[2019] JMSC Civ 217

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 4827

BETWEEN	**DELROY CHANDLER (also known as D.Y.C.R.)**	**CLAIMANT**
AND	**DOWNSOUND RECORDS LIMITED (also known as DSR)**	**DEFENDANT**

IN OPEN COURT

Mr. Adrian Christie instructed by Williams, Young, Parker for the Claimants.

Chad Lawrence instructed by Samuda and Johnson for the Defendant.

Breach of Management Contract between Artiste/Dub Poet and Recording Company - Interpretation of contractual terms - Whether time was of the essence - Option to renew - Whether the option was exercised - Repudiation of contract - Whether the Claimant waived his right to terminate - Anticipatory Breach - Whether intention to breach established - Damages - Damage to reputation or loss of opportunity - Whether damages proven - Whether the award should be substantial or nominal - Whether the Defendant is entitled to a set off.

Heard 6th - 9th May 2019 and the 26th September, 2019

THOMAS, J.

INTRODUCTION

[1] The Claimant Mr. Delroy Chandler (A.K.A DYCR) a professional Dub Poet has brought this claim against the Defendant Company, Down Sound Records (DSR) for damages for breach of management contract. It is the claim of Mr.

Chandler that prior to contracting with DSR he had an active and successful career as he was in high demand to produce dub-plates and jingles, being paid between $20,000.00 and $40,000.00 Jamaican, per dub-plate from around the year 2000. He further alleges that his contractual relationship with the Defendant led to a down turn in his career and a loss of reputation as a result of the Defendant failing to comply with the terms of the contract.

[2] However the defence is that the Defendant Company has fulfilled its obligation under the contract and that it is the Claimant who is in breach of the contract. Additionally, in defence of the Company Mr. Josef Bogdanovich Chief executive officer, and Managing Director of the Defendant company asserts that in any event whatever payment the Claimant would be entitled to under the contract would have been exhausted by way of a set-off against the Defendant's expenditure in promoting his career under the contract.

Liability

Summary of the Fact

[3] A summary of the facts as it relates to liability for breach of contract are as follows:

The parties entered into a management contract on the 12th August, 2004 whereby the Defendant Company, Down Sound Records (DSR) agreed to exclusively manage the career of the Claimant (DYCR) for the contractual period, which appears to be for 1 year in the first instance with an option to renew for three years. In return, the Claimant was to record tracks and attend shows booked for him by the Defendant. The contract also included terms for the Defendant to produce videos and one album, with an option to produce three additional albums within a three-year period. The Claimant terminated the contract with the Defendant Company in July 2008.

[4] The Claimant contends that:

He began working on the album that consists of several tracks as was agreed under the contract, within a few months from signing the contract. He completed recording all tracks for the album before the scheduled date. Within twelve months after signing and during the life of the contract his career began to decline and lacked its previous successes. As a result, he threatened to leave the company and was asked not to leave and was given the assurance that his album would be produced and promoted as agreed. In and around August 2005, with the knowledge and authorization of the Defendant, he entered into a Recording Agreement with TAD's International Limited and TAD's Inc**.** TAD's paid DSR Five Hundred and Fifty Thousand Dollars ($550,000.00) for the purpose of producing two (2) music videos for him. DSR only produced one of those music videos. The failure of DSR to make the necessary provisions to facilitate the production of the two music videos indicated a breach by DSR of the contract with him that required DSR to Produce music "videos" for him. This, he asserts was a further failure by DSR to promote his music career. It also caused a breach of contract between himself and TAD's. Furthermore, the fact that TAD's paid DSR for two music videos, one of which was never produced, caused a deterioration in the business relationship with himself and TAD's. It also created further loss in his earnings as TAD's recouped from his royalties that full amount of Five Hundred and Fifty Thousand Jamaican Dollars ($550,000.00 JA).

[5] Her further alleges that his cultural appeal and reputation as a Rastafarian dub poet was further tarnished when, under the direction of DSR, who had the obligation of promoting him, released a poster of him in which he was sprayed in gold. He contends that the poster received such negative reviews that DS R was forced to redo the poster.

[6] At the end of the first year of the Contract, he again indicated his dissatisfaction with DSR and his intention to terminate the Contract. DSR continued to assure

him that they would make amends and perform their obligations under the contract. Thereafter, DSR repeatedly gave him such assurances, but they never did deliver on their promises. In 2008, he sought to terminate the contract and DSR tried to convince him to stay in the arrangement by undertaking to perform its obligations under the Contract.

[7] He testifies that as an entertainer it is vital to his continued success to have music produced and distributed, and played publicly to maintain his visibility in the music industry and in the eyes of the public. DSR's failure to release the album stifled the momentum he had generated prior to signing of the contract.

The Defence

[8] However Mr. Bogdanovich contends that:

The Defendant successfully carried out the tenets of the contract with the Claimant by providing him with opportunities to perform at stage shows, producing videos, the recordings of an album and promoting him throughout the Caribbean and on international music radio stations. He was booked to perform at shows in the Cayman Islands, Caribbean Music Festival in New York, the Sons and Daughters Show, Sting and East Fest just to name a few examples

[9] His single "Misunderstandings", which is arguably one of his better works, was recorded by the Defendant and the music video for the song was also done by the Defendant. Another music video titled "Barber Chair" was recorded in collaboration with TAD's International Limited and the Claimant; with the consent of the Defendant contracted with TAD's International Limited for them to record, promote and distribute the album. The album was sufficiently promoted electronically, visually and in the printed media.

[10] The funds for both videos were sent to the Defendant by TAD's International Limited; however, the amount contracted for was insufficient to produce two videos of quality and commercial viability with the result that the parties to the contract took the decision to use the funds to create one good music video. In

order to promote the album in an effective manner for the benefit of all parties, the Defendant brought in popular entertainers to perform on the video for “Barber Chair”. The Defendant provided opportunities for the Claimant, throughout the Caribbean United States and the United Kingdom. The Defendant provided the Claimant with work on stage shows, some engagements that were sufficient to place the Claimant in the mainstream industry but he could not survive as the audience and the populous did not respond favourably. Event promoters who were clients and associates of the Defendant started requesting less of the Claimant. In view of his failed market appeal and the dismal record sales it became clear to the Claimant and the Defendant that the Claimant was a failed artiste but the Claimant prevailed upon the Defendant to continue to fund his album to which the Defendant consented.

[11] The Claimant expressed disappointment to the Defendant that he wasn’t gaining traction. He declined to consistently record tracks and to attend shows that were booked for him, indicating that he did not like the shows. The Claimant was reprimanded and encouraged to make greater effort in advancing his career and to complete the recording of an album which at the time only had eight (8) recorded songs. The contents of the songs were not marketable. Nevertheless, the Defendant produced an album. An external survey was done by the Defendant which indicated that it would not be commercially viable.

[12] The Defendant made an executive decision not to release the album. In or around July 2008 and after several discussions, the Claimant agreed to ensure that he complied enough recordings of the Defendant’s standard for the future release of an album. In consideration of that oral agreement, the Defendant made an offer to give the Claimant an advance payment of Five Thousand United States Dollars (US$5000) for an album with an additional Five Thousand United States Dollars (US$5000) on completion. The Claimant failed to complete the album as he was contracted to do and thereafter terminated the contract.

[13] Mr. Bogdanovitch further alleges that the Claimant was unable to abide by the guidelines of the Defendant in his overall general conduct and the management of his career. Despite years of best efforts of the Defendant and investments, the genre was not commercially viable as the public did not respond well to the music that was put out and the Claimant himself did not have sufficient appeal to compensate. He denies that the Defendant owes the Claimant any sum at all, and in the unlikely event it is otherwise found, then there must be a set off of the amount owed by the Claimant to the Defendant amounting to approximately US$90,000.00., for cost and expenses incurred by the Defendant on the Claimant's behalf, which set off would extinguish any monies allegedly due to him

ISSUES

[14] In all matters involving breach of contract the court must first establish that there is a valid contract between the parties. However, in light of the fact that there is no challenge to the validity of the contract signed between the parties, the issues with regard to liability which fall for me to determine primarily relate to;

(i) the interpretation of the contractual terms;

(ii) Whether time was of the essence in the contract;

(iii) Whether the Defendant breached the contract by:

a. Failing to produce Music Videos

b. Failing to produce Album(s)

c. Failing to promote the Claimant

(iv) Whether it was the Claimant that wrongfully and prematurely terminated the contract.

[15] However in order for me to make a determination on the issues raised I must first examine the contract to establish the relevant contractual terms.

The Contractual Terms

[16] The contract was signed by both parties on the 12th of August 2004. It reads as follows:

"Management Agreement between DownSound Records and Delroy Chandler,

- It is understood that the above parties agree to the following:

-DSR is the exclusive managing entity for Delroy Chandler aka DYCR in all fields of the entertainment including comedy, movies, acting, recordings, DVDs and booking shows.

-DSR will produce one album for DYCR with an option to produce three (3) more albums within a three-year time period. Specifically, this means that after one year from date of signing the above parties will decide to continue or not;

-DSR will produce videos for said artist;

-DSR will promote said artist;

-It is understood that DSR will solicit outside agents to book shows and look for record contracts with outside companies.

-On local bookings that artist or outside promoters develop in Jamaica, DSR will be entitled to no percentage of said fees.

-On bookings in Jamaica developed by DSR the company will be entitled to 20% of booking fee.

-On bookings made outside of Jamaica DSR will be entitled to 20% of all fees

-All 3rd party booking agent's fees will be paid over and above the DSR fee and all other costs.

-With regards to a foreign recording contract DSR is entitled to 50% of contract.

-With regards to TV specials, movie acting contracts and all other outside engagements.

-DSR is entitled to 50% of all proceeds.

-DSR is entitled to 50 percent of the Publishing administered by DSR publishing company.

Agreed and accepted By: *Agreed and accepted By:*

Delroy Chandler *Josef Bogdanovitch"*

SUBMISSIONS

For the Claimant

[17] On this issue Mr. Christie made the following submissions on behalf of the Claimant:

(a) The contact created an obligation on DSR, as the exclusive managing entity, to produce at least one album and music videos; to promote DYCR; to solicit outside agents; bookings for shows; and recording contracts with outside companies. The true meaning and purpose of the Management Agreement was for DSR to increase DYCR's visibility and thereby improve his reputation; and increasing publicity and ultimately increasing DYCR's income. On a literal and plain interpretation of the clause, the parties agreed that DSR "will" produce one album for DYCR in one year. The word "will" in this context created a mandatory contractual obligation without any room for DSR's discretion. DSR

was legally obligated to produce an album for DYCR by the 11th of August 2005.

(b) The contract created a fixed term of one year for DSR to produce one album and provided the parties with an option to extend the Management Agreement for an additional three years. During the additional three years, DSR was obliged to produce three additional albums for DYCR. DSR essentially offered a contractual arrangement in which it committed to produce one album per year for DYCR and if the contract continued past the first year, DSR had a further commitment to produce three additional albums, and DYCR agreed. If the court were to observe an alternative interpretation to this clause, it should accept the one most favourable to DYCR based on the *contra proferentem* rule. This rule provides that, if there is any ambiguity, the words in a contract are to be construed against the party who proposed it for inclusion in the contract. Mr. Bogdonavich admitted quite early in cross-examination that the Management Agreement was prepared by DSR and that this clause was introduced by DSR itself. These circumstances support the application of the *contra proferentem* rule.

