Interventions

Beckingham v. *Hodgens*: The Session Musician's Claim to Music Copyright

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The High Court judgment in *Beckingham* v. *Hodgens*, delivered in July but as yet unreported, revisits the issue of the backing musician's entitlement to a share of the copyright in a song on which he has played. The decision seems to put the law in this area back on the right path, from which it had strayed in *Hadley & Others* v. *Kemp* (the Spandau Ballet case) [1999] EMLR 589. It also demonstrates the continuing divergence between conventions in the music industry and the law in relation to music copyright.

Music Industry Conventions

There is a hierarchy within popular music, with vocalists and guitarists at the top, followed by bass players and, at the very bottom, lowly drummers. Given the large egos frequently involved and the large sums of money earned from music copyrights, those who consider themselves the main creative forces in a band are not usually inclined to give credit to the contributions of supporting musicians.

The convention is that the songwriter or songwriters who compose the chords of a song and its main vocal melody are to be considered its authors and entitled to the entire music copyright. The group members who contribute the other musical parts are not considered to have earned a share of the music copyright and, still less, any session musician brought in to add a musical part on an instrument which no group member can play.

Where a group composes a song together in a jam session it is generally accepted that the group members are joint authors and joint owners of the music copyright. See *Stuart* v. *Barrett and Others* [1994] EMLR 448. Even in this situation a session musician is unlikely to be considered for a share of the music copyright.

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The Facts of the Case

The claimant in *Beckingham* v. *Hodgens*, Robert Beckingham professionally known as 'Bobby Valentino', had been a member of various bands and a session musician. He played a violin part on the recording by The Bluebells of the song 'Young At Heart' in 1984. For his services he was paid £75.

Robert Hodgens of The Bluebells and his girlfriend of the time, Siobhan Fahey, then a member of Bananarama, were credited as the writers of 'Young At Heart'. The song was a hit in 1984 and repeated its success in 1993 when it was used in a Volkswagen advertisement. Bobby Valentino maintained that he had composed the violin part. Robert Hodgens strenuously disagreed.

Having decided not to assert a claim in 1984, Bobby Valentino changed his mind in 1993 and told Robert Hodgens that he would be making a claim. Proceedings were eventually commenced in 1999.

Christopher Floyd Q.C. concluded that Bobby Valentino had indeed composed the violin part. The judge had then to consider whether this made Bobby Valentino a joint author of 'Young At Heart'.

Joint Authorship

The requirements for joint authorship are that:

(i) there must be a collaboration in the creation of a new musical work;
(ii) there must be a significant and original contribution from each author; and
(iii) the contributions of each author must not be separate.

The first and third requirements flow from the definition of 'work of joint authorship' in s.10(1) of the Copyright Designs and Patents Act 1988. All the authorities relate to its predecessor, s.11(3) of the 1956 Act, but there is no significant difference in the wording.

It is the requirement that each author's contribution must be 'significant and original' which has been at the centre of all the cases. These disputes have undoubtedly been exacerbated by the fact that in the absence of agreement to the contrary all joint authors own an equal share of the copyright regardless of their relative contributions.

The question is said to be one of 'fact and degree' for the Court. This never seems to deter parties from calling expert witnesses to give their opinions as to whether a particular contribution is 'significant'.

In the Bobby Valentino case Christopher Floyd Q.C. dealt briskly with the expert evidence. He concluded, after listening to the piece played, that

the violin part was significant and original. The session musician was a joint author and therefore entitled to a share in the music copyrights.

The Judge also dismissed the argument that Bobby Valentino should not be allowed to raise his claim at such a late stage. He found that Bobby Valentino had granted an implied licence, royalty free for the period 1984–93 but was entitled to give Robert Hodgens notice, as he had done in 1993, that this licence was revoked and that in future he would claim a share of royalties.

The Barclay James Harvest Case

The music industry was first made aware of the possibility of such claims by the decision in *Godfrey* v. *Lees and Others* [1995] EMLR 307.

The claimant Robert Godfrey had acted as an orchestral arranger and piano and organ accompanist for the group Barclay James Harvest, which enjoyed success in the late 1960s and early 1970s. He contributed arrangements and accompaniment to various works on the group's two albums. Robert Godfrey was not a member of the group and the group members had never considered that he was entitled to any share in the music copyrights in the songs to which he contributed.

In 1971 he ceased to work with the group. In 1985 he issued the first of two sets of proceedings against the group members in which he claimed a share in the music copyrights and a share of the income from them.

In coming to his decision Blackburne J. made it clear that it was unnecessary for each joint author of a musical work to establish that 'his contribution to the work is equal in terms of either quantity, quality or originality to that of his collaborators'.

