



Neutral Citation Number: [2022] EWHC 827 (Ch)

Case No: IL-2018-000095

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST

7 Rolls Building
London EC4A 1NL

Date: 6 April 2022

Before:

MR JUSTICE ZACAROLI

Between:

- | | |
|---|--------------------------|
| (1) MR EDWARD CHRISTOPHER SHEERAN
MBE | <u>Claimants</u> |
| (2) MR STEVEN MCCUTCHEON | |
| (3) MR JOHN MCDAID | |
| (4) SONY/ATV MUSIC PUBLISHING (UK)
LIMITED | |
| (5) ROKSTONE MUSIC LIMITED | |
| (6) POLAR PATROL MUSIC LIMITED | |
| - and - | |
| (1) MR SAMI CHOKRI | <u>Defendants</u> |
| (2) MR ROSS O'DONOGHUE | |
| (3) ARTISTS AND COMPANY LIMITED | |

Ian Mill QC, Jessie Bowhill and Rayan Fakhoury (instructed by Bray & Kraiss) for the
Claimants

Andrew Sutcliffe QC and Tom Rainsbury (instructed by Keystone Law) for the Defendants

Hearing dates: 4, 7-11, 14-16, 21, 22 March 2022

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

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Approved Judgment**Mr Justice Zacaroli:**A. Introduction

1. The first three claimants, Ed Sheeran, Steven McCutcheon and John McDaid are the writers of the song “Shape of You” (“Shape”). Shape, performed by Mr Sheeran, was released as a single on 6 January 2017 and included on Mr Sheeran’s album “÷” (“Divide”), released on 3 March 2017. It became the best-selling digital song worldwide in 2017. In December 2021 it became the first song to pass 3 billion streams on the streaming service Spotify. It has had more than 5.6 billion views on YouTube.
2. The first two defendants, Sami Chokri (who performs under the name Sami Switch) and Ross O’Donoghue, are the writers of the song “Oh Why”. The song was performed by Mr Chokri, released in mid-March 2015 and included on Mr Chokri’s EP “Solace”, released on 1 June 2015.
3. The fourth to sixth claimants are music publishing companies that own a share of the rights in the musical and literary works subsisting in Shape. The third defendant (“A&C”) is a music artists’ development, management and social media company and is the assignee of Mr Chokri’s copyright in Oh Why.
4. The defendants’ claim relates only to an eight-bar post-chorus section of Shape, in which the phrase “Oh I” is sung, three times, to the tune of the first four notes of the rising minor pentatonic scale commencing on C#. The defendants refer to this as a “hook”, commonly understood to mean that part of a song that stands out as catchy, memorable and keeps recurring. The claimants point out that there are other parts of Shape which are just as catchy, memorable and recur much more, for example the four-bar marimba pattern which starts the song and repeats throughout most of it, or the sung phrase “I’m in love with the shape of you” which defines the song. I will refer to the post-chorus passage in issue, neutrally, as the “OI Phrase”.
5. The defendants contend that the OI Phrase is copied from the eight-bar chorus of Oh Why, in which the phrase “Oh why” is repeated to the tune of the first four notes of the rising minor pentatonic scale, commencing on F#. This catchy and memorable phrase is clearly central to the song Oh Why, and I will refer to it as the “OW Hook”.
6. These proceedings were commenced by the first four claimants (and three other entities that were later replaced by the fifth and sixth claimants) on 16 May 2018, seeking declarations that they had not infringed copyright in Oh Why. The claim was issued following the defendants having notified the Performing Rights Society Limited (“PRS”) of their contention that they should be credited as songwriters of Shape, causing the PRS to suspend all payments to the claimants in respect of the public performance/broadcast of Shape. By a counterclaim, the defendants assert their claim that copyright in Oh Why has been infringed by the claimants.

B. The issues

7. It is common ground that copyright subsists in the musical work “Oh Why”. The issue that lies at the heart of this case is copying. Without establishing copying the defendants’ case cannot succeed, and the stated desire of the writers of Shape to clear

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their name depends upon defeating the claim of copying. Accordingly, this issue is the main focus of this judgment.

8. The defendants' pleaded case is that each of Mr Sheeran, Mr McCutcheon and Mr McDaid had access to Oh Why and "as a result" reproduced a substantial part of the OW Hook in writing Shape. By the end of cross-examination of Mr McDaid and Mr McCutcheon, it was made clear that the defendants do *not* contend that either Mr McDaid or Mr McCutcheon copied the OW Hook, whether deliberately or subconsciously. The allegation of copying is made, therefore, *only* against Mr Sheeran (albeit that if that allegation is made good, the consequences will impact on each of the claimants as owners of the copyright in Shape).
9. The principal way in which the defendants put their case against Mr Sheeran is that he copied from the OW Hook, deliberately and consciously, in creating the OI Phrase. Alternatively, they contend that he did so subconsciously.
10. So far as conscious copying is concerned, Mr Sutcliffe QC (who appeared for the defendants) submitted that there is sufficient similarity between the works, clear evidence of access and other indicia of copying that the evidential burden should shift to the claimants, which they have failed to discharge. The matters on which he relies are, in summary, as follows.
 - (1) The extent of similarity between the musical works, strengthened, it is said, by the following alleged matters: the OW hook is a memorable and portable phrase; the first recording of the OI Phrase is remarkably similar to the OW Hook; Mr Sheeran, in the course of writing Shape, moved away from the OW Hook before re-instating it; he had a clear idea of what the OI Phrase should sound like; the OI Phrase sits in stark contrast to the rest of Shape; and the absence of anything comparable in 250 years.
 - (2) It is alleged that Mr Sheeran had access to Oh Why through a number of channels.
 - (3) It is also alleged that Mr Sheeran has a propensity to collect ideas for songs in advance of writing them (which, they say, contradicts Mr Sheeran's evidence that he wrote Shape from scratch in a couple of hours on 12 October 2016), and habitually copies, 'references' or 'interpolates' other artists. The defendants rely on other instances of alleged copying, in particular in relation to: (1) a section from an early version of the pre-chorus in Shape; (2) a song called "Photograph" written by Mr Sheeran and Mr McDaid in 2012; and (3) a song called "Strip That Down" (written by Mr Sheeran and Mr McCutcheon in October 2016).
11. The claimants deny that Mr Sheeran (or any of the writers of Shape) copied any part of the OW Hook in creating the OI Phrase.
12. Even if copying is established, the claimants do not accept that the defendants have established, as a matter of fact, that the elements of the OW Hook said to be similar to the OI Phrase represent the expression of the intellectual creativity of Mr Chokri and Mr O'Donoghue. In addition, the claimants contend that the elements of the OW Hook on which the defendants rely are not protectable because they do not represent that which confers originality on Oh Why as a musical work.

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13. Finally, the defendants contend that even if Shape was not copied from Oh Why, the claimants are nevertheless not entitled to the declaration sought by them, on various discretionary grounds.

