that any time was spent at Owen's home in Birmingham.

[89] When the boys were together they were either at James' house in Southend or at an hotel (either the Forum Hotel or the Intercontinental Hotel) in London at a time when Mr Rashman was staying in the same hotel.

[90] I am satisfied that Ki went to James' house in Southend on many occasions. However, in addition to visiting James, Ki had a girlfriend in Southend and spent some of the time at her house. Ki has undoubtedly exaggerated the amount of time he spent at James' house in Southend. He suggested he had been in Southend for a month and a half prior to the end of August 2001 and then he changed his evidence to it being a period of two months, July and August 2001. He suggested that Mr Rashman had told him he had to stay in Southend for two months. This appears puzzling in view of Ki's insistence that the four of them were a band and the further fact that Owen did not go to Southend very often and Mat came and went. Indeed as regards the period July and August 2001, Ki was in Majorca in the last week of July and James' parents were in Cornwall and not in Southend for the first three weeks of August. Indeed, it is clear from other evidence that the boys were at the Intercontinental Hotel between 5 and 15 August 2001 during which time they assisted with the recording of a demo tape at Steve Robson's recording studio in London.

[91] There was also a dispute as to what the boys did when some or all of them were together. It must be remembered that Mat turned eighteen in May 2001 and James and Ki turned eighteen in September 2001. Owen was a little older. Ki's evidence was that when the boys were together they spent 95% of their time writing songs. James' mother prepared a witness statement and the Claimant did not require her to attend for cross examination. She said:

> "They spent a lot of their time 'mooching around', going out, watching television, playing a bit of music. When they were staying with us, the boys were not slaving away writing all the time. They were not working together in a hot house of

> creativity. They spent some time writing songs, but a lot of the time was just spent hanging around together in the way in which many teenagers tend to do."

[92] Apart from the time that some or all of the boys were in Southend, there were other times when the boys were in Mr Rashman's hotel in London. Between 9 and 26 March 2001, the boys were together at the Forum Hotel and three of the boys stayed overnight and Ki stayed at his aunt's flat in Kentish Town. At the end of April 2001, Mr Rashman was staying at the Intercontinental Hotel for several weeks and the boys were there for periods throughout his stay. He then moved back to the Forum Hotel and the boys stayed at the Forum Hotel for several days at a time. In August 2001, Mr Rashman stayed at the Intercontinental Hotel and the boys stayed in that hotel between 5 and 15 August 2001.

[93] During their stays in the hotel, the boys certainly did some song writing and some of the time they practised performing songs. It seems likely that the only time that the boys were split into pairs by Mr Rashman for the purpose of song writing was on the occasion when Ki and Mat wrote "Who's Your Daddy" and James and Owen wrote "Average Guy". Even though the boys were in the same hotel as Mr Rashman, the four boys were not the only group that Mr Rashman was managing and I did not understand that Mr Rashman was standing over the boys supervising their activities to ensure productive work. Undoubtedly during the periods of stays in the hotels the boys socialised a great deal and had fun, as distinct from getting down to productive work.

[94] Over the period of their collaboration, the boys wrote many songs. It was suggested there were as many as thirty songs. When the parties came to make their settlement agreement in March 2002, however, only six of those songs were singled out to be the subject of the agreement. These must be considered to be the six important songs and the remainder of the songs were certainly less important and possibly many of them quite unimportant.

[95] Also during the stays in the hotels, the boys got ready to be taken by Mr Rashman to meet representatives of record companies, for example Sony/Epic and also Gut Records. Further, the principal if not the only reason they stayed in a London hotel in August 2001 was so that they could attend Steve Robson's studio to make a demo tape.

[96] During the period of the collaboration between the boys, James did not write songs exclusively with the other three. He sat down to write with Fletch and with Stu Hannah. James was also a student at South East Essex College until Easter 2001 and in the period to Easter 2001 he worked with other students from the college.

[97] I also find that Mat went for an audition for a musical during the period of the collaboration between the boys. The musical was called Closer to Heaven.

[98] The collaboration between the four boys did not at any time involve public performance. They never performed a conventional pop concert or gig. They never made an announcement of an intended future gig. They did perform in front of family and friends and there was a light-hearted session in the Forum Hotel involving the four boys and twenty American high school students.

[99] The boys were taken to meet representatives of record companies. They met Johnnie Blackburn of Sony/Epic. The first meeting was on 16 March 2001 just after the signing of the management agreement. It may be that Mr Rashman was in a hurry to have the management

agreement signed before he introduced the boys to Sony/Epic. Mr Blackburn came to the hotel where the boys were staying on a later occasion to hear them perform again. The meeting with Sony/Epic did not lead anywhere but was not discouraging and Mr Blackburn liked the song “She Knows”. The boys also performed before Guy Holmes at Gut Records. The boys met a junior member of staff at Smash Hits magazine. They also auditioned for, but failed to get, a commission for a Kodak advert. They also failed to get taken up by a Saturday morning show. They met Mr Gilmour of Music House. They did not see any representatives of record companies after about May or June 2001.

[100] By mid June 2001 James' father in particular was expressing concern about what was, or was not, happening with the development of the boys' careers. James' father met Mr Rashman in London and then Mr Rashman came to Southend. There was discussion at one or both of these meetings about the musical direction the boys should be taking. By this stage, James and Mat wanted to go in a more rock-orientated direction whereas Owen wanted to stick to a boy band format. As a result of these meetings, Mr Rashman plainly felt he ought to do something and he organised a photo shoot which eventually took place in September 2001 and also arranged for the four to attend Steve Robson's recording studio in August to make a demo tape.

[101] Before describing the visit to the recording studio in August 2001, I will deal with the question of the name “Busted”.

[102] The management agreement referred to the Group by the name, The Termites. This name was Mr Rashman's idea and none of the four boys liked it and certainly none of the four boys were committed to the group going forward under that name. Before the end of April 2001, the name of the group was wholly up in the air with many suggestions being made as to a possible name. Several different people, according to the evidence in this case, have claimed that they were the first person to have the idea of the name “Busted”. It does not seem to me to matter where the name came from. The name was undoubtedly used when Ki's sister rang the former Spice Girl, Geri Halliwell, on a phone-in during a programme on MTV. Ki's sister told Geri Halliwell that her brother (Ki) was in a group called Busted. The name Busted was either the only name or certainly the dominant name of the group before the split in October 2001. It is not possible to predict whether the group would have committed to that name if they had had a recording contract and any other name had emerged or was preferred by, for example, the record company.

[103] The name Busted for the four boys would have been known by a certain number of other people before the split in October 2001. The name was known to the four themselves, to Mr Rashman, to Mr McLaughlin and to family and friends. The name was used for the backing tracks produced as a result of the recording in August 2001 in Steve Robson's studio. If the four boys had any meetings with third parties in connection with their activities after the end of April 2001, the name Busted would probably been used. Another band managed by Mr Rashman, called Skandal, had a website. Mr Rashman put on the Skandal website a link to the domain name Bustedmusic.com. On that site there were three pages with photographs of the boys. There was no music accessible on Bustedmusic.com. There was a chat room facility on that site. The evidence is conflicting as to whether many people ever accessed Bustedmusic.com. It is likely that the boys themselves and family and friends would have accessed the site. That would account for tens of visitors each visiting probably more than once. It is suggested there were 7,000 hits on the website. However, the counter for hits was not set at zero and it was not clear from the evidence whether the counter went up to 7,000 (starting from a figure above zero)

or whether the counter went up to seven thousand above where the counter started. A hit is a page impression and so if the visitor looked at all three pages, that would involve three page impressions or hits.

[104] During the period of their collaboration, the four boys did not perform in public and so the name Busted would not have been advertised to the public in connection with the group. Further, no music was ever sold under the name Busted. Further, the website, Bustedmusic.com, did not have any music on it.

[105] On or shortly after 8 October 2001, Mr Rashman did mention the name Busted to Owen or vice versa. Mr Rashman told Owen that whoever wanted to use the name could do so. After the split in October 2001, when James and Mat advertised for a third band member, they did not use the name Busted in the advertisement. When Charlie Simpson was selected to join the new band there was no commitment initially to use the name Busted. Mr Rashman managed the new band and gave evidence, which was not challenged, that if Ki or Owen had objected to the new band using the name Busted, the new band would not have done so.

[106] In June 2001, Mr Rashman did take steps in the US Trade Marks Registry to register “an intention to use” the name “Busted”.

[107] In August 2001, the four boys made two sets of demo tapes. The first set of demos was made by Steve Robson and John McLaughlin at Steve Robson's recording studios. The second set of demos was made by a record producer, Steve Duberry. He made a demo of “Who's Your Daddy”.

[108] The boys never received finished versions of the recordings made by Steve Robson and John McLaughlin. In Steve Robson's studio, four songs were recorded. One was a song composed by John McLaughlin and Steve Robson and they wanted the song recorded by the boys in an attempt to interest another boy band, Westlife, in the song. Three other songs written by one or other of the members of Busted were recorded. These were What I Go To School For, She Knows and Psycho Girl. The instruments for these three songs were played by Steve Robson, a Paul Gandler who was a professional guitarist and by James. I accept James' evidence that Ki did not contribute instrumentally. The lead vocals were by James. Ki and Owen did not sing the lead vocals for any one of the three songs but all of the boys contributed to the backing vocal tracks.

[109] In late August 2001, James, Mat and Ki were in Southend and James' friend Jeremy Singer made a video recording of the three singing on Southend beach and being “interviewed”.

[110] In late August 2001, Ki copied certain tracks from James' eight track recorder onto a mini disc and on 29 August 2001 he sent the mini disc together with an accompanying note addressed to himself in Herne Bay. I have already referred to the contents of the note and the assistance that it gives in deciding whether the parties ever did make a song split agreement.

[111] During September 2001 not much seemed to be happening. The demo tapes recorded at Steve Robson's studio in August 2001 had not appeared. John McLaughlin got married on 17 September 2001 and left on a four week holiday. In September 2001, James' parents met Ki's father in Herne Bay, Kent. There was a general and growing air of dissatisfaction with Mr Rashman's performance. The suggestion was made that the boys should see Eddie Seago who

was a friend of Ki's father and was active in the music industry. The four boys did meet Eddie Seago and Mel Medalie who was understood to be Eddie's business partner. Ki's aunt also attended that meeting.

[112] On 13 September 2001, James turned eighteen. On 25 September 2001, Ki turned eighteen. He was the last of the four boys to reach eighteen.

[113] On 1 October 2001, Mr Rashman sent a parcel by FedEx to James in Southend. In the parcel was a letter addressed to James which stated that the parcel included £50 cheques for each boy for three weeks described as this week, next week and the week after. The parcel also included age of majority forms for James and Ki. The letter stated that the age of majority forms for James and Ki were the same as the one Mat filled out earlier in the year when he turned eighteen. Mat had turned eighteen in May 2001. The majority form signed by him was not in evidence but it is to be inferred from Mr Rashman's letter in the parcel of 1 October 2001 that Mat did indeed sign an age of majority form in relation to the management agreement.

[114] The cheques were given to the four boys and I understand that they were cashed. The age of majority form amounted to a ratification of the terms of the management agreement. Ki never did sign the age of majority form drafted for him. James did sign the age of majority form on 9 October 2001 but that was after the split on 8 October 2001.

[115] The arrival of the FedEx parcel triggered an important series of events. James, Ki and Owen were in Southend on 3 October 2001 and they discussed what they should do. There was plainly deep dissatisfaction with Richard Rashman. James' father helped the three boys to prepare a fax to be sent to Mr Rashman. The fax that was sent was in these terms:

> "It with great sadness that we write to you today as a band and as individuals. After a great deal of thought we have all decided that we do not wish to work with you any longer on this project. During the last couple of weeks we have been advised by Prestige Management to get jobs and sign on the dole. As of today's date we still do not have any firm date when we will receive our three mixes from Steve Robson which we recorded at the beginning of August. Neither do we have from you any firm times or dates when any of this is going to happen. Furthermore we do not have any firm times or dates for seeing any major labels. At our meeting in June when we expressed our concern at the lack of progress in the project, you said that to progress we needed three of our songs recorded and mixed to present to the major labels in a promotional pack, and we required the same mixes for our performance development. Four months have gone by since that June meeting and we still do not have our mixes. We have today received your FedEx parcel enclosing the age of majority forms for James and Ki together with a series of cheques for us individually. We will of course return these to you together with our signed hard copy of this faxed letter. We wish to remain friends and hope you appreciate our situation."

The letter bore the name of all four boys. Mat was not with the other three boys in Southend when this letter was being composed. However, the three boys telephoned Mat and read the suggested fax to him and Mat approved the sending of the fax. The fax was sent from James' father's office. Ki denied ever having seen the age of majority forms. However, the letter unmistakably refers to age of majority forms for James and Ki and I find that Ki fully understood that he was being asked to ratify the management agreement, now that he had turned eighteen. Ki deliberately chose not to ratify the management agreement at that time or at any time afterwards.

[116] There was considerable dispute at the hearing as to all of the factors which led up to the decision of the four boys to send the fax of 3 October 2001. In my judgment, it is absolutely clear that the four boys meant what they said in the fax and the matters of concern referred to in the fax were genuinely felt by them. The four boys wanted to terminate the management agreement with Mr Rashman. Frustration with Mr Rashman was an important reason for the boys' decision.

However, there were other sources of discontent, or at least concern, being felt by one or more of the boys. During the period of the boys' collaboration, differences had opened up between them. There was certainly a difference as regards the musical direction in which they wished to go. The gap was widest between Owen on the one hand and James and Mat on the other. Owen wanted to be in a boy band. James and Mat wanted to be more rock orientated. Ki may have been somewhere between Owen on the one hand and James and Mat on the other but his own views were not identical to those of James and Mat. There were also personal differences. James and Mat had become very friendly with each other and much less friendly with Ki.