He also emphasised that the qualifying threshold was not high. Referring to the decision in *Redwood Music* v. *Chappell* [1982] RPC 109, the judge commented that the 'case was not concerned with joint authorship but it well demonstrates how little originality is required of a person's contribution to a piece of music in order to attract copyright in the altered work which results'.

Blackburne J. went on to find that Robert Godfrey was a joint author of the various works on which he played even though in one 'borderline' instance his 'accompaniment [was] of a straightforward and largely repetitive nature'.

The claim to a share of the earnings from the music copyrights nevertheless failed on the basis that Robert Godfrey was estopped by his conduct in allowing the band members to proceed for 14 years under the assumption that he did not claim any interest in the music copyrights.

The issue came before the Courts again in 1999 and the position in the Barclay James Harvest case was effectively reversed.

The Spandau Ballet Case

In *Hadley & Others* v. *Kemp* the claimants Tony Hadley, John Keeble and Steve Norman were the vocalist, drummer and multi-instrumentalist respectively of the group Spandau Ballet, which enjoyed considerable success in the 1980s. The defendant Gary Kemp was the group's guitarist and principal songwriter.

Throughout the band's career Gary Kemp was acknowledged to be the writer of all but one of the songs recorded by the group. Nevertheless, he agreed to pay via service companies a share of the income from the music copyrights to the other group members.

In 1988, as the group reached the end of its career he decided to stop these payments. In 1996, the claimants commenced proceedings against Gary Kemp. Initially their claim was based only on an alleged agreement that they should continue to receive the share of the income from the music copyrights. In 1998 the claim was amended to include an alternative claim that they were joint authors of the songs and thus joint owners of the music copyrights.

Park J. was having none of this. While accepting that the test was whether the contribution of the backing musicians was 'significant and original', he appeared to move away from the principle established by *Godfrey* v. *Lees* that this was a threshold and not a high one.

The judge seemed to be adopting some sort of sliding scale test. He stated that 'the musical works in this case – the Spandau Ballet songs – are totally original, and, in my judgment if contributions to them by the members of the group other than Gary Kemp are going to be sufficient to make the other members joint authors, the contributions need to possess significant creative originality'. The effect of this was that the higher the quality of the contribution of the main songwriter the higher the quality of the contributions of the other musicians would have to be if they were to be considered joint authors.

Park J. also drew an unhelpful distinction, prompted by expert witnesses called on behalf of Gary Kemp, between composing music and performing it. He came to the conclusion that in relation to most of the songs Tony Hadley, John Keeble and Steve Norman had done no more than interpret in their performances the music composed by Gary Kemp.

This was correct in the case of vocalist Tony Hadley, because Gary Kemp always composed the entire vocal melody. However, in the case of the drum parts played by John Keeble and the various parts played by Steve Norman it is clear from the facts found by the judge that all that Gary Kemp had composed was the chords of the song.

What drum parts was John Keeble 'interpreting' when Gary Kemp hadn't composed any? The position was the same regarding the saxophone

parts played by Steve Norman. The judge found that Garry Kemp had simply left gaps for Steve Norman to fill with saxophone parts. Clearly the drummer and multi-instrumentalist had composed their own parts. The real issue was whether what they had composed was 'significant and original'.

Here Park J.'s sliding scale principle worked against the claimants. This was particularly evident in the case of the saxophone contributions by Steve Norman, which included the 16 bar solo in the group's biggest hit, 'True'. By the standard being applied by the judge, Charlie Parker would have been struggling to come up with a saxophone solo which would have entitled him to be considered a joint author alongside Gary Kemp.

The judge found that apart from one song on which the drums and percussion parts devised by John Keeble and Steve Norman were given 'substantial and prolonged prominence', their contributions did not entitle them to a share of the music copyright in the songs.

Park J. also found that having entered into a number of agreements on the basis that Gary Kemp was the sole composer, the claimants had effectively warranted that this was the position. On this basis also the claim must fail.

The Position Post-Bobby Valentino

The Bobby Valentino case has now reaffirmed that supporting musicians who make significant musical contributions will be held entitled to shares of the music copyright. Part of the reason for the differing approaches and the differing results may lie in the fact that while Park J. acknowledged his difficulty with musical matters, Christopher Floyd Q.C. was evidently quite expert, perhaps indicating a youth misspent jamming in dingy rehearsal rooms.

Increasingly those involved in the music industry are becoming aware that supporting musicians may be entitled to claim a share of valuable music copyrights. Session musicians are being asked to sign agreements designed to prevent such claims. It is a rather more difficult matter to ask group members to sign away their rights. Therefore we have probably not seen the last of these disputes over music copyrights.