C. The witnesses

14. In addition to Mr Sheeran, Mr McCutcheon and Mr McDaid, the claimants called evidence from a number of people who were involved in recording Shape and from others through whom it is said Mr Sheeran might have accessed Oh Why.
15. For the defendants, in addition to Mr Chokri and Mr Donoghue, I heard evidence from those involved in seeking to promote Oh Why: David May (the managing director of A&C); Timothy Bowen (a director of A&C); David Gibbs (a former director of A&C) and Mark Anstey (Mr O'Donoghue's manager).
16. Mr Mill QC (who appeared for the claimants) suggested that I might conclude that all of the witnesses who attended were doing their best honestly to assist the court. Save in respect of Mr Sheeran, Mr Sutcliffe did not object to that analysis and I agree with it.
17. Mr Sutcliffe characterised Mr Sheeran's evidence, however, as "riddled with inconsistencies, evasiveness, and confusion" and as being on occasion untruthful. It is a necessary part of the defendants' case of deliberate copying that Mr Sheeran must be telling lies when he claims not to have heard and copied from Oh Why.
18. I address the key parts of Mr Sheeran's evidence at the relevant points in this judgment and I address the overall complaints about his evidence at section E4 below. At the outset, however, I stress that I reject Mr Sutcliffe's characterisation of Mr Sheeran's evidence. On the contrary, I consider that Mr Sheeran, too, was doing his best honestly to assist the court.

D. The law

19. Copyright subsists in, among other things, original musical works, defined as "a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music": Copyright, Designs and Patents Act 1988 ("CDPA"), s.1(1) and s.3(1)(b). A separate literary copyright claim may be made in respect of lyrics, but no such claim is made here ("Oh I..." is clearly not copied from "Oh Why...").
20. Copyright in a musical work may be infringed if, among other things, it is copied, which means "reproducing the work in any material form": s.17(2) of CDPA.
21. To amount to an infringement, however, the copying must be of either the original work or a "substantial part" of it: s.16(3)(a) of CDPA. This is a qualitative, not quantitative, question. The test is whether the part in question contains elements which are the expression of the intellectual creation of the author of the work: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, at [24]-[28], applying *Infopaq International A/S v Danske Dagblades Forening* [2009] E.C.D.R. 16. The essential consideration is to ask whether a defendant has taken that which conferred originality on the claimant's copyright work (or a substantial part of it): *Mitchell v BBC* [2011] EWPC 42, per HHJ Birss QC at [28]-[29].

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22. As observed by Lord Millett in *Designers Guild v Russell Williams* [2000] 1 WLR 2416, at p.2425E-F (in a case concerned with artistic works):
- “The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas.”
23. In music cases, it is the sounds that are more important than the notes: see Copinger and Skone James on Copyright (18th ed) at [3-125]. This depends to a large degree on the aural perception of the judge: *Francis Day & Hunter v Bron* [1963] 1 Ch 587, per Upjohn LJ at p.618.
24. While the legal burden rests with the person alleging infringement, in the case of conscious copying the evidential burden shifts to the alleged infringer if there is proof of sufficient similarity and proof of access. There was some debate as to whether what was required was proof of access, or proof of the possibility of access.
25. The weight of authority supports the former: see, for example, *Designers Guild* (above), per Lord Millett at p.2425E; *Baigent v Random House* [2007] EWCA Civ 247 at [4], although I do not think anything turns on it in this case. Tens of thousands of new songs are uploaded to internet sites daily. It clearly cannot be enough to shift the burden of proof that a song was uploaded to the internet thereby giving the alleged infringer *means* of accessing it. In every case, it must be a question of fact and degree whether the extent of the alleged infringer's access to the original work, combined with the extent of the similarities, raises a sufficient possibility of copying to shift the evidential burden. Where, for example, the original work was highly individual or intricate, and the alleged infringing work was very close to it, then only limited evidence of access may be sufficient in order to shift the burden. The same would not be true, on the other hand, where the original work was simple and involved relatively common elements.
26. Irrespective of where the burden lies, infringement requires there to have been *actual* copying, which necessarily entails that the alleged infringer not only had access to the original work, but actually saw or heard it.
27. The leading case on subconscious copying is *Francis Day & Hunter v Bron* (above), in which the Court of Appeal established that, although it was possible to demonstrate that a person had infringed copyright without intending to do so, it was nevertheless necessary to establish “proof of familiarity” with the allegedly copied work, as a prerequisite to establishing infringement: and that there was a causal link between the alleged infringing work and the original work: see Wilmer LJ at p.614 (with whom Upjohn LJ agreed). Diplock LJ also spoke of the clear need for a causal connection between the two works (at p.624).

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28. Whether there has been subconscious copying is a question of fact to be determined on the basis of all the evidence (and does not rest on the shifting of an evidential burden: see *Mitchell v BBC* (above) at [39]). There will rarely, if ever, be direct evidence of subconscious copying, so it is necessary – as with any issue where direct evidence is lacking – to reach a conclusion based on inferences from other evidence. The following direction which the trial judge, Wilberforce J, had given himself was approved by the Court of Appeal in *Francis Day* (at pp.614-615):

“The final question to be resolved is whether the plaintiffs' work has been copied or reproduced, and it seems to me that the answer can only be reached by a judgment of fact upon a number of composite elements: The degree of familiarity (if proved at all, or properly inferred) with the plaintiffs' work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendants' work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences upon the defendant composer, and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiffs' work.”

E. Copying

29. I address the matters relied on by the defendants in support of the allegation that Mr Sheeran copied the OI Phrase from the OW Hook by reference to the following matters: (1) similarities and differences between the two works and their significance; (2) the likelihood of Mr Sheeran having access to Oh Why; (3) the alleged propensity to copy and conceal, including similar fact evidence; (4) criticisms made by the defendants of Mr Sheeran's evidence and of the three “key fingerprints” of Mr Chokri which the defendants say are found in Mr Sheeran's work.

E1. Similarities and differences and their significance

30. When transposed into the same key of A Minor, for the purposes of comparison, the OW Hook and OI Phrase look as follows (taking the words of the OW Hook as it is sung the first time as an example):

The image displays two musical staves in 4/4 time, transposed into A Minor for comparison. The top staff represents the OW Hook, with a melody of quarter and eighth notes. The lyrics are: "OH WHY, OH WHY, OH WHY, OH WHY DO I PUT MY-SELF THROUGH THIS". The bottom staff represents the OI Phrase, with a similar melodic structure. The lyrics are: "OH I, OH I, OH I, OH I, WELL I'M IN LOVE WITH YOUR BO - DY". Both staves include dynamic markings and phrasing slurs.

31. Both sides presented expert evidence of musicologists: Mr Anthony Ricigliano for the claimants and Mr Christian Siddell for the defendants. They collated examples from the world of music of various of the elements used in Oh Why and Shape. This assists

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in determining the likelihood of elements of the OI Phrase having been derived from sources other than the OW Hook. The similarities and differences between the songs, and their significance as an indication of the likelihood of copying, are matters of fact for the court to decide. As pointed out in Copinger (above) at 7-30: “it is important to appreciate the limitations of the expert’s role, which is not to evaluate the factual evidence or to decide the issues of copying or substantial part, these being for the court and the court alone.”

32. In considering the significance of similarities between the works as an indication of the likelihood of copying, it is necessary to take into account the following: (1) the extent of the similarities and differences between the two works; (2) possible sources for the OI phrase other than the OW Hook, by reference to the rest of Shape and the extent to which it is comprised of elements that are commonplace in music; and (3) the evolution of the OI Phrase, according to the evidence of the claimants and contemporaneous evidence.

(1) Similarities and differences

33. On listening to the two works, there are obvious similarities between the OI Phrase and the OW Hook. But there are also important differences.