[117] Mr Rashman appears to have received the fax more or less immediately after it was sent. He telephoned the boys while they were travelling back from James' father's office to James' home in James' father's car. However, the line went dead. Ki, Owen and James spoke to Mr Rashman on the telephone from James' house. I find that Mr Rashman was very upset by the fax and indeed he was angry. He felt the sacking was not justified. There was considerable evidence as to statements allegedly made by Mr Rashman in a telephone conversation with Ki and with Ki's mother. Ki and his mother allege that Mr Rashman had threatened to kill himself and in particular to throw himself off the top of a high building. Mr Rashman gave evidence that he said no such thing. It seems to me that it is highly unlikely that Mr Rashman threatened to throw himself off a building. I do not say that it is impossible that he made that remark. It may be that he made some non-serious suggestion to that effect and it has suited Ki to turn it into a threatened suicide which Ki has then used in this case to show that Mr Rashman sought to apply wholly inappropriate pressure on a young man such as Ki.

[118] Ki's mother gave evidence that she had a two hour conversation with Mr Rashman on the evening of 3 October 2001 and Ki's mother alleged during her cross examination that Mr Rashman had threatened to jump off a building during that conversation. I think it is very unlikely that Mr Rashman and Ki's mother had a two hour conversation on the evening of 3 October 2001. There was a conversation between those two the next day and it is possible that Ki's mother has confused the two days. I fear that it is also likely that Ki's mother has exaggerated the content of any conversation with Mr Rashman with a view to being helpful to her son's case that Mr Rashman was applying inappropriate pressure on Ki.

[119] I do, however, have to decide what was said by Ki to Mr Rashman and what was said by Owen to Mr Rashman on the evening of 3 October 2001. Ki suggests that when Mr Rashman threatened suicide, Ki then backtracked on the sacking and wanted to calm everyone down and this produced a sea change in everyone's attitude so that in conversations with Mr Rashman on the evening of 3 October 2001 Mr Rashman was told that the sacking had been withdrawn.

[120] Mr Rashman gave evidence that there was no attempt to withdraw the sacking. He stated that in his conversation with Ki, Ki was belligerent and insisted that the management agreement was a “rip off” and that Ki would not affirm it. Mr Rashman said that Owen stood by the fax and he was going to quit the group anyway. Mr Rashman's account of the conversation with Owen is corroborated by a chance video recording made that evening which shows Owen on the telephone to Mr Rashman and the sound is sufficiently audible to be consistent with Mr Rashman's version of the conversation and inconsistent with Owen's evidence to the contrary. James gave evidence that Mr Rashman was still sacked by the end of 3 October 2001. The idea that the boys withdrew the sacking does not begin to confront the difficulty that Mat was not consulted at all. The last time anyone asked Mat on 3 October 2001 was to get his approval to sack Mr Rashman and no one suggests that they went back to Mat to ask him to reconsider.

Accordingly, I find that by the end of 3 October 2001, nothing had been said by Ki or Owen, or anyone else, to withdraw the sacking contained in the faxed letter of 3 October 2001.

[121] There were further telephone conversations on 4 October 2001 and Fletch went to James' house on 4 October 2001 where he met James, Ki and Owen and Mat joined the meeting part way through. The sequence of events seems to be as follows. The first conversation was between Mr Rashman and Mat. Mat was on a train going to Southend. Mat said he did not want to work with Ki and Owen any more and was going to quit the group. However, he wanted Mr Rashman to continue to manage him if Mr Rashman was willing to do so. Mr Rashman told him to reflect on his decision after Mat had spoken to James.

[122] As I have stated above, Fletch came to James' house on 4 October 2001. Mr Rashman had told Fletch of the events of the preceding day. Fletch gave clear evidence of what transpired at the meeting on 4 October 2001. Fletch had a good recollection of the meeting and gave his evidence in a convincing way which persuaded me that his evidence was reliable. It is of some importance that Fletch's evidence of the events of 4 October 2001 is in conflict with the evidence Ki gave about the meeting with Fletch. One of the two is entirely wrong about the meeting and it is clear to me that Ki's evidence seriously mis-describes what happened. I am not able to accept Ki's evidence of what happened. Either Ki has deliberately and knowingly mis-described what happened or he has convinced himself of a version of the facts which best suits his case. It suits Ki's case to say that the management agreement was not terminated as a result of the events of 3 and 4 October 2001. It particularly suited Ki's case to say this when he sued Mr Rashman as a Defendant alleging breaches by Mr Rashman of the management agreement after October 2001. It still suits Ki's case to say that the management agreement continued after October 2001 even though Ki has now settled with Mr Rashman. If Ki has persuaded himself of the truth of the evidence he gave then that indicates to me that he is capable of significant reconstruction of the relevant events without appreciating that he is seriously mis-describing them. The conflict of evidence as to 4 October 2001 which I resolve in favour of Fletch and against Ki is one of the important indicators to me that I should treat Ki's evidence overall with considerable caution.

[123] At the meeting on 4 October 2001, Ki said to Fletch: “still stands, Fletch, it still stands”. From the context it was clear that what still stood for Ki was the sacking of Mr Rashman. Fletch found Owen was not really interested in the band anymore. James had known Fletch a lot longer than he had known Ki and Owen and the fact that Fletch disapproved of the decision to sack Mr Rashman made James rethink.

[124] After the meeting with Fletch, James spoke to Mat. Mat told James that he had already apologised to Mr Rashman and that he wanted to keep Mr Rashman as his manager. James thought that the most positive thing which had come out of the collaboration between the four boys was the time spent by Mat with James. James and Mat then spoke to Mr Rashman about retaining him as a manager for the two of them without Ki and Owen and Mr Rashman advised them to think about it over the weekend; 4 October 2001 was a Thursday.

[125] Following the meeting Fletch had with the boys, Fletch spoke to Mr Rashman and said that Ki was still belligerent, Owen did not say very much and James was being sheepish. Mr Rashman spoke to Ki who repeated the stance he had taken the previous evening. Mr Rashman spoke to Owen who said he stood by the facts but that it did not matter because he was quitting. Mr Rashman called Ki's mother to confirm that she knew what was happening. They had a conversation for under ten minutes and the conversation was not hostile. After that

conversation, Mr Rashman spoke to Ki again. Ki was more calm than earlier but said that the management agreement would have to be renegotiated if he was to keep Richard as a manager and Ki would not sign the age of majority form until the agreement had been renegotiated. Ki and Owen left Southend either on 4 October or 5 October 2001. They either left together or separately. It is not necessary to resolve these matters although I heard disputed evidence about them. James and Mat decided not to tell Ki and Owen about James and Mat's conversation with Mr Rashman and the possibility that they might continue to be managed by Mr Rashman. I saw some video footage of a karaoke session where James, Mat and Owen sang a Westlife track. This occurred on 4 October 2001. I do not believe that the way the boys behaved in the karaoke session tells me anything useful as to the events which had occurred on that day.

[126] On 5 October 2001, Mr Rashman spoke to James and Mat who said that they wanted to try working together and to create something new. It was agreed that Mr Rashman would speak to James and Mat on Monday 8 October 2001.

[127] On 8 October 2001, Mr Rashman spoke to James in Southend and Mat in London. They each told him that they had not changed their minds about quitting the group. James asked Mr Rashman to telephone Ki to tell Ki about James and Mat's decision. James and Mat both thought it was better to leave this communication to Mr Rashman rather than tell Ki themselves.

[128] James telephoned Owen to tell him that James and Mat had decided to keep Mr Rashman as their manager. The conversation was not unpleasant as Owen did not want to work with James and Mat anymore.

[129] Mr Rashman spoke to Ki and told him that James and Mat wished to keep Mr Rashman as their manager. Mr Rashman told Ki that he was not willing to manage Ki in view of Ki's belligerence, his refusal to sign the age of majority form and the fact that James and Mat were no longer working with Ki. Mr Rashman also told Ki that Owen did not want to continue with the group either.

[130] During the conversation with Ki, he and Mr Rashman talked about songs that had been written by the group. Ki did not suggest there had been any song split agreement. Ki said that the songs should be sorted out on the basis of who wrote what song. Although Ki gave evidence that Mr Rashman had said that James and Mat would be keeping all the songs, I do not accept that evidence. Mr Rashman denied saying any such thing. It would have been surprisingly early for James and Mat to have made any decision of that kind about their future. Ki also gave evidence that Mr Rashman said that James and Mat were going to use the name Busted. I do not accept that evidence. The question of the name was not discussed. In particular, Mr Rashman had no idea at that stage whether James and Mat would want to use the name or indeed whether Ki and Owen would want to use the name.

[131] Mr Rashman also spoke to Owen on 8 October 2001. Owen confirmed that he had spoken to James and that Owen was quitting the group to follow a different musical direction. Thereafter, Mr Rashman spoke to Ki again. This time they spoke about individual songs. Ki said that he had not contributed to She Knows, Sleeping With The Light On, or Psycho Girl. Ki said he thought he had contributed something to What I Go To School For. He said Who's Your Daddy was written by him and Mat. Year 3000 was not mentioned.

[132] Mr Rashman then telephoned Owen to run through the same songs. Owen said he had

not contributed to Sleeping With The Light On nor to Psycho Girl but he had contributed lyrics to the third verse of What I Go To School For. On She Knows, he said that when he was singing on the demo for Steve Robson he had done some impromptu “answer backs” and Mr Rashman told Owen that he did not think that constituted song writing. Owen did not mention Year 3000.

[133] Mr Rashman told Ki and Owen that he would speak to James and Mat but encouraged Ki and Owen to speak to James and Mat direct about the songs. Ki said that out of fairness that James should let Ki have one of the songs to help him pursue his own recording career but Mr Rashman said that had to be between Ki and James and Mat to discuss.

[134] On 9 October 2001, Ki telephoned James' house and spoke to James and Mat. Ki said that he was content about the band splitting but he also made comments along the lines: “see how you get on without us”; “you go your way we'll go ours, let's see who gets there first”; and “you don't look like David Beckham, you're not the heart throbs in the band”. Ki also said that he did not want to leave with nothing. James said that each person should take the songs that that person wrote and Ki said no, he wanted “She Knows” which at the time was the song that had the best reaction from the record companies. James was unhappy with that suggestion as he regarded She Knows as a song written by James and Mat at Mat's mum's house in Molesey. Ki also stated that he wanted to claim Sleeping With the Light On. It was these references by Ki to certain songs that led James the next day, 10 October 2001, to send himself a mini disc containing versions of some of the songs which were on the eight track recorder.

[135] Mr Rashman also spoke to Ki and Owen on 9 October 2001. Ki and Owen appear to have changed their attitude and were suggesting that maybe they had contributed more than they said to Mr Rashman the previous day. However, Ki and Owen were reluctant to provide details of their contributions to individual songs. Ki and Owen stated that they were going to try and create something new together. Owen asked about the name Busted and Mr Rashman replied that whoever wanted to use the name could use it.

[136] Shortly after the split, Ki's mother decided to take legal advice. She consulted Clintons. Clintons had acted for the four boys in connection with the making of the management agreement in March 2001. Clintons had also acted for Ki's father who was a professional singer in relation to a copyright infringement dispute. The particular solicitor at Clintons who spoke to Ki's mother told her that he did not know much about music publishing and advised her to contact a music publisher. Ki's mother followed that advice. She approached Eddie Seago who was a friend of Ki's father. The Claimants did not call Eddie Seago to give evidence. I understand that Eddie Seago is an experienced music publisher. Eddie Seago appears to have agreed to act for Ki and then later for Ki and Owen in connection with a dispute as to the copyright in certain songs written during the four boys' collaboration. Eddie Seago advised that Ki should register his interest in the disputed songs with the MCPS/PRS Alliance.

[137] Eddie Seago produced a draft publishing agreement for Ki to sign on 13 November 2001. He prepared a further draft publishing agreement for Ki which bears the date 1 January 2002. Ki did not sign either of these draft agreements. Mr Seago had a recording studio and an engineer as a permanent employee. Ki made a rough demo of Who's Your Daddy and She's Cleared Me Out in Eddie Seago's studio early in the new year 2002.

[138] After the split of the group, Ki wanted to move forward with his own career and wanted to be in a position to appoint a new manager. He therefore wanted a document which would show

that he was no longer being managed by Mr Rashman. Ki asked Mr Rashman for a document recording that fact. Ki's mother also asked Mr Rashman for that document. Mr Rashman asked his solicitors to prepare a document that he could give to Ki and indeed to Owen which would recognise that Ki and Owen were no longer contracted to Mr Rashman or Prestige Management. Precisely what happened next is not completely clear on the evidence. The documents before the court do include a letter from Mr Rashman's solicitor to Mr Rashman on 26 October 2001. That letter enclosed three copies of what was called a Termination Letter. It looks as if the copy sent on 26 October 2001 was a revision of some earlier copy because the letter refers to “fresh signature copies”. The document enclosed with the letter is written as coming from Ki and Owen to Prestige Management. In the draft, Ki and Owen request Prestige Management to agree to vary the management agreement and terminate the appointment as manager. The draft continues by providing that the parties agree that the Term in respect of the management of Ki and Owen should be terminated with effect from the date of the document. The covering letter of 26 October 2001 appears to have been in Mr Rashman's possession and the enclosure was produced by Ki during the trial.

[139] Mr Rashman gave evidence that the document drafted for him by his solicitors was not acceptable to him and he redrafted it. He says he redrafted it “in the first person” and that he wanted to record something which simply confirmed that the management contract was terminated. He says that the document he drafted had a place for Ki and Owen to sign to acknowledge receipt. He then says that Ki and Owen came to his hotel signed the document to confirm receipt and he provided Ki and Owen with copies. Fletch gave evidence that Mr Rashman had told him that Ki and Owen had gone to the hotel to pick up the release. A document answering the description in this evidence has not been produced by any of the parties.

[140] On disclosure, the Claimants disclosed another draft document which is similar to but not identical to the enclosure to Mr Rashman's solicitor's letter of 26 October 2001. This further draft has a date showing the year 2001 but no other date. This second draft has been produced by removing some of the terms of the enclosure to the letter of 26 October 2001. The second draft is still addressed from Ki and Owen to Prestige Management. The operative part of the second draft amounts to an agreement that the Term of the management agreement in respect of Ki and Owen is terminated with effect from the date of the document. Mr Rashman gave evidence that he did not recognise this draft document.