(c) The Management Agreement therefore mandated the production of three additional albums if the parties continued the Management Agreement beyond the first year.

Discussion

[18] Let me state from the outset that I am grateful for the submissions and useful authorities provided by counsel for both parties. However, in light of the length of these submissions and the number of authorities, and in the interest of time I will refrain from a verbatim reproduction of these submissions. Additionally, I will

not be quoting from all the authorities. However in my endeavour to do justice to the parties, I will ensure to apply the relevant principles emerging from these authorities.

[19] On examining the terms of the contract, I find that the contract was initially for a term of 1 year (herein after referred to as the "first term contract") with an obligation for DSR to produce an album within the one year. I arrived at this conclusion in light of the construction of the third clause of the contract which reads:

> *"**DSR will produce** one album for DYCR with an option to produce three (3) more albums within a three-year time period. Specifically, **this means that after one year from date of signing** the above the parties will decide to continue or not"*

[20] The terms indicate that in the event that the parties exercised the option to renew, the new contract period would have been for three years. That is, the parties would continue in a contractual relationship for an additional three years.

[21] By the end of that additional three years the Defendant was obligated to produce three additional albums. In light of the language of the parties used in the contract, I do not agree with counsel for the Claimant that there should have been a production of one album per year during this three (3) years period. Applying the literal meaning to the words used by the parties "Three more albums within three years' time period" clearly indicates that the time period for producing the three additional albums is three years. Additionally, there is no contra intention demonstrated on the evidence for me to hold otherwise. Therefore, there is no basis on which I can conclude that there was a term in the option to renew, stipulating the time for production to one album per year**.**

Did the Parties exercised the Option to Renew?

[22] There is no denial on the evidence that no album was produced at the end of the first year. Similarly, there is no denial on the evidence that both parties continued in the contractual relationship beyond the period of a year. Both

parties also agree that the contact was terminated after a period of approximately three years and eleven months. In this regard, the Counsel for the Claimant is asking the court to find that the parties exercised the option to renew.

[23] However, counsel for the Defendant is asking the court to find that the option to produce three more albums was an option that was exercisable by the Defendant and that option was not exercised. He further argues that the Claimant in this case, by his conduct over the following years, continued the relationship with DSR and consequently, DSR made the relevant investments and choices pursuant to its obligations under the contract. As a result, if the Court finds that DSR did not produce an album within the first year, the Claimant should be treated as having waived the time stipulation for the production of an album. (He relies on the authority of Charles ***Rickards Limited v. Oppenheim*** [1950] 1 KB)

[24] On my examination of the evidence, it is clear from the utterances of the Claimant that after the first year he continued in the contract with the Defendant on the basis of the first term contract. He testifies that at the end of the first year of the contract, he indicated his intention to terminate the contract. This could only relate to the contract for the first term of one year. He further states that DSR continued to assure him that they would perform their obligations under the contract and repeatedly gave him such assurances.

[25] Additionally, up 2008, when he sought to terminate the contract with DSR his reference to DSR's obligations under the contract relating to the production of albums, is "the production and release of ***a long awaited album***". The only inference that can be drawn from this evidence is that he was making reference to the Defendant's obligation under the first term contact. This is also an indication that the Claimant's motivation for continuing the contractual relationship with DSR was not on the basis of the option to renew but on the basis of an assurance by the Defendant to perform its obligation under the first term contract. I am strengthened in this view by the Claimant's reference to the

Defendant's obligation to the production and release of a long awaited album. In essence his expectation of the production of a single album after the contractual relationship continued beyond the one year is an indication that he had not continued with the impression that the option to renew was in fact exercised. Essentially, the Claimant by his own conduct demonstrated that he continued in the contractual relationship with the Defendant on the basis of the first term contract. Therefore, he cannot now insist on the terms under the option to renew for the production of the three additional albums. (See Charles ***Rickards Limited v. Oppenheim*****,** **Supra**)

Whether time was of the essence

[26] It is at this stage convenient for me to address an issue raised by both counsel as to whether time was of the essence in the contract.

Submissions

[27] Counsel for the Claimant submits that an implied term existed that time was of the essence of the contract. He takes the view that, the fact that Mr. Bogdanovich admitted under cross-examination that timing in promoting an artiste is critical to the artiste's success, the parties contemplated and DSR knew the importance of riding DYCR's popularity wave when signing the Management Agreement. (He relies on the authority of ***The Moorcock*** (1889) 14 PD 64).

[28] Counsel for the Defendant submits that:

(a) There was no provision for making time of the essence which is a specific contractual term in respect of which there must be mutual agreement. In the absence of mutual agreement of a time of the essence provision in the management agreement, the court cannot import such a term as this would violate an accepted principle in law that a tribunal should not in these circumstances import terms in agreements where there is clearly no evidence that the parties so intended.

(b) The Claimant's reliance on ***Moorcock*** is misconceived because to imply such a term would defy business efficacy and the contract would be unworkable if such a term were to be implied.

Discussions

[29] Despite the fact that some contracts may stipulate deadlines for performance, failure to comply with the deadline will not amount to a breach by a party unless time is made of the essence; or the time stipulated is determined to be a condition in the contract. Time is made of the essence by; (a) the parties expressly agreeing in the contract that the time fixed for performance must be expressly complied with or;(b) where it can be implied from the circumstances of the contract and the nature of the subject matter that the time stipulated in the contract must be strictly adhered to or; (c) where one party who is able and ready to complete has given notice to the defaulting party requiring completion within a reasonable time. The effect of the notice entitles the innocent party to terminate the contract in the event of a failure to comply with the terms of the notice. However, most of these cases are concerned with contract for the sale of land, lease, or tenancy. (See ***United Scientific Holdings Ltd v Burnley BC*** [1974] AC 90; In ***Union Eagle Ltd v Golden Achievement Ltd*** [1997] A.C. 514, PC) (***Mungalsingh v Juman*** [2015] UKPC 38).

[30] In the case of ***Charles Rickards Limited v. Oppenheim*** (Supra), a buyer of a Rolls-Royce motor chassis agreed for a body to be built upon it by a fixed date. The body was not completed by that date. However, after some time he served a notice on the other party to the contract, that unless delivery of the car with a completed body was effected within four weeks he would cancel the contract. The car was not delivered within the period of four weeks. At a later date the plaintiffs sought to deliver the car. The Defendant refused to accept it and the plaintiffs sued for the sum due to them under the contract. They argued "that no notice making time of the essence could be given in regard to contracts for work and labour". The court found that the Defendant was entitled to cancel the

contract. He was entitled to give a reasonable notice making time of the essence of the matter.

[31] Lord Denning stated that:

> *"If the defendant, as he did, led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made in effect a promise not to insist upon his strict legal rights. That promise was intended to be acted upon and was in fact acted upon. He cannot afterwards go back on it."*

[32] However Lord Denning did go on to say *that:*

> *"It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter.' The reasonableness of the notice must be judged at the time at which it is given."*

[33] The principle enunciated in the case ***Epsilon Global Equities Ltd v Hoo (Paul) et al. 2017] JMCA*** Civ 12 is equally applicable to this issue. At paragraph 178 of the Judgment in the afore-mentioned case Phillip JA stated:

> *"The law is clear and that case can therefore be distinguished from the case at bar as generally time is not of the essence for the sale of land, and in the instant case the agreement was for the forward sale of shares. There were no express words in* ***Graham v Pitkin*** *making time of the essence and so any intention to rescind the contract would have required a notice to do so. In the instant case, the nature of the transaction made the difference. Once the time stipulated had not been compiled with, the appellant committed a repudiatory breach and the respondents could either accept the same and rescind the contract or affirm the contract and if desirous of so doing, sue for damages"*

[34] The case of ***Bunge Corporation v Tradax*** CA ([1980] 1 Lloyds Rep 294) concerned a breach of contract for the sale of goods. The contract required that the buyers were to give notice of the probable readiness of the ships on which the goods were to be carried. The notice was given four days too late. One of the issues that the court had to consider was whether the stipulation of time was a condition or warranty, and whether time was of the essence.

[35] The court had this to say:

> *"As to such a clause there is only one kind of breach possible, namely to be late, and the questions to be asked are: first what importance have the parties expressly ascribed to this consequence? And, second, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole?' and 'In conclusion, the statement of the law in Halsbury's Laws of England, 4th ed., vol. 9 (1974), paras. 481-482, including the footnotes to paragraph 482 (generally approved in the House in the United Scientific Holdings case), appears to me to be correct, in particular in asserting (1) that the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in 'mercantile' contracts - with footnote reference to authorities which I have mentioned". (See the judgment of Lord Wilberforce)*

[36] On a careful review of the authorities my understanding of the law in this area is that; generally, time is not of the essence in relation to contract for the sale of land, unless it is specifically stated in the contract or can be implied from the circumstances, or one of the parties serve a notice making time of the essence. In relation to other contracts, and especially in relation to mercantile contracts, generally time will be considered of the essence unless there is indication to the contrary.

[37] Essentially, failure to comply with the stipulated time in mercantile contract and contract not related to sale or lease of land generally amount to a repudiation where the innocent part is entitled to rescind the contract and sue for damages. However, the innocent party does not have to accept the repudiation. That is,

instead of rescinding, the innocent party can choose to waive his right to the stipulation of time by affirming the contract whether expressly or by conduct.

[38] However subsequent to affirming the contract the innocent party can afterwards insist on compliance within a reasonable time. That is, once the defaulting party has been given reasonable time to perform the innocent party who had previously affirmed the contract can still rescind after reasonable time. In essence the specified date is replaced either by a reasonable time stated in a notice or by an implied obligation to complete within a reasonable time.

[39] It is clear from the evidence of both parties that this contract is a mercantile contract. Mr. Bogdonvitch admitted that the main purpose for which DSR contracted with DYCR was to make a profit, on its investment. That is, DYCR traded his time and artistic talent with DSR for the duration of the contract while DSR contracted to provide financial investment in DYCR's time and talent expecting to make a profit from this trade. Therefore in light of the afore-mentioned authorities, I hold that the time stipulated in the contract was a condition and therefore it was the intention of the parties that it was of the essence.

[40] I also make this finding in light of the fact that the parties found it necessary to insert a clause with an option to renew. It is therefore my view that the parties intended full compliance under the first term contract within the year. They therefore took into consideration that if there was any necessity to continue the contractual relationship beyond the year they would have to do so on new contractual terms. It is evident that the production of three additional albums were not the subject of the first term contract; neither was the obligation to produce an album under the first term contract subject of the renewable three-year contract.

[41] Therefore, if it is found that the Defendant's failure to produce the album within 12 months was not as a result of DYCR's failure to perform his obligation under

the contract, DSR would have committed a repudiatory breach. In that event DYCR would have acquired the right to either accept the repudiation and rescind the contract and sue for damages or affirm the contract and continue.

