

A [COURT OF APPEAL]

MOOD MUSIC PUBLISHING CO. LTD. v.  
DE WOLFE LTD.

[1970 M. No. 6074]

B 1975 Oct. 27, 28 Lord Denning M.R., Orr and  
Browne L.JJ.

*Evidence—Similar facts—Copyright action—Musical work—Allegation of infringement—Defence of coincidental similarity—Works produced by defendants bearing similarity to works still in copyright—Whether admissible evidence in civil action where fraud not pleaded*

C The plaintiffs and the defendants were both music publishers supplying background music for television programmes based on works in which each company held the copyright. In 1964 the plaintiffs acquired the copyright in a musical work entitled "Sogno Nostalgico" with exclusive rights to use it in the United Kingdom. In 1967 they complained to the defendants that their copyright in "Sogno Nostalgico" had been infringed by the defendants in the making and reproduction of a musical work called "Girl in the Dark." The defendants' reply then, and repeated on a later similar complaint in 1970, was that they had taken an assignment of the copyright in "Girl in the Dark" from its composer in 1966 and that its resemblance to the plaintiffs' work was coincidental. In December 1970 the plaintiffs issued a writ alleging infringement of their copyright and asking for an injunction and other relief. The defendants' original defence denied infringement and alleged delay by the plaintiffs such as to disentitle them from their equitable remedy. The action came on before Plowman J. in 1973, when it emerged that the defendants were claiming prior publication, in 1960, for "Girl in the Dark"; and the judge adjourned the trial to enable them to amend their defence to particularise the claim.

E When the action came on for trial again in October 1975 before Fox J. the plaintiffs still relied on simple infringement but sought to adduce evidence of "similar facts" as relevant to the question whether the similarity of the two works was coincidental or due to copying. The evidence included three records—one a "trap order" commissioned on the plaintiffs' behalf in 1970, and the other two being recordings of two works issued under the defendants' name bearing marked similarity to works of well known composers which were still in copyright and which were also on the recordings. The defendants, who had had notice of the "trap order" but not of the two other records, objected to evidence of "similar facts" being introduced into a civil action for infringement of copyright where there was no allegation of fraud or dishonesty and where they had not had proper notice. The judge heard the records played de bene esse and ruled that they were admissible on the issue of coincidence or copying.

H On the defendants' appeal:—

*Held*, dismissing the appeal, that though the courts in the exercise of their criminal jurisdiction would receive evidence

of "similar facts" only where its probative value was so strong that justice required its admission, evidence of "similar facts" would be admitted in civil actions if it was logically relevant to the matter in issue, so long as it was not oppressive and was produced on fair notice to the other side; and that, where the issue was coincidence or copying, the probative force of the additional records showing similarity was relevant and the judge had rightly ruled that the evidence should be admitted, a fortiori in a copyright action where even subconscious copying might constitute infringement, and fraud was not an essential ingredient.

*Reg. v. Boardman* [1975] A.C. 421, H.L.(E.) and *Rex v. Sims* [1946] K.B. 531, C.C.A. considered.

Decision of Fox J. affirmed.

The following cases are referred to in the judgments:

*Brown v. Eastern and Midlands Railway Co.* (1889) 22 Q.B.D. 391, C.A.  
*Hales v. Kerr* [1908] 2 K.B. 601, D.C.

*Moore v. Ransome's Dock Committee* (1898) 14 T.L.R. 539, C.A.

*Reg. v. Boardman* [1975] A.C. 421; [1974] 3 W.L.R. 673; [1974] 3 All E.R. 887, H.L.(E.).

*Rex v. Sims* [1946] K.B. 531; [1946] 1 All E.R. 697, C.C.A.

The following additional cases were cited in argument:

*Blake v. Albion Life Assurance Society* (1878) 4 C.P.D. 94.

*Cellular Clothing Co. Ltd. v. G. White & Co. Ltd.* (1952) 70 R.P.C. 9.

*D'Almaine v. Boosey* (1835) 1 Y. & C.Ex. 288.

*Francis Day & Hunter Ltd. v. Bron* [1963] Ch. 587; [1963] 2 W.L.R. 868; [1963] 2 All E.R. 16, C.A.

*Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd.* [1971] 2 All E.R. 1074.

INTERLOCUTORY APPEAL from Fox J.