[141] In 2003, Ki was in contact with a Mr Andrian Adams and wished to appoint Mr Adams as his manager. Mr Adams paid for Ki to take legal advice from Clintons. On 9 May 2003, Clintons wrote to Mr Rashman's solicitors and said this:

> “I am instructed by my client that you should be in possession of a couple of agreements that were entered into following my client's ejection from 'Busted', namely, an agreement which terminated his management relationship with Richard Rashman and an agreement by which the continuing members of 'Busted' sought to acquire certain publishing rights from my clients in songs which he had co-written (including 'What I Go To School For' and 'Year 3000'). I should be grateful if you could let me have copies of these agreements at your earliest convenience. If my instructions are incorrect, however, and you do not have a copy of these, perhaps you would let me know.”

[142] On 28 May 2003, Clintons sent a chasing letter to Mr Rashman's solicitors. On 28 May 2003, Mr Rashman's solicitors replied to the letter of 9 May saying they had retrieved the relevant file. They enclosed a copy of the agreement, to which I will later refer, of 22 March 2002 but they stated that they did not have a copy of “the other agreement you have referred to”.

[143] This exchange of correspondence between the solicitors in May 2003 seems to have proceeded on a basis common to both sides that there had been a written agreement which terminated the management relationship between Mr Rashman and Ki. Following this exchange of correspondence, on 13 June 2003, Ki entered into a management agreement with Andrian Adams.

[144] Based on the evidence I have just described, I find that Ki and Owen and Mr Rashman did sign a document not long after the split of the band recording that the management agreement between Ki and Owen and Mr Rashman was at an end. That is Mr Rashman's recollection. I also give considerable weight to the evidence that Mr Rashman told Fletch that Ki and Owen had gone to Mr Rashman's hotel to pick up the relevant document and that both boys had signed a relevant piece of paper. Further, it seems clear that in May 2003 Ki told his solicitors, Clintons, that there been an agreement entered into following the split in the band terminating the management relationship between Mr Rashman and Ki.

[145] It is not necessary to make any further findings as to the precise terms of the agreement signed by Ki and Owen referring to the termination of the management by Mr Rashman. Based on the documents I have seen it must be a possibility that when Mr Rashman received his solicitor's letter of 26 October 2001 he redrafted the enclosure with that letter and produced a shorter version of the draft in accordance with the draft produced by the Claimants on disclosure. It is entirely possible that Mr Rashman is now mis-remembering the redrafting which he did and the terms of the document when he had redrafted it. If that supposition is correct, I would not regard that fact as causing me to treat Mr Rashman's evidence on other matters with any degree of caution. It is entirely possible for an honest witness doing his best to recollect the detail to get an occasional piece of detail wrong without the court rejecting his evidence in other respects.

[146] It was submitted on behalf of the Claimants that if one reads the draft documents of October 2001, they contemplate that the management agreement was continuing between Mr Rashman and Ki and Owen until the draft document came to be executed. It is right that the drafts speak of the management terminating with effect from the date of execution of the draft. However, I have very clear and, I find, wholly reliable evidence as to the events during the period from 3 to 8 October 2001 and I have been able to make confident findings as to what happened in that period. If the appropriate legal analysis which flows from those findings of fact is that the management agreement ended on 8 October 2001, the drafting of the documents later in October 2001 would not deflect me from giving effect to that legal analysis.

[147] Owen gave evidence that he was telephoned by Mr Rashman shortly before the settlement agreement of 22 March 2002 and Mr Rashman said to Owen that Owen was not to worry about the termination document which Owen said had not been signed because the management agreement was going to run out in a couple of weeks anyway. I do not accept this evidence from Owen. I have already concluded that Ki and Owen did sign a document recording the termination of the management agreement. In any event, the alleged statement by Mr Rashman would not have been correct as to the operation of the management agreement and it is inherently unlikely that he would have said it.

[148] My finding that the management agreement between Ki and Owen and Mr Rashman ended in October 2001 is completely consistent with what Mr Rashman and Ki and Owen did

after October 2001. Neither Ki nor Owen asked Mr Rashman to do anything for them as their manager. Neither Ki nor Owen sought advice from Mr Rashman nor told Mr Rashman what their own plans were. Mr Rashman did not do anything or even offer to do anything as manager for Ki and Owen. Mr Rashman did have conversations with Ki in November and December 2001 but those conversations were about sorting out issues as to certain songs and not about Mr Rashman's management of Ki's proposed new career.

[149] In November 2001, Mr Rashman was continuing to act as manager for James and Mat. He discussed with James and Mat the suggestions being made by Ki as to ownership of the songs. James and Mat told Mr Rashman that Ki and Owen had not contributed to the songs in question except “Who's Your Daddy”. Mr Rashman relayed James and Mat's position to Ki and Owen. Ki and Owen said to Mr Rashman that they would enforce their interest in the songs one way or another. Mr Rashman had never considered bringing a legal claim on behalf of James and Mat against Ki and Owen. Mr Rashman's position at the time, a position he expressed to all four of the boys and to Mr Seago, was that any talk about legal action was ridiculous and the dispute should be resolved by agreement. When Mr Seago later asked for what was in effect one third of certain songs on behalf of Ki and Owen Mr Rashman's attitude was that would not be very much for James and Mat to give up, whatever the rights and the wrongs of the argument. If James and Mat had given up that proportion of the songs everyone could move forward. This evidence from Mr Rashman, which I accept, is quite inconsistent with the picture which the Claimants have attempted to paint of Mr Rashman, which included the suggestion that Mr Rashman aggressively threatened legal action and put intolerable pressure on Ki and Owen to give up their rights.

[150] In November 2001, Ki raised for the first time with Mr Rashman the suggestion that there had been an agreement to split ownership of the songs. Mr Rashman asked Ki to say what the contributions to the songs had been to which Ki would answer that there was an agreement to split ownership in any event; Mr Rashman would then explain that he did not understand there to have been any agreement to which Ki would say well, anyway, Ki and Owen had contributed to the songs. The discussion tended to be circular and no progress was made.

[151] Mr Rashman spoke once on the telephone to Ki in December 2001. After that conversation, there was no contact between Ki and Mr Rashman until the meeting on 15 February 2002 to which I later refer. Mr Rashman called Owen around Christmas 2001. Mr Rashman indicated that Owen could seek to conclude a separate arrangement with James and Mat but Owen asked Mr Rashman to deal with Ki and Mr Seago on behalf of Owen.

[152] I have referred earlier, in passing, to Mr John McLaughlin. Mr McLaughlin was a song writer and record producer who by late 2001 had enjoyed a fair measure of success. Mr McLaughlin had been involved with the recording of the demo tape at Steve Robson's studio in August 2001. After the band split on 8 October 2001, Ki and Ki's mother turned to Mr McLaughlin for assistance. The Claimants' case is that Mr McLaughlin made a nuisance of himself and began pestering Ki and Ki's mother. I do not think that that is very likely. Mr Laughlin gave evidence that Ki's mother was repeatedly on the telephone to him asking him to help her son Ki. I think that is inherently likely. Ki's mother was plainly concerned about Ki's career following the break up of the band and she plainly went to considerable lengths, certainly in the case of Mr McLaughlin, to get support and assistance for Ki.

[153] Before turning to the more specific disputes of fact concerning the involvement of Mr

McLaughlin, I will refer to the correspondence and the conversations between Mr Seago on behalf of Ki and Owen and Mr Rashman on behalf of James and Mat.

[154] On 29 November 2001, Ki had a conversation with Mr Rashman concerning the ownership of certain songs. On 30 November 2001, Mr Seago wrote to Mr Rashman. Mr Seago stated he was writing on behalf of Ki and Owen. Mr Seago said that what Mr Rashman had told Ki the previous day about the relative contributions to the songs was not accepted. Mr Seago suggested that the parties try and agree the position as to copyright ownership. To this end he attached a list of nine songs. Five of the listed nine songs became significant in the later negotiations. These were Psycho Girl, She Knows, Sleeping With The Light On, What I Go To School For and Who's Your Daddy. The list did not include Year 3000.

[155] Between 30 November 2001 and 5 December 2001 Mr Seago and Mr Rashman had a telephone conversation. This conversation, like all of the dealings between Mr Seago and Mr Rashman, was perfectly civilised and not unfriendly. Mr Rashman had plainly put forward James and Mat's position to Mr Seago. Mr Seago then wrote on 5 December 2001 to Mr Rashman stating that he had discussed the matter further with Ki and Owen. In this letter, Mr Seago suggested that the four boys had agreed that the songs would be split equally between the four of them and so a debate about “who contributed what” was not really relevant. Mr Seago indicated however that the parties' concerns were over a Ltd number of songs and he suggested a compromise. His letter was marked: “without prejudice subject to contract”. The compromise concerned five songs only. The first song which was listed was Who's Your Daddy and in that case, Ki and Owen would settle for two thirds of the song leaving one third to James and Mat. The letter then referred to four other songs, namely, What I Go To School For, She Knows, Sleeping With The Light On and Year 3000. In the case of those four songs, the settlement offer was that Ki and Owen would take one third of those four songs and James and Mat would take two thirds. This letter reveals a number of things. First, Ki and Owen (or probably Ki alone) was attaching more significance to Who's Your Daddy than the other songs. Further, Ki and Owen were including She Knows in a list of five songs. The list of five was a short list from an earlier list of nine and indeed from a potential longer list of all the songs that had been written by one or other member of the group in the period of their collaboration. The other matter which emerges from the letter is that Ki and Owen were effectively asking for the equivalent of two songs out of a total of five songs. The figure of two is calculated as two thirds of one song (Who's Your Daddy) and one third of four songs; this is the same as six thirds or two whole songs. It was this offer, described as 33.3% by Mr Rashman in his evidence, which Mr Rashman thought that James and Mat should accept, whatever the rights and wrongs of the argument so that everyone could move on. As before, the songs referred to in the letter of 5 December 2001 did not include Psycho Girl.

[156] Between 5 December 2001, the date of Mr Seago's without prejudice offer, and 15 January 2002, Mr Seago and Mr Rashman had a further conversation. It was in this conversation that Mr Rashman explained to Mr Seago the advice which Mr Rashman had given the boys about the possible different ways of agreeing on song splits in the event of the boys signing a recording deal.

[157] On 15 January 2002, Mr Seago wrote again, without prejudice, to Mr Rashman. He referred to the telephone conversation and Mr Rashman's contention that the agreement to split the songs four ways was “conditional”. I have already referred to the proper interpretation of this letter when I reached my earlier finding that there had not in fact ever been a binding song split

agreement. The letter of 15 January 2002 also reveals that Mr Seago had discussed the matter with Ki and Owen and, indeed, Ki's father. Ki's father denied in his evidence that he had any conversation with Mr Seago. I cannot accept that evidence. There is absolutely no reason why Mr Seago would have volunteered the fact that he had spoken to Ki's father if it was not true. In their case, the Claimants and their witnesses sought to distance themselves from Mr Seago's correspondence but in my judgment it is quite clear that Mr Seago was writing with the full knowledge and approval of Ki, Owen and Ki's father. Copies of Mr Seago's letter of 15 January 2002 were sent to Ki and Owen.

[158] The letter of 15 January 2002 referred to nine songs. The list of nine songs in the letter of 30 November 2001 was essentially repeated save that the two titles Who's Your Daddy and Betta Be Fine were treated as alternative titles for a single song. Thus the nine songs in the earlier letter were now counted as eight and Year 3000 was added to give a total of nine. Ki and Owen reverted to asserting 25% each of every song. That meant that Ki and Owen together were claiming the equivalent of four and a half songs out of nine.

[159] The letter of 15 January 2002 singled out Who's Your Daddy. It was stated that Ki expected to be recording Who's Your Daddy. Because Ki and Owen were claiming 50% of Who's Your Daddy they wanted the consent of James and Mat to Ki recording that song. The letter also asterisked four songs, namely, Psycho Girl, She Knows, Sleeping With The Light On and What I Go To School For. In relation to those four songs, Mr Seago wrote that Ki would like to record one of them but that was subject to discussion with Mr Rashman on behalf of James and Mat. Accordingly, at this stage, Ki in particular was asking to be allowed to record two of the songs.

[160] During this period James and Mat, managed by Mr Rashman, were moving forward. James and Mat had auditioned for an additional member of the band and had recruited Charlie Simpson. In late November 2001, James, Mat and Charlie Simpson entered into a management agreement with Mr Rashman. The new management agreement cross referred to the earlier management agreement with the four boys of 15 March 2001. The new management agreement stated that the agreement of 15 March 2001 should remain in force and effect in all respects (save as were varied in respect of James, Mat and Charlie Simpson). It was argued on behalf of the Claimants that the terms of this management agreement indicated that the management agreement with the four boys had continued in effect. I have already made my findings as to the conversations in the period 3 to 8 October 2001 and the fact that Ki and Owen signed a termination letter in October 2001. I will later discuss the legal consequences of those findings of fact. However, in my judgment, the terms of an agreement between James, Mat and Charlie Simpson will not affect any contractual relationship between Ki, Owen and Mr Rashman.

[161] In a conversation between Mr Seago and Mr Rashman, probably one of the conversations to which I have already referred, Mr Seago said something which made it clear that he knew of James and Mat's general intention. Mr Seago told Mr Rashman that it was clear to Mr Seago that the new group were going to get a good record deal and that there was “a good buzz” about them. Mr Seago was probably referring to this with a view to encouraging Mr Rashman to settle the dispute about the songs. If Mr Seago knew about the new group's plans and prospects, it is very likely that Ki and Owen knew the same.