[42] In light of the evidence of the Claimant, I find that it was in reference to the first term contract of which he testifies that after registering to Mr. Bogdanovitch his intention to terminate the contract, he continued in the contract beyond the one year based on the assurances of Mr. Bogdanovitch that the Defendant would fulfil its obligation under the contract. In this regard I find that that on this evidence he would have continued in the contractual relationship with the Defendant beyond the time stipulated in the first term contract, granting the Defendant an extension of time to perform under the first term contract. That is, he would have waived his right to the stipulation of time only in relation to the 12 months.

Whether the Defendant Produced the Required Amount of Videos under the Contract

[43] The contract did not specify the exact amount of videos that were to be produced by Defendant for the Claimant. Nonetheless the Defendant agreed to produce "videos" for the Claimant. Therefore, in the event that the Defendant produced more than one videos for the Claimant, that part of the Defendant's contractual obligation to the Claimant would have been performed.

[44] The evidence of Mr. Bogdanovitch is that during the period of the contract that is 2004 to 2008 the Defendant produced two (2) videos for DYCR. One is called "Barber Chair". However on cross examination, he admits that "Barber Chair" was the subject of a separate agreement between DSR and TAD's International where TAD's provided him with the expenses for the production of that video. In fact, he agrees that the original agreement between himself and TAD's was for the production of two videos but due to the cost they agreed to do one instead. In light of that admission and by examination of the contract between TAD's and

the Claimant it is clear that, that contract was strictly between TAD's and the Claimant. Under the terms of that contract TAD's was obligated to produce two videos for the Claimant. Nowhere in that contract was DSR mentioned.

[45] Essentially TAD's had contracted or employed DSR to produce "Barber Chair" in order to fulfil TAD's obligation to the Claimant. Therefore, in light of the fact that "Barber Chair" was produced by DSR by virtue of a separate contract where separate consideration was provided by TAD's, I find that the production of "Barber Chair" does not amount to a partial fulfilment of DSR's contractual obligation to the Claimant to produce at least two videos. The implication of this is that DSR would have failed to produce the required amount of videos for DYCR during the contract period, having only produced one other in addition to "Barber Chair"

[46] I also note that the Claimant has included in his claim, damages for the failure of DSR to produce another video in addition to "Barber Chair" in relation to his contract with TAD's. However for the same reason that I hold that the production of "Barber Chair" does not amount to a partial fulfilment of the Defendant's obligation to produce video's for DYCR, I find that in failing to produce this additional video for TAD's, DSR would have been liable to TAD's for that failure. Additionally, unless there was an express provision in an agreement between DYCR and TAD's allowing DYCR to enforce the obligation, for his benefit in the contract between TAD's and DSR, DYCR's remedy would lie against TAD's and not DSR. *(See* ***New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd. (The Eurymedon)*** [1975] AC 154). This is in light of the fact that each of the parties had separate contract with TAD's (*See also* ***Dunlop Pneumatic Tyre Co Ltd v Selfridge Ltd*** [1915] AC.)

Whether the Defendant Produce an album for the Claimant

Submissions

By Mr. Christie for the Claimant

[47] On this issue the following is a summary of Mr. Christie's submissions:

(1) The album entitled "Delroy", which was produced by TAD's International does not satisfy DSR's obligation to produce an album for the following reasons:

(a) That Recording Agreement was procured by DYCR himself, without the assistance of DSR. DSR merely provided its consent to enter this agreement, and that recording agreement only had two parties involved namely DYCR and TAD's International.

(b) DSR has not provided the court with any evidence that it produced or collaborated on the production of the "Delroy" album. Mr. Bogdanvitch admitted that the album booklet, which shows the different persons involved in the production of the album, does not mention DSR at any point. DSR, even at the point of trial, has not disclosed in its List of Documents or tendered in evidence a copy of an album or its work-in-progress

(c) DYCR's evidence has been that DSR has not produced an album for him, and this has not been challenged under cross-examination;

(d) The witnesses for the Defendant, Mr. Bogdanovicth and Ms. Rowe gave materially contradicting evidence. Mr. Bogdanovitch claims an album was produced in 2007/2008; but, Ms. Rowe admitted under cross-examination that DSR did not produce an album for DYCR. Mr. Bogdanovich admitted under cross-examination that

the album he speaks of has not been "finalized" and the compilation of the album's contents has not been determined by DSR. Mr. Bogdanovich claims that "produce" means making the album ready for processing and distribution; but, since he admits that even the compilation for the album that he speaks of has not been determined, that the artwork for the album is not complete, the album cannot be ready for processing and distribution.

By Mr. Chad Lawrence on behalf of the Defendant

[48] Mr. Lawrence's submissions are summarised as follows:

(1) Any interpretation of what is meant to" produce an album" must be derived from the evidence of an accredited witness who has the competencies upon which the court can rely. The Defendant Company satisfies the requisite expertise in this regard. The Claimant has not adduced any evidence to controvert the Defendant's evidence as to industry standards in so far as they relate to producing an album and the commercial viability thereof. The court must appreciate that to "produce" an album has a different definition in music as explained by the Defendant's CEO Mr. Bogdanovich. There is a distinction between "producing" and "releasing" an album. A company would not undertake to release an album where it would defy business efficacy to release such an album; when there is a possibility that an artiste may not gain sufficient market interest for the company to obtain a return on their investment.

(2) The Defendant had produced an album and separate and apart from that, the Claimant's album titled "Delroy" was released in 2005 while under the management of the Defendant Company through a collaborative effort with TAD's International Limited.

(3) The only binding agreement was to produce one album, and this duty was discharged. A commercial decision in keeping with industry standards was made not to release any more albums for the Claimant as there was no market appeal. The release of this album for the Claimant would place the Claimant's reputation at risk with a consequential loss to the Defendant.

(4) It is understood by the evidence of Mr. Bogdanovich that to "produce" an album is a continuous process leading up to the release. His evidence indicates that an album will be released where the executive producers of the music believe that all the relevant components are present for an album to be a success. The contract is silent on this issue and consequently, a term needs to be implied to give substantial effect to these relevant considerations. An officious bystander would have concluded that this must have been what the parties intended in light of the industry standard.

(5) The case of ***Moorcock*** extends the test of business efficacy. Without the contract being interpreted as having the obligation to "produce" an album be dependent on the commercial viability to do so, the contract would have effectively been unworkable. If the Defendants were obligated to release an album where it was not commercially viable to do so, it would have placed both parties at risk of irreparable damage. The compilation is tantamount to the production of the album. Its commercial viability is determined by other factors thereafter including market surveys, artistic works, and promotional evaluations to determine its readiness.

(6) The Claimant's own admission is that within a few months from signing the contract he completed all the tracks for the album. Therefore, whether or not the Defendant wishes to release the compilation of tracks as an album is immaterial as the tracks and compilation thereof were produced

at the Defendant's expense and in satisfaction of the relevant clause of the management contract.

(7) The material issue is that in producing a compilation of the tracks, the Defendant Company satisfied its obligation in producing the album. Having done so, the only process that remains is related to the determination of its commercial viability which is by market analysis. The music industry standard is explained by the witness of Junior "Heavy D" Fraser, a pioneer and expert in the music industry that an album is not released unless the label sees sufficient market interest to indicate a strong enough response to assure at least a chance in this highly competitive market of a return on investment**.**

Discussion

What was the Common intention of the Parties?

[49] On an examination of the evidence it is accepted by the Defendant that DSR had a responsibility to produce at least one album. However in light of the fact that there are contending views in relation to extent of this obligation to "produce" an album, I must first decide what the obligation to produce entails.

[50] I first begin with the application of the ordinary and literal meaning of the word. However where this gives rise to an ambiguity or it is clear from the conduct of the parties that at the time of entering into the contract the parties intended a meaning other than the literal meaning then this court will apply the meaning intended by the parties on the formation of the contract.

[51] The definition of the word "produce" from the **Cambridge Academic Content Dictionary** (Cambridge University Press) in the business sense is "to make or grow something to be sold". The Claimant, DYCR is contending that DSR breached the contract by failing to "release" the album; essentially intimating that this was a part of the Defendant's obligation under the contract. He further states

on cross examination that he believes it was within his authority to tell DSR to release the album for him based on the fact that they signed that within the 1st year they would put out an album for him. It is clear from the contract that the word “release” was not one of the terms mentioned in the contract.

[52] Mr. Bogdanovitch in cross examination states that the Defendant has produced an album but just did not release it. He testifies that “produce” means making the album ready for processing and distribution. He does not agree that the production of an album is not complete until it is released. At this juncture I consider it necessary for me to define the word “release.” According to the **Cambridge Academic Content Dictionary** (Cambridge University Press) “release” in terms of the commercial sense means “*the act of making a new product available to buy or a new film available to see”.* Counsel for the Defendant has submitted that in arriving at an interpretation of the word “produce”. I should be mindful of industry standard and the efficacy of business. For support he relies on the case of ***The Moorcock***.

[53] The facts in the **Moorcock case** are that the owners of the ship called the “*Moorcock*” contracted for space at a jetty in order to unload the ship’s cargo. While the ship was docked, the tide caused the hull of the ship to hit a ridge located in the region of the river bed where the ship was docked. This caused damage to the ship. The plaintiff argued that the owners of the wharf were responsible to ensure that his vessel would remain safe while it was docked. The wharf owners, in their defence, claimed that there were no provisions in the contract for them to ensure the safety of the vessel, neither could they have foreseen the damage caused to the vessel.

[54] The issue before the court was whether there was an implied warranty in the circumstances. The court ruled that there was an implied term that the wharf owners had taken reasonable steps to ascertain the state of the riverbed adjacent to the jetty. If they had taken such reasonable steps, then they would have

discovered the ridge of rock and would have been under a duty to warn the ship owners of the potential hazard.

[55] It was the view of the court that, any implied warranties must be based on the presumed intentions of the parties. An implied warranty may be read into a contract for reasons of *"business efficacy" and in order to maintain the presumed intention of the parties"*. (See the Judgment of Bowen LJ)

[56] The importance of this case is that terms will only be implied into a contract where there is a finding that, the particular term was the presumed intention of the parties. In the case of ***Rugby Group Ltd v ProForce Recruit Ltd*** [2006] EWCA Civ 69*,* the parties entered into a service cleaning agreement whereby they contracted that the "*contract will be of a minimum two-year period and will be re-negotiable at the end of that period. During that period ProForce will hold preferred supplier status".* They later disputed over the meaning of the term "preferred supplier status*"*.