34. The principal similarities consist of the following.

- (1) The tune in each song comprises the first four tones of a rising minor pentatonic scale: A, C, D and E.
- (2) In each song the first three tones of the scale are repeated so as to sound: A-A; C-C; D-D (although the fourth tone – E – is repeated only in Shape).
- (3) Both phrases are vocalised similarly: the diphthong in the OI Phrase means that although it is sung to the words “Oh I”, it sounds the same as “Oh why”.
- (4) They are both harmonised with the melody being doubled an octave above and/or below. The defendants label this a “vocal chant pitched in a low register”. I accept that both involve a vocal chant of some kind, I do not agree that the OI Phrase is in a low register: to my ear both the low and high harmonies can be heard equally.
- (5) In both songs, the phrase is used as part of a “call and response” (although the only similarities in the responses are that they start on the second offbeat of the following bar and last for the remainder of that bar).

35. The principal differences are as follows.

- (1) The OW Hook begins with a quaver rest, which means that it is the second of the repeated A, C and D (in each case sung to the word “why”) that falls on the beat, and so is stressed. The “E” (sung to the final “oh”) is on the last offbeat and so not stressed at all. In Shape, in contrast, each “Oh I” is sung to two quavers beginning with the first beat of the bar, so that the first of each A, C, D and E is stressed. A consequence of the quaver rest in Oh Why is that there are only seven notes in the OW Hook, whereas there are eight notes in the OI Phrase.

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- (2) The mood of the two phrases is markedly different. The OW Hook, in keeping with the rest of the song, is in a slow, dark, questioning mood. In contrast, and in keeping with the rest of Shape, the OI Phrase is faster, brighter and more upbeat.
- (3) There are subtle differences between the tunes. The OW Hook interposes a “b” between the A and C, so that it sounds: A-A; b/c-C; D-D; E-E (the lower case letters representing notes of twice the speed of the capital letters). Mr Siddell said that he excluded the “b” from his transcription because it was a feature of performance, not part of the composition. The defendants contend that it cannot be heard unless the music is slowed down. I disagree. Upon listening to the song, the “b” is clearly discernible each time the OW Hook is sung as a separate, albeit short, note linking the A and the C. It is not, to my ear, a mere feature of performance such as a grace note. In addition, the fourth time the OW Hook is sung, a top G is sung before the E, so that it sounds: A-A; b/c-C; D-D; g/E.
- (4) There are also subtle differences in the harmonies: additional intermediate notes are added to the octave harmonies in Shape, but not in Oh Why.
- (5) There are marked differences in the responses following, respectively, the “Oh why” or “Oh I” phrases, both melodically and rhythmically. In Oh Why, the response ranges from a middle A to top A an octave above, then back to E. In Shape, the three pick-up notes (“well I’m in...”) of the response repeat the same rising melody (a-c-d) and the remainder (“...love with your body” follows the scale back down to A (“E-d/c-D-A).
36. Mr Siddell suggested that the quaver rest in the OI Phrase is of minor significance because the OI Phrase is still “seamless”, there being no break *between* the notes. He suggests that, given the syncopated rhythm in Shape, the quaver rest would hardly be noticed by the listener. I disagree. The significance of the quaver rest is that the word “why” falls on the beat, thus giving it emphasis. The effect is amplified by ending the OW Hook on “oh”: overall, it therefore sounds more like; “oh; *why*-oh; *why*-oh; *why*-oh”.
37. In contrast, in Shape the “Oh” of the phrase “Oh I” is to my ear very clearly *on* the beat and, despite the syncopated rhythms, throughout Shape there is a very clear sense of the beat. The difference is not a mere musical technicality. The stress being placed on “why” is fundamental to the mood of the song, as the repeated “oh *why*” leads into the question asked in the following bar (e.g. “why do I put myself through this?”). That is not so in Shape, where the OI Phrase is simply a lead in to “I’m in love with your body”, so that the ear naturally hears the emphasis falling on the first of each of the two repeated notes: “*oh*-I; *oh*-I; *oh*-I; *oh*-I.”

(2) The likely source of the relevant elements in Shape

38. The first thing to note is that the broad shape of the melody of the OI Phrase appears in many other places in the song. As the following examples show, in each of the pre-chorus, the chorus and the last line of post-chorus (which is pivotal as it ends with the words from the title “I’m in love with the shape of you”), the melody follows the basic contour of A, rising to E, and falling back to A (using notes only from the minor pentatonic scale):

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An example phrase from the pre-chorus:



An example phrase from the chorus:



The last line of the post-chorus:



39. The OI Phrase follows the same contour (with the call “Oh I, Oh I, Oh I, Oh I” rising from A to E, and the end of the response “I’m in love with your body” falling back from E to A). The fact that the melodic pattern of the OI Phrase is found throughout the song is, in my view, an important pointer to the phrase *not* being copied from elsewhere – particularly where neither of the other co-writers of the song are said to have heard or copied from Oh Why at all. To put it another way, where the words that follow “Oh I” are set to the downward minor pentatonic scale from E to A, it was an obvious choice – given that a similar pattern is found throughout the song – to set “Oh I” to the rising scale from A to E.
40. This is supported by the fact that the rising pentatonic scale is also present in other parts of the song.
41. First, the low hummed phrase just before the chorus is set to “E-G-A”, three notes of the rising pentatonic minor scale, albeit ending with rather than starting on the tonic. In a preliminary opinion considering whether Shape infringed Oh Why, Mr Siddell said of this phrase: “compositionally, the “Oh I” line could be viewed as a development of the earlier melodic vocal “mmm” motifs of verse 1 and the pre-chorus”, although he did not repeat this point in his expert report for the proceedings.
42. Second, the marimba part repeats the following chord pattern: C#m; F#m; A; B. The bass part plays the root of each chord such that, transposed into A minor, it follows the pattern: E, A, C, D. Played on a loop, that means that it is constantly repeating the phrase A, C, D, E. Mr Siddell rightly pointed out that this is a bass line, not a melody but, as Mr Ricigliano suggested, if (as the claimants say) they were coming up with melodic vocal ideas spontaneously against the background of the marimba riff playing on a loop, it is not surprising that they would land upon the same pattern of notes that was playing over and over throughout the writing and recording session. Mr Sutcliffe

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criticised this “theory” of Mr Ricigliano as being unpleaded, not supported by the songwriters and involving speculative analytical gymnastics. I reject that criticism. It is not a theory, but an observation of something that, when pointed out, is obvious. It reinforces the point that the “unifying feature” (as Mr Ricigliano put it) of the entire song is the first four notes of the minor pentatonic scale, such that the writers of Shape had it “in their DNA” (no doubt without theorising it in this way) during the writing session.