[162] At this point, I will deal with a part of the Claimants' case about something giving rise to “a buzz”. The Claimants say that before the four boys split on 8 October 2001, the name “Busted”

had given risen to “a buzz in the industry”. I have already referred to the exposure of the four boys to the record industry prior to 8 October 2001 and the various ways in which the name Busted was used in that period. It seems very hard to understand how anyone could have thought that the name Busted had given rise to a buzz in the industry before 8 October 2001. The exposure of the name Busted to the record industry in that period was really very Ltd. I also do not accept the Claimants' case that Mr Rashman told Ki and Owen that the name Busted had a buzz in the industry before the split of the four boys. If anyone ever mentioned a buzz in the industry to Ki and Owen at any time it is likely to have been a mention along the lines of what Mr Seago said to Mr Rashman that the new threesome Busted were generating a good buzz.

[163] I now return to the subject of Mr McLaughlin's involvement in the period up to a meeting which he attended in the Intercontinental Hotel on 15 February 2002.

[164] The Claimants' case is that Mr McLaughlin made a number of misrepresentations and issued threats of various kinds directed at Ki with a view to breaking Ki's will to resist entering into an unfavourable settlement with Mr Rashman acting for Mat and James. The principal evidence tendered of these misrepresentations and threats came from Ki and Ki's mother. Mr McLaughlin gave evidence dealing with the suggested misrepresentations and threats and, in summary, stating that he had not made misrepresentations and threats and the evidence of Ki and Ki's mother was an exaggerated and distorted account of matters which when properly explained involved no element of misrepresentation or threat whatever.

[165] Before dealing with the individual matters which have been raised, I repeat my earlier assessment of Mr McLaughlin as a witness which was that he gave his evidence apparently fairly and persuasively. He did not recall all matters of detail that were alleged to have occurred but, in my judgment, that is consistent with him giving truthful evidence as, in relation to many of the matters of detail, they were not matters of real concern to him at the time and it is not surprising that he does not recall those matters of detail, if they occurred, many years after the event.

[166] As regards Ki's evidence, I have already indicated that I treat it with very great caution. It is clear that Ki says things that are simply untrue either because he knowingly makes them up or because he has great skill and capacity for persuading himself in relation to events that did not happen. As to Ki's mother, she has shown immense loyalty to Ki but this loyalty is at the expense of her ability to give accurate evidence as to the events. Ki's father does not assert that any threats were made directly to him save possibly for something said at the meeting on 15 February 2002. I have to treat Ki's father's evidence with circumspection because he denied having a discussion with Mr Seago about the negotiations with Mr Rashman when the contemporaneous correspondence unmistakably reveals that Ki's father did have such a discussion. Ki's father gave evidence about Ki's physical and mental state in the run up to the meeting in the Intercontinental Hotel on 15 February 2002 but I am not prepared to accept that evidence. That evidence appears difficult to square with the other things Ki was doing with a view to developing his career in that period. If Ki's father had said that Ki was disappointed about what had happened to the collaboration with the four boys or even that he was angry and resentful, such evidence would be more credible. However, Ki's father described the situation as one where Ki was very seriously ill and out of control and that I do not accept.

[167] It is also highly relevant that the Claimants have not demonstrated to me that Mr McLaughlin had any sufficient motive to behave in the way he is alleged to have behaved. At the

relevant time he was a successful song writer and record producer. He was involved in a number of projects. He did hope to benefit from the success of the threesome Busted. However, he was also prepared to assist Ki with Ki's career and there is no doubt that he was of considerable assistance to Ki although in the end very little seems to have come of it. Ki regarded Mr McLaughlin as his friend. Ki saw Mr McLaughlin's attendance at the meeting on 15 February 2002 as being in the role of an impartial go-between.

[168] Further, although the Claimants' case now is that Mr McLaughlin made threats to Ki, Ki and Ki's parents obviously did not regard Mr McLaughlin as a man who issued threats at the time. A good example of their attitude to Mr McLaughlin was that at Easter 2003, following the birth of Mr McLaughlin's daughter, Ki's parents made a gift of a soft toy to the McLaughlin family.

[169] Mr McLaughlin was not employed by Mr Rashman or Prestige Management and had no contractual relationship with Mr Rashman or Prestige Management. He was not part of the management team for the threesome Busted. In so far as the Claimants gave evidence that Mr Rashman said that Mr McLaughlin was part of the management team, I do not accept that evidence.

[170] In Mr McLaughlin's evidence, he explained his assessment of the dispute as to the songs at the time. He said that it was not “a big dispute” and should have been the sort of dispute that could easily have been sorted out between the four boys.

[171] In so far as the Claimants allege that Mr Rashman made threats to Ki to force Ki to enter into the settlement agreement, such a case is contrary to the evidence given by Mr Rashman as to his attitude to the dispute. I have already referred to Mr Rashman's evidence that he thought that James and Mat should be conciliatory and give Ki and Owen something of what they claimed because it would not matter very much to James and Mat and would allow everyone to move forward.

[172] The first alleged threat or improper pressure is that Ki was warned it would be unwise to make a complaint about his expulsion from the group, the use of the songs by James and Mat or the use of the name Busted because this would damage his career in the music industry.

[173] Mr McLaughlin did tell Ki to “move on”. He told Ki to “dry your eyes”. Mr McLaughlin gave that advice with a view to being helpful to Ki. He was at that time introducing Ki to people in the music industry and could see that it would be best for Ki to be positive about his future. I regard the advice as good advice. There was certainly nothing improper about the giving of the advice. The Claimants' case on this matter suggesting that the comments amounted to a threat or improper pressure is a distortion of the real position. In so far as it is alleged that Mr McLaughlin put Ki under improper pressure in some way, I reject that suggestion.

[174] It is next alleged that Mr Rashman made a misrepresentation by stating that the original agreement whereby the boys would share “all songs equally” had come to an end or was not valid.

[175] I have already held that the four boys did not make any binding song writing agreement. Mr Rashman explained to Mr Seago in a conversation to which I have already referred that his statements to the boys had been to do with a possible future agreement in the event of a

recording contract. If this is what the Claimants are referring to then the statements made by Mr Rashman were accurate and were not misrepresentations or any form of improper pressure.

[176] The next allegation made by the Claimants is that if the Claimants sought to contest the issue of ownership of the songs Ki's parents would risk losing their home. At the trial, this allegation took on a central position in the case that improper pressure was put on the Claimants and, in particular, Ki. When Ki gave his evidence he suggested that Mr McLaughlin had told Ki that there had been a meeting between Mr Rashman and James' father at which the question of how to pressurise Ki was discussed. The suggestion was that Mr Rashman and Mr Bourne knew that Ki's relationship with his parents was his “Achilles heel” in that Ki would be very concerned not to do anything which would cause any harm to his parents. With that in mind, the suggestion goes, there was a conspiracy to threaten Ki that if he stood up for himself the other side would take away his parents' house, in a way which Ki did not wholly understand. He thought that the other side were getting a chuckle out of the idea that they would take away Ki's parents' house.

[177] In my judgment, the Claimants' evidence on this point is another gross distortion of what really happened. First of all, I do not find that Mr McLaughlin or Mr Rashman or anyone else ever threatened legal proceedings against Ki, or Ki and Owen, or Ki's parents. I have already referred to Mr Rashman's evidence where he suggested to Mr Seago that court proceedings were not the way forward. Mr McLaughlin was reasonably clear that he did not discuss with Ki the possibility that Ki's parents might lose their home.

[178] I do find that Ki and his parents did give thought to the implications of Ki's challenge to the ownership of the songs. Ki had acted on the advice of Mr Seago to register his claim to the songs. He must have appreciated that if the matter was not settled and his interest continued to be registered, that would provoke a conflict which would have to be resolved in some way. It is entirely probable that Ki and his parents realised that if Ki was to press his claim he would either have to sue or be sued. Ki and his parents very probably realised that litigation would be expensive and they did not have substantial assets save for Ki's parents' home.

[179] Thus, I find that this allegation of a threat to take away Ki's parents' home, in so far as it has any foundation in fact, stems from Ki and his parents considering for themselves what the consequences would be, given their financial position, if Ki were to get involved in litigation with, for example, a record company who had signed the new threesome Busted.

[180] The next matter raised by the Claimants is that it is said that Mr McLaughlin misrepresented that he was Ki's friend and only wanted the best for Ki and Ki could trust him.

[181] I find that Mr McLaughlin was indeed friendly to Ki and sought to act in Ki's best interests by advising him to move on and also, more practically, introducing him to a number of contacts in the music industry. There was no misrepresentation and no pressure and certainly no improper pressure placed on Ki.

[182] It is next alleged that Mr McLaughlin said that the best that the Claimants could hope for would be the two songs that they were offered during the meeting on 15 February 2002. It is not clear how far this allegation is being pursued by the Claimants. Even if Mr McLaughlin did say something along those lines to Ki and his parents, it does not amount to a misrepresentation nor any kind of improper pressure.

[183] Then it was said that Mr McLaughlin told Ki that if Ki took the two songs he was offered on 15 February 2002, Mr McLaughlin would arrange for them to be recorded. As before, it is not clear how far this allegation is pursued by the Claimants. In any event, Mr McLaughlin did assist Ki in relation to the two songs and I do not find that there was any false representation or any improper pressure in this respect.

[184] The next allegation is that Mr McLaughlin misrepresented to Ki that Year 3000, Psycho Girl and Sleeping With The Light On would not be used as anything but fillers on an album.

[185] In the course of his evidence, Ki took this point somewhat further. He complained that these songs were included on the Busted album at all. He suggested he felt physically sick when he saw that the album contained Sleeping With The Light On and Year 3000. That was when he says he realised that Mr McLaughlin and Mr Rashman “had all along been screwing me”.

[186] Ki's evidence does not make much sense. The settlement agreement provided that Ki and Owen were to give up any claim to four songs. The only point in Ki and Owen being asked to give up any claim to those four songs would be that the songs would be available to be used by the threesome Busted. Ki and Owen knew at the time of the settlement agreement, at the least, that the new Busted wished to enter into a recording contract.

[187] In any event, the alleged misrepresentation is an alleged misrepresentation as to the existence of an intention. For the alleged statement to amount to a misrepresentation it would have to be shown that the maker of the statement had a settled intention to do something at the time when he made his statement to the effect that he did not have a settled intention to do that thing. However, in the period up to March 2002, no one could realistically say what songs would end up being recorded and what songs would appear on an album and later be released as a single and what songs would never be released as a single. In my judgment, there is no sustainable case of misrepresentation on the facts of this case.

[188] The next allegation relates to a statement allegedly made by Mr Rashman to Owen. Mr Rashman allegedly said to Owen that it would be in Owen's best interest to enter into the March 2002 agreement. I find that no such statement was made. Mr Rashman denied making any such statement. Mr Rashman's position was that he did not see why Owen would necessarily want the two songs which James and Mat gave up in favour of Ki and Owen under the agreement. That part of the agreement seems to have been driven by Ki's aspirations and not Owen's aspirations. However Owen had told Mr Rashman around Christmas 2001 that he would leave the matter to Ki and Mr Rashman did not seek to persuade Owen otherwise.

[189] A further allegation in relation to Owen is that Mr McLaughlin allegedly said to Owen that Owen would have an option to record Sleeping With the Light On and that James and Mat did not intend to record that song. Owen's evidence did not support the pleaded allegation.

[190] Having reviewed the various allegations of misrepresentation and threats allegedly made to the Claimants and Ki's parents, I find that the Claimants have not established any one of the allegations of misrepresentation and threats.

[191] There was an important meeting at the Intercontinental Hotel, where Mr Rashman was staying, on 15 February 2002.

[192] Present at the meeting were Richard Rashman, Ki, Ki's mother, Ki's father and Mr McLaughlin. Richard Rashman was representing Mat and James. Mr McLaughlin was invited in his role as a go-between. Ki and Ki's parents did not invite Mr Seago to the meeting. That was their choice.

[193] I heard detailed evidence from each of the persons present at the meeting on 15 February 2002. I will now record my findings as to what transpired.

[194] I do not accept that Ki was ill or, as he put it, in “la-la-land” during the meeting. I find that Ki was uncomfortable and perhaps rather resentful about the band splitting up and Mr Rashman not accepting his claim to have contributed to the songs. However, Ki did participate in the meeting although when he gave evidence he professed not to have any real recollection of what happened.

[195] The purpose of the meeting was to see if the dispute about the songs could be resolved.

[196] There was a long statement made by Mr Rashman at the beginning of the meeting and there was general discussion. Ki's mother got upset but Ki's father helped to quieten things down. Ki's father wanted progress to be made at the meeting.

[197] Mr Rashman made a specific offer of shares in various songs. That offer was 80% of Who's Your Daddy and 20% of What I Go To School For, She Knows, Sleeping With The Light On and Psycho Girl; these percentages were to be for Ki and Owen with the remainder for James and Mat.

[198] Ki flatly rejected Mr Rashman's offer. Mr Rashman argued that his offer was not very far from the offer made by Mr Seago in the earlier correspondence.

[199] Ki stated that he wanted 100% of Who's Your Daddy, 50% of two other songs, 40% of two other songs and 30% of one song.

[200] Although the contrary was suggested, I find that Mr Rashman did not offer during the course of the meeting to give to Ki and Owen all of Who's Your Daddy and She Knows.

[201] Ki stated that he did not want to have his name on any songs with James and Mat and that what he really wanted was a record deal. Mr Rashman stated that he would take to James and Mat a proposal that Ki and Owen should have Who's Your Daddy and one other song. Mr Rashman did not really want that outcome because it would involve giving up a single whereas he would rather give percentages.

[202] Ki stated that he wanted She Knows plus Who's Your Daddy. Mr Rashman did not want to give up She Knows.

[203] Towards the end of the meeting, Ki's parents appeared enthusiastic about the prospect of a “clean break”, that is to say, a division into whole songs and not the allocation of percentages

in songs. There was discussion about limitations on an agreement as to whole songs, in case Ki did not get a record deal.

[204] There was no concluded agreement at the end of the meeting. Ki and his parents had indicated that they wanted to think about the proposals and talk to others about them.