[57] Lord Justice Mummery stated that the fact that "preferred supplier status" is not defined by the parties anywhere in the agreement, and the expression does not, in his view, have an obvious natural and ordinary meaning, its meaning can only be properly determined in the context of the agreement read as a whole and of all the surrounding circumstances. (See paragraph 25)

[58] Having made the observation that the remainder of the agreement and ProForce's standard terms and conditions did not throw any light on the meaning of the expression. He *stated at paragraph 28 that;*

> *"It would be necessary to explore the factual hinterland of the agreement in order to see whether illumination of the meaning of the expression could be found: for example, in evidence showing that the parties had agreed upon the meaning of the terms or had a mutual understanding of the term and were using it in the agreement as a shorthand expression of their agreement or understanding".*

[59] Further at paragraph 29 he states*;*

> *"The exploration of the surrounding circumstances is not, in my view, as completely ruled out as Field J held, either by the authorities on the admissibility of extrinsic evidence or by clause 9.2 of the agreement".*

[60] He continued at paragraphs 30 to 31*;*

> *"As for the authorities Mr Sweeting cited a pertinent passage from the judgment of Kerr J in* ***The Karen Oltmann*** *[1976] 2 Lloyds Rep 708 at 712:*
>
> *"I think that in such cases the principle can be stated as follows. If the contract contains words which , in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would ex hypothesi reflect the meaning which both parties intended. Also, as stated in Chitty on Contracts para 12. 119, evidence of facts about which the parties were negotiating is admissible to explain what meaning was intended and evidence of what the parties said in negotiations is admissible to show that the parties negotiated on an agreed basis that the words used bore a particular meaning".*

[61] In light of the reasoning in that case, it is clear that the court can examine the evidence surrounding the negotiation for the contract in order to arrive at a determination as to what was intended by the parties. That is, whether it was negotiated on an agreed basis that the words used bore a particular meaning*.*

[62] Counsel for the Defendant submits that*, "*Without the contract being interpreted as having the obligation to produce an album be dependent on the "commercial viability" in keeping with industry standards and market appeal, the contract would have effectively been unworkable and that it would have placed both parties at risk of irreparable damage. However, it is my view that the necessity to imply such a terms as "commercial viability" or "business efficacy" only arises

where the issue was not considered by the parties and the court finds that that would have been their intention had they considered it. It is not applicable to a situation where based on the conduct of the parties and the evidence it is clear that the issue was considered at the time of entering the contract and the parties agreed on a position, but one party later decides to change that position after the formation of the contract.

[63] In the instant case, it is the evidence of both parties that DSR did a test run with DYCR's single "Misunderstanding" prior to contracting with DYCR. The inference from the evidence of both parties is that the test run on "Misunderstanding" was to test the commercial viability of DYCR's talent. It was based on the public's response to "Misunderstanding" that DSR entered into the contract with DYCR to produce the album in issue.

[64] The Claimant testifies that, it was agreed that he would do a record for DSR and depending on the success of the track, ("Misunderstanding") Mr. Bogdanovich, on behalf of DSR, undertook to sign the Management Agreement with him. He further states that "Misunderstandings" was a success blazing local dancehall circuit and jumping the local Top 40 Charts and DSR gave him an advance payment for the track in the amount of Fifty Thousand Dollars ($50,000.0.).

[65] Mr Bogdanovitch indicates in his evidence that "Misunderstanding" was DYCR's best work yet in light of the evidence of both parties, it is apparent that it was based on the initial performance of "Misunderstanding" that DSR entered into the Management Contract contracted with DYCR. I take the view that Mr. Bogdanovitch was impressed by the initial performance of "Misunderstanding" and formed the impression that it would have been profitable for DSR to contract with DYCR. He would have addressed the issue of commercial viability prior to entering into the contract in light of his view of the performance of "Misunderstanding". Consequently, I find that having previously assessed the commercial viability of producing an album for DYCR, DSR took a calculated risk to entered enter into the contract with DYCR.

[66] Furthermore, I note that the term “produce” is used twice in the contract. Mr. Bogdanovich has asserted that “the Defendant successfully carried out the tenets of the contract with the Claimant by providing him with opportunities to perform at stage shows, producing videos, successfully doing recordings of an album, and promoting him throughout the Caribbean and on international music radio stations”.

[67] I take into account that in his evidence in relation to the production of these videos, he made no distinction between the compilation or arrangement of the video and making the videos available to the public. Nowhere in his evidence did he say that DSR produced and then released the videos. Therefore, there is no dispute that the meaning ascribed to “producing videos” by the parties included making them available to the public, that is releasing them. An examination of the contract reveals that there is nothing in the contract assigning a different meaning to the word “produce” as it relates to videos and as it relates to album.

[68] There is no doubt on the evidence that DSR was in the stronger bargaining position, being the party with the financial means to invest in the Claimant. Mr. Bogdanovich admitted on cross examination that DSR was the party that drafted the contract. For these reasons the contract can be narrowly construed against DSR. (See ***O'Sullivan v. Management Agency and Music Ltd.*** [1985] 3 All E.R. 351 (Eng. C.A.)

[69] I find that in spite of Mr. Bogdanovich’s assertions on cross examination that producing an album does not include release, at the time of drafting the contract if that was the meaning the parties intended to ascribe to the word “production” he was in a position to make this distinction. Accordingly, I find that the intention of the parties was for the word “produce” to have the same meaning as it relates to both videos and the album.

[70] It is apparent from the conduct and the assertion of the parties that the production of the videos as used in the contract meant making the videos available to the

public. It is clear from the evidence of the parties and accepted that the offer of the advance of $ 10,000 US, related to the expected sale of the album. Additionally, on Bogdanovich's evidence DSR produced the album. Therefore on his version of the evidence DYCR's dissatisfaction surrounded only the release of the album. Essentially if the meaning of the word "production" between the parties did not include "release", I see no basis on which Mr. Bogdanovich would have offered $10,000 US, to the Claimant for him to remain in a contractual relationship with DSR. This is in light of his evidence that as far as he was concerned DSR would have discharged its contractual obligation to DYCR, and according to his evidence it was DYCR that was refusing or failing to perform under the contract.

[71] It is therefore my view on the evidence that the terms drafted by DSR, the party with the expertise, were properly contemplated and the intention conveyed to DYCR. I find that this intention was to compile and release the album within a year. Consequently, I find that it was the common intention of the parties that the album was to be compiled and release within a year.

[72] Therefore where one party, especially one with experience and expertise in a particular field, and based on his own calculation of the benefits, voluntarily entered a contract with another party, that party cannot turn around and refused to comply the terms of the contract because it turns out that his projections in terms of benefit were not as much as he calculated, due to market turn down. For example, where an artist is contracted to perform at a stage show at an agreed price, the promoter cannot refuse to pay the artist because he did not get the crowd turn out; or the profit he expected or the audience did not like the artist's act. These are hazards of the industry and forms part of the risk the promoter would have undertaken in entering such a contract.

[73] As it relates to the issue of business efficacy, counsel for the Defendant raised the issue of the Defendant's financial investment. However it must also be born in mind that the Claimant did also invest some things of value. These are his time

and his talent. These would in law amount to sufficient consideration. It is trite law that for there to be a valid contract there must be consideration. It is not the duty of the court to enquire into the adequacy of the consideration. (See ***Thomas v Thomas*** [1842], 2 QB 851; 114 ER 330 and **Chappell & Co Ltd v Nestlé [1960] AC 97**)

[74] The fact of the matter is this, the court will not conduct a valuation of the consideration of one party over the other in order to uphold the non-performance of the party providing the consideration of greater monetary value under a contract, in light of his view that performance will not materialize in the projected financial returns. In the instant case, I have no doubt that at the time of entering into the contract, DSR agreed to compile and release the album within a year. Therefore, there is no basis for this court to make a finding that there was a presumed intention that the time period for release was subject to commercial viability.

[75] I note that Mr. Bogdanovich, testifies that an album was produced in 2007 to 2008 and ready to be released but it is not commercially viable to be released. He further states that it will be released where the demand is believed to be attractive or supportive for it to be released. However, he admitted under cross-examination that the album he speaks of has not been "finalized" and the compilation of the album's contents has not been determined by DSR, and the artwork for the album he speaks of is incomplete. He further testifies that there are times when new material is being recorded and tested and added to the final product and that he has not yet decided what the compilation is going to be. In this regard I agree with the submissions of Counsel for the Claimant that, since Mr. Bogdanovich admits that even the compilation for the album that he speaks of has not been determined, the album cannot be ready for processing and distribution.

[76] In spite of the fact that it is the Claimant that bears the burden of proof, where the Defendant has a legal responsibility to carry out an obligation, albeit in private

law and the knowledge of performance of that obligation rest with him, it is my view he has an evidential burden to discharge. Mr. Bogdanovich agrees that the existence of this album is not mentioned in the Defendant's list of document. I find that in light of the fact that this is one of the issues that was raised from the outset by the Claimant in his statement of case, if this album in fact existed I see no basis why it would not have been mentioned in the list of Documents of the Defendant and be made available for inspection and produced in court.

[77] Additionally, Ms. Ava Rowe, the administrative manager and director of the Defendant company admits on cross examination that the only album she knows of was done by TAD's and that TAD's is the producer of that album. She also agrees that Mr. Bogdanovich has not produced an album for DYCR. Therefore, I reject the evidence of Mr. Bogdanovich that this album even exist***.***

Whether the Album "Delroy" was Co-produced by TAD'S and DSR.

[78] When I examine the agreement with TAD's International dated the 22nd of August2005 there is no mention of DSR anywhere in this agreement whether as co-producer or otherwise. Mr. Bogdanovich in his evidence stated that by collaborating he meant DSR played a part in the production of the album "Delroy". However, on further cross examination he admits that back then there was a booklet that indicated everyone that played a part in the creation of an album. He further states that he does not recall DSR being mentioned anywhere in the booklet for "Delroy".

[79] In light of the foregoing and in addition to Ms. Rowe's evidence that "*Delroy"* was produced by TAD's, I find that the Album "*Delroy*" was not co-produced by or in collaboration with DSR. That is, "*Delroy"* was the subject of a separate contract between the Claimant and TAD's. They were the only contracting parties in relation to that album. DSR was not the facilitator of that contract. DSR's permission had to be sought by DYCR to prevent a breach of their contractual

relationship. However, as it is correctly stated by counsel for the Defendant, the Defendant cannot take credit for the production of "*Delroy*."

Whether the Defendant Failed to Promote the Claimant

[80] The evidence of the Claimant is that as an entertainer it is vital to his continued success to have music produced and distributed, and played publicly to maintain his visibility in the music industry and in the eyes of the public and that DSR stifled the momentum he had generated prior to signing the contract. He claims that DSR's failure to produce "videos" for him amounted to the Defendant's failure to promote his music career. However on cross examination he admits that he performed at the stadium in Guyana in 2007 when he was with DSR.

[81] However it is the contention of Mr. Bogdanovich that the Defendant provided the Claimant with work on stage shows and Dance Hall engagements sufficient to place him in the mainstream industry but he could not survive as the audience and the pubic did not respond favourably to him. Additionally, The Defendant hired popular actors, such as Titus and Fancy Cat to bring him to a wider audience which found him entertaining but could not he sell records and the request by promoters for the Claimant continued to decrease.

[82] He asserts that dub poetry is not that commercially viable of a genre. However, he admits that as the manager he needed to do more work for that artist than for the main stream dancehall artistes. When asked, if based on his experience in the industry and as the manager of a dub poet artiste, should he be booking him on shows in addition to dancehall, he agrees that there might have been a few poetry readings but what he did differently in promoting DYCR, is that Dance Hall dancehall has an easier and a bigger fan base. He agrees that not putting out an artist's music could possibly affect his popularity.