43. There was nothing original in this, and the claimants do not claim that there was. There are countless songs in the pop, rock, folk and blues genres where the melody is drawn exclusively from the minor pentatonic scale, and moves predominantly between the tonic and dominant (A and E). Given that there are limited ways of moving between them (with only two intervening notes) it is not surprising that Mr Ricigliano was able to point to numerous examples where the melody follows the same contour as in Shape. Equally unsurprisingly, there are examples where the same pattern is found of repeating the first four notes of the minor pentatonic scale, such as (You Drive Me) Crazy by Britney Spears which contains precisely the same tune as the OI Phrase (albeit neither this, nor the other examples Mr Ricigliano found, was an example of the precise pattern *in a single bar phrase*). Others have a close approximation to it (for example Heartbreaker by Led Zeppelin, in which the guitar riff – A-A; C-C; D-D; E – follows the same pattern without the final E; and Praying by Tom Grennan, in which a vocal part set to “mm, ah, mm, ah, mm, ah, yeah” does the same). The melody in No Diggity (to which I refer below, and which Mr Sheeran himself had performed and recorded) revolves almost exclusively around these four notes – sometimes rising up through the scale though more often descending it.
44. Mr Sheeran himself has written many songs in which a part of the tune has followed the pattern A-C-D-E, albeit without repeating each note as in the OI Phrase. Examples include Don’t (2014), Give Me Love (2011); Grade 8 (2011), Afire Love (2014) and I See Fire (2013).
45. The defendants contend, nevertheless, that it is the fact that the OI Phrase shares multiple features in common with the OW Hook that indicates it was copied, rather than created organically on 12 October 2016. The other similarities relied on are: the rhythm of multiple quavers in a single bar; the instrumentation of a vocal chant with male lead and backing vocals pitched at low and high registers; and the use of alternating vowel sounds.
46. In considering the likelihood of copying, it is important to note that all of these features are, however, commonplace and their use in Shape can be readily explained by other matters. The use of a vocal chant to fill a pre- or post-chorus section is often found in this style of music, and something that Mr Sheeran had done before. The use of multiple quavers in a single bar is hardly an indication of copying. The melody throughout the song is paced essentially in quavers, with semi-quavers where necessary to fit in the words. Since a chant has no words, it is unsurprising that it defaults to the quaver beat.
47. As to the instrumentation, the use of octave harmonies was a technique Mr Sheeran had used before. Indeed, he used it in the pre-chorus and chorus of the demo of Shape produced at 18:25 on the day the song was written (which, as I explain in the next section, was before he settled on octave harmonies for the OI Phrase in later mixing sessions), and he had used it before. In at least two previous songs, Bloodstream and

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Runaway from his “X” (Multiply) album, there are sections using three octaves of harmony (one above and one below the main melody).

48. That leaves just the oscillating vowel sounds, where “Oh I” and “Oh why” sound materially the same. There is, of course, nothing original in those phrases being used, and used in repetition, in popular music. Mr Ricigliano identified numerous examples. More importantly, as I develop below, in this case the evolution of the OI Phrase provides, in my judgment, compelling evidence that its source was other than Oh Why.

(3) The evolution of the OI Phrase

49. Mr Sheeran’s evidence is that he went to the Rokstone studio on 12 October 2016 with the intention of writing new songs for other artists, believing that the Divide album was by then fully written.
50. I accept that evidence, which was corroborated by both Mr McDaid and Mr McCutcheon. This was the first occasion that Mr Sheeran had met Mr McCutcheon, who had had no involvement with Divide. The other songs that were worked on during the day had nothing to do with Divide. Indeed, one of them was a song that Mr McCutcheon had partially written with others, which he asked for help in re-writing. It is also consistent with the evidence of Ed Howard (co-president of Atlantic Records) and Ben Cook, who was at the time the president of Atlantic Records, to whom the demo of Shape was played at RAK Studios in London on the evening of 12 October 2016. They both said that the song was played to them by Mr Sheeran as a song to be pitched to someone else, that they thought it would be ideal for Mr Sheeran to perform and that Mr Sheeran was initially reluctant, but was persuaded by them to record it. Joe Rubel, a recording engineer, producer and writer, who was working on Divide at RAK Studios that same evening, also recalls the demo of Shape being played, and introduced by Mr Sheeran along the lines of “something we wrote today, maybe we should give it to Rihanna”. Finally, this is consistent with the way Mr Sheeran, Mr McDaid and Mr McCutcheon referred to the evolution of the song in interviews in the weeks and months following the release of Shape.
51. The defendants claim that, whatever Mr Sheeran may have said to others on the day, and although Mr McCutcheon and Mr McDaid may have believed they were writing a song from scratch on 12 October 2016, Mr Sheeran had already had the idea for the OI Phrase, having heard Oh Why and decided to copy the OW Hook.
52. There is no evidence of any part of Shape having been written or thought of by Mr Sheeran prior to 12 October 2016 (save for certain comments made by Mr Sheeran in interviews after Shape’s release, which in my judgment do not provide any support for the conclusion that it was). There was some support for that conclusion in a film produced by Mr Sheeran’s cousin, Murray Cummings, called “Songwriter”. The film includes footage of Mr Sheeran talking about making the Divide album. In one sequence of the film, he is heard talking with (among others) Mr Cook on 31 August 2016 about the possibility of a further song or songs for the album. In the unedited version of the soundtrack to this part of the film, there is reference to making “two massive hit singles” before Christmas. The film then cuts to Mr Sheeran speaking in his car the following day about having an idea in his head for the song that is “missing from the album”. This sequence segues directly into a subsequent mixing session for Shape, the soundtrack playing Shape in the background.

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53. Accordingly, the impression given in the film as published is that the song Mr Sheeran had in his head on 1 September 2016 was Shape. The unedited footage of that scene, however, makes it clear that the song in Mr Sheeran's head was not Shape, but a song based on the idea that "boys don't cry .. what do men do when they're sad". The cut-away to the mixing session of Shape was purely artistic licence, intended to create a link with Shape that did not in fact exist, as was made clear on behalf of Mr Cummings (in the context of an application for disclosure of more footage and sound recording from the unedited film).
54. There are numerous clips of audio recordings at Rokstone from 12 October 2016. The parties are agreed as to the chronology of the various clips. Piecing them together with the evidence of Mr Sheeran, Mr McCutcheon and Mr McDaid (which for the avoidance of doubt I accept as their honest best recollection of the day, aided by the audio clips), I make the following findings of fact as to what occurred on 12 October 2016.
- (1) Mr Sheeran arrived at Rokstone Studios shortly before 11am. Mr McDaid arrived at 11am. They introduced themselves to Mr McCutcheon, and Mr Sheeran played Mr McCutcheon a part of one of the songs from the Divide album to show him what he had been working on.
 - (2) Shortly afterwards, they commenced writing together. Mr McCutcheon (or an engineer in his studio) created a blank audio project using Logic recording software, picked the marimba virtual instrument (from the pre-existing library of Logic virtual instruments) and improvised a four bar "riff". That riff, virtually unchanged, underpins the entire song. Mr McCutcheon "looped" the marimba riff so that he, Mr Sheeran and Mr McDaid could come up with ideas for the song while it played in the background.
 - (3) Mr Sheeran began vocalising bits of melody and words on top of the marimba riff, with Mr McDaid and Mr McCutcheon bouncing back ideas to him. In this way, the different parts of the song began to emerge.
 - (4) At 11:42 the Logic audio project was first saved. The precise time that it was opened is unknown, but I accept that it was opened some time earlier, during which time the process I have described above took place.
 - (5) The first timed recording of any vocal part is a voice note made on Mr McDaid's phone at 11:46. Mr Sheeran can be heard (above the repeating marimba riff) first speaking "...it might be a bit close to the bone ... so, what about this.." and then singing "I'm in love with your body" (to the tune which subsists in the final version of Shape) and "heya, heya, heya, heya", each "heya" to A-A; C-C; D-D; E-E. At the end of this clip, he can be heard singing "hey now, hey now" instead.
 - (6) At 11:48 Mr McCutcheon transferred the marimba riff from Logic Audio to another music software called Protools, which he prefers to use for recording live sound such as vocals and acoustic guitar. The track (consisting at this point of just the repeating marimba riff) was just over 4 minutes in duration. Shortly afterwards, Mr Sheeran added percussive effects using his guitar and Mr McCutcheon added some pizzicato strings.