The plaintiffs, Mood Music Publishing Co. Ltd., carried on business as music publishers and proprietors of a library called Ember Mood Music Library at 155/157 Oxford Street, London W.1. By a writ issued on December 11, 1970, they claimed against the defendants, De Wolfe Ltd., also carrying on business as music publishers and recorders and proprietors of a Mood Music Library in Wardour Street, London W.1, an injunction to restrain them from infringing the plaintiffs' interest in the copyright in a musical work entitled "Sogno Nostalgico" by reproducing it or any substantial part of it in the form of gramophone records or otherwise and from selling and distributing such gramophone records containing such infringing material without the licence of the plaintiffs and from authorising any of the aforesaid acts; damages for infringement of copyright and conversion; alternatively an account of profits; delivery up of all infringing material; and further or other relief.

By their statement of claim they claimed that by an agreement in writing made on September 1, 1964, between an Italian company and themselves they were the owners in the United Kingdom of those parts of the copyright in the named musical work composed by one Armando Sciascia which consisted of the sole and exclusive right to print, publish, copy, sell, reproduce and record the work and authorise others to exercise

**1 Ch. Mood Music Publishing Co. v. De Wolfe Ltd. (C.A.)**

A such rights and that since April 1965, they had made available to music libraries and licensees in the United Kingdom copies of a gramophone record on which the named work was recorded. They complained that one Jack Trombey had without their licence composed a musical work entitled "Girl in the Dark" which reproduced their work, and that the defendants without their licence had manufactured or authorised the manufacture of a gramophone record in large numbers on which "Girl in the Dark" was recorded; and that they had thereby infringed the plaintiffs' interests in the copyright in their own work. They stated that by a letter dated March 10, 1967, to a director of the defendant company they had informed the defendants that the defendants' work infringed their copyright but that the reply on March 23, 1967, from the defendants' solicitors alleged that the similarity between the two works was coincidental; that by a later letter dated October 29, 1970, they had repeated the complaint of infringement and asked for an admission of liability, but that the defendants' reply had again alleged that the similarity was coincidental.

D The defence served on March 25, 1971, admitted the composing by Jack Trombey of "Girl in the Dark" but denied that it reproduced the plaintiffs' work "Sogno Nostalgico," and also admitted the manufacture, selling and distribution of a gramophone record of "Girl in the Dark" but denied that the acts they had committed or intended to continue committing were infringements of the plaintiffs' copyright; and they claimed that without prejudice to other defences they would rely on the plaintiffs' acquiescence, laches and delay, and contend that no injunction or other relief should be granted.

E The action came on for trial before Plowman J. in May 1973. At an early stage in the proceedings the defendants claimed prior publication in 1960 for their work by J. Trombey and relied on a notebook said to have been made by him in 1960. The judge gave the defendants leave to amend their defence and adjourned the hearing. By their amended defence the defendants claimed that "Girl in the Dark" had been composed by one Jan Stoeckart (known as J. Trombey) in the first half of 1960, was thereafter submitted by him to a television company as a possible theme for a new television series in tape form, and that lyrics for the work were composed in the Dutch language; and they annexed to the defence the Dutch words and an English translation.

G The adjourned trial with the amended defence came before Fox J. in October 1975. Three main issues arose in the action: (1) prior composition; (2) similarity of the tunes; and (3) access to the plaintiffs' work for the purpose of copying to produce the defendants' work.

H The plaintiffs sought to adduce certain evidence to support their allegations of copying by the defendants, namely (1) records relating to a "trap order" whereby they had employed an agent to ask the defendants to make a new record from a work which was in the plaintiffs' copyright and which had been presented as the defendants' own work; (2) records with the defendants' labels which when steamed off revealed other labels; and (3) De Wolfe records said to be close copies of works by

Edward Elgar and Sibelius which were still in the copyright domain, played with the Elgar and Sibelius original works to show the similarity. A

Fox J. ruled that the evidence under (1) and (3) was admissible on the issue of copying or coincidence. He gave leave to the defendants to appeal from his ruling to the Court of Appeal and adjourned the trial of the action (which was later settled).