Leeds United on Trial

STEVE REDHEAD

In these increasingly 'libertarian' though conservative times I want to raise a question about the nature of contemporary state intervention in popular cultural industries like football, especially through the judiciary, magistracy and police, but also in terms of a wider governance, indeed 'governmentality',[1] of popular culture by governing bodies and by private and public companies like professional football clubs. I want to take as a case study the so-called 'Leeds United trial', although it is by no means the only example[2] we could select. First let us set the scene for the case study.

Come On You Whites?

Leeds United Football Club is based at Elland Road in Leeds, Yorkshire's 'capital' city. Since the time of Don Revie, the team have played in all white, a kit based from the days of the 1960s on the great Real Madrid side of Di Stefano, Puskas and Gento, who from the 1950s dominated the early years of the European Cup. It is, semiotically, a signifier of style in football history: like the unforgettable 7–3 defeat of Eintracht Frankfurt at Hampden Park, Glasgow, before 135,000 spectators in the European Cup Final of 1960, and more recently of the team of Roberto Carlos, Luis Figo and Raul, who also played and won the European Champions League Final at Hampden Park, before rather fewer spectators, this time with a superb individual goal by Zinedine Zidane against another German opponent, Bayer Leverkusen, in May 2002. It is also a sign, in Leeds United's case, of 'whiteness' in general. The club has had a chequered history of fan racism over the past three decades and few black players have ever played very often for the first team. No Asian player has appeared in the first team. But in the 1960s Albert Johansen, a stylish black South African left-winger plied his trade for Leeds, and in the 1990s players such as the national South African team captain, Lucas Radebe, together with Olivier Dacourt and Michael Duberry, joined the club's playing staff. At the same time, Leeds city centre became known as a regenerated urban development space espousing cosmopolitan values, entrepreneurship and club cultures. Clubs

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like Back to Basics did for Leeds what the Hacienda did for Manchester. Television dramas such as 'North Square' celebrated the trendy young new movers and shakers in the city's legal community. Leeds established a reputation for commerce and finance, for arts and entertainment. And for sport, especially football.

The Lads

In December 2001 Jonathan Woodgate and Lee Bowyer, two young, white, high-profile professional footballers at Leeds United, escaped jail sentences at the end of a long court case over the vicious assault on a young local British Asian student, Sarfraz Najeib, outside a nightclub in Leeds city centre almost two years earlier in January 2000. Their black colleague, Michael Duberry, was also allowed to leave court a free man after being charged with conspiracy to pervert the course of justice as a result of assistance he gave to Bowyer, Woodgate and two friends that night. After the verdicts Leeds United fined Bowyer and Woodgate for their drinking activities on the night in question but not for their violence. Woodgate was fined eight weeks wages and asked to take part in the club's community programme. Bowyer initially complained about his disciplinary treatment by the club which amounted to a fine of four weeks' wages (something like £80,000 in total) and a spell on the club's community programme beyond that which players were normally asked to undertake. In fact he at first refused to accept the disciplinary action and was placed on the transfer list for two days until he accepted the club's internal punishment. Before being transferred to Leeds United from Charlton Athletic, Bowyer had been convicted of attacking Asians at a McDonalds restaurant in East London, but in the Leeds United trial he walked away without any conviction. Lee Bowyer was totally acquitted after the court case, but his colleague Jonathan Woodgate was sentenced to 100 hours community service for affray. The judge, Henriques J., singled out the players for what he called their dishonesty in the court. By the end of the season both players were regularly playing for Leeds United in the Premiership. In fact Bowyer had hardly been out of the team at all during the whole episode. Chants at Elland Road from the home fans regularly proclaimed 'Bowyer for England!'; indeed the Football Association never imposed a formal ban on either Woodgate or Bowyer. In April 2002 Woodgate broke his jaw after an incident in his home town of Middlesbrough which the club described as 'horseplay'. Leeds United considered disciplining him after the injury caused him to miss the final games of the season, even though a club investigation cleared him of blame. He had in fact been injured for a considerable part of the time since the original assault on the night of Wednesday 12 January 2000.