[83] However, he testifies that DSR also put some advertisement out. He gave examples of (a) DYCR's performance at millennium in Nassau, Bahamas being advertised by radio stations. (b) He caused the artist DYCR to record a song

publicly celebrating the victory of Veronica Campbell for winning gold at the Olympics. Veronica won that race on Friday, and by Saturday morning all the Radio stations had a copy of this song. He states that for the Defendant that is promotion as best as it could be. He agrees that this was an expressed distribution of a track. He did not pay any of the radio station for this. In the four years he doesn't recall paying for any radio promotion. However, he further agrees the production of two (2) videos in four years for DYCR was not too reasonable.

[84] Mr Bogdanovich further admitted on cross examination that DSR produced approximately three videos per year for Ishawna, another Dance Hall artist. However on re-examination he states that the reason for producing more videos for this other artist than for the Claimant is because she was generating bookings and incomes. He said DSR continued to promote her as her reach was expanding and she was getting jobs in new cities in USA and Canada.

[85] The witness for the Defendant, Ms. Ava Rowe gave evidence that:

> "DSR promoted the Claimant on radio, street, newspaper and advertisement. The Defendant's investment in Mr. Chandler was significant and included producing videos for promotional purposes, radio promotions, public appearances, interviews and some live performance bookings."

[86] She further states that for "Misunderstandings" the Defendant's records indicate that this work had poor record sales despite significant promotion and marketing, as for the period beginning September 2004 and ending December 2005, only 915 records were sold with sales totaling J$51,431.00 which by all standards in the music industry is dismal. However, on cross examination she admits that the Defendant has no documentary evidence of these expenditures or record sales. She also admits that there was no music video for the single "Run Veronica Run". Additionally, she agrees that in light of the fact that her evidence is that the Claimant's records were not being sold**,** music videos would have helped in promoting the artist.

[87] The Defence witness Junior Frazer, admits that:

> *"in order to promote the Claimant, you would also want to do several or many music videos to bring him into the market space. If a manager agreed to produce a music video for a dub poet artiste in order to promote that artiste, videos must be done to bring him into the music space. On average per year, there are no fixed numbers of music videos an artiste should do to get him into the public space it depends on the song that is coming out per year. Two (2) music videos over the period of four (4) years does not assist the Claimant's promotion."*

[88] Mr Christie submits that:

(1) DSR signed DYCR when he was popular and recognized as an award-winning dub poet DSR failed to capitalize on DYCR's popularity gains that he made with a novel genre breaking into mainstream Jamaican music. DSR has obliterated all those gains made by DYCR, as there is never a guarantee that such momentum can easily be regained.

(2) Mr. Bogdanovich has admitted, as an experienced individual in the music industry, that the production of two music videos for an artist over the period of four years is "*not too reasonable*".

(3) Mr. Bogdanovich admitted under cross-examination that greater effort was required for the promotion of DYCR in light of his novel area of entertainment – reggae dub poetry. The evidence shows that DSR did nothing above or even up to the standard for promoting its other artistes who were in mainstream entertainment (dancehall and reggae) for DYCR

(4) It is reasonable for the court to take judicial notice that the production of videos for DYCR would contribute to the promotion of his artistic works to his audience Therefore, the failure to produce a reasonable number of videos was a further failure to promote DYCR's career.

(5) Both parties agree DYCR's career declined after he entered the Management Contract with DSR. Both DYCR and DSR gave evidence

to show that DYCR was a “popular” artist before signing the Management Contract. Mr. Bogdanovich ultimately admitted that DYCR was popular before being managed by DSR. There is also DYCR’s biography, which confirmed his popularity before the Management Contract was signed.

(6) This decline in DYCR’s career supports his claim that he was not reasonably or properly promoted by DSR. DYCR was not a one-hit wonder, nor was he an overnight sensation. His career grew steadily over the years, from which the Court can infer that there was indeed a market for his work, contrary to DSR’s assertions.

(7) DSR should have taken steps to maintain and increase the artists’ visibility in the music industry and in the eyes of the public; whether it be literal or artistic, reputation and public appearance is paramount to the artist’s reputation. DSR’s failure to produce the album and to effectively promote and manage DYCR’s career while it was his exclusive manager stifled the momentum that DYCR had generated.

[89] Mr. Chad Lawrence submits that:

(1) There is no standard as to how many videos should be released and how often for an artiste to be promoted. What is reasonable in the circumstances is dependent on the commercial viability of the artiste and the income he will generate for the production company to be able to further invest in promoting his career. This was made clear in re-examination of Mr. Bogdanovich in relation to the production of produce 3 music videos per year for Ishawna, an artiste who was recently on his label in comparison to only two for the Claimant over four years.

(2) This is implicit in the simple logic in the music industry, that although a management team will attempt to promote an artiste as efficiently as possible, the success of the artist is dependent on the response of the market and the ability of the artiste to generate the crowd or fan base

appeal and consequently income that would be used for re-investment in furthering his career.

(3) The evidence demonstrates that none of the two music videos that were produced for the Claimant gained him any additional traction and the Defendant Company continued to suffer loss as the Claimant was not market attractive and therefore was not generating income.

(4) The time in which this relationship existed (2004-2008), music videos were not the dominant means of promotion for obvious reasons. At the time, the dominant social media and online presence did not exist at the time. Radio promotion remained the dominant and most efficient means of promotion in the period of 2004-2008 and the Defendant has submitted evidence of the amount of radio promotion which was done for the Claimant.

(5) DYCR has submitted no evidence of having ever done a music video before signing to DSR, making his music video for “Misunderstandings” a highlight of his career. The evidence throughout the trial indicates that the Defendant Company did everything in their power to promote the artiste by means that were most efficient in that time period and did not waste expenses on music videos that would not gain the artiste any further traction and incur further expense for the Defendant Company. The Defendant’s obligations under this aspect of the contract were discharged.

[90] In relation to other fields of entertainment he submits that:

(1) The court ought to be cognizant of the fact that this is a management contract and the primary duties of DSR were to manage the affairs of the artiste which included managing opportunities that would have arisen. It provides no obligation whatsoever on the Defendant to seek these opportunities. Consequently, the Defendant could not manage what was not in existence. It is abundantly clear that DSR being a reggae/dancehall

entity, was targeting the popular culture of reggae/dancehall for DYCR's career.

Discussion

[91] In order for me to determine whether or not the Defendant failed to promote the Claimant I must determine what is meant by the term "promotion". The definition of the word "promote" according to the *Cambridge Academic Content Dictionary* (Cambridge University Press) is *"to encourage people to buy or want something, through advertising, offers of lower prices, special events,* etc." Therefore in order to fulfil this obligation under the contract, during the life of the contract DSR assumed the responsibility to expose the talent of DYCR to members of the public in order to encourage or persuade them to buy or want his product. At this juncture the question is, did DSR discharge this obligation.?

[92] The Defendant was obligated under the contract to produce more than one videos, that is at least two for the Claimant. However, the responsibility to promote the Claimant was not so limited. That is, the promotion of the Claimant was not limited to the production of videos but could have been by other means in the music industry at time.

[93] Whereas the Defendant cannot be held liable for the public response, the Defendant would be liable for any lack of effort to encourage, members of the public to consume or want to consume the Claimant's art. I will at this point address the complaint of the Claimant in relation to the poster. There is nothing in his evidence and nothing in witness statement that he expressed any prior disapproval to the poster being published. The fact that the public did not accept it cannot by itself be treated as a breach of the DSR's responsibility to promote him. On the face of it there is no negative connotation that is readily portrayed.

[94] The Claimant being the Rastafarian would have been in a better position to understand the culture and the perception of the public in this regard. There is no evidence that he conveyed any such information to Mr. Bigdanovich, and that

Mr. Bogdanovich nevertheless persisted with the particular promotion. Where the Claimant willingly participated the particular act, which was intended to promote his career, he cannot claim that it is a breach of the contractual terms because it did not produce the desired effect.

[95] However, the fact that the contractual relationship continued, and the fact that DSR would have become aware of any negative connotation this had if any on the public's perception of DYCR as an artist, DSR would have had a responsibility under their obligation to promote DYCR, to do damage control. That is to present to the public a more acceptable image of DYCR. On DYCR's admission the Defendant did take corrective measures by redoing the poster.

[96] Nonetheless, I find that the Defendant DSR did not sufficiently promote the Claimant. While it is accepted that the performance of this obligation cannot be measured on the public's acceptance or rejection of the Claimant it has to be measured on the effort of DSR and the mutual expectation of the parties at the time of entering into the contract. That is, the common intention. Despite the fact that I was not presented with any precise standard of measurement in the contract counsel for the Claimant suggests that it should be based on reasonableness. Reasonableness would have to be dependent on an objective standard. This is where I find that the industry standard would be applicable. The Defendant's own witnesses, Mr. Bogdanovich, and Mr. Junior Frazer have admitted that by industry standards two videos over four (4) years is not reasonable for the promotion of the Claimant. In any event the Defendant can only be credited with the production of one of those videos.

[97] Therefore despite the fact that the Defendant's witnesses testified that: "The Defendant used its resources and network to promote Claimant, all three (3) witnesses accepted the fact that music videos would have assisted in promoting the Claimant. At least two of those witnesses one of whom is the executive director of the Defendant Company has essentially admitted that the production of two videos over a period four years is insufficient promotion by the Defendant

for the Claimant. Therefore, I accept the evidence of the Claimant that the failure of the Defendant to produce in excess of the one music videos during the life of the contract indicates a failure by DSR to promote his music career. Consequently, I find that the Defendant failed to sufficiently promote the Claimant over the contractual period.

[98] In light of the fact that Counsel for the Claimant has raised the issue that the Defendant should have promoted the Claimant in other areas mentioned in the contract, I am obliged to briefly address this issue. I am mindful of the fact that Mr. Bogdanovich said there could have been some poetry reading**.** However, he did say that the dancehall fan base was easier.

[99] The history that Claimant has given with regards to his talent, exposure and interest is that he has always had a passion for music. His prior performances, related to sound systems, clubs, and stage shows in the genre of reggae and soca. All throughout his evidence his focus was on the DSR's failure to promote and release his album which included the production of videos. Additionally, his evidence indicates that his complaint to the Defendant over the three years and eleven months was in relation to his promotion in relation to music. There is no indication on the evidence that he had any interest, prior experience or exposure in other areas; or that there was any opportunity in other area for which he was denied.

[100] I take note of the fact that the contract has no express provision regarding production in the areas of movie, comedy etc. The Claimant admits that the test run was based on the single "Misunderstanding". Therefore the implication is that he knew and accepted that dance hall and reggae music were the Defendant's main area of interest when he entered the contract

[101] Consequently, on my reading of the contract and the conduct of the parties, the obligation to promote and produce was in the area of music and the obligation with regard to the other areas mentioned in the contract was to manage.