[205] Mr Rashman said he understood why Ki wanted the type of deal proposed but he did not understand why Owen would want it. Owen would be better off with percentages and song writing credits. Ki said he had his own deal with Owen and Owen would agree to whatever Ki negotiated.

[206] Mr Rashman told Ki and his parents that he expected the threesome Busted to conclude a record deal.

[207] Mr Rashman did not make any threats at this meeting. Nor did Mr McLaughlin. The meeting ended more amicably than it had begun.

[208] It was not suggested at the meeting that Mr Rashman remained Ki's manager.

[209] After the meeting, Mr McLaughlin had a brief conversation with Ki's parents. Mr McLaughlin told Ki's parents that he thought that the meeting had produced a better atmosphere. Mr McLaughlin denied talking about any “plan B”. Ki's mother says that Mr McLaughlin stated that if the matter was not agreed “they” would go to “plan B”. She took plan B to be a reference to “them” suing Ki and his parents; it was suggested that that's what Mr McLaughlin was talking about in most of the meeting. I find that this is wholly untrue. If there was any discussion of “plan B” it can only have been the proposal that the songs be split as a whole rather than as a settlement providing for percentages of songs.

[210] I also find that a deal for Ki under which he took whole songs, namely, Who's Your Daddy and She Knows was in Ki's interests. Mr Seago had said on 15 January 2002 that he was keen for Ki to record Who's Your Daddy. As to She Knows, Johnnie Blackburn of Sonic/Epic had liked the song. Mr McLaughlin thought it was a strong song. By having whole songs, Ki and Owen would have the benefit of not needing to seek permission from James and Mat to record those songs.

[211] After the meeting of 15 February 2002, there were discussions between Mr McLaughlin and Ki's father as to what Ki and his parents wanted to do. Mr McLaughlin reported the position of Ki and his parents to Mr Rashman.

[212] On 18 or 19 February 2002 Mr Rashman wrote a letter to Mr Seago. The letter was sent by fax on 19 February 2002. The letter bears the date 15 February 2002 but that was not the date of composition or transmission of the letter. The letter is headed “without prejudice and subject to contract”. The letter began by stating that Mr Rashman was pleased everything was settled. He wrote that on the strength of Mr McLaughlin's reports as to what Ki and his parents wanted. The letter states that Ki had asked Mr Rashman to send Mr Seago a fax outlining what was agreed. The letter then outlined a proposal in relation to Who's Your Daddy and She Knows. The proposal was not as simple as Ki and Owen acquiring 100% of both songs. There were qualifications as to what would possibly happen if Ki did not record the songs but had benefits from them in another way. In some such cases, James and Mat would also participate.

In return for this agreement in favour of Ki and Owen, Ki and Owen were to drop any claims they had on the other “Mat/James songs” which were said to be, for example, What I Go To School For, Psycho Girl, Year 3000 and Sleeping With The Light On.

[213] The letter sent on 19 February 2002 gave rise to further discussions. There was further discussion between Ki and his parents on the one hand and Mr McLaughlin on the other. There was communication between Mr Rashman's solicitor and Mr Seago; Mr Rashman's solicitor had been copied in to the letter sent on 19 February 2002. Mr Rashman also had a discussion with Ki's father.

[214] Mr Rashman's understanding of the state of play at that point was that Ki and his parents wanted the deal proposed in the letter sent on 19 February 2002 but Mr Seago was against the deal. This seems to be corroborated by Ki's evidence that Mr Seago told Ki not to sign the settlement agreement of 22 March 2002. Mr Rashman understood why Mr Seago might prefer a settlement which involved percentages in more songs rather than a settlement dealing with only two songs.

[215] This difference of approach between Mr Seago on the one hand and Ki and his parents on the other explains the next two letters that were sent. On 22 February 2002 Mr Seago wrote to Mr Rashman and on 26 February 2002 Mr Rashman replied to Mr Seago. Mr Seago said in his letter that from the discussions he had with Ki and his parents since 15 February 2002, Mr Seago believed that Ki's parents' understanding of a satisfactory alternative to a four way split was different from that proposed in the letter sent on 19 February 2002. Yet in his letter of 26 February 2002, Mr Rashman wrote that Ki's father had confirmed that the letter sent on 19 February 2002 described the matter correctly. Ki's father denied having a conversation with Mr Rashman at this point. However, the letter clearly refers to Ki's father confirming something and the letter was in the Claimants' possession as they disclosed it.

[216] Mr Rashman's letter of 26 February 2002 offered “to close” the settlement. He said he had told Ki's father that James and Mat would “drop all the qualifiers” by which he meant the qualifications which prevented there being an agreement as to outright ownership of two songs in Ki and Owen. The letter therefore proposed that Ki and Owen would have Who's Your Daddy and She Knows and James and Mat would have What I Go To School For, Year 3000, Psycho Girl and Sleeping With The Light On. Mr Rashman said this was conditional upon the agreement being executed that week. The letter also recorded that Ki's father told Mr McLaughlin that Ki and his parents were happy with this new proposal. Mr Rashman wrote on his copy of this letter a note which read: “Scott said he's spoken to Eddie and all agreed”. This shows that Ki's father spoke to Mr Rashman and agreed the proposal for 100% of the two songs to go to Ki and Owen. Mr Rashman's note also stated that his solicitors were to speak to Mr Seago.

[217] Following the letter of 26 February 2002 referring to Ki and Owen taking 100% of Who's Your Daddy and She Knows, the matter was documented in essentially those terms. Completion of the documents was handled by Mr Rashman's solicitors and Mr Seago. Mr Rashman's solicitors sent Mr Seago a first draft on 4 March 2002 and the matter was completed on 22 March 2002. The documents before the court show the various communications between Mr Rashman's solicitors and Mr Seago during this period and the various drafts of the final agreement. In fact, there was only one amendment to the initial draft and that amendment did not affect the operative terms but identified Mr Seago's interest as a trading name of Bad B Music rather than the Ltd company, Champion Management and Music Ltd.

[218] I will refer in a moment to the final terms of the concluded agreement of 22 March 2002. However, it is relevant to refer to an oddity which arose in the evidence at the trial as to the drafting of this agreement. Ki's mother stated that Mr Rashman's solicitors prepared a draft agreement with “a gagging clause”. Ki's father supported her recollection of this. Based on this recollection, Ki's mother stated that she was not prepared to allow Ki to agree to the gagging clause. Accordingly, she says that she telephoned Mr Seago to require the removal of the gagging clause and the gagging clause was then removed from the draft and the draft was then executed.

[219] Having reviewed the documents before the court showing the drafting of the final agreement, there is no sign of any draft which contained a gagging clause. There is equally no sign of any communication between Mr Rashman's solicitors and Mr Seago discussing a gagging clause. It is not completely impossible that there was a draft document with a gagging clause which has not been found and it is not impossible that there was an oral communication between Mr Rashman's solicitors and Mr Seago of which no trace has survived. However, having seen the documents that do exist, I regard the evidence of Ki's mother and Ki's father as to a draft containing a gagging clause as improbable in the extreme. It is however relevant to point out that if their evidence were right on this point it would go a considerable way to undermine their case based on undue influence to the effect that Ki was pressurised into signing up to a settlement which Mr Rashman and Mr McLaughlin insisted he had to sign up to.

[220] The settlement agreement was dated 22 March 2002, was signed by the four boys and also signed by Mr Seago. The settlement agreement is short and is in these terms:

> “In consideration of the sum of one pound (£1) paid by each of KF and OD and JB and MS to the other (receipt of which is hereby acknowledged) and for other good and valuable consideration, it is hereby irrevocably and unconditionally agreed that:
>
> (a) JB and MS have no claim, right, title or other interest (including copyright interest) in or to the musical and lyrical compositions entitled 'Who's Your Daddy' (alternative title 'Betta Be Fine') and 'She Knows'; and
>
> (b) KY (sic) and OD have no claim, right, title or other interest (including copyright interest) in or to the musical and lyrical compositions entitled 'What I Go To School For', 'Year 3000', 'Psycho Girl', 'Sleeping With The Lights(sic) On'.
>
> Each of the parties agreed to execute such further documentation necessary to give effect to the terms hereof.
>
> This Agreement shall be governed by English Law and the English courts shall be the courts of exclusive jurisdiction.”

[221] I have already referred to the fact that in October 2001 James and Mat held auditions for a third member of a new group and selected Charlie Simpson. The three of them formed a new group which took the name Busted.

[222] The Defendants' evidence was that Charlie Simpson added a great deal to the attractiveness of the new group. I was not asked by the Claimants to take a different view of the contribution which Charlie Simpson made.

[223] The new three person band set about finishing the demo tape started in Steve Robson's recording studio in August 2001. I find that the contributions of Ki and Owen to the demo tape were removed and Charlie Simpson's vocals and bass guitar were added. Charlie Simpson went into the studio in November 2001.

[224] Mr Rashman intended to take the three man Busted to see record companies in January 2002. That would give him time to finish the demo tape. However, Steve Robson's manager was a Miss Sarah Vaughan who was also an A&R Administrator at a record company, BMG, headed by Simon Cowell. Mr Rashman agreed at Miss Vaughan's request to let Simon Cowell have an early view of the new group. Simon Cowell's reaction was positive and he asked Mr Rashman to come back to Simon Cowell first when Mr Rashman decided to introduce the new group to record companies.

[225] The new group made a three track demo tape of What I Go To School For, She Knows and Psycho Girl. The demo tape, in an unfinished state, was played to Simon Cowell. The demo tape was later finished off and two further tracks, Year 3000 and You Said No (also known as Crash and Burn) were added. As I have already indicated, any contribution by Ki and Owen to the demo tape recorded in August 2001 was removed from these later versions of the demo tape.

[226] In January 2002, once the five track demo tape was on the eve of completion, Mr Rashman arranged meetings with record companies, BMG, Universal, Sony, Jive, Wildstar and Parlophone.

[227] Simon Cowell of BMG liked the new group. So too did Paul Adam of Universal. Paul Adam was particularly enthusiastic. The result was a competition between BMG and Universal to sign the band. The band preferred Universal.

[228] There was evidence as to BMG's reaction and there was some discussion as to whether BMG had made an “offer” or had given an indication short of an offer.

[229] Eventually the band entered into a recording agreement with Universal-Island Records Ltd on 5 March 2002. This recording agreement was concluded at a time when the settlement agreement was in draft form although the settlement agreement was not executed until 22 March 2002. The agreement with Universal did not refer to any particular songs.

[230] Mr McLaughlin gave evidence, which I accept, that Ki knew certainly before he signed the settlement agreement that James and Mat had been in negotiations with Universal.

[231] In February and early March 2002, Mr Rashman investigated a publishing deal for the new group. Negotiations took place later and a publishing agreement was concluded with EMI Music Publishing Ltd on 9 August 2002.

[232] The new group, called Busted, released What I Go To School For as a single. They released an album two weeks after the release of this single. By Christmas 2002, the album had not sold particularly well. It was not clear whether the new group would succeed. In January 2003, the group released Year 3000 as its second single. That release was much more successful and a third single, Crash and Burn, reached number one in the charts.

[233] The three person Busted played numerous concerts at Wembley Arena and won two Brit Awards in 2004. The group later broke up.

[234] In December 2001, Mr McLaughlin introduced Ki to Tim Bowen of Done & Dusted and in

January 2002 to Paul Morrison of Done & Dusted. The purpose of the introduction to Mr Morrison was with a view to Mr Morrison becoming Ki's manager. Mr Morrison indicated that he might be interested in managing Ki. Ki's parents met Mr Morrison two or three times to discuss Mr Morrison's plans for Ki. When Ki's parents gave evidence they tried to portray these meetings with Mr Morrison as very brief and very preliminary and not really about management of Ki at all. This seems to have been because the Claimants' case at the trial was that Mr Rashman remained Ki's manager until long past March 2002. In my judgment, it is quite clear that the meetings with Mr Morrison were serious meetings with a view to taking on Ki's management. After all, on the findings I have earlier made, Mr Rashman ceased being Ki's manager in around October 2001.

[235] The approach to Mr Morrison was on behalf of Ki alone and not on behalf of Ki and Owen.

[236] Shortly after the split Ki and Owen wrote a song together, Two Lads, but by the beginning of 2002 Ki wrote three songs without Owen. On the evidence before me, there is no real sign of Ki and Owen intending to stay together and Ki appears to have approached the matter on the basis that he would be a solo artist. Mr McLaughlin and Mr Morrison put Ki in touch with some musicians who could be a backing band for Ki. Mr Morrison also introduced Ki to a group called The Dirty Geezers.

[237] After March 2002, Ki does not appear to have used the services of Mr Seago. He did not sign the draft agreements prepared by Mr Seago. Mr Seago wrote on 18 April 2002 but no agreement was reached with Mr Seago and Mr Seago does not appear to have played any part in Ki's solo career.

[238] Ki wanted a record deal and Mr McLaughlin took Ki to meet two independent record labels, Wildstar and Concept Records. Mr McLaughlin arranged for Ki to see a publisher, Windswept Music, although the meeting was cancelled. In the first half of 2003 Ki approached a new prospective manager, Andrian Adams, and a formal management contract with Mr Adams was signed on 13 June 2003.

[239] Notwithstanding these efforts to progress in the music industry, Ki has not had any real success. Nor has Owen.

THE ISSUES

[240] The parties have drafted and agreed the following issues which arise, or potentially arise, in this litigation. I will set out the full text of the issues below:

> *Issue 1*: composition of and copyright ownership in the songs:
>
> 1.1 What were the respective contributions of each of the Claimants and the First and Second Defendants to the composition of each of the following songs: “Sleeping With The Light On”, “What I Go To School For”, “Psycho Girl”, “Year 3000”, “Who's Your Daddy” and “She Knows”?
>
> 1.2 Were the Claimants (or either of them) the joint authors with the First and/or Second Defendant of the musical and literary works comprised in each of those six songs?