The Case

The case of the alleged assault directly involved Lee Bowyer, Jonathan Woodgate and Tony Hackworth (a reserve team striker) of Leeds United Football Club. Hackworth was cleared of the assault by the judge, Poole J., early in the trial at Hull Crown Court for lack of evidence. Bowyer and Woodgate were at the time well known Premiership players who had represented their country. Bowyer was 22 years old at the time of the incident and Woodgate 21 years old. Two other men who were friends of Woodgate and Bowyer, Neale Caveney and Paul Clifford were also charged. The charges were affray and grievous bodily harm with intent, an extremely serious charge which could carry long jail sentences for the defendants if found guilty. Conspiracy to pervert the course of justice charges were also laid against Woodgate, Clifford and Caveney. Michael Duberry was additionally charged with conspiracy to pervert the course of justice by driving the four men away from the scene of the alleged crime. All the defendants pleaded innocent. Beginning in late January 2001, over a year after the incident, the initial trial took nine weeks, heard testimony from 60 witnesses, cost £8m in legal fees and was nearing its close when the media intervened. Defendants had already been cleared of the perversion of the course of justice charges and jury verdicts were awaited on the grievous bodily harm with intent and affray charges. This first court trial was sensationally halted on Monday 9 April 2001 when on the eve of the jury's decision a tabloid newspaper, the Sunday Mirror, published an interview with the victim's father Muhammad Najeib, alleging the incident was racist, a charge which had been disdained in the court proceedings. After the collapse of the first trial it was announced that Michael Mansfield QC, a prominent barrister in the National Civil Rights Movement set up in the wake of the Stephen Lawrence case, was considering taking a civil case on behalf of the victim. In the event a retrial was ordered, again at Hull Crown Court. This second trial began in October 2001.

The Event

On a mid-week evening in January 2000, Bowyer, Woodgate, Hackworth, Caveney and Clifford had been drinking with another friend Jamie Hewsion in a nightclub in Leeds city centre called the Majestyk. Hewison had apparently been causing trouble in the club. Woodgate testified in court that he thought Hewison was going to hit someone with a bottle. The alcohol consumption by the group had already been considerable. Testimony in court suggested they had drunk 'seven or eight pints of Vodka Mule and Bacardi Breezer' each but were not 'mortal drunk'. Bowyer had already

drunk five or six glasses of wine before arriving at the Majestyk to join up with Woodgate and his Middlesbrough friends. Hewsion was subsequently thrown out by the bouncers at the club and about ten minutes later Woodgate emerged to find Hewison 'having a go with some white lads'. Hewison then approached what the media described as some 'Asian' men. Woodgate testified that he told Hewison to 'get off' them. One of the 'Asian' men was the Leeds Metropolitan University student Sarfraz Najeib, who was 19 years old at the time. Najeib had been attacked by Hewison and he had thrown a punch which he testified in court was in self-defence. Fortunately for Najeib, who was shortly to be seriously assaulted in Mill Hill a few hundred yards away, there was a CCTV system in operation which showed the scene outside the club. The knowledge that there had been CCTV security footage was well known once the prosecution decided to charge the men and it was widely assumed that the surveillance images would be enough to convict them.

The events so far described were more or less agreed by the participants in the court trial. What followed was disputed. Najeib's account was that he was chased into Mill Hill from outside the Majestyk nightclub and beaten and kicked. He sustained a broken nose, a broken cheekbone and a broken leg. He was beaten unconscious during the assault and spent eight days in hospital. He was bitten on the cheek by one man who according to witnesses shook Najeib like a dog hanging on to his face with his teeth. Another of the attackers was said to have jumped two footed into his body. The CCTV cameras did not catch any of this action. However they did capture Lee Bowyer leaving the scene outside the club 27 seconds after the other men running in the direction they had gone and then a little while later in what was described as a 'victory' ('post-score') embrace with Caveney, after the assault had taken place, back in front of the nightclub.

Lee Bowyer denied in court that he was involved in the savage attack on Najeib. He had refused prior to the trial to take part in identification parades. He was not reliably identified by any witnesses of the assault in the course of the court case. He said in court that he had fallen over after leaving the Majestyk and felt a 'whack' on the head. He argued that he had never entered Mill Hill and had not been involved in the trouble. Bowyer was wearing a Prada designer leather jacket that night and later forensic tests on its cuffs revealed a smear of blood which matched that of Shahzad Najeib, the victim's brother, who was present at the scene. The prosecution alleged that Bowyer had come into contact with him by preventing him from going to the aid of his brother when he was being beaten unconscious. The two barworkers who gave evidence in court as witnesses gave different descriptions of the man who bit Najeib on the cheek. Bowyer or Clifford were the two men in the frame for this part of the action. Bowyer's barrister

Desmond de Silva QC told the court that Bowyer, on leaving the Majestyk, had thought that the group were going on to a lapdancing club. De Silva said that Bowyer had 'girls on his mind, not grievous bodily harm' and 'lap dancing on his mind, not affray'. Bowyer was apparently keen not 'to miss a lively evening with the ladies'. In court under questioning Bowyer admitted that he was 'not very clever. It's how I speak' and that he was 'not very good with words'.

Jonathan Woodgate was alleged to have jumped in the air, and two footed, landed on Najeib's body in the assault in Mill Hill. Woodgate was represented in court by Donald Sumner QC (and at the second trial by David Fish QC). Even his own barrister likened him to a 'plank'. Donald Sumner admitted that his client communicated badly and was largely ordinary except for his football talent. Woodgate's version of events was that Lee Bowyer had run past him after leaving the Majestyk. Woodgate said in court that he had then fallen over and hurt his ankle and by the time he got up and hobbled forward he was only able to watch the incident. When asked at the trial about whether he could have helped, Woodgate replied 'No. What could I do? I couldn't do nothing'. Nicholas Campbell QC for the prosecution said that in contrast to the defendants the witnesses had been 'courageous people' because they had spoken in court at great risk to themselves from Leeds United supporters who might take revenge on them.