*Andrew Bateson Q.C.* and *John Mummery* for the defendant company. This application for a ruling concerns the admissibility in a civil action for infringement of copyright of evidence of "similar facts." There is nothing about such evidence in *Copinger and Skone James on Copyright*, 11th ed. (1971), though it arises in trade mark disputes: see *Kerly's Law of Trade Marks and Trade Names*, 10th ed. (1972), p. 359. In the present case the plaintiffs have pleaded infringement simpliciter; they have never pleaded deliberate copying. But the evidence they now seek to have admitted is only relevant if they are alleging deliberate copying amounting to fraud. The original defence was coincidental similarity in the two works; the amended defence is prior composition based on the notebook of 1960. If the defendants had been notified that the "similar facts" evidence was to be produced they would have applied for the trial of prior composition as a preliminary issue, with witnesses from Holland; and if that had succeeded it would have disposed of the action. The "similar facts" material is not relevant to prior composition; and at this stage of the proceedings it is quite wrong for a defendant to be faced with issues which have never been pleaded. B C D

The plaintiffs now say that the similarity is so great as to create a "causal connection" between the alleged infringing work and the original work: see *Francis Day & Hunter Ltd. v. Bron* [1963] Ch. 587, per Wilberforce J. at p. 596, Willmer L.J. at p. 612, Upjohn L.J. at p. 617 and Diplock L.J. at p. 624. That case is authority for saying that the causal connection has to be established by the plaintiffs alleging fraud, which must be pleaded: see R.S.C., Ord. 18, r. 12 (1) (b) and *Cross, Evidence*, 4th ed. (1974), pp. 309-310, that evidence of disposition must be excluded unless it is highly relevant to an issue raised at the trial. Evidence of "similar facts" is hardly relevant per se in a copyright action, though it may be in a criminal case. In *Reg. v. Boardman* [1975] A.C. 421, the House of Lords reviewed all the law on "similar facts," saying it was exceptional to allow such evidence but that in the particular case there were common features of such an unusual nature and striking similarity that it would be an affront to common sense to exclude them on the ground that it might be mere coincidence. In that case the "similar facts" were technically the same in relation to both boys and disclosed an identical method. But in the present civil action it is being suggested that the "similar facts" material shows that one of the defendants' records, which on its face is described as in the style of Sibelius, is a deliberate infringement of the Karelia Suite by Sibelius and piracy of the kind which the defendants would wish to conceal; and that is said to be relevant to obtaining the plaintiffs' "Sogno Nostalgico" and copying it in "Girl in the Dark" when deliberate copying is not pleaded. Such an E F G H

## 1 Ch. Mood Music Publishing Co. v. De Wolfe Ltd. (C.A.)

A allegation will require investigation by the defendants which will protract the trial. The application to admit is really asking for *carte blanche* at the trial and a ruling is required as to its admissibility before the trial proceeds further.

B *John Wilmers Q.C.* and *E. P. Skone James* for the plaintiffs. The plaintiffs' case is similarity and there are only two heads of claim: (1) similarity through coincidence or (2) similarity through copying the plaintiffs' work. [Reference was made to *D'Almaine v. Boosey* (1835) 1 Y. & C.Ex. 288.] In *Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd.* [1971] 2 All E.R. 1074 Graham J. pointed out that infringement can only be established by inference because there will never be anyone available to give evidence of being present and looking over the infringer's shoulder. That applies equally to the present case. One copy is a matter for inference: see *Francis Day & Hunter Ltd. v. Bron* C [1963] Ch. 587, the first case where unconscious copying was considered. If the plaintiffs make out a case of similarity with sufficient substance, that raises an inference of copying which the defendants have to displace. Evidence of access is not required for that purpose, for both copying and access may be inferred from similarity. It is not necessary to prove anything in the nature of *mens rea*; what is important is whether there is an D "objective similarity": see *per Willmer L.J.* at p. 614 in the *Francis Day* case. If copying is a matter of inference, then other instances of similarity are "reasonably probative."

[The records were played *de bene esse*.]

[BROWNE L.J. Do you say that the defendants are more likely to have copied the relevant work because they copied other works, although you do not allege fraud?]

E Fraud is not an ingredient of any cause of action for breach of copyright. If the evidence is such as to raise an inference of fraud, that is just too bad; it is a matter for the judge. The plaintiffs seek to have the records admitted to prove that there is no mere coincidence. "Similar facts" evidence has always been admissible, even before the law on the subject was reviewed in the *Boardman* case [1975] A.C. 421: see *Cross*, F *Evidence*, 4th ed., pp. 310–311 and 324 on rebutting the defence of accident or involuntary conduct, and the citation: "That the same accident should repeatedly occur to the same person is unusual, especially so when it confers a benefit on him." It is not sought to have this evidence admitted to show that the defendants have committed other breaches of copyright in relation to other works but to show striking similarity in more than one instance. If the defendants take someone else's musical G work, get some composer employed by them to adapt it and claim it as their own to be used as part of their library, they are doing exactly what Lord Lyndhurst C.B. referred to in *D'Almaine v. Boosey*, 1 Y. & C.Ex. 288; and if there is copying the civil wrong is complete: see *Kerly*, 10th ed., p. 273 on "passing off" cases. The fact that the plaintiffs have not pleaded fraud does not prevent the court considering whether fraud in H fact exists: see *per Diplock L.J.* in *Francis Day & Hunter Ltd. v. Bron* [1963] Ch. 587, 624, that "neither intention to infringe, nor knowledge . . . is a necessary ingredient of the cause of action for infringement of copyright." Coincidence is pure accident; but copying is not: see *Cross*,