1.3 Did the Claimants and First and Second Defendants agree the alleged songwriting credit agreement (or any other songwriting, copyright or income sharing agreement) and if they did so what were the terms of their agreement and what was its effect (if any) in law?

1.4 Having regard to the fact that the First Claimant and the First and Second Defendant were minors when any such agreement was made, is it enforceable against the Defendants after they attained the age of majority?

1.5 Who were the first owners of the copyright in each of the said songs? Did the first owners of the copyright hold the copyright on trust for the Claimants and First and Second Defendants in equal shares pursuant to the alleged songwriting credit agreement? If there was a partnership, were the song copyrights partnership property?

Issue 2: issues relating to the Management Agreement, and in particular:

2.1 When did the management agreement dated 15 March 2001 terminate as between Prestige Management and each of the Claimants?

2.2 What (if any) duties did Prestige Management and/or RR owe the Claimants and the First and Second Defendants between 3 October 2001 and the signing of 22 March 2002 Agreement?

Issue 3: Partnership issues, and in particular:

3.1 Was the collaboration between the Claimants and the First and Second Defendants between late January 2001 and 8 October 2001 a partnership? If so;

3.2 What property comprised the partnership property of the partnership as at the date of dissolution, 8 October 2001? In particular did it include:

(i) the copyright in the musical and/or literary works comprised in the said six songs or any of them;

(ii) the goodwill in the name Busted (this involves a consideration of whether there was any goodwill in the name “Busted” as at 8 October 2001);

(iii) the US and UK trade mark applications in the name “Busted” registered by Richard Rashman prior to 8 October 2001;

(iv) the performers property rights in recordings embodying the performances of the Claimants and the First and Second Defendants during their collaboration?

3.3 What were the legal duties and obligations of the partners to each other during the dissolution period, and in particular what if any fiduciary duties were owed, what remedies are available for breach of those duties and what is the basis (if any) for claiming an account?

3.4 Is there a liability (subject to any equitable defences) to account for profits derived from the First and Second Defendants' use of partnership property?

3.5 Whether the March 2002 Agreement represents a final account and/or winding up of the partnership?

3.6 Were the Defendants in breach of their fiduciary duties towards the Claimants and if so in what respects and with what consequences?

3.7 Are the Claimants entitled to rescind 22 March 2002 Agreement on the ground of material non-disclosure?

3.8 In relation to the fact that the First Claimant and both the First and Second Defendants were minors when the partnership commenced, is the partnership enforceable against the First and Second Defendants, and more specifically:

(i) was the partnership binding on the minors;

(ii) were the minors entitled to repudiate the partnership when they reached 18;

(iii) did any of the minors in fact repudiate the partnership when they reached 18 and if they did what are the legal consequences?

Issue 4: are the Claimants entitled to rescind 22 March 2002 Agreement on the grounds of actual and/or presumed undue influence, and specifically:

4.1 In relation to the allegation of actual undue influence?

1) Did the Sixth and/or Eighth Defendants make the pleaded representations and threats to the Claimants?

2) Did the undue influence induce the Claimants into signing 22 March 2002 Agreement?

3) Are the First and Second Defendants bound by the undue influence of the Sixth and/or Eighth Defendants?

4.2 In relation to presumed undue influence:

1) Does 22 March 2002 Agreement call for an explanation?

2) Was there a sufficient relationship of influence between the Claimants and the Sixth, Seventh and/or Eighth Defendants?

3) Are the First and Second Defendants bound by the presumed undue influence?

4.3 Was 22 March 2002 Agreement affirmed by the Claimants by delay and/or by conduct?

Issue 5: Are the Claimants entitled to relief, including rescission of 22 March 2002 Agreement, based on misrepresentation?

Issue 6: Whether any of the Claimants' claims are barred by the doctrines of laches, acquiescence or estoppel.

ISSUE 1.1

[241] Issue 1.1 seeks to identify the contributions of Ki and Owen and James and Mat to the composition of six songs. If the settlement agreement, which deals with the six songs, is binding on the parties, then it is not necessary to answer issue 1.1. In these circumstances, I will, in accordance with later issues, determine whether the settlement agreement is binding and then will return to issue 1.1 to comment upon it.

ISSUE 1.2

[242] Issue 1.2 follows the findings in issue 1.1 and, as with issue 1.1, I will defer consideration of issue 1.2.

ISSUE 1.3

[243] Issue 1.3 is:

> "Did the Claimants and First and Second Defendants agree the alleged song writing credit agreement (or any other song writing, copyright or income sharing agreement) and if they did so what were the terms of their agreement and what was its effect (if any) in law?"

[244] I have addressed this issue in detail when making my earlier findings of fact. Those findings of fact conclude the issue. I hold that the four boys did not make any binding agreement as to song writing credits or as to song writing or as to copyright or as to sharing of income.

ISSUE 1.4

[245] Issue 1.4 raises the question whether any agreement found pursuant to issue 1.3 is enforceable against James and Mat after they reached eighteen. In view of my finding that there was no such agreement of the kind referred to in issue 1.3, issue 1.4 does not arise. In view of

the fact that my finding that there was no relevant agreement was based on findings of fact which turned to an extent on the credibility of witnesses, I do not think it is appropriate to go on to consider further questions of law and possibly further questions of fact which might arise if it were necessary to answer issue 1.4.

ISSUE 1.5

[246] Issue 1.5 asks:

> "Who were the first owners of the copyright in each of the said songs. Did the first owners of the copyright hold the copyright on trust for the Claimants and First and Second Defendants in equal shares pursuant to the alleged song writing credit agreement. If there was a partnership, were the song copyrights partnership property?"

[247] If the settlement agreement is binding on the parties then it is not necessary to answer the question in issue 1.5. I will therefore defer considering issue 1.5 until after I have determined whether the settlement agreement remains binding. By that point I will also have considered whether there was a partnership between the four boys.

ISSUE 2.1

[248] Issue 2.1 asks when the management agreement dated 15 March 2001 terminated as between Prestige Management and each of Ki and Owen.

[249] I have addressed this issue when making my detailed findings of fact earlier in this judgment. I hold that the management agreement ended as regards each of Ki and Owen on 8 October 2001. The letter of 3 October 2001 signed by Ki and Owen was a repudiatory breach of the management agreement which Mr Rashman accepted on 8 October 2001 as terminating the management agreement. The management agreement therefore terminated on 8 October 2001. Further, Mr Rashman and Ki and Owen agreed in the conversations up to and on 8 October 2001 that Mr Rashman was no longer the manager for Ki and Owen. If it had been necessary to go further, I would also hold, consistent with my earlier findings, that Ki and Owen signed a document recording that the management agreement was at an end. That document was signed some time in October 2001.

ISSUE 2.2

[250] Issue 2.2. asks what duties Prestige Management and/or Mr Rashman owed the four boys between 3 October 2001 and 22 March 2002.

[251] Prestige Management and/or Mr Rashman ceased to be the manager of Ki and Owen on 8 October 2001. After that date Prestige Management and/or Mr Rashman were not the manager for Ki and Owen and did not owe Ki and Owen any duties as manager. It is not suggested that there was any other contractual or fiduciary relationship between Prestige Management and Mr Rashman on the one hand and Ki and Owen on the other.

[252] There does not appear to be any dispute as to the relationship between Prestige Management and/or Mr Rashman on the one hand and James and Mat on the other hand in the period October 2001 to March 2002. In summary, Prestige Management through Mr Rashman was the manager for James and Mat in that period on the terms of the management agreement of 15 March 2001 and the further management agreement of late November 2001. When Mr Rashman discussed a settlement of the dispute as to the songs at the hotel on 15 February

2002 with Ki and Ki's parents, Mr Rashman was acting as the manager of James and Mat and the negotiations with Ki and Ki's parents were not complicated by any fiduciary relationship between Mr Rashman and Ki and in that sense they were arm's length contractual negotiations.

ISSUE 3.1

[253] Issue 3.1 asks whether the collaboration between Ki, Owen, James and Mat between late January 2001 and 8 October 2001 was a partnership.

[254] In due course, I will refer to the way in which the Claimants have pleaded their case as to the existence of a partnership and the points made by the Defendants in relation to that pleading. However, before I consider the way in which the matter is pleaded I will describe the case which the Claimants wish to put forward and which they did put forward both in Opening and in Closing Submissions.

[255] The Claimants assert that there was an agreement between the four boys as to the nature of their collaboration, that the agreement was contractually binding and that the contract was a contract of partnership. The Claimants wish to put their case for the existence of an agreement on the basis of an express oral agreement, alternatively, an agreement to be implied from their conduct.

[256] Section 1 of the Partnership Act 1890 defines a “partnership” as “the relation which exists between persons carrying on a business in common with a view to profit”. As Lord Millett pointed out in *Hurst v Bryk* [2002] 1 AC 185 at 194F, [2000] 2 All ER 193, [2000] 2 BCLC 117, this definition does not refer to the existence of any contract between the partners. However, Lord Millett explained, in the same case, at 194C, that a partnership is a consensual arrangement based on agreement and it is clear from the context that Lord Millett was referring to an agreement which had contractual force and effect. Thus, it is a precondition to the existence of a partnership that there is a binding contractual relationship between the parties and the law will then determine whether that contract is a contract of partnership or creates some other relationship.

[257] A partnership will, of course, often be created by express agreement between the parties. The agreement need not be in writing. The agreement can be created formally or informally. In the event of a dispute as to whether the parties made a relevant express agreement, the court will normally receive direct evidence as to the making of the express agreement and will then determine the issue between the parties. If, for whatever reason, there is no direct evidence of the making of the express agreement, then the court may be able to infer from other evidence that the parties did indeed reach an express agreement.

[258] The agreement which is necessary for the existence of a partnership need not be an express agreement. The existence of such an agreement may be implied from the conduct of the parties. If, for example, two or more persons carried on a business in common with a view to profit and distributed the net income of that business between them, it may well be appropriate to imply the existence of a contract between them, the terms of which contract provided for those persons to carry on that business and to have rights and obligations in relation to that business and the benefits and the liabilities to which it gave rise.

[259] There is no dispute in this case, at the theoretical level, as to the possibility in law of there

being a contract implied from conduct and such a contract being a possible contract of partnership. The possibility of implying a contract of partnership from conduct is referred to in *Medcalf v Mardell*, Court of Appeal, 2 March 2000 (unreported), *Phillips v Symes* [2002] 1 WLR 853 at 43and *Greville v Venables* [2007] EWCA Civ 878, to which my attention was drawn. The facts of those cases are of little relevance to the present case and I need not refer to them further. However, the last of the three decisions contains a helpful citation from the judgment of Bingham LJ in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, 88 LGR 864, [1990] 1 WLR 1195 at 1202(not itself a partnership case) where it was stated that contracts were not be to lightly implied; but a contract could be implied where the court was able to conclude with confidence both that the parties intended to create contractual relations and what the terms of the contract were.

[260] I was also referred to *Khan v Miah* [2001] 1 All ER (Comm) 282, [2001] 1 All ER 20, [2000] 1 WLR 2123. That was a case of an express agreement on a joint business venture. The parties had begun to implement the agreement but the business had not commenced trading. The House of Lords held that there was no rule of law that parties to a joint venture did not become partners until actual trading commenced. The case does not offer any assistance in the present case in relation to the Claimants' contention that there was an express contractual agreement between the four boys. That issue is a matter to be decided on the specific facts of the present case. However, if I held that the four boys did make an express contractual agreement which could in law be a partnership I would not hold that the case fails merely because the four boys did not actually secure a recording contract. In relation to the Claimants' case as to the implication of a partnership from conduct, it seems to me that I should take into account all of the circumstances in the period from January 2001 to October 2001 to see how matters developed and then decide whether such an implication is appropriate.

[261] I will now refer to the way in which the matter has been pleaded and the arguments that have arisen from the pleading. Paragraph 7 of the final version of the Particulars of Claim, which is the Re-Re-Amended Particulars of Claim (for simplicity I will refer to this as the Particulars of Claim), pleads that Ki and Owen and James made an agreement on or around 12 January 2001. Their agreement was that they would write and perform together as a group with a view to obtaining a recording contract releasing records and achieving success in the music industry. It is said that they further agreed that a fourth group member was required and they would carry out auditions to identify and recruit a suitable fourth group member.

[262] Paragraph 8 of the Particulars of Claim refers to a second agreement made in or about the end of January 2001. This agreement was between all four boys and it is said that they agreed that they would write and perform together as a group for the purposes referred to in para 7 of the pleading, namely, to obtain a recording contract, release records and achieve success in the music industry. It is then pleaded that from the end of January 2001, the four boys considered themselves to be a working group and the membership of the group remained the same until, it is said, Ki and Owen were excluded from the group in mid October 2001.

[263] The question of a partnership is referred to for the first time in para 38 of the pleading. Paragraph 38 comes under the heading: “The Claimants' claims arising out of the matters pleaded above”. Paragraph 38 essentially pleads that the Group consisting of the four boys “was a partnership between them which commenced at the end of January 2001”. Paragraph 38 then states that pursuant to the partnership, the four boys carried out a number of specified activities. The Particulars of Claim had initially pleaded that the partnership was a partnership for an

undertaking, namely, the securing of a recording contract and the recording and commercial release of an album. The plea of a partnership for an undertaking was deleted by amendment and in its place it was pleaded that the partnership was a partnership at will, which was dissolved on 8 October 2001.

[264] Paragraph 39 of the Particulars of Claim pleads that the partnership between the four boys was a partnership at will which was dissolved on 8 October 2001. The above mentioned paragraphs in the pleading are the entirety of the pleading in the Particulars of Claim as to the formation of a partnership in this case.

[265] The Defendants accept that the pleadings identify a case which the Defendants have to meet that there was an oral agreement for a partnership: see paras 7 and 8 of the pleading. However, the Claimants go on to contend, but the Defendants deny, that there is also a pleading of a partnership to be implied from conduct with the relevant conduct being identified in paras 7 and 8 of the pleading (referring to the fact of agreement) together with para 38 of the pleading, referring to the activities carried on “pursuant to the partnership”.