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- (7) The writing process (as I have described it above) continued, and then, from 12:23 onwards, they began recording a number of “takes” of Mr Sheeran singing the chorus or parts of it (which begins “I’m in love with the shape of you...”). Some of the takes were sung an octave higher.
- (8) At 12:29, Mr Sheeran recorded the first element of the OI Phrase. The sound clip starts with him saying “let’s not overcook this”, then singing “Oh I, Oh I, Oh I, Oh I”, to the tune that exists in the final version of Shape, except that the final “Oh I” oscillates from the E to the G above it and back again. Over the next eight minutes he recorded numerous further takes of harmonies for the OI Phrase. In the demo produced at the end of the day, these are stacked to produce a choir effect.
- (9) The recording process continued, with other parts of the song being worked on. Two further voice notes – timed at 14:10 and 14:11 – record Mr Sheeran singing “oh, oh, etc” to a melody based on the rising pentatonic scale, against the chorus being played in the background, but nothing came of this idea.
- (10) Two other songs were also worked on. By 18:25, a complete demo version of Shape had been created. In this version, it is difficult to pick out any one of the numerous harmonisations of the OI Phrase as being the “lead” or “root” melody. Each of the parts in the virtual choir sound to have equal weight. It sounded very different at this stage to the OW Hook.
55. Not surprisingly, it is difficult for the writers of Shape to remember, consistently and precisely, all aspects of a writing session over five years ago. Although it was the first time that either Mr Sheeran or Mr McDaid worked with Mr McCutcheon, they have worked together many times since. There was no reason to think, when they began writing Shape, that it would be a momentous occasion, either because the song would become such a hit or because the writing session would need to be dissected in minute detail in a courtroom six years later. Specifically, I reject the defendants’ criticism that the claimants have failed to explain adequately how the song was written. They were consistent in their evidence as to the way in which they worked, with the marimba riff in the background, Mr Sheeran vocalising melodic and lyrical ideas and the others responding or throwing in ideas of their own. The fact that they do not have a clear or consistent recollection of who came up with particular phrases (other than that it was Mr McDaid who came up with the phrase “the shape of you”) is not surprising, and is no cause for suspicion.
56. Mr Sutcliffe made much of the fact that Mr Sheeran gave accounts of the songwriting process, in interviews in the months following the release of Shape, which are inconsistent in some respects from his evidence in court. In particular, there is some inconsistency between the evidence of Mr McCutcheon (that he came up with the marimba sound without any prompting) and some of the comments made by Mr Sheeran in interviews that the marimba sound was prompted by his suggestion that they might write a song for Rihanna and so he was looking for a sound with a tropical feel. The first point to note is the level of consistency between what was said in interviews and the evidence at trial that the purpose of the session was to write songs for other people, and that it was only afterwards that Mr Sheeran was persuaded to record Shape himself. It is also not in doubt that it was Mr McCutcheon who came up with the marimba sound (including importantly the notes to which it was played). Whether or not that was prompted by a comment from Mr Sheeran that he wanted to write a song

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for Rihanna is of no relevance. On balance, I consider that the evidence given by Mr Sheeran in court is to be preferred. It accords with Mr McCutcheon's evidence, and I consider that less weight is to be given to what Mr Sheeran said in some, of no doubt many, interviews the purpose of which was promotion and entertainment.

57. The defendants suggested that Mr Sheeran's words in the first voice note recorded on the day ("it might be a bit close to the bone") indicate that he had *first* sung "Oh I, Oh I, Oh I, Oh I" because he had in mind the OW Hook, but realised that risked infringing copyright in Oh Why, so changed it to "heya, etc". I reject this suggestion for three main reasons.
58. First, it would have made no sense for Mr Sheeran to have started with an idea that he recognised would risk infringing copyright in Oh Why, to reject it in favour of "heya, etc" so as to avoid that infringement risk, only to return to it 40 minutes later. The illogicality of that process makes it inherently unlikely.
59. Second, as there is no allegation that Mr McDaid or Mr McCutcheon were privy to any conscious copying from Oh Why, the suggestion that Mr Sheeran's "close to the bone" comment was a reference to Oh Why makes little sense. It presupposes that he was telling his co-writers of a copyright infringement risk but *not* telling them, and them not asking, what song he was referring to. I find that inherently unlikely.
60. Third, Mr Sheeran and Mr McCutcheon recall that there *was* a concern (which explains the "close to the bone" comment) about the "heya, etc" phrase, in that it was reminiscent of another song, called "No Diggity". Not only (as I have pointed out above) does the melody in that song revolve around the first four notes of the minor pentatonic scale, but a significant element of No Diggity is the chant "heyo", sung (if transposed to A minor) as follows:



61. Mr Sheeran's recollection was that having first sung that exact phrase, which might be too close to the bone, he changed the tune to: A-A; C-C; D-D; E-E. In cross examination, he also said "I felt that using those precise words would be a bit close to the bone".
62. Mr Sheeran also recalls a discussion that "heya" made no lyrical sense in the context of the song, whereas creating a pick up to "I'm in love with your body" by singing "oh I" did make sense. He remembers that it was Mr McCutcheon that said this. Mr McCutcheon does not remember doing so. Much was made of the fact that Mr McCutcheon said, in his witness statement, that he did not originate the OI Phrase. As he pointed out in evidence, however, that does not mean that he did not suggest that the chanted phrase which (I accept) Mr Sheeran had already originated be changed from "heya" to "oh I". It is just that he does not remember it. In the voice note from 11:46, Mr Sheeran is clearly not wedded to "heya", as he also tries out the melody to "hey now".

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63. Mr Sutcliffe submitted that Mr Sheeran’s explanation that he changed the words because of the likeness to No Diggity is flawed, because – having mentioned that what came before was too close to the bone – he *then* sang the phrase to “heya”. I accept that Mr Sheeran may have been confused about the precise order of events. The following facts, however, make it inherently likely that the OI Phrase was indeed an evolution from an idea that sprang from No Diggity. First, both Mr Sheeran and Mr McCutcheon recall that there *was* a discussion about No Diggity. Second, No Diggity was well known to Mr Sheeran: he had recorded a live version of it with an artist called Passenger in 2013 and performed it on other occasions. Third, there are obvious similarities between the chant in No Diggity and the OI Phrase, as they both follow the contour of a rising pentatonic scale between A and E. Fourth, the “heya” phrase sung by Mr Sheeran at 11:46 is nevertheless different in important respects to the chant in No Diggity, which is consistent with an attempt to change it so that it was not “close to the bone”. Fifth, it would make logical sense to change “heya” to “Oh I” as the post-chorus section developed, for reasons of lyrical sense. This makes it unnecessary to decide who first introduced the idea of the words “oh I” instead of “heya”. Had it been necessary to do so, in view of the lack of a clear and reliable recollection from each of the songwriters, I would have concluded that if the evidential burden fell on the claimants on this issue, they would not have discharged it, but if the burden fell on the defendants, they also would not have discharged it.
64. Finally, on this point, I reject the defendants’ suggestion that there is anything to be made of the fact that Mr Sheeran “did not deny” singing “Oh I” before the “heya” passage heard on the voice note. In the relevant piece of cross-examination relied on for this point, I am satisfied that Mr Sheeran was querying what he had been singing *as captured on the voice note* (because the relevant question “You tell me, what were you singing” follows immediately after Mr Sheeran’s comment: “Well, what was I singing in the recording? “Hey now” probably”).
65. The defendants initially contended that it is suspicious that only three voice notes from 12 October 2016 (whose combined duration was only 47 seconds) have been produced by the claimants. They suspected that the other voice notes would assist in demonstrating that the OI Phrase was derived from Oh Why.
66. The voice notes were made by Mr McDaid. It was his practice to record various parts of a writing session – where ideas are being produced spontaneously – so as to capture ideas that the writers might want to revisit. It is common ground that he made other voice notes on the day. That is clear because extracts from other voice notes can be heard in a short video made by the New York Times (published in December 2017) about the creation of Shape. Mr McDaid said (and I accept) that he collated materials, including voice notes, into nine mp3 files for the purpose of the making of that video. Those mp3 files have been disclosed, but the originals from which they were compiled have largely not been retained. He said that he often deletes extraneous or erroneous voice memos as he goes along, and that it is likely that he did so in this case. Mr Sutcliffe made it clear in closing argument that the contention that there is anything suspicious about the lack of other voice notes was not pursued, but that the lack of other voice notes was a factor against the claimants if the evidential burden shifted to them. He did not suggest that Mr McDaid had deliberately deleted voice notes because they contained damaging material. He was right not to do so. Mr McDaid was an honest witness doing his best to recall events. There is nothing to suggest, and I have