Michael Duberry had picked the four men up in his car after the incident and taken them to his home where they could change clothes and clean up. When questioned by police initially in January 2000 Duberry went along with Jonathan Woodgate's story that the men had taken a taxi to Duberry's home. Clare Montgomery QC for Duberry said in court, after several weeks had gone by in the trial, that Duberry had not told police the truth at the time of the questioning. Duberry said that he had not wanted to contradict his friend 'Woody's' statement and he had lied to avoid getting his friend into trouble. The effect of the revelation that he had originally lied was instant. The retraction was treated as dynamite by the media. There was widespread suggestion that this evidence alone would be enough for the jury to convict the other men. The defence barristers were taken by surprise. One even made the strange suggestion that Duberry had changed his mind at this stage of the trial because if the other men were convicted he would take Woodgate's place in the Leeds United team since they both played as central defenders. Leeds United's chairman Peter Ridsdale had previously told the media that if convicted the players would never again play for the club.

The subsequent publication of the interview with Muhammad Najeib effectively closed the question of whether the jury at the original trial of the men would convict on the charges of grievous bodily harm with intent and affray. The jury admitted to the judge when he questioned them on the

Monday after publication that they had read the *Mirror*'s story. Poole J. immediately discharged the jury and ordered a retrial on the grounds of contempt of court. He announced that it was for the reason that he had been 'deeply concerned' that an article published in the *Sunday Mirror* on 8 April 2001 suggesting the attack was racially motivated could be prejudicial. Poole J. went on to say that 'whatever the intentions behind that publication, the effect for now, is that all that effort has been derailed'. Peter Ridsdale said after the collapse of the trial that there was a 'sense of belonging at the club' and pointedly recalled the murder of two Leeds fans in Turkey a year before. Ironically, Ridsdale was soon to be the target of personal death threats from Leeds United fans who were unhappy with proposed moves to relocate the club from Elland Road to new premises.

Poole J. singled out the Macpherson report on the murder of black teenager Stephen Lawrence for a particularly bitter attack after the collapse of the Leeds United trial. Stephen Lawrence was brutally murdered by several young, white men at a bus stop in Eltham in south-east London in 1993 and eventually, after bungled work by the Metropolitan Police and unsuccessful criminal trials, a major investigation into the racism and policing was undertaken. The eventual government sponsored judicial report presided over by Sir William Macpherson and released in 1999 recommended that police treat any incident as being racist 'where the victim or any other person believes it to be a racist attack'. In other words it established a subjective definition of racist attack. Poole J. claimed that in general the report places an unfair burden on the police in dealing with incidents which may or may not have racist connotation. The judge suggested that the report's effect is to attach a stigmatising label to an incident. In his view it may be that a 'serious prejudice' can be created and a suspect cannot be fairly tried. The *Sunday Mirror* story had carried the view of Sarfraz Najeib's father that the attack on his son was racist. It was precisely this article which led to the collapse of the trial. Poole J. proclaimed that 'we live in a society where there is a particular sensitivity to issues of racism and race' whilst allowing that the victim and his family were entitled to their views on the nature of the attack. The fact that 'the young man who was attacked is an Asian, and it is not in dispute that his attackers were a group of white males' had 'absolutely' no significance according to Poole J. The whole prosecution in the case was explicitly not based on the racial context of the incident at all, relying instead on the expressed view that group loyalties, not racism, triggered the assault. It was not racism which motivated the men who attacked Sarfraz Najeib but 'spiteful group retaliation' in the view of the prosecution, and the judge simply endorsed that view in claiming that the 'misleading theme of racism' which 'this court thought it had exorcised' had been revived by the *Sunday*

Mirror. He thundered that 'justice cannot be done in the sort of atmosphere created by a publication such as this'. The defence legal team, too, had indeed gone along with the prosecution view on the lack of racial motivation for the assault on Sarfraz Najeib.