*Evidence*, 4th ed., p. 373 on criminal evidence and whether designed or accidental; and *Rex v. Sims* [1946] K.B. 531, 540, on the “probative force of all the acts together” being “much greater than one alone”—a passage prophetic of what was to be said in *Boardman’s* case [1975] A.C. 421. There is now no material distinction, for the purpose of evidence of “similar facts,” between criminal and civil law, apart from statutory provisions; and in criminal law evidence is sometimes excluded because the judge has an overriding discretion to exclude it, but a judge in a civil case does not possess such a discretion: see *Blake v. Albion Life Assurance Society* (1878) 4 C.P.D. 94, 102 *per* Grove J. On the test laid down in *Boardman’s* case [1975] A.C. 421, the records have common features so unusual that it would be an affront to common sense to say that it was coincidence. It does not matter whether the evidence of “similar facts” relates to a date before or after the relevant allegation. [Reference was also made to the article by Professor R. Cross in *Criminal Law Review* 1975, p. 62 stating that *Reg. v. Boardman* rings the death knell of the “categories” approach.]

As to the “trap record,” even if there is a rule that trap evidence should be notified to the defendant, it does not apply here: see *Cross, Evidence*, 4th ed., p. 359 that it is desirable but not necessary to give such notice. [Reference was also made to *Cellular Clothing Co. Ltd. v. G. White & Co. Ltd.* (1952) 70 R.P.C. 9.]

*Bateson Q.C.* in reply. The case for the plaintiffs has been put in a way which completely misrepresents the issues pleaded. Prior composition has been a pleaded defence since May 1973; the authenticity of the notebook relied on as establishing prior composition in 1960 has never been challenged under R.S.C., Ord. 27, r. 4; but at the trial before Plowman J. it was alleged that the document was a forgery. The evidence of “similar facts” for which admission is now sought is of no use to disprove a defence of innocence, accident or coincidence. It is solely relevant to support the case of copying. What is being done is to allege “similar facts” (though not identical facts, because that is not possible) without pleading copying in order to support an inference of fraud. It is accepted that in the normal case copying does not require proof of fraud in the case of a published work; and in *Francis Day & Hunter Ltd. v. Bron* [1963] Ch. 587, there was material on which to base the inference of unconscious or subconscious copying. But that does not apply here where “Sogno Nostalgico” was played in 13 episodes for two minutes and 55 seconds. The “similar facts” evidence cannot go to originality; nor to prior composition for that is being treated as a separate issue. It cannot be used to rebut the presumption of coincidence where prior composition is a defence. The only way to prove copying in the case of a work that has not been played in public before is to prove fraud: see *per* Diplock L.J. in the *Francis Day* case at p. 625; but it is a complete departure from the rules of pleading to use such evidence to allege fraud. The records played are not evidence that the defendants obtained a copy of “Sogno Nostalgico” before it was published. No one would suggest that it is necessary to obtain an Elgar score by dishonest means when one can buy it at any music shop. The records are no evidence of obtaining knowledge of and then obtaining works by dishonest means. They do not go to the issue of copying at all.

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## 1 Ch. Mood Music Publishing Co. v. De Wolfe Ltd. (C.A.)

A The “similar facts” are being used to support the line that “the defendants will infringe copyright if a copy of music is available to them.”  
 B But it is the condition which is the crux of the matter. There is no probative force in these “similar facts” which bears on the issues. The court has heard the pieces of music. It is suggested that one is an infringement of the other; but no one claims that because the Warsaw Concerto and Rachmaninov are similar one is a copy of the other. The judge may have a musical beanfeast, but the bare proposition that compositions written in the style of great composers like Elgar and Sibelius are automatically deliberate infringements of copyright is totally wrong.