Whether the Claimant had a right to rescind the contract

[102] Having established that:

(a) The Claimant had waived the stipulation of the 12 months for completion under the contract;

(b) The Defendant had failed to;

(i) Produce at least 2 videos and produce an album for the Claimant

(ii) Failed to promote the Claimant;

The issue which now lies for me to determine is whether the Claimant by terminating the contract in July 2008 had by that time derived the right to rescind the contract.

[103] The answer to this question is dependent on whether the Claimant having affirmed the first term contract after the first repudiation was entitled to terminate the contract after an additional two years and eleven months. In essence the evidence of the Claimant is that he terminated the contract after three years and eleven months because the Defendant did not give him a time as to when he would release the album. Therefore despite the fact that there is no evidence that after affirming the contract the Claimant served a notice stipulating a time for completion, the issue I must determine at this juncture is whether a right of rescission arose on the basis that the Defendant was given reasonable time to complete.

[104] In the case of ***Universal Cargo Carriers Corporation*** v. ***Citai. Citati*** [1957] 2 Q.B. 401, by a voyage charter party dated June 30th, 1951, the Catherine D. Goulandris was chartered to load at Basra, a quantity of scrap iron for carriage to Buenos Aires. By the charter party it was agreed that "cargo to be brought alongside in such a manner as to enable the vessel … to load … the cargo at

the rate of 1,000 tons per weather working day. … Time to commence 1 p.m. if notice of readiness is given before noon and at 6 a.m. next working day if notice given … after noon … notice of readiness to be given to shipper. … Time lost in waiting for berth to count as loading time."

[105] The ship arrived at Basrah on July 12, but the charterer failed to nominate an effective shipper so she was sent to the buoys where she remained until July 18. On July 18, three days before the lay days were due to expire under the charter party, no cargo having been provided, the owners cancelled the charter, re chartered the ship to another charterer and ordered her away from Basrah. She sailed on July 23. The charterer's failed to find a cargo and the owners refused to accede to his demand to detain the ship. The owners claimed damages for breach of the charter party on the grounds that, (i) the breaches alleged, namely, in failing to nominate a shipper or a berth or to provide cargo, were breaches of conditions, and (ii) the charterer's conduct amounted to a repudiation of the charter party. The charterer denied any breach and counterclaimed for damages for wrongful repudiation by the owners

[106] At page 417 Devlin J stated that:

> “Rescission is justified if there is inability to perform the contract within a reasonable time within which performance must take place. The case is a fortiori if a party to a contract shows that he is unable to perform it whatever time for performance may be given”

[107] He further stated that:

> “Here, although the charterer never in fact said that he was going to break the charterparty, his conduct and the cumulative effect of the facts found were such as to justify the conclusion of repudiation.”

At page 430 he pointed out that:

> "… a party to a contract may not purchase indefinite delay by paying damages. Further: "When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind".

[108] In applying the reasoning of Devlin J in the above-mentioned authority to the instant case I take the view that rescission is not only justified if there is ***inability*** to perform within a reasonable time but also where there is a clear indication of an ***unwillingness*** to perform within a reasonable time. That case also indicates that there need not be any direct verbal or written expression from the Defendant that he does not intend to perform his obligation under the contract. His conduct can justify that conclusion.

[109] I find that in addition to his failure to produce any evidence of the album which he alleges that he produced Mr. Bogdanovich has clearly demonstrated that to date he has no specific time line timeline as to when, if ever the album will be released. His evidence is that it is not commercially viable. Therefore, the Claimant would have been justified in anticipating that DSR did not intend to compile a finished product and release the album within a reasonable time.

[110] Essentially the Claimant can also rely on the principle of anticipatory breach. This is evidenced by an expressed declaration of non- performance or one clearly demonstrated by conduct. That is, if the behaviour of the Defendant is of such that it would lead a reasonable person to conclude that he has no intention of fulfilling his obligations prior to the time fixed for performance, and in the instant case, within reasonable time. Such evidence is sufficient grounds for the Claimant to rescind the contract on the principle of anticipatory **breach**. (See **Universal *Cargo Carriers Corp. v Citati (No.1)*** [1957] 2 QB 401, at 436 and ***United Scientific Holdings Ltd v Burnley*** *BC* [1974] AC 904, ***Geden Operations Ltd v Dry Bulk Handy Holdings Inc M/V "Bulk Uruguay"*** [2014] EWHC885 (Comm)).

[111] I accept the evidence of DYCR that before the end of the First Term contract he did all the work that he was required to do to fulfill his obligation under the contract. I do not accept the evidence of Mr. Bogdanovich that the Defendant was handicapped by the Claimant's, reluctance to work. This is against the background that despite Mr. Bogdanovich's assertions that the Claimant was a failed artist, he agrees on cross examination that the Claimant had good work ethics.

[112] Mr. Bogdonovitch agrees that DSR permitted the Claimant to enter the contract with TAD's approximately few days after the stipulated time for the end of the first term contact. Based on the evidence of the parties, the contract with TAD's was performed within the stipulated period and the album was release while DYCR was still contracted to DSR. Therefore, it is my view that this is a sound basis for me to judge DYCR's work ethics.

[113] Additionally, I take the view that had it been that DYCR had outstanding work to perform for DSR, the Defendant would not have permitted him to contract with a third party to perform the same type of work. That is, while he was in breach of his contractual obligations with DSR. Therefore, I accept the Claimant's evidence that he did not fail to go into the studio at any time; that he was always willing and did the recording for the album. I accept his evidence that the amount of tracks requested by the Defendant to be completed was done. I further accept his evidence that there was no need for him to be encouraged by the Defendant to work at his art.

[114] I also take the view on the evidence that the Defendant would not have made a monetary offer to persuade the Claimant to remain in the contract in circumstances where;(a) the Claimant was the party in breach and (b) the Defendant was reluctant to continue in the contract. That is, to fund the Claimant's album. Despite the fact that Mr. Bogdanovich referred to an oral agreement, there was an offer in writing by letter from DSR to DYCR.

[115] The fact that the Defendant chose to make this offer in writing is also an indication that if DYCR was in breach of the contract Mr. Bogdanovich could also and would also have pointed out the Claimant's failure to perform his obligation under the contract and stipulate that the offer was conditional upon a commitment to perform. This is obviously absent from this written offer.

[116] Therefore, I find that Mr. Bogdanovich made this offer in recognition of the Defendant's failure to perform it obligation under the contract, and also as an attempt to convince the Claimant of an intention on the part of the Defendant to perform its obligations under the contract**.** Furthermore, it is my view on the evidence that while TAD's was prepared to take the risk to compile and release an album for DYCR, DSR was the one that was reluctant to take that risk.

[117] My impression of the evidence is that Mr. Bogdanovich was waiting to see what would happen with the TAD's album before the Defendant continued the production of the album for DYCR. In his own evidence on cross examination, Mr. Bogdanovich said that the Claimant begged him to fund his album. However, despite the fact that Mr. Bogdanovich decided that the risk was one that was not worth taking it was a risk that the Defendant had contracted to take. In that regard, the fact that TAD's having contracted with DYCR and produced an album within a year, a period during which DSR was still in a contractual relationship with DYCR, is basis for me to conclude, and I so conclude that DSR having contracted with DYCR to produce an album and two videos and promote the Claimant was given more than reasonable time to carry out these activities. That is, I find that an additional two (2) years and eleven months was reasonable time.

[118] Counsel for the Defendant has suggested that to release the album during the contract period would have placed both parties at risk of irreparable damage. However, I find that this argument is not sustainable. This is in light of the fact that TAD's released an album for DYCR during the contract period with DYCR and DSR and there is no evidence that this release resulted in irreparable

damage to DYCR andTAD's.Therefore on a balance of probability, I find that the Claimant has established that the Defendant DSR had committed a repudiatory breach of the contract by failing to produce a minimum of two videos; by failing to promote his career; and by failing to produce an album for him after 3 years and 11 months and without given giving any indication as to when the process would be completed. That is full compilation and release. Consequently, the Claimant has proven that he was entitled to terminate the contract. In light of the foregoing, I find that the Defendant is liable to the Claimant in damages flowing from the afore-mentioned breaches

Damages

The LAW

[119] The aim of damages is to put the Claimant in the position he would have been in had the contract been properly performed. Therefore, the Claimant has the burden to prove the quantum of damages that he is seeking to recover and that they are;

(i) losses flowing naturally from the breach (See ***Hadley v Baxendale*** ([1854] 9 Exch. 341) and or*;*

(ii) losses that were in the contemplation of the parties at the time the parties entered into the contract as a probable results of the breach (See **The Heron II** [1969] 1 AC 350*).*

[120] Where loss of expectation is difficult to prove then the Claimant can succeed by proving the cost of loss opportunity and or expenses incurred in reliance on the contract. That is damages that would put him back into the position he would have been had he not entered the contract. (See **Anglia TV v Reed** [1972] 1 QB 60). Therefore, I now have the difficult task of assessing whether the loss flowing from the breach of contract can be quantified

Submissions for the Claimant

[121] Mr. Christie submits that:

(i) Where publicity or actually performing the work is an essential element of the contract, especially in the entertainment business, damages may be awarded for loss of publicity or loss of opportunity to enhance a reputation. (He refers to ***Marbe v George Edwardes (Daly's Theatre), Limited and Another*** [1928] 1 K.B. 269

(ii) If a manager undertakes to allow an artiste to appear upon the stage and breaks his contract, the artiste is entitled to damages for the loss, not for injury to reputation already acquired, but for the loss of advertisement or publicity, which would enhance the artiste's reputation in the future. Due to the nature of artistes earning their remuneration is by getting their name before the public and where they are deprived of the necessary screen credit they would have suffered damage, which is not nominal. (He refers to ***Tolnay and Another v Criterion Firm Productions Limited*** [1936] 2 All ER 1625)

(iii) The Claimant was approached by a representative of Soundproof Records, who had interest in working with him. The representative, Milton Moore, proposed that a recording contract with Soundproof Records would be an estimated earnings of approximately Four Million Jamaican Dollars ($4,000,000.00 JMD).

(iv) DYCR already had an existing reputation and was in the height of his career. After being sought after by DSR he lost publicity. The true situation is that the profession of an actor, musician or pianist depends on getting known by the public.

(v) Where a contract to employ a performer is broken by one party not fulfilling its obligation, the impact on the performer is greater than any agreed fees. This is because the performer is relying on publicity, to enhance his career. (He refers to ***Fechter v Montogomery*** and ***Tolnay Criteron Film***

Production Ltd [1936] 2 ALL ER 1625; Marbe v George Edwardes (Daly's Theatre), Limited and Another [1928] 1 K.B. 269). It is reasonable to infer that loss of reputation and publicity would affect DYCR's income. It is implied that the Defendant would give the plaintiff sufficient work to enable him to earn what the parties must be taken to have contemplated he should earn and on that basis the Claimant is entitled to damages for loss of salary and remuneration (He refers to the case of ***Bauman v Hulton Press Ltd*** [1952] 2 ALL ER 1121)

(vi) The Court should accept the evidence of Mr. Moore that DYCR could have earned and received opportunities valued at least J$4,000,000.00 for an album; and, since DSR had an obligation to produce three additional albums if the contract continued beyond one year, the Court should award the lost income and opportunities for all four albums – totalling $16,000,000.00. This, is quite reasonable given that this amount does not take into account the increased popularity and increased rates that he would possibly obtain over the four-year period, inflation, or any other factors that would cause this amount to increase over the four years.