The Drama

The outcome of the second trial under Henriques J., which involved only one prison sentence, that of six years passed on Paul Clifford for affray and grievous bodily harm with intent, but convictions by the jury for affray for Woodgate and Caveney, left many observers staggered and the victim feeling far from compensated. Muhammad Najeib stated that 'the almost fatal assault on my son has turned our lives upside down. We have been victimised not only on the streets of Leeds but also in court'. As a reaction to what was perceived to be a lack of justice, in July 2002 Imran Khan, the lawyer who had acted for the family of Stephen Lawrence, organised the serving of civil proceedings on, initially, Lee Bowyer for £100,000 aggravated and exemplary damages with further action against others in the case to follow. The particulars of claim also alleged that Bowyer 'dishonestly and unlawfully' took various steps to 'prevent himself from being held responsible for the assaults' and to prevent him from having to pay compensation. Such steps included unlawfully conspiring with others, including Jonathan Woodgate, to provide an untrue account of what had happened on the evening, failing to produce to the police on request clothing and other evidence that would assist in the police investigation, providing misleading evidence to the police and court, denying to the police and the court his true role in the assault and seeking to persuade the police and court that an account of his role in the assaults, which he knew to be false, was true. The claim against Bowyer was on behalf of both Sarfraz and Shahzad Najeib, who had also suffered injuries in the attack and who had to withdraw from his university course because of post-traumatic stress. However, the civil action prepared by the Najeibs and their legal team in the wake of the criminal trial was not quite the end of the matter. Yorkshire TV and its parent company Granada Media, producers of recent 'factual' television dramas such as 'The Murder of Stephen Lawrence', planned a two hour TV drama based on the entire case, emphasising that the civil action would make the drama more relevant. The feeling was that Najeib's experience was not just a story about race in modern Britain but a more general metaphor for our times. Executive producer Allen Jewhurst argued that 'it is mainly the story of how young men can earn twenty thousand pounds a week and virtually own whole cities and think they are bullet proof'.

As a further twist to the horrific tale of racial violence compounded by state and judicial ineptitude, David O'Leary, the Leeds United manager who had published a conventional mass market football manager's autobiography during the years of the case entitled *Leeds United on Trial*,[3] was sacked at the end of the 2001–02 season despite Leeds United having finished in the top six of the English Premiership. O'Leary criticised both Bowyer and Woodgate in *Leeds United On Trial* for 'failing to exercise control' on the night of the incident. If any of the Leeds United footballers had in fact been found guilty of grievous bodily harm, O'Leary stated, echoing his chairman Peter Ridsdale, 'they would never have played for the club again'. O'Leary stated in the book that he 'found the attack on student Sarfraz Najeib absolutely appalling'. He regarded it as 'senseless violence' which was abhorrent. In O'Leary's view 'Paul Clifford, the man convicted of carrying out the attack on the young student, deserved to be sent to prison for his crime'. O'Leary maintained that Bowyer and Woodgate's conduct ('running around Leeds drunk that night') was 'sheer stupidity' and a 'disgrace'. Even though they were 'both found not guilty of the more serious charge of GBH' the manager was 'ashamed' of his players. In a Sunday newspaper article following the end of the second trial O'Leary expressed further views about the players. In the book and the article O'Leary certainly gave the impression that he thought that the reputation of Leeds United Football Club had been damaged by the events of the previous two years. Many commentators suggested that this was a step too far in the eyes of Leeds United's chairman and board and that the subsequent breakdown of relations between manager and dressing room was the final straw which broke the camel's back. After O'Leary's surprise sacking former England manager Terry Venables was appointed as Leeds United manager, something of a rehabilitation for the former England manager, who was eventually replaced because of 'off the field' activities at Tottenham Hotspur in the 1990s which had led him into the civil courts. Lee Bowyer, who as a result of refusing to sign a new five-year contract was already being offered to other clubs via Leeds United's transfer list at the end of the 2001–02 season, at first continued with his proposed transfer to Liverpool, although delays occurred because of bartering with Leeds about the million pound costs of Bowyer's trial and with Liverpool about Bowyer wanting effectively to double his wages, and eventually the transfer was called off. Bowyer's fellow defendant Jonathan Woodgate signed a new three-year contract to keep him at Leeds United until 2005 and Michael Duberry, after discussing a transfer to Bolton Wanderers, also remained within the fold at the beginning of the 2002–03 season. The England manager Sven-Göran Eriksson was reported to be watching Woodgate and Bowyer with a view to including them again in his England national squads and both played against Portugal on 7 September 2002.