C LORD DENNING M.R. The Mood Music Publishing Co. Ltd. keeps a library consisting of records of musical works. They own the copyright in the works and supply them to television producers—who use them for background music for their productions. One of the works in the plaintiffs’ library is a musical work called “Sogno Nostalgico.” It was composed by an Italian, Mr. Sciascia, in 1963. The copyright of it was assigned to the plaintiffs in 1964. A record was made of it in Italy. One of the records was brought to England and kept in the plaintiffs’ library here. After 1967 copies were made here and were available in the library.

D Mr. De Wolfe is in the same line of business. In 1967 he had in his library a musical work called “Girl in the Dark.” He supplied it to television producers for use in a play called “Magnum for Schneider.” Someone in the plaintiffs’ employment saw that play and heard the music. He thought that “Girl in the Dark” was very like “Sogno Nostalgico” and might have been copied from it. So on March 10, 1967, the plaintiffs wrote to Mr. De Wolfe complaining that “Girl in the Dark” was an infringement of “Sogno Nostalgico.”

E On March 23, 1967, the solicitors for Mr. De Wolfe replied in these terms:

F “‘Girl in the Dark.’ . . . It appears from your letter that you have in your library a musical work entitled ‘Sogno Nostalgico’ which apparently bears some resemblance to the above work which is included in our clients’ music library and in which they own the copyright. Our clients’ work was composed by J. Trombey who resides in Holland and from whom they took an assignment of copyright in 1966. The fact that your work”—that is “Sogno Nostalgico”—“was composed prior to our clients’ work is not really relevant in the circumstances as, of course, mere similarity between two musical works does not constitute any infringement. Infringement only occurs where there has been an actual copying of a copyright work by another person without the owner’s consent. It would appear therefore that the similarity between the works is coincidental, in which event neither work infringes the other.”

H That letter shows that Mr. De Wolfe recognised that the two works were very similar. Also that the plaintiffs’ work was produced prior to his own. But that his answer to the claim was that the similarity had arisen by sheer coincidence without any copying from the plaintiffs’ work. Mood Music Publishing Co. Ltd. did not take the matter further until

1970. They then raised the matter again. Mr. De Wolfe's solicitors replied in the same terms as in their letter of March 23, 1967, which I have read. A

On December 11, 1970, Mood Music Publishing Co. Ltd. issued a writ against De Wolfe Ltd. In the statement of claim they said they were the owners of the copyright in the musical work "Sogno Nostalgico" and that the defendants had infringed it by their work, the "Girl in the Dark." The defendants denied that there was any infringement; and, by an amendment in 1973 they alleged that their work "Girl in the Dark" was composed by a Dutchman called Stoeckart, known as J. Trombey, in or about the first half of 1960, and that they acquired title from him. On discovery they disclosed a book of music said to have been composed by the Dutchman in 1960 including this work. B

Last week the trial started before Fox J. Some days were spent in taking evidence. Some of the evidence was as to "similar facts." Part of it was taken de bene esse. But then Mr. Bateson asked the judge for a definite ruling whether or no evidence of "similar facts" was admissible. The judge yesterday morning ruled that some of it was admissible. Mr. Bateson challenges his ruling and, with the leave of the judge, appeals to this court for a decision now. The hearing has been adjourned pending our decision. C D

In order to appreciate the point, I must state the nature of the evidence which is sought to be admitted. One matter relates to a "trap order" which was given by or on behalf of the plaintiffs. It was arranged in this way. The plaintiffs made a record of a distinctive piece of music called "Fixed Idea." The copyright undoubtedly belonged to the plaintiffs. They wrote on the record "Taken off air U.S.A." That was not true. It was not taken from a piece which had been broadcast in the U.S.A. It had been made by the plaintiffs from their own copyright. Those words "Taken off air U.S.A." would lead anyone to believe that it was copyright, though not in the plaintiffs. The plaintiffs then got Mr. Shillingford, an agent provocateur, to take it to De Wolfes and ask them to make a new record from the piece of music. Mr. Shillingford saw a Mr. Chambers and arranged that, in return for a sum altogether of £250, De Wolfes would make a new record from that piece of music. Now this is where De Wolfes fell into the trap. They made the new record, but they called it a De Wolfe work. In a letter of November 12, 1970, they sent to Mr. Shillingford two versions of their recording. They called it "Vision." They said the composer was Mr. Reg Tilsley, that De Wolfe Ltd. were the publishers, and £250 was to be paid for it. E F G

The plaintiffs say that the work "Vision" is a copy of their own "Fixed Idea," which was their copyright. No doubt they invited it, they asked for it, they paid for it; but here were De Wolfes copying their music and putting it out to the world as if it was their own publication of a work by a different composer altogether.