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absolutely no reason to think, that he would have engaged in deliberate deletion of relevant material.

67. The defendants also contend that it is not credible that Shape was written from scratch in such a short time on 12 October 2016, so that Mr Sheeran must have come to the writing session with preconceived ideas about it. Mr Sutcliffe submitted that here (as in other instances) speed was indicative of copying. I reject that submission. The fact that Mr Sheeran works surprisingly quickly when songwriting was corroborated by those who have worked with him many times (including Mr McDaid, Mr McCutcheon and Mr Gosling, who co-wrote songs with Mr Sheeran at an earlier stage in his career). The clear picture gained from all those that work with him in writing songs is that he has a rare ability to come up with lyrical and melodic ideas, and connect them together to create catchy songs, at great speed.
68. In fact, the speed at which he writes is of little relevance to the key issue in dispute in this case, given the simplicity of both the words and melody of the OI Phrase. Such lyrical or musical complexity as there is in Shape lies in other parts of the song. Apart from a deliberate initial reference to the song “No Scrubs” (to which I refer below) there is no suggestion that these came from anywhere except the creative minds of Mr Sheeran, Mr McDaid and (to a lesser extent so far as the lyrics were concerned) Mr McCutcheon.
69. Mr Sutcliffe also contended there were inconsistencies in the way Mr Sheeran has explained how he writes songs. In his third statement he said that whereas in his early career he would make notes of lyrical ideas (as he explained to a group of children some years ago, in a clip from the Songwriter film), from around the time of the Divide album he has adopted a much more phonetic, melody-based approach, starting to improvise lyrics over a melody with no pre-meditated thought process. In cross-examination, however, he said that when he writes alone he will still make notes of ideas as he thinks of them but that when he collaborates in songwriting with others, the whole point is to see what can be generated between them, and it is writing in this context where the change of approach described in his witness statement has occurred. I note that the track listings for the albums he has created since 2014 show that he co-wrote virtually all of the songs on them with others. That would suggest that his predominant song writing style is collaborative. In that context, while his witness statement does not present a complete picture, I do not think – as the defendants contend – that it was an attempt to “close down” the allegation of copying.
70. Importantly (since Shape was a collaborative process), I accept his evidence that when collaborating with others (particularly producers such as Mr McCutcheon) he does indeed work on lyrics and melodies at tremendous speed from scratch. As I have noted, it was corroborated by others and it accords with common sense, as the purpose of collaborating is to see what can be produced together.
71. In any event, it was clear that when Mr Sheeran referred to noting down ideas for songs, he was referring to ideas for lyrics. This has no relevance to Shape, because there is no suggestion that any of the lyrics in Shape were copied from Oh Why (and the phrase “Oh I” would hardly need noting down to ensure it was remembered for future use).
72. Work continued on producing and mixing the song on and off over the following days and weeks. Mr Sheeran toyed with replacing the OI Phrase altogether with an

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instrumental part: first an acoustic guitar (recorded as an iPad memo on 13 October 2016, and integrated into the song on 18 October 2016) and then with an added saxophone-style sound (on 19 October 2016). He returned to the OI Phrase in the afternoon of 24 October 2016, recording a number of ‘takes’, still experimenting with different notes and harmonisations. After an hour’s break, he returned to the task, but by now the final version began to emerge: the upward minor pentatonic scale, doubled an octave below. A further demo version of the song, on 25 October 2016, reflects the work of the previous day on the OI Phrase (the instrumental replacement having now gone).

73. There is a slight inconsistency between Mr McCutcheon’s and Mr Sheeran’s recollection of how this instrumental replacement came about (Mr McCutcheon having booked a session guitarist to play it), but nothing turns on it.
74. In a version dating from 31 October 2016, the fully harmonised OI Phrase returned (i.e. without a recognisable lead melody). A week later, on 8 November 2016, the final version of the OI Phrase appears to have been settled upon, harmonised predominantly with octaves above and below.
75. The defendants contend that the likelihood of copying is enhanced because of the “full circle” Mr Sheeran performed in relation to the OI Phrase: starting off with something very similar to the OW Hook, moving away from it, and then returning to it.
76. In fact, as I have already noted, the version of the OI Phrase that was produced by the end of the day on 12 October 2016 bears little resemblance to the OW Hook, there being no discernible lead melody, and instead a choral effect achieved by stacking multiple vocal takes. It was only later – during the mixing sessions – that the sound coalesced into the simple lead melody with predominantly octave harmonies. The implicit allegation would appear to be that Mr Sheeran having, towards the start of the day (in the 11:46 voice note), used the melody of the OW Hook to the words “heya, heya”, tried his best to disguise the fact that he had lifted the OI Phrase from the OW Hook, before arriving at a mix that enhanced rather than diminished the likeness. I do not accept this. The evidence I have summarised above suggests a natural evolution of the OI Phrase during the production and mixing sessions – as shown, for example, by the experimentation with an instrumental part in place of the vocal chant. The likelihood of this is enhanced by the fact – as I have already found – that the musical essence of the OI Phrase is present in other parts of the song as created on 12 October 2016.
77. I accept, as contended by the defendants (and as recalled by Mr Howard and Mr Cook), that it was Mr Sheeran who was the driving force during the mixing sessions in re-working the post-chorus so that there was a clear melodic line (A-A; C-C; D-D; E-E) with octave harmonies. I do not agree, however, that there was anything untoward in his lack of recollection of this, or in his denial that a passage in the Songwriter film filmed at a mixing session showed him pushing for his version of the harmonies on the OI Phrase. As I read the extract from the film upon which the defendants rely, Mr Sheeran was (as he insisted in cross examination) indeed referring to something different, namely the percussive sounds which he wanted to hear “kicking in” at the start of the OI Phrase so as to give it a lift.