Entertainment/Law

The case we have chosen to study has a number of implications for the governance of popular culture at the beginning of the twenty-first century. I do not have the space to deal with all of these implications here. However, in conclusion, I want to draw attention to what I think is the most important of these implications for those interested in theorising the disciplinary field designated by the label 'entertainment law'. These terms 'entertainment' and 'law' seem to me to be increasingly a binary division in need of deconstruction in the Derridean sense of the word. Popular cultural industries like football are part of a global domain of entertainment, or more accurately, popular culture. They are populated, at least in the top echelons such as the Premiership in England, by highly paid young men who like to think they virtually 'own cities' and are effectively 'bullet proof', in the words of the television producer interested in making the Leeds United crisis into a drama. Law, civil or criminal, is an anathema to them which seems not to impinge on their everyday lives. Even when it does, as in the decision to prosecute the Leeds United players in January 2000, the state intervention is relatively weak and ineffectual. The state in relation to popular cultural industries, say in the form of action by the Department of Culture, Media and Sport in the UK government, is usually offering facilitation, rather than full blooded intervention, in the contemporary free market, neo-liberal environment of the entrepreneurial creative businesses New Labour wishes to form, sustain and encourage. Governing bodies like the Football Association seem content to sit back and, with a laissez-faire attitude, allow football players' 'misdemeanours' (on and off the field) to be forgotten when it comes to performing on the international and global stage. In short a strategy of non-, or at least minimal, state intervention continues to reign. Maybe the idea of a 'strong state', most recently last heard of in the 1980s during Margaret Thatcher's odious regimes, is in need of some rehabilitation, albeit in a more palatable social democratic form. Without such a rethinking of state intervention and the governance of culture, and a re-theorising of 'entertainment' on the one hand and 'law' on the other, I fear that we are condemned to more cases of the 'Leeds United on Trial' variety.

NOTES

1. See Michel Foucault's' important lecture on the 'art of government' from the late 1970s at the College of France, entitled simply 'Governmentality', collected in J.D. Faubion (ed.), *Power: The Essential Works of Michel Foucault, Volume 3* (London: Allen Lane, 2001).
2. For instance, three other high-profile footballers, two from Chelsea and one from Wimbledon, went on trial in London in July 2002 as a result of events in a nightclub in January 2002 (a mere month after the end of the second trial at Hull Crown Court) which were very similar to those in the 'Leeds United trial'.
3. D. O'Leary, *Leeds United On Trial* (London: Little, Brown, 2002).

The Legality of Social Clubs' Disciplinary Procedures

STEPHEN C. MILLER

Introduction

From time to time the worlds of leisure and law collide with unhappy consequences. We live in litigious times and, as a result, when the leisure, sport or social club member discovers that he faces discipline and perhaps expulsion from his club for a misdemeanour, he may be tempted to go to law in order to preserve his position. For that reason, the club's management body will need to know the extent to which the court will interfere in its disciplinary and decision-making process. The purpose of this short piece is to outline some of the legal issues a management body would need to be aware of should that eventuality arise.

Reflections on *Lee* v. *Showmen's Guild*

It may be surprising for the contemporary reader to realise that, when Lord Denning wrote his leading judgment as a Member of the Court of Appeal bench in the seminal case of *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All ER 1175, he was settling what was then a controversial area. Up to that point, many learned judges had baulked at the prospect of interfering with the disciplinary processes within clubs and the like, considering themselves permitted only to interfere in disputes to protect rights of property (*Rigby* v. *Connol* [1880] 14 Ch 487; *Cookson* v. *Harwood* [1932] 2 KB 481). As a consequence, until *Lee*, the degree with which a club's internal disciplinary processes and proceedings might be scrutinised by the court was not at all clear; and Lee's livelihood depended on the court being willing to intervene.

Lee had ceased to be a member of the Showmen's Guild following disciplinary procedures taken against him after he squabbled with another member about the prime site at a fairground in Bradford in the late 1940s. The Guild was then a Society of Showmen and a registered trade union formed exclusively to protect the rights and interests of Showmen visiting fairs and show grounds. Lee found himself unable to pursue his chosen

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trade. As a result, Lord Denning was primarily concerned to consider the disciplinary processes of the Guild in the light of the deprivation of Lee's livelihood. In arriving at his conclusion that the Guild had acted *ultra vires*, Lord Denning paused to consider the position in respect of social clubs.

Denning contrasted the position of social clubs with the situation applied in respect of those domestic tribunals that sit in judgment on the members of a trade or profession. He ruled that the court will not treat those domestic tribunals as being on the same footing as a social club. The courts did not have to be bashful or overly respectful in seeking to establish whether nor not fair play was done.

But something short of that standard has to apply to social clubs (expulsion from which will have no immediate bearing on the ex-member's livelihood), the committees of which must be accorded a margin of appreciation, as the modern administrative lawyer might put it.

That Denning had this conflict in mind is evident from the following passage:

> in the case of Social Clubs the rules usually empower the Committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club and this is a matter of opinion and nothing else. The Courts have no wish to sit on appeal from their decisions in such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules, but will not otherwise interfere.[1]

To that extent, Lord Denning was approving the language used in *Labouchere* v. *Earl of Wharncliffe* [1879] ChD 346. Here, it was stated by Lord Jessel M.R. that 'if, having given the accused fair notice, and made due enquiry, the Committee came to the conclusion that the conduct of one of the members of club was injurious to its welfare and interests, no judicial Tribunal could interfere with any consequences which might arise from an Opinion thus fairly formed'.