[266] In my judgment, the original pleading is not well drafted for the purpose of alleging the existence of a partnership, where there was no express agreement for a partnership, but nonetheless the existence of a partnership is to be implied from the parties' conduct. Paragraphs 7 and 8 allege express (presumably oral) agreements, which (the Claimants contend) amounted in law to a contract (or contracts) of partnership. Paragraphs 7 and 8 do not put forward an alternative plea where, assuming that there was no express agreement, nonetheless the existence of a partnership is to be implied from conduct. Nor does para 38 allege that the existence of a partnership is to be implied from conduct. Paragraph 38 puts matters the other way round. It asserts the existence of a partnership and then pleads that various activities were carried out pursuant to the partnership which was alleged to exist. Paragraph 38 does not go quite far enough to assert that in the light of the activities which are pleaded, it is to be implied that there was a partnership. However, it only just fails to plead what is needed for the purpose of asserting the existence of a partnership to be implied from conduct.

[267] In these circumstances, I would be very ready to deal with the case which the Claimants put forward in their Opening Submissions to the effect that there was an oral agreement for a partnership, alternatively that the existence of a partnership is to be implied from the parties' conduct, although I would wish to see a proper pleading of such a case. The Defendants were aware that this was a case which the Claimants wished to put forward and I do not think that the Defendants would be prejudiced by having to meet such a case. I do not believe that the Defendants failed to explore any matters at trial on the assumption that the contention of an implied partnership, which was spelt out in the Claimants' Opening Submissions, was not being put forward. It therefore seems to me to be fair to both parties for the court to be prepared to consider the real case which the Claimants wish to put forward although, as I have already said, the case of the suggested implication of a partnership should be pleaded.

[268] In their Closing Submissions, the parties were at issue as to whether the existing pleading allowed the Claimants to advance a case of the existence of a partnership to be implied from conduct. I did not rule at that time on the effect of the pleading. I indicated to the Claimants that they could decide whether to apply for permission to amend their pleading and I would consider written submissions and counter-submissions on that subject following the conclusion of the oral hearing.

[269] The Claimants have now made further submissions on this point. They have not, as such, applied for permission to amend their existing pleading. They have instead prepared a document running to 18 paragraphs which are said to be particulars of the facts and matters relied upon in support of a contention that a partnership agreement is to be implied from the parties' conduct. In a supporting submission, the Claimants seek permission to "rely upon" these facts and matters.

[270] I do not find the Claimants' approach to the pleading point to be altogether satisfactory. As I have held that the Claimants have (just) failed to plead a case of an implied partnership, it must surely be right to amend the Particulars of Claim to make it clear that the facts and matters set out in para 38 are relied upon to support such an implication. The Claimants seem to be loath to make such an amendment possibly because they think that making an amendment to the pleadings at this stage will, or might, attract an adverse order for costs. For the purposes of finalising my judgment, I will therefore proceed on the basis that para 38 of the Particulars of Claim is further amended to plead that the facts and matters already pleaded in para 38 justify the implication of a partnership having been agreed between the parties. I will not however widen the matters pleaded in para 38 to other matters on which the Claimants might wish to rely. This is because the Claimants have not applied to amend para 38 of the Particulars of Claim to widen the matters contained within it as particulars of an implied agreement. I will treat the document submitted by the Claimants following the oral hearing as containing submissions based on the evidence but remembering that the essential facts and matters which are said to justify the claimed implication are those in para 38 of the Particulars of Claim. As it happens, I would reach the same overall conclusions in this case, even if para 38 of the Particulars of Claim were amended to plead all of the facts and matters referred to in the further submissions.

[271] I will now deal with the case as to the existence of a partnership, first by considering whether there was an oral agreement (or agreements) as pleaded in paras 7 and 8 of the Particulars of Claim and then considering whether the existence of such a partnership is to be implied from conduct, with the particulars of the relevant conduct being those in para 38 of the Particulars of Claim.

[272] I have already made detailed findings, having regard to the allegations in paras 7 and 8 of the Particulars of Claim, as to what was, if anything, agreed between the four boys at the beginning of their collaboration. In my judgment, those findings of fact lead me to the conclusion that there was no contractual relationship entered into by the four boys when they reached an understanding that they would collaborate together and write songs and rehearse those songs and act under the management of Mr Rashman with a view to getting a record deal and being successful in the music industry.

[273] The alleged oral agreement, alleged to give rise to a partnership, was made in January 2001 which was before the four boys received any legal advice about contracting with Mr Rashman in the terms of a management contract and before the management contract of 15 March 2001. At the time that the four boys allegedly made an oral contract between themselves, there was therefore no management agreement with Mr Rashman. I will consider, later in this judgment, the impact of the later management agreement.

[274] In January 2001, save that Ki and Owen already knew each other and save that Ki says he remembered Mat from drama school and Mat says he did not remember Ki from drama

school, the boys were effectively new to each other. I can accept that they got on well as seventeen year old boys (or in Owen's case a little older) can do even on a first meeting. But I do not accept that it is reasonable to regard what they were doing with each other and what they were saying to each other at that time as having any contractual consequences or significance. I was not given any evidence as to any detailed discussion as to what everyone would be expected to do. I asked Mr Penny, Counsel for the Claimants, what contractual obligations were undertaken by each party to the alleged agreement. For example, was there an agreement to spend so many hours or so many days writing songs or engaging in specified activities? Mr Penny did not suggest that there were any obligations of that kind or indeed any similar obligations undertaken expressly or impliedly. The most that Mr Penny could identify by way of obligation was an obligation to act in good faith towards each other. Mr Penny suggested that the obligation of good faith would mean that none of the boys could join another band. However, I did not regard that submission as persuasive in a case where the contract contended for by the Claimants was a contract of partnership terminable at will. Accordingly, even on the contract contended for by the Claimants, if one of the four wanted to join another band, he was entitled to do so merely by indicating that he wished to leave the original group of four.

[275] Indeed, in my judgment, in a case where the choice for the court is between holding that there was no intention to create contractual relations at all and holding that there was an intention to create a contract terminable at will, it is difficult to see why the parties would see it as necessary to have an informal contract terminable at will as compared with no contractual relationship at all, with the matter resting on a social relationship and a great deal of optimism, which no doubt existed.

[276] Furthermore, in relation to the suggested express agreement, and an obligation of good faith imposed on the parties, there would have been a lack of clarity as to what would and what would not be permitted in those respects. Mat went for an audition for a musical and if he had been accepted it would have involved him working hard for a considerable period during which he could not devote himself to group activities. James continued to write songs with third parties and no one objected. The lack of definition in relation to the activities which were the subject of the contract and the alleged partnership and, indeed, the complete lack of appreciation that anything the boys were doing required them to address those questions suggest to me that there was no intention to create a contractual relationship at all.

[277] Although the Claimants have only pleaded the making of an express agreement in January 2001, I will go on to consider whether it might be said that the parties had reached an express agreement at some later time, before October 2001.

[278] After January 2001, the boys did have legal advice and did enter into the management agreement with Mr Rashman. The fact that the management agreement related to a matter of business and involved legal advice and a written document shows that, in relation to that part of their activities, the boys did intend to be contractually bound. However, this was because Mr Rashman required them to act that way, for Mr Rashman's protection. Mr Rashman did not suggest to them that they should form a contractual relationship between themselves and it does not seem to have occurred to them that they should do so. Further, it is a factor suggesting that the four boys had no intention to create a contractual relationship between themselves that the management agreement was recorded in writing following legal advice and following the involvement of the parents of some of the boys, but there was nothing comparable in relation to the suggested contractual relationship between themselves.

[279] Mr Penny, for the Claimants, contended that the terms of the management agreement themselves indicated that the boys must have made a parallel contractual relationship between themselves. However, an examination of the terms of the management agreement does nothing to support that proposition. The management agreement was for a term of five years with quite specific early termination provisions. The suggested contract and alleged partnership was said to be at will. Thus the contract and alleged partnership could end at any time whilst the management agreement would continue. Further, the management agreement, consistently with the above, expressly contemplates that one or all of the four boys could be solo artists or indeed in groups with third parties but yet the management agreement would continue. Finally, the management agreement extended to the boys activities in the entertainment industry but the Claimants do not contend that there was a partnership governing the activities of the boys in the entertainment industry but only in some much narrower sector.

[280] Further, in relation to the possibility of there having been an express agreement between the four boys after January 2001, Mr Rashman advised the four boys in March 2001 of the various agreements they might in the future make about the ownership of, or rights in, songs which appeared on their first album, if one came to be made. On my findings, the four boys did not make any agreement about ownership of or interest in songs in or after March 2001. This was consistent with Mr Rashman's advice that the right time to make an agreement of that sort would be later, if at all. The fact that they did not make a contract about the songs makes it less likely that they entered into a contract of partnership given the emphasis laid by the Claimants on the fact that the partnership was for the purpose of collaborating in song writing.

[281] For the above reasons, I conclude that the four boys did not enter into any express contractual relationship in January 2001 as pleaded or at a later point in time. If they did not enter into a contractual relationship then they cannot have made an agreement for partnership, which is a particular class of contractual relationship.

[282] I now consider whether a contract of partnership is to be implied from conduct. For much the same reasons as I gave when considering whether the four boys had made an express contractual agreement in or after January 2001, I conclude that the activities of the four boys between January 2001 and October 2001, which were consistent with the non-contractual arrangements made in January 2001, do not justify an inference that they must at some time, after the initial meeting, have turned their non-contractual relationship into a contractual relationship. In January 2001, the boys contemplated that they would collaborate in a non-contractual way and that is what they did. The fact that the collaboration took place does not then mean that they are to be taken to have agreed at a later time that the collaboration would now be on a contractual basis. I have already indicated that the entry into the management agreement on 15 March 2001 does not require one to take a different view as to what must have been intended as to the collaboration between themselves. Further, the fact that the four boys (on my findings of fact) took Mr Rashman's advice not to make an agreement about song splits at any time before October 2001 is an additional reason for not implying a contract of partnership which would necessarily have legal consequences as to rights in the songs.

[283] Accordingly, I hold that it is not appropriate to imply from conduct in this case that the parties had made a contractual relationship.

[284] Accordingly, I hold that the four boys never entered into a contract of partnership, express or implied.

ISSUE 3.2

[285] Issue 3.2 raises a question as to the property which comprised partnership property as at 8 October 2001.

[286] As I have held that there was no partnership between the four boys, issue 3.2 does not arise. I will, however, give a slightly more extended answer to that question. The first category of suggested partnership property in issue 3.2 is the copyright in the musical and/or literary works comprised in the six songs which were the subject of the settlement agreement. If the settlement agreement is not set aside then the claims in respect of those six songs are governed by the settlement agreement. If the settlement agreement were to be set aside then the parties would not be barred by it from asserting a copyright in the six songs. It would undoubtedly be true that someone, depending on the detailed facts, would have copyright in the musical work and the literary work in the six songs. However, because there was no partnership, that copyright would not be partnership property.

[287] The second suggested item of partnership property is the suggested goodwill in the name Busted and this is said to involve a consideration of whether there was any goodwill in the name Busted as at 8 October 2001. I have made detailed findings as to the use of the name Busted in the period up to 8 October 2001. My conclusion based on those findings is that there was no goodwill, or no goodwill other than de minimis, in the name Busted at that date. There being no goodwill, the name Busted would not be partnership property. Further, there was no partnership. If there was no partnership but the name Busted carried with it goodwill then the goodwill would be owned by the four boys, but not as partners. However, it is not necessary to explore that question further. I say this because the original pleading by the Claimants originally claimed damages in respect of an alleged passing off by the new group using the name Busted. However, the Claimants have deleted that claim by an amendment to their pleading.

[288] The third suggested item of partnership property relates to trade mark applications in the name Busted registered by Mr Rashman prior to 8 October 2001. Mr Penny on behalf of the Claimants did not seek to distinguish this item from the earlier item of suggested goodwill in the name Busted. He accepted that if I found, as I do, that there was no goodwill in the name Busted then no relevant question arose in relation to trade mark applications.

[289] The fourth suggested item of partnership property concerned the performer's property rights in recordings embodying the performances of Ki and Owen (and James and Mat) during their collaboration. The short answer to this issue, as before, is that there was no partnership and these rights cannot be partnership property. I also find, in the context of this issue, that James and Mat did not after 8 October 2001 make any use of recordings to which Ki and Owen had contributed. That finding applies in particular to the demo tapes recorded by Steve Robson in August 2001.

ISSUE 3.3

[290] Issue 3.3 raises a question as to the legal duties and obligations of partners to each other

during the dissolution period. As before, the short answer to this issue is that there was no partnership. The collaboration between the four boys ended on 8 October 2001. There remained a dispute between them as to certain songs. In seeking to resolve that dispute and in making the settlement agreement of 22 March 2002, the matter was not governed by fiduciary duties owed by one to the other. The negotiations were arm's length contractual negotiations and the settlement agreement was a contractual settlement of a pre-existing dispute.

ISSUE 3.4

[291] Issue 3.4 asks whether there is a liability, subject to any defences, to account for profits derived from the First and Second Defendants' use of partnership property. As I have held that there was no partnership and no partnership property this issue does not arise. I have commented separately above on the four matters which are suggested to be items of partnership property.

ISSUE 3.5

[292] Issue 3.5 asks whether the March 2002 agreement represented a final account and/or winding up of the partnership. Because there was no partnership, the agreement was not a final account or winding up of a partnership. The agreement was restricted to six songs and does not bind the parties in relation to any other matters of legal right or obligation between them. It is perhaps indicative that the parties felt that it was only the six songs that were of any significance and which required to be dealt with.

ISSUE 3.6

[293] Issue 3.6 asks whether James and Mat were in breach of their fiduciary duties towards Ki and Owen. The only fiduciary duty identified in the Claimants' pleaded case is the fiduciary duty on James and Mat in relation to the period between dissolution and winding up of an alleged partnership. As I have held that there was no partnership, there is no other pleaded fiduciary duty which arises.