(vii) With respect to the music videos that were to be produced under the Management Agreement, DSR should refund the sum of $250,000.00 to DYCR, due to its failure to produce the second music video. This sum is arrived at by deducting the agreed cost of one music video ($300,000.00) from the total amount received by DSR ($550,000.00).

(viii) If, however, the Court is not persuaded by these calculation calculations, then in the alternative, in applying the principles to the DYCR and DSR agreement, the court can calculate earnings based on the salary/commission DYCR would have earned had it not been for the act/omission of DSR in defaulting on their contractual obligations. DYCR's earnings before he had signed with DSR from 1995-2004 is calculated to be Two Million Nine Hundred and Eighty Thousand Dollars

($2,980,000.00). These calculations are based on his income during the respective years, using the February 2019 CPI 254.3 the figure converted to today's rate is Eleven Million Seven Hundred and Forty-One Thousand Four Hundred and Eighty-Two Dollars and Ninety-Five Cents ($11,741,482.95). DYCR estimated his earnings would have increased at the very minimum after signing with DSR or he would have maintained the same pace for the next five years. The estimated figure from 2005-2010 was One Million Two Hundred and Fifty Thousand Dollars ($1,250,000.00) per year, being a total of Six Million Two Hundred and Fifty Dollars ($6,250,000.00) for five years.

[122] However Mr. Lawrence submits that:

(i) Loss of publicity/reputation is not derived from injury to reputation already acquired but for the loss of publicity which would enhance future reputation. The Claimant's cases cited in support of his claim for loss of publicity/reputation are distinguishable. To establish this loss, there should be a loss of a specific opportunity to perform.

(ii) Substantial damages cannot be recovered where the claim is merely for the loss of a benefit which might or might not have accrued to the Claimant. They cannot be recovered where, in ordinary language, the odds are against the claimant ever deriving any benefit from his contract. The evidence shows the odds were always against DYCR as there is no evidence of him ever being commercially viable.

(iii) For an industry such as this one which is both unpredictable and unforgiving, profits cannot be certain One cannot use the past successes of an artiste to determine that the said artiste was on a certain trajectory of success, particularly where there is evidence that the genre of music he provides has no longevity or commercial viability over a long period of time, which is common place within the music industry. The evidence

given by Junior “Heavy D” Fraser reflects that in the music industry it is common for an artiste to have a few songs resonate with the public and then completely fall of track. Some artistes will only enjoy success, even if it is minimal for a short period of time and that is just the unforgiving nature of the music industry. Sustaining a long and profitable career in this industry is no easy task, and it is particularly unprecedented for any dub poet. The Defendant could not force the Claimant on the market, no matter how much money was spent promoting him.

(iv) Loss of income must be strictly proven. The Claimant admits that he does not have income tax returns to validate his income earned, although the payment of taxes is a personal obligation to the Government of Jamaica.

(v) The Claimant seeks for the court to estimate his loss of income on his evidence that in January of 2005 he was approached by Milton Moore to have a recording agreement in which he estimated that the Claimant would have earned Four Million Dollars ($4,000,000). The Defendant contends that Milton Moore is not a credible witness and does not have the expertise to make any such estimation as to the value of an artiste. Mr. Milton Moore admitted in his evidence that he is a civil servant and that his estimation was not “hard and fast” but was based on a “good guess as to the market”. The Court is therefore unable to rely on such tenuous evidence, particularly against the background of the known principle that special damages must be specifically proven.

(vi) There is a difficulty in finding the appropriate award to meet the Claimant’s expectations where the cost of providing the Claimant with exactly what was bargained for may be out of proportion to the benefit which would thereby be obtained. Although this principle is usually used in cases regarding construction contracts, it is instructive as it exemplifies a situation where a staggering amount of money has been spent on an artiste whose performance indicates no return on the investment

whatsoever. Consequently, providing such an artiste with any further investment when there is failed market value would result in a lack of benefit for both parties and is not within their best interests. (He relies on the case of **Ruxley *Electronics and Construction Ltd. v Forsyth*** [1995] 3 All ER 268). The Claimant has not established any loss whatsoever and to find otherwise would be a miscarriage of justice.

Discussion

[123] In the case of ***Withers v. General Theatre Corporation, Limited*** **[1933] 2 K.B. 536,** the Plaintiff, who was a variety artiste, was engaged by the Defendant company to appear and perform a certain sketch at the London Palladium for three consecutive weeks. The contract contained a clause by which the Plaintiff agreed, should the Defendants so desire, to transfer the engagement to any hall owned, controlled by or associated with the Defendants either in London or the provinces. The Plaintiff had a preliminary trial week at Portsmouth, and after viewing a performance there the Defendants on July 2, 1931, gave the Plaintiff notice that they would not allow him to perform at the London Palladium under the agreement. The Plaintiff sued the Defendants claiming damages for breach of contract, including loss of publicity and reputation.

[124] The court stated that the law stands in this way: speaking generally, in actions for “wrongful dismissal and for wrongfully not allowing a service to be performed, damages are only given for the pecuniary loss thereby sustained, and the damages cannot include compensation for the manner of the dismissal, for the dismissed man's injured feelings, or for the loss that he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment - that is to say, for the fact that a dismissed man may find it more difficult to get employment in the future”.

[125] In that judgment the court indicated that the principle that was stated in Marbe ***v George Edwardes (Daly’s Theatre), Limited and Another*** was clarified in the

case of ***Clayton & Waller, Ld. v. Oliver*** **[**1930] A. C. 209**.** Quoting from the Judgement of Lord Dunedi in the case of ***Clayton & Waller, Ld. V Oliver***. The court stated that:

> *"…. the object for which a person enters into a contract of this description, ….it would be defeated if the effect of the contract is this: that if the gentleman who engaged him is not bound to employ him, and does not in fact do so, so as to give him an opportunity to display his talent and abilities, yet he is not to be at liberty to act elsewhere, unless by the permission of the gentleman who engaged him."*

[126] It further stated that:

> *"Damage to a reputation already existing by not allowing an appearance is not a matter which can be considered, but what has to be considered is whether, if the actor had been allowed to appear, that appearance would have given him publicity, and whether he has been deprived of that opportunity of appearing. That is taken to be the law, and it is quite certain that that distinction, somewhat difficult to explain, but important in assessing damages in these publicity cases." (see page 547 and 548 of the judgment)*

[127] In the case of ***Tolnay and Another v Criterion Firm Productions Limited*** [1936] 2 All ER 1625, the court found that if a manager undertakes to allow an artiste:

> *"to appear upon the stage and breaks his contract, the artiste is entitled to damages for the loss, not for injury to reputation already acquired, but for the loss of advertisement or publicity, which would enhance the artiste's reputation in the future**. "***

[128] It further stated that:

> *"One way in which they (the artistes) can expect remuneration and expect employment is by getting their name before the public. Therefore, I think that as they have been deprived here of screen credit, it must be that they have suffered damage, and it must mean that they have suffered damage which is not nominal, and I am bound to give a separate sum to each of them." (See the Judgment of Goddard J.)*

[129] In the instant case, in spite of the submission of counsel for the Claimant, there is no evidence from the Claimant that the Defendant did not allow him to go on stage. In fact, as I have previously discussed in the section dealing with liability, he admitted that he participated in stage shows in the Cayman Islands and the Bahamas in 2007 while signed to the Defendant. He has produced no evidence of missed opportunities in relation to movies and comedies.

[130] His contention is that the Defendant failed to promote him by failing to produce a sufficient number of videos and by failing to release his album. There is no evidence of any show for which he was booked and then he was not allowed to perform nor paid.

[131] Therefore as I have previously indicated, in order for me to award damages on this aspect of the claim the Claimant must establish damages flowing from the failure to produce the videos or the failure to promote the Claimant. The Claimant has highlighted his success and achievement as an artiste since 1993. It is not necessary at his stage to list all of these achievements. The fact is, in light of the aforementioned authorities and in the circumstances of this case, it is not necessary for me to consider the loss of reputation that already existed, but whether if more videos had been produced or the album had been released the Claimant would have gain more popularity with the public. He must therefore establish that the release of the videos and album would have engendered a correlating positive impact on the demand for his product. That is his talent.

[132] The Claimant has to demonstrate that had the additional album and videos been produced his pre-contractual appeal would either have remained the same or improved. This in light of the fact that it is common knowledge that in entertainment industry the taste of the consumer evolves as a consequence of generational change.

[133] Therefore what may have resonated with the 1990s generation when the album “Flame Fire” was released may not be appealing to 2000 generation. This is also

against the background that he would have to be competing with new artiste that are consistently emerging with new styles of music. I find that the Claimant has failed to adduce sufficient evidence in this regard.

[134] Counsel for the Claimant is submitting that the award should be based on DYCR's earnings before he contracted with DSR. That is, the period 1995-2004. However, despite the fact that the Claimant in his evidence has indicated that he used to earn certain sums during this period, apart from the evidence of Mr. Milton Moore that Sound Proof paid him an advance of $ S600,000 dollars for the album "Flame Fire" the Claimant has presented no supporting evidence to substantiate these other Claims.

[135] I make this observation against the background that having proven liability he still bears the burden of proof with regard to damages. I also notice that despite the fact that he speaks about payments for particular performances, during the period 1995 t0 to 1998, there was no evidence of continuous earning during this period.

[136] He states that in 1995 he received Ten Thousand Jamaican Dollars ($10,000.00) each as an advance from Mr. Milton Moore of Soundproof Records to record two tracks, "Rasta Rise Again" and "Flame Fire'. Despite testifying that he performed weekly at various clubs, at a stage shows in Port Maria, St. Mary at a school complex ; in 1996 at Jamaica's largest one-night show, "Sting"; in or about January 1997, at 'Rebel Salute" in Brooks Park in Manchester which catered to thousands of patrons; the only other earnings he mentioned are, a payment of ($4,000.00), four thousand Jamaican dollars to do a "Flame Fire" dub plate from WEPO, owner of Stone Love Sound System and five thousand Jamaican dollars ($ 5,000.00) that he was paid by Japanese Yellow Choice Sound System to do a dub plate of Flame Fire.

[137] I am cognizant of the fact that on cross examination he indicates that by the year 2000, he was in high demand for live shows and for recording of "dub plates" and jingles and that between 2001 and July 2004, he was being paid between twenty-

thousand and forty thousand Jamaican dollars ($20,000.00 and $40,000.00 JA) per dub-plate at that time.

[138] However, he presented no documentary or supporting evidence in relation to these figures. His evidence is that previous to his contract with DSR he was signed to Ritchie Stephens. Therefore, based on the history that he presented and the fact that he used the term signed, I can only conclude that at least his engagements with Ritchie Stephens was not informal but a professional relationship. In this regard, I would expect to be presented with documentary or supporting evidence of these figures.