E2. Access

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78. Each of Mr Sheeran, Mr McCutcheon and Mr McDaid said that to the best of their knowledge they had never heard Oh Why or the Solace EP and had never heard of Mr Chokri before the defendants made their complaint about copyright infringement.
79. The defendants contend that Mr Sheeran (but not the others) was not telling the truth. Mr Sutcliffe criticised Mr Sheeran's apparent evidence that he can remember every song he has listened to, when he accepted that he has forgotten songs that he has written. In fact, Mr Sheeran's evidence was "I don't know about that" when it was put to him that "obviously, there is no way you can remember every song that you have ever listened to". He clarified that he was not saying that he could, but "I am saying there is not no way."
80. These answers have to be viewed in the context of the allegations made against Mr Sheeran and the basis on which he had been cross-examined for the best part of two days: namely that he is a "magpie", who habitually and deliberately copies and conceals the work of other songwriters. Specifically, he was defending the charge that he had deliberately copied Oh Why. Someone who deliberately copied another's song is inherently likely to remember that other song, so that someone accused of deliberate copying, if it is true that they did not do so, is more likely to be able to say with confidence that they had *not* listened to the song from which they are alleged to have copied.
81. I did not understand Mr Sheeran to be making the more adventurous (and implausible) claim that he remembered every song he had ever *heard*, whether on the radio, at a venue or shared with him by others in a social context. Indeed, when the cross-examination turned, shortly afterwards, to the alternative case of subconscious copying, and he was asked whether he could exclude the possibility that he may have heard Oh Why, he said: "I can't, and that is why we are here." I reject the defendants' characterisation of this as Mr Sheeran feeling "obliged to make [a] concession". It was no more than stating the obvious.
82. In this section, I consider the strength of the evidence that Oh Why may have been shared with, or discovered by, Mr Sheeran, so as (1) to test the credibility of Mr Sheeran's denial that he had deliberately copied the OW Hook, and (2) to determine the likelihood of him having heard it (despite his best recollection that he had not), in the context of the alternative case of subconscious copying.
83. Oh Why was played on the radio only twice, late at night on Radio 6 Music in July 2016. It was not suggested that Mr Sheeran or anyone associated with him heard it that way. There is no evidence that any of the Solace EP, the track Oh Why or the video of it was ever played or shown by anyone to Mr Sheeran. In particular, although the defendants contend that they specifically wanted to get the song to Mr Sheeran's attention, it was never sent either to him, his manager or to anyone associated with Mr Sheeran with a request that it be passed on to him. Mr Chokri said that he would have been embarrassed to do so as it would have come across as needy.
84. The defendants instead rely on either (1) their efforts to publicise Oh Why and the Solace EP, including by getting it on the radar of people known to be associated with Mr Sheeran in the hopes that they may play it to him; or (2) the possibility that Mr Sheeran would himself have come across Mr Chokri and Oh Why in looking for new artists or inspiration for his own songs.

Approved Judgment*(1) The defendants' efforts to publicise Oh Why*

85. Oh Why was released on a music blog called “Noisey” on 18 March 2015. “Released” in this context means no more than it was uploaded to the site, with an accompanying article, on the basis that Noisey had exclusivity for a short period (of 24 hours) before it could be uploaded elsewhere. The next day it was uploaded to YouTube. Around this time it was also posted to the Facebook pages of David May, A&C and Mr Chokri. It was subsequently uploaded to other music blogs. In the weeks following the release of Oh Why, other tracks from the Solace EP were uploaded to various platforms. The Solace EP was itself released for download on the Bandcamp site on 1 June 2015.
86. From the available evidence it is clear that none of these attempts to publicise Oh Why via social media met with any material success. Tweets and Facebook posts from Noisey, Mr May and Mr Chokri garnered only a handful of retweets and “likes”. A month after its initial release, Mr O’Donoghue’s manager, Mark Anstey, recorded in an email dated 17 April 2015 that the defendants were “disappointed in the initial views” of Oh Why via Noisey. After more than two years, Oh Why had been viewed on YouTube only 12,914 times. It was not suggested to Mr Sheeran that he was among that number.
87. Mr Chokri performed Oh Why at two shows, one at the Old Queen’s Head in Islington on 28 May 2015 and one at Birthdays, a live music venue in Dalston on 6 October 2015. These venues held no more than about 200 people. Mr Gibbs and Mr Anstey’s evidence was that these events were attended by various artists and repertoire (“A&R”) executives, industry people and others from the UK urban music scene. There is no evidence that anyone associated with Mr Sheeran attended either show.
88. The defendants contend that they wanted to get Mr Sheeran and his team to hear Oh Why because he was known to have friends in common with Mr Chokri and he was known to be into Mr Chokri’s style of music.
89. I have already noted that this plan did not involve sending Oh Why to Mr Sheeran, his manager, or to any of his associates with a request that it be passed on. The only contemporaneous reference to a plan to get Mr Chokri’s music before Mr Sheeran was a note made by Mr O’Donoghue on his phone on 14 June 2014 (just after Oh Why had been written, but long before it was released) with the idea, which was never pursued, that Mr Chokri sample a performance by Mr Sheeran of a cover of a Johnny Cash song, “Wayfaring Stranger”, to be passed via Jake Gosling to Mr Sheeran. The other contemporaneous records of the defendants’ attempts to promote Mr Chokri’s work in 2015 refer to finding collaborators in genres (“hip-hop or alternative like Aquilo/Lapsley”) that were far removed from Mr Sheeran.
90. More generally, the defendants’ efforts to promote Mr Chokri consisted of sending emails to individuals within the industry, with links to Oh Why and/or the Solace EP, and following up where possible with meetings. There is no evidence that these efforts attracted any real interest from anyone other than Daniel Lloyd-Jones (an A&R executive at Sony/ATV). (The only other response highlighted by the defendants in closing submissions was from a Ben Scarr at Universal Music, but this merely said “will give it a listen and let you know man!”, with no further follow-up.)