ISSUE 3.7

[294] Issue 3.7 asks whether the Claimants are entitled to rescind 22 March 2002 agreement on the ground of material non disclosure.

[295] As I have held that James and Mat were not obliged to disclose matters in the course of contractual negotiations with Ki and Owen, it must follow that Ki and Owen are not entitled to rescind the agreement on the ground of alleged material non disclosure.

[296] If I had held that James and Mat were under a duty to disclose certain matters, it would then be necessary to investigate a whole series of further questions. The first question would be a detailed question of fact as to precisely what Ki and Owen knew. There would also be an issue as to the precise scope of the duty of disclosure. The duty of disclosure is described in *Law v Law* [1905] 1 Ch 140, 74 LJ Ch 169, 53 WR 227, possibly by reference to the specific circumstances of that case, as a duty to disclose material facts with reference to the partnership assets. However, in *Conlon v Simms* [2006] EWCA Civ 1749, [2007] 3 All ER 802, [2008] 1 WLR 484the duty to disclose was described as a duty to disclose material matters or a duty to

disclose the material facts which might influence the mind of a prudent contractor: see at 127 to 128. If it transpired that there was a duty to disclose and there had not been full disclosure, an issue would arise whether Ki and Owen had elected to make the contract at a time when they knew that they did not have all the matters of detail which might have a bearing on their decision to proceed. In *Law v Law,* a party to whom relevant matters had not been disclosed was not entitled to set the transaction aside because he knew certain general matters about the partnership assets and deliberately did not ask for more information. There would also be an issue as to whether the non disclosure induced Ki and Owen to enter into the settlement agreement. That would have required one to draw inferences as to what difference it would have made to their behaviour at the time, if further information had been disclosed to Ki and Owen.

[297] In my judgment, having held at the first stage that James and Mat did not owe a duty of disclosure to Ki and Owen at all because there was no partnership between the four boys, it is not necessary to explore the further questions and given the range of matters that could potentially arise if they were to be explored, I do not think it is appropriate to investigate those points further.

ISSUE 3.8

[298] Issue 3.8 deals with the fact that Ki and James and Mat were under eighteen when the partnership allegedly commenced and whether a minor can repudiate an earlier contract of partnership when the minor reaches eighteen. In view of the fact that I have held there was no partnership between the four boys, this issue does not arise and I do not deal with it.

ISSUES 4.1 AND 4.2

[299] Issue 4 raises various questions in relation to the topic of undue influence. Issue 4.1 is concerned with the Claimants' allegation there was actual undue influence and issue 4.2 is concerned with presumed undue influence. Issue 4.3 asks whether the settlement agreement of 22 March 2002 was affirmed by the Claimants so that the Claimants lost the right to rescind on account of the alleged undue influence.

[300] Earlier in this judgment, I made detailed findings of fact as to what took place between the sacking of Mr Rashman on 3 October 2001 and the meeting in the Intercontinental Hotel on 15 February 2002 and the signing of the settlement agreement on 22 March 2002. In my judgment those findings effectively conclude the issues arising as to undue influence. Further, the parties were not seriously at odds as to the principles of equity which fall to be applied in a case of alleged undue influence. In these circumstances, the appropriate course is for me to summarise the consequences of my earlier findings of fact and thereby to determine the outcome in respect of the alleged actual undue influence and the alleged presumed undue influence.

[301] Based on my earlier detailed findings of fact I conclude as follows:

(1) There were no threats made to Ki or Owen to induce them to enter into the agreement of 22 March 2002;

(2) There were no misrepresentations made to Ki and Owen to induce them to enter into the agreement of 22 March 2002;

(3) There was no improper pressure put on Ki and Owen to induce them to enter into the agreement of 22 March 2002;

(4) There was no impropriety or unacceptable behaviour on the part of James or Mat or Mr Rashman or Mr McLaughlin in relation to the negotiations which led to the conclusion of the agreement of 22 March 2002;

(5) There was no fiduciary relationship between Mr Rashman on the one hand and Ki and Owen on the other after 8 October 2001;

(6) At 15 February 2002 and in the period from 15 February 2002 to 22 March 2002, Mr Rashman was not in a position of influence over Ki or Owen;

(7) I make the finding in (6) above because I have already held that Ki and Owen were dissatisfied with Mr Rashman before 3 October 2001, they sacked him on 3 October 2001, they made it clear between 3 October and 8 October 2001 that they did not intend to take him back as manager and after 8 October 2001, Ki sought to appoint another manager;

(8) There had not been a partnership between the four boys and there was no duty of disclosure on James and Mat in the period 8 October 2001 to 22 March 2002;

(9) Mr Rashman was acting as agent for James and Mat but Mr McLaughlin was not an agent for James and Mat;

(10) In the relevant period Ki was advised by his parents and by Mr Seago, who was an experienced music publisher;

(11) Owen left the arrangements to Ki and took next to no part in them; his decision to do so was due to his relationship with Ki and the influence which Ki had over Owen but was not attributable to any influence practised on Owen by Mr Rashman or Mr McLaughlin;

(12) Different settlement packages were offered to Ki and he rejected some of them;

(13) Ki accepted the settlement terms which appeared in the agreement of 22 March 2002 because he preferred them to other settlement terms that he had been offered;

(14) Mr Seago advised Ki not to accept the settlement terms but Ki disregarded that advice because he considered that the settlement terms he agreed to were more favourable to him than other settlement terms he had been offered;

(15) If it became necessary to consider whether the settlement of 22 March 2002 was or was not unfavourable to Ki and Owen, that assessment should be made by comparing

the benefit of the certainty obtained under the settlement terms with the fact that, in the absence of a settlement, there was a dispute which could be difficult to resolve and if it were resolved might involve litigation which would take time and cost money; if it is appropriate to assess how some elements of that dispute might be resolved, I have already held that Ki and Owen were wrong in contending that there was a song split agreement and in contending that there was a partnership; the remaining issue as to ownership of the songs would turn upon an investigation of the detailed facts as to who wrote what and that dispute was likely to involve a major conflict of evidence between the four boys;

(16) James and Mat genuinely thought that the settlement was far too favourable to Ki and Owen; and

(17) There is no feature of the case which makes it unconscionable for James and Mat to hold Ki and Owen to the settlement made on 22 March 2002.

[302] In the light of the combination of the findings I have made, my conclusion is that there is no case for saying that the settlement agreement was procured by undue influence practised on Ki and Owen, whether that undue influence be classified as actual or presumed. In those circumstances, it does not seem to me to be appropriate to begin to sub-divide the combination of findings and to ask whether the same result would follow if I made only some of those findings and not others. My conclusion is, on the basis of the findings of fact that I have made, that the claim to rescind the settlement agreement by reason of undue influence fails.

ISSUE 4.3

[303] Issue 4.3 raised the question whether the Claimants had affirmed the agreement of 22 March 2002 and had lost any right they may once have had to seek rescission of it. In view of my earlier conclusions, issue 4.3 does not arise and I do not deal with it.

ISSUE 5

[304] Issue 5 asks whether the Claimants are entitled to relief, including rescission of 22 March 2002 agreement, as a result of misrepresentations made to them.

[305] Based on my earlier findings of fact, there was no misrepresentation made to the Claimants which entitles the Claimants to seek rescission of the agreement of 22 March 2002, or any other relief.

ISSUE 6

[306] Before considering issue 6 (which asks whether any of the relief to which the Claimants might be entitled is barred by laches, acquiescence or estoppel) I will consider whether the Claimants have established an entitlement to any of the relief claimed in the Re-Re-Amended Particulars of Claim.

[307] Paragraph 1(i) and (ii) of the prayer for relief claimed declaratory relief on the basis that there was a partnership between the four boys. The Claimants are not entitled to that relief.

[308] Paragraph 1(iii) of the prayer for relief refers to the six songs the subject of the settlement agreement of 22 March 2002. The Claimants are not entitled to a declaration that those songs were held on trust for a partnership because there was no such partnership and, in any event, the Claimants are bound by the settlement agreement. The same paragraph in the prayer for relief claims a declaration in relation to the six songs on the basis of a song split agreement between the four boys. The Claimants are not entitled to that relief because there was no such song split agreement and because of the settlement agreement.

[309] Paragraph 2 of the prayer for relief asks for an order that the partnership be wound up. The Claimants are not entitled to that order because there was no partnership.

[310] Paragraph 3 of the prayer for relief claims all necessary accounts and enquiries on the basis that there was a partnership between the four boys. The Claimants are not entitled to that relief because there was no partnership.

[311] Paragraph 4 of the prayer for relief claims damages for misrepresentation. I have found that there was no misrepresentation and so the Claimants are not entitled to that relief.

[312] Paragraphs 5 and 6 claim relief on the basis that the settlement agreement of 22 March 2002 ought to be set aside. The Claimants are not entitled to that relief because I have held that the settlement agreement was and remains binding on the parties to it.

[313] Paragraph 7 of the prayer for relief claims a declaration that the Claimants were joint authors and joint copyright owners of the six songs referred to in the settlement agreement. Since 22 March 2002, the Claimants are not entitled to any relief which is at variance from the terms of the settlement agreement. It is not material to declare what the situation was prior to the settlement agreement as any dispute about the position then was settled by the settlement agreement. Accordingly, the Claimants are not entitled to the relief sought in para 7 of the prayer for relief.

[314] Paragraph 7A of the prayer for relief claims relief by reason of alleged breaches by James and Mat of fiduciary duty. The Claimants have not established that James and Mat were in breach of fiduciary duty and so are not entitled to the relief claimed.

[315] Paragraph 7B of the prayer for relief seeks relief in relation to allegations made in respect of a song called “Loser Kid”. I have not so far referred to this song in this judgment. The parties agreed at the trial that the claim in relation to Loser Kid would be stood over until after judgment on all other issues.

[316] Issue 6 asks whether any of the Claimants' claims are barred by the doctrines of laches, acquiescence or estoppel. I have held, leaving Loser Kid to be dealt with later, that in all other respects the Claimants' claim has failed and so issue 6 does not arise and in my judgment it is not appropriate to deal with it.

ISSUE 1.1 LEFT UNRESOLVED

[317] I referred earlier in this judgment to issue 1.1 which asked: what were the respective contributions of each of the Claimants and the First and Second Defendants to the composition

of each of the following songs: Sleeping With the Light On, What I Go To School For, Psycho Girl, Year 3000, Who's Your Daddy, She Knows?

[318] These six songs are the subject of the settlement agreement. I have held that the Claimants are not entitled to have the settlement agreement set aside. The settlement agreement therefore binds both the Claimants and the Defendants. Any findings I made as to the respective contributions of the four boys to the composition of the songs would not affect the result in this case. Indeed, the whole purpose of the parties making a settlement agreement was to produce the result that it would not be necessary to determine what were the respective contributions of each of the four boys to the six songs.

[319] I have considered whether I ought, nonetheless, to make detailed findings of fact in relation to issue 1.1 either (a) in case my decision on the settlement agreement was later to be reversed or (b) to satisfy the interests of the parties who devoted considerable effort and time debating this issue.

[320] It would be very difficult, perhaps much more difficult than in the case of any of the other issues of fact in this case, to determine with complete precision the facts needed to answer issue 1.1. That issue relates both to the music and the words of the six songs. The facts or alleged facts in relation to each of the six songs are different. There is a massive conflict of evidence. If I felt that I could accept the evidence of any one witness or group of witnesses in its entirety then the fact finding process might be more straightforward.

[321] I have already indicated that I preferred the evidence of James to the evidence of Ki and Owen. I made this finding, largely for the reasons I indicated at the outset, because I found James' evidence on the whole, to be fair and reliable. Conversely, I have treated the evidence of Ki and Owen with very great caution. Another reason for preferring the evidence of James to Ki and Owen on the issue of composition is that James tended to be more precise and clear in his recollection of the facts whereas Ki and Owen spoke in terms of generalities such as: “we worked on the song” without detailing precisely what the “work” consisted of. This lack of precision was particularly acute in relation to the composition of the music. However, even though I prefer the evidence of James to the evidence of Ki and Owen, I would want, in fairness to Ki and Owen to consider carefully the possibility that James' evidence might in some matters of detail be too unfavourable to Ki and Owen.

[322] The amount of detail that would require to be considered if I were to make findings of fact on issue 1.1 is considerable. An indicator of this is that in the closing submissions on behalf of the parties, the Claimants deal with this issue over 27 pages of submissions and the Defendants deal with this issue over 32 pages of submissions. To make conscientious findings of fact on all the points raised in argument would, I fear, be an enormous labour. As I have indicated, it is a labour that need not be undertaken and, indeed, the whole purpose of the settlement agreement was to make it unnecessary to carry out such an exercise.

[323] In the end, I have decided that I will not undertake the task of answering issue 1.1. However, in case the following comment is of any help to the parties, I will indicate that if I had to do the task, I would go about it by taking James' evidence as a general framework for my findings of fact and then sifting through the other evidence I have heard to see if James' evidence is to be supplemented, or contradicted, by other findings which I would be able to make on the basis of objective evidence from a reliable witness. I would not take the evidence of

Ki and Owen as my framework nor would I regard the evidence of Ki and Owen as objective evidence from a reliable witness for this purpose.

ISSUES 1.2 AND 1.5 LEFT UNRESOLVED

[324] I have also deferred considering issue 1.2 which asks the question as to the identity of the joint authors of the six songs having regard to the findings made under issue 1.1. The parties were not really at odds in relation to the legal principles which fall to be applied. Accordingly, the answer to issue 1.2 essentially depends on the findings of fact needed to answer issue 1.1. As I do not answer issue 1.1, I similarly do not answer issue 1.2. For the same reasons, I do not answer issue 1.5. In so far as issue 1.5 assumed the existence of a partnership, I have already given my reasons for concluding there was no partnership between the boys.

THE OVERALL POSITION

[325] I have now dealt, to the extent that it is necessary, with all of the issues which I have been asked to decide. I will hear Counsel as to the consequences of these findings.

Judgment accordingly.

End of Document