[139] The Claimant cannot just throw these figures at the court. The Claimant testifies that his career had begun to fail five (5) months after he entered the contract. That is, prior to any breach. In light of the fact that there was no specific timeline within the year that the videos and albums were to be produced, any decline in the Claimant's career within the year cannot be attributed to a breach of the contract by the Defendant. Essentially, no damages can be recovered in this regard unless the Claimant can establish specific opportunities for publicity, that is to be put on stage during this period which were denied.

[140] It is my view that the evidence in relation to the offer by Sound Proof Record does not pass this test. The Claimant states that in January 2005, he was approached by Milton Moore, a representative of Sound Proof Records, who was aware of his talent and reputation as a dub poet, and was interested in working with him again. He further states that he refrained from entering into such agreement with this other Record Company in order to abide by the "exclusive management" agreement between himself and DSR.

[141] Nevertheless, during that very year he contracted with TAD's to produce an album. DSR did not deny him that opportunity. He admitted that he did not bring to the attention of DSR the offer by Sound Proof. He went on to say that it was a recording contract that was being proposed by Soundproof Records to produce an

album with estimated earnings of approximately Four Million Dollars ($4,000,000.00).

[142] Initially on cross examination he did say it was not of the same nature as the contract with TAD's. However, when confronted with his evidence from his examination in chief he admits that the proposed contract by Sound Proof and the contract with TAD's were both Recording Contracts. He agrees that under the terms of the contract with DSR he was allowed to sign a recording contract with another recording company if DSR agreed. Consequently, I cannot ascribe any loss of opportunity to earn $4,000,0000 or to contract with Sound Proof by the Claimant to DSR.

[143] Additionally**,** Mr. Moore gave evidence supporting the assertions of the Claimant. However, it is not clear on what he has based the estimated earnings. That is, over what period the $4 million would have been earned. On cross examination admits that this figure was a calculated guess. Therefore, I reject the suggestion of Counsel for the Claimant that this figure should be the basis of calculation of an award to the Claimant.

[144] Counsel for the Claimant also suggests that I should arrive at a sum based on the presumption that the Claimant should have been, and was not, earning a salary from the Defendant. However, there is nothing on the evidence which supports this proposition. In light of the nature of the contract and using the contract with TAD's as reference for the officious bystander, it is my view that the common intention of the parties was for the Claimant to earn from performances, advance, and future payment of royalties from the album.

[145] As I earlier indicated there is no evidence that the Claimant was not paid for performances. In fact, his evidence as it relates to his earning during the period does not point to him not earning any income at all but that his "income and earning potential decreased consistently and significantly and was by the time he exited the contract earning little to no income from the music industry and his craft".

[146] The issue now remains; how do I arrive at a reliable basis for the calculation of damages to the Claimant arising from the Defendant's breach of the contract. In the case of ***Chaplin v Hicks*** [1911] 2 KB 786, a theatre manager invited women to enter a beauty contest by sending in photographs which would be placed in a newspaper. The readers of the newspaper would vote for their winner, who would then be awarded a paid engagement as her prize. Chaplin entered the competition and came first in her group. A letter was sent inviting her to attend the next stage of the contest but arrived too late. Consequently, she was denied the opportunity to be considered. She sued for damages for lost opportunity for her to attain lucrative engagements.

[147] Mr. Hicks argued that even if there had been a breach of contract, any damages awarded should be nominal because it would not be possible to assess the chances of Chaplin winning the competition, and her losses, if any, were incapable of assessment. The court found inter alia that, the loss of the chance of winning such a lucrative prize was a breach which afforded her the right to substantial, and not merely nominal damages. Such damages were not necessarily incapable of assessment

[148] Additionally "The mere fact that it is impossible to assess damages with precision and certainty does not relieve the jury of their duty to assess damages for breach of a contract to the best of their ability". Therefore, the court "must be entirely guided by common sense "(See the judgments of Fletcher Moulton J and Vaughn Williams J)

[149] The case of ***Ruxley Electronics and Construction Ltd v Forsyth***; ***Laddingford Enclosures Ltd v Forsyth,*** *(Supra)* concerned the breach of a building contact. In that case, Ruxley agreed to build a swimming pool in Forsyth's garden. The contract specified that the pool should have a diving area of seven, six inches deep. However, the diving area was constructed with a depth of only six feet. This was still safe for diving and did not affect the value of the pool. Forsyth brought an

action for breach of contract, claiming the cost of demolishing and rebuilding the pool.

[150] The House of Lords found that in assessing damages for breach of contract for defective building works, if the court took the view that it would be unreasonable for the plaintiff to insist on reinstatement because the expense of the work involved would be out of all proportion to the benefit to be obtained, the plaintiff was confined to recover the difference in value.

[151] Furthermore, the court stated that the plaintiff's intention, or lack of it, to reinstate was relevant to reasonableness and hence to the extent of the loss which was sustained, since if the plaintiff did not intend to rebuild he had lost nothing. Lord Jauncey of Tullichettle, stated at Page 274 that:

> *"Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party, from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure…"*

[152] In addition to the fact that the case deals with building contract the principle, which I find applicable to the case at bar is that the court made a distinction between the cases in which contractual objective had been achieved to a substantial extent and those in which the contractual objective had not been achieved. It provides guidance as to the approach that the court should take in assessing damages where the contractual objective has been substantially achieved and where the defaulting party has entirely failed to achieve the contractual objective.

[153] At page 275 his Lordship stated that:

> *"What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be*

> *difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing. Furthermore, in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly, if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do"*

[154] He further stated that:

> *"'If he contracts for the supply of that which he thinks serves his interests, be they commercial, aesthetic or merely eccentric, then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.'…However, where the contractual objective has been achieved to a substantial extent the position may be very different".*

[155] In the instant case, I find that the contractual objective was the compilation and release of the album within a timely matter so that the Claimant could receive financial benefits from the royalties. I find that DSR, the defaulting party, has entirely failed to achieve the contractual objective. However, in light of the evidence of both sides that the purpose of the production of the videos was for promotional purposes, I form the impression that the intention of the parties in relation to the production of the videos was to try and enhance the Claimant's popularity in order to boost the sale of the album to the public. That is, to facilitate and increase demand for the album.

[156] As a consequence of the foregoing, I find that there is no necessity for a separate award for the failure to produce the additional videos. Therefore , it is

my view that the only loss I am at liberty to quantify is that resulting from the failure of the Defendant to compile and release the album*.*

[157] With the exception of the offer of the Defendant, the Claimant has presented no other reliable sum on which I can arrive at a reliable assessment arising from the Defendant's failure to produce and release the album. He has presented no figures or evidence or record of album sales prior to, and during the contract.

[158] He testifies testified that the $10,000.00 (US), indicates the value DSR attached to the recoupable value of an album produced by him. That DSR clearly assumed that profits would significantly exceed such an advance though sales, from which the Defendant would benefit. He further states that the Defendant's willingness to offer the advance payment indicates their belief that he could produce a profitable album, and reap high album sales based on his local and international reputation.

[159] It is my view that the fact that Mr. Bogdanovich made this offer as an advance to the Claimant is an indication that at that time he expected to realize over and above that amount on the sale of the album. This is in light of his evidence in relation to his experience in the entertainment business, and as an investor. Additionally, the fact that he states that one of the reasons for DSR entering the contract with the Claimant was to make a profit, it is reasonable for me to infer, and I so infer, that in calculating the advance such an important factor as the Defendant's deductible or recoupable expenses would have formed a basis for Mr. Bogdanovich's calculation and would not have been included in the advance.

[160] Therefore, I find that the offer of $10,000 US to the Claimant by DSR was only part of a calculated estimation of a surplus that Mr. Bogdanovich expected the Defendant to realize, excluding recoupable expenses, on the compilation and release of the album, subject of the contract.

[161] Another relevant factor is that Mr. Bogdanovich indicates that he had produced the album between 2007- 2008. Therefore, I conclude that he admits that at least by that time period he had the relevant materials to compile and release the album. Therefore I find that it was on these very songs that the advanced sum was being offered.

[162] Additionally, in arriving at the sum to be awarded to the Claimant I take into consideration:

(i) The fact that Mr. Bogdanovich indicated that he conducted Market surveys.

(ii) These surveys were prior to the offer being made to the Claimant.

(iii) The reason the Claimant gave for rejecting the $10,000 US was not based on the fact that he thought that he was valued more, but because the Defendant did not give him a time as to when his album would be released.

[163] Consequently I find that the sum of $10,000 US that is $720,000 Jamaican at July, 2008 updated to $1,413,671.64 is a reasonable and just award in damages to the Claimant for the Defendant's breach of the contract.

Whether the Defendant entitled to Claim a Set Off

[164] The evidence of Mr. Bogdanovich is that the the Defendant incurred expenses amounting to the sum of approximately US$90,000.00 in costs and expenses in promoting, producing and managing the career of the Claimant. The Defence witness, Miss Rowe has presented figures with no supporting evidence.

[165] Counsel for the Claimant submits that if the Court holds that DYCR has not breached the Management Agreement, this defence of set-off should be rejected. He further submits that: Ms. Rowe's witness statement establishes that expenditures were communicated to her and she has explained that her

personal knowledge of the expenses arose from the fact that she entered the expenses in the expense sheet, not truly from her own personal knowledge. Mr. Bogdanovich also confirms that he personally would pay artistes and advise Ms. Rowe of the said payment. Ms. Rowe is not a credible witness. She was evasive in demeanour and the substance of her evidence remains questionable.

[166] However counsel for Defence submits that it is a standard occurrence in the music industry and the policy adopted by the Defendant to advance monies for cost and expenses relating to promoting, producing and managing an artiste and these costs and expenses are recouped from the artiste's earnings.

[167] On my examination of the contract it is evident that there is no reference whatsoever to recoupable expenses and how it should be addressed. However, if one were to apply the common intention, and the officious bystander approach, the implication is that the intent of the parties could only be that, had the contract been properly performed these expenses would have been recoverable from the sale of the album.

[168] There is no doubt that had the Claimant been the one in breach of the contract he would be liable to the Defendant for these expenses even in the absence of the sale of the album. However this court has already found that the Claimant is the innocent party and the Defendant is the party in breach.

[169] It is the Defendant that has chosen not to release the album. The Claimant has invested his time and his talent for the production of the album for which he is entitled to an award that would place him in a position had the contract been performed.

[170] In light of these findings, there is no basis to make an award for a set off. That is, there is no basis for me to make an order for set off in relation to recoupable expenses where the material or product from which these were to be recovered are still in his hands and in the power of the Defendant to be released. To date there is no indication as to when or if ever the album will be released.

Additionally, the fact is the award is based on a finding on the evidence that Mr. Bogdanovich would have made a calculated offer that would have cover DSR ‘s recoupable expenses. That is, his offer was based on his projected value of the album minus DSR’s expenses and profit; an offer that would be beneficial to the Defendant.

[171] Consequently, I find that it has not been established that the Defendant is entitled to a set off.

Order

On The Issue Liability Judgment is entered for the Claimant.

Damage is assessed and awarded in the sum of $ 1,413,671.64.

Interest is awarded at 6% from July 2008 to the Date of Judgment.

Cost to the Claimant to be agreed or taxed.