The plaintiffs gave notice to the defendants some time ago of their intention to put those matters in evidence relating to the "trap order." H

There are two other matters which the plaintiffs desire to give in evidence. They have only been discovered in the last week or so. It

## 1 Ch. Mood Music Publishing Co. v. De Wolfe Ltd. (C.A.) Lord Denning M.R.

A appears that records have been made by other publishers of music by Sibelius and Elgar. Both of them are the subject of copyright. We have had them played before us. The plaintiffs say that De Wolfes have recorded music which bears a close resemblance to those copyright airs. They also were played before us. There is indeed a very close resemblance so that one may well think that De Wolfes may well have copied them from the copyright work.

B The plaintiffs wish to give those matters in evidence. They say that they go to show that, in other cases, De Wolfes have been reproducing musical works which are subject to copyright; and so may have done the same in regard to the work "Sogno Nostalgico." Mr. Bateson says that those matters are not admissible.

C The admissibility of evidence as to "similar facts" has been much considered in the criminal law. Some of them have reached the highest tribunal, the latest of them being *Reg. v. Boardman* [1975] A.C. 421. The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it. Instances are *Brown v. Eastern & Midlands Railway Co.* (1889) 22 Q.B.D. 391; *Moore v. Ransome's Dock Committee* (1898) 14 T.L.R. 539 and *Hales v. Kerr* [1908] 2 K.B. 601.

F The matter in issue in the present case is whether the resemblances which "Girl in the Dark" bear to "Sogno Nostalgico" are mere coincidences or are due to copying. Upon that issue it is very relevant to know that there are these other cases of musical works which are undoubtedly the subject of copyright, but that the defendants have nevertheless produced musical works bearing close resemblance to them. Whereas it might be due to mere coincidence in one case, it is very unlikely that they would be coincidences in four cases. It is rather like *Rex v. Sims* [1946] K.B. 531, 540, where it was said: "The probative force of all the acts together is much greater than one alone." So the probative force of four resemblances together is much better than one alone.

G Mr. Bateson urges that this is virtually a charge of fraud: and fraud is not pleaded. But in infringement of copyright fraud is not an essential ingredient. Reproduction without the owner's consent is enough. Even subconscious copying is an infringement. And even if there were a charge of fraud, it would not mean that evidence of similar fraud should be excluded. It might be very relevant to prove the fraud.

H It seems to me the judge was right. He said the evidence of these three matters is of sufficient probative weight to be relevant to this issue and should be admitted. Incidentally, he rejected evidence of other

matters which was not of sufficient probative value. I would dismiss the appeal.

ORR L.J. I agree.

BROWNE L.J. I also agree.

*Appeal dismissed with costs.*

Solicitors: *White and Webb, Syrett & Sons; Davenport, Lyons & Co.*

M. M. H.

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[COURT OF APPEAL]

UNITED SCIENTIFIC HOLDINGS LTD. v. BURNLEY  
BOROUGH COUNCIL

[1973 U. No. 6585]

1976 Feb. 25, 26, 27;  
March 1

Buckley, Roskill and Browne L.JJ.

*Landlord and Tenant—Rent—Revision—Time limit in rent review clause—Construction—Whether time of essence of contract—Whether landlords entitled to equitable relief—Law of Property Act 1925 (15 & 16 Geo. 5, c. 20), s. 41*<sup>1</sup>

The plaintiffs leased adjoining properties from the defendants for 99 years at a rent of £1,000 a year each. A rent review clause provided that, inter alia, during the year preceding the second and each succeeding 10 year period the parties should either agree or determine by arbitration the sum total of the properties' current rack rent and that one quarter of that sum, or £1,000, whichever was the greater, would be the rent of each property for the next 10 years. The first 10 year period ended on August 31, 1972, and by that date the new rent had neither been agreed nor referred to arbitration and the plaintiffs sought a declaration that, since time was of the essence of the contract, the defendants had lost their chance of increasing the rent for the second 10 year period. Penny-cuick V.-C. held that although the review clause was expressed merely as a provision for the quantification of additional rent, it constituted a unilateral right to increase the rent vested in the defendants alone; that time was of the

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[Reported by A. G. B. HELM, ESQ., Barrister-at-Law]

<sup>1</sup> Law of Property Act 1925, s. 41: "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."