These fine words have to be given a modern context. Membership of clubs is no less popular now than in the late nineteenth century, when there was a rash of litigation involving expulsion from gentlemen's clubs (as in the *Labouchere* case). It just so happens that today various social clubs tend to concentrate on sporting rather than purely social interests. Considerable status can attach to membership of certain clubs.

Accordingly, it will undoubtedly fall to a court to consider shortly how

far, if at all, these settled common law principles have to be revisited in the light of the Human Rights Act 1998, and in particular the terms of Article 6(1) of the European Convention on Human Rights, which provides that, 'in the determination of his civil rights and obligations or of any criminal charge against him [the subject] is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Article 6 then provides further rights specifically for those facing criminal charges. While it might well be tempting for social clubs to argue that the Human Rights Act does not directly apply to their processes because of the essentially private nature of the relationship between member and club, the application of the Act in practice is bound to influence the development of the applicable provisions of natural justice.

Recent Developments: *ex parte Fleurose*

In the Court of Appeal decision *R* v. *Securities and Futures Authority Limited and another ex-parte Fleurose* [2002] IRLR 297, there is an analysis of the processes adopted by the Securities and Futures Authority Disciplinary Appeal Tribunal when it suspended the financial trader Fleurose from registration for two years and made a significant costs order against him. Fleurose's employer, JP Morgan Securities Limited (JPM) found itself contractually obliged to pay £475,000 if the FTSE index ended the month of November 1997 higher than at the start of the same month.

In the event, the obligation did not crystallise thanks to a sudden and mysterious fall in the index during the last six seconds of that month's trading. After an investigation, the London Stock Exchange (LSE) concluded that the sudden fall of the index stemmed from substantial sales by JPM during the last ten minutes of trading (as one reads of these events in the case report, the image in the mind's eye is of an opponent's curling stone being frantically brushed out of the house). The problem for Fleurose and JPM was that this type of intervention is banned by the Rules of the LSE. Those rules prohibit member firms from doing acts or engaging in a course of conduct the sole intention of which is to move the index value. JPM was fined £350,000 by the LSE. Fleurose, who came within the jurisdiction of the Securities and Features Authority Limited, faced serious disciplinary charges.

Fleurose failed in his attempt to invoke the additional 'criminal court' protections available in Article 6(ii) and 6(iii) of the Convention, such as the presumption of innocence, the right to be informed of the detail of charges and the right to legal representation in view of the quasi-criminal nature of the charges against him. In resolving in favour of the Securities and Futures Authority, the Court made it clear that the issue of whether or not a hearing is fair is a question which should be considered in the round, having regard

to all relevant factors. It does seem, therefore, that even if the Human Rights Act were to apply to social and sporting clubs, Lord Denning's forceful but *obiter* comments in the *Lee* case will still stand to guide the hand of committees forced to consider expelling misbehaving members.

It should also be pointed out that lawyers called to assist the members being disciplined may still find themselves forbidden from entering the committee room in defence of the member. One consequence of the court's finding in *ex parte Fleurose* was clarification of the fact that the right to legal representation is only available when answering genuine criminal charges (*Han and Yau* v. *Commissioners of Customs and Excise* [2001] EWCA Civ 1048). To that extent the line of authorities making it clear that no party in disciplinary proceedings has an inalienable right to legal representation stands firm. That line depends on the judgment in *Enderby Town* v. *Football Association* [1971] Ch 591 which provides a closing irony because one dissenting judge in 1971 sought to prevent the type of blanket ban on legal representation as existed at that time within the Football Association Rule Book. The judge? One Lord Denning.

Concluding Thoughts

It is said that Lord Denning was always right with his judgments, but that it sometimes takes time for the rest of us to realise it. It is tempting to speculate that, if he had had an occasion to review his *obiter* comments in *Lee* in the light of Article 6 of the European Convention of Human Rights, he might well have identified the importance of legal representation for the member being disciplined. As more and more clubs voluntarily allow their members the right of legal representation so the standards of fairness in disciplinary practice will improve to the point where it may be impossible for the court to continue to deny legal representation. Certainly, to deny legal representation on the basis that the court is unable to identify a legal argument which could have been expressed by a trained lawyer (as was argued in *ex parte Fleurose*) seems a precarious balance to strike.

Until the law becomes clearer, club members would do well to acquaint themselves with those of their fellow club members who happen to be legally qualified and treat them particularly nicely, because no club is permitted to deny a member the right to be accompanied by a fellow club member in the disciplinary process. As a result, there may well be a role for the Garrick room lawyer to play …

NOTE

1. *Lee* v. *Showmen's Guild* [1952] 1 All ER 1175 at 1181.