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91. Mr Lloyd-Jones was made aware of the Solace EP after his assistant, James Bullock, was contacted by Mr Anstey on 21 May 2015, inviting him to the show at the Old Queen's Head. Mr Bullock passed that on to Mr Lloyd-Jones the next day, with a link to a SoundCloud file for Solace. Mr Lloyd-Jones was immediately enthusiastic, telling Mr Gibbs that "I absolutely love it", wanting to know whether Mr Chokri was managed and expressing his hope that he was not already published. This was followed up with a meeting between Mr Lloyd-Jones, Mr Chokri and Mr Gibbs. Nothing, however, came of that meeting. After the initial burst of enthusiasm from Mr Lloyd-Jones, any interest dissipated: there was no follow-up, and Mr Chokri was never signed by Sony/ATV.
92. It was not suggested to Mr Sheeran that Mr Lloyd-Jones shared Oh Why or the Solace EP with him. In fact there was no relevant connection between them at the time. Mr Sheeran's A&R representative at Sony/ATV was Mr Luke McGrellis. He provided a witness statement, which was accepted by the defendants, in which he said that he did not recall Mr Lloyd-Jones or Mr Bullock ever playing him Oh Why or giving him a copy of it, and that he was certain he did not either send or play Oh Why to Mr Sheeran.
93. The only relevance of Mr Lloyd-Jones, therefore, is that he shared at least some part of the Solace EP with Ed Howard who, at the time, worked at Asylum records in an A&R capacity with Mr Sheeran. On 27 May 2015, Mr Lloyd-Jones emailed Mr Howard with the subject heading "Sami Switch", saying "thinking about signing this kid. Check out Solace, imagine it fully produced and elongated could be huge with Rudi...". The reference to Rudi was to the band Rudimental. The link was to a SoundCloud file. It is common ground that the link – if followed today – is to a single track on the Solace EP entitled "Solace (Nearly Home)". It was the same link that Mr Bullock had sent to Mr Lloyd-Jones on 22 May 2015. Mr Gibbs said that he would not have sent Mr Bullock a link to a single track, but would have sent a link to all of the songs on the EP.
94. Whether or not that was Mr Gibbs' intention at the time, I find that all that was sent to Mr Howard was the single track "Solace (Nearly Home)", for the following reasons. First, Mr Lloyd-Jones' response to Mr Gibbs was that he had "only heard the one track". Second, in forwarding the link to Mr Howard, Mr Lloyd-Jones' reference to "Check out Solace, imagine it fully produced and elongated could be huge with Rudi" suggests that he was indeed referring to a single, short, song. Solace (Nearly Home) was only just under 2 minutes long. Third, Mr Howard's response was to say that it "didn't jump out to me as a Rudi hit", i.e. referring to a single song.
95. Another possible access route upon which the defendants rely is an email from Mr Anstey directly to Mr Howard dated 22 May 2015. This was one of many emails that Mr Anstey sent to music industry executives. It invited Mr Howard (who Mr Anstey had never met) to the Old Queen's Head show and enclosed a link to the Solace EP and to Oh Why. Mr Howard's evidence, however, was that the address to which that email was sent was not one that he had at the time, and that he had no recollection of seeing it at any time before these proceedings. That evidence was not challenged.
96. Accordingly, I find that Mr Howard was not provided with and did not hear Oh Why in 2015.
97. In an email dated 14 July 2015 from Mr Gibbs to Mr Anstey, a "campaign breakdown" was provided for the Solace EP. While I accept that Oh Why remained a focus of attention for the defendants, as demonstrated by the fact that Mr Anstey's "mail shot"

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to industry executives in late May focused on Oh Why, the campaign breakdown nevertheless shows that following the release of Oh Why in March 2015, the attention turned to other songs on the EP. As at 14 July 2015, Mr Gibbs commented that “in terms of what we have left for the ‘Solace’ campaign we currently don’t have a proper marketing plan organised”. He referred to “more content” which they had to release, but that involved either other tracks (e.g. “Favourite Song”) or the EP generally. Aside from the second show, in Dalston in October, there is no evidence of any material progress in getting any wider publicity for Oh Why or the EP. Mr Gibbs’ email also referred to Oh Why having hit 16,000 views on Facebook. There was no other evidence as to the extent to which Oh Why was viewed on Facebook, but it was not suggested to Mr Sheeran that he ever looked at any of the defendants’ Facebook pages.

98. Mr Chokri agreed that the promotion by his managers of Oh Why and the Solace EP was “amateurish”. When Mr Mill put the same point to Mr Anstey, he fairly accepted that “we weren’t very experienced at this early stage of our careers”.
99. The defendants also rely on the possibility that Oh Why reached Mr Sheeran’s attention through certain mutual acquaintances. I will address each of these in turn.

Jamal Edwards

100. The late Jamal Edwards, who very sadly died shortly before the trial, was a close friend of Mr Sheeran. He was also a friend of Mr Chokri. In 2011 he created an online YouTube channel, SBTV, particularly to champion lesser-known artists. Videos from many artists have been uploaded over the years. Mr Chokri was among them. A handful of his videos were on SBTV between 2010 and 2012, a track from the Solace EP – “Canvas” – was uploaded to SBTV in May 2015, and a spoken word piece – “God?” – was uploaded in March 2016. Oh Why itself was never on SBTV.
101. Mr Edwards had provided a witness statement in these proceedings, in which he said that he did not recall ever being sent a copy of Oh Why, and he did not recall ever listening to or seeing Oh Why or the Solace EP. Moreover, even if he had seen either of them, he did not share them with Mr Sheeran. He said that only in the last couple of years – long after Shape was released – did he send Mr Sheeran bits of music to listen to, and then it was only ‘Grime’ or ‘Drill’ tracks, which had nothing to do with Mr Chokri.
102. The defendants rely on an exchange of messages between Mr Chokri and Mr Edwards in March 2015. The exchange began on 15 March 2015 with Mr Chokri asking whether he could send over his new EP. Mr Edwards responded “Yh kl” and provided his email address. The exchange ended the following day with Mr Chokri asking: “u get a chance to listen?”. There was no reply. Two months later, Mr Chokri messaged Mr Edwards again to say that he had put him on the guestlist for his show at the Old Queen’s Head “if you are free”. There was again no reply and Mr Edwards did not attend the show. On 3 June 2015, Mr Chokri messaged Mr Edwards with a link to “Solace”, to which Mr Edwards replied the same day “Safe g”. There was no further reply.
103. This evidence demonstrates, contrary to Mr Edwards’ recollection, that the Solace EP was brought to his attention by Mr Chokri. It does not demonstrate that Mr Edwards listened to the EP. The lack of any substantive response referencing any of the material on the EP suggests that he had not done so. Had he been sufficiently interested in any

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of the songs that he had passed them on to anyone else – particularly someone with as high a profile as Mr Sheeran – then the likelihood is that he would have at least told Mr Chokri. Mr Chokri said in cross-examination that he thinks he got an answer in person from Mr Edwards, but there was nothing in his witness statement to that effect. If he actually recalled such a discussion, then I consider – given its importance to his case – he would have included it in his statement. The fact that Mr Edwards did not respond is consistent with his (and Mr Sheeran’s) evidence that he did not share the Solace EP or Oh Why with Mr Sheeran.

104. While Mr Sheeran also said that Mr Edwards had not shared Oh Why or Solace with him, the defendants criticise his evidence as being internally inconsistent. On the first day of his cross-examination he said that Mr Edwards only began sharing music with him at the beginning of last year, although he might have shared music with him prior to that. On the second day of his cross-examination, he also accepted that Mr Edwards had sent him music at the beginning of their relationship, in about 2010. Viewing Mr Sheeran’s evidence as a whole, I do not see any material inconsistency. His evidence was not that Mr Edwards had not shared *any* music with him prior to the beginning of last year. They had been close friends for a long time, and in that context they naturally sometimes shared music, but it was only since the beginning of 2021 that Mr Edwards had started actively sending Mr Sheeran new artists for him to listen to.
105. The defendants also rely on the fact that Mr Gibbs was in communication with Mr Edwards in this period, specifically because they wished to have something from the Solace EP uploaded to SBTV. In his witness statement, Mr Gibbs said that “we also discussed Oh Why”. In his oral evidence, however, he said that he had decided *not* to ask for Oh Why to be uploaded to SBTV, because he considered that another track, Canvas, was a much better fit. He said that even if Mr Edwards had previously shown any interest in Oh Why in response to Mr Chokri’s messages to him about it in March 2015, he (Mr Gibbs) would still not have asked Mr Edwards to upload Oh Why to SBTV. In these circumstances, I find it unlikely that there was any reference to Oh Why in discussions between Mr Gibbs and Mr Edwards. If there had been, then I consider it would have been no more than a passing reference. In the circumstances described by Mr Gibbs, it is highly unlikely that he would have asked Mr Edwards to listen to Oh Why.
106. On 8 January 2017 Mr Chokri posted on his Facebook page: “Anyone else think ed sheerans new song ‘shape of you’ chorus sounds familiar lol?” Mr Chokri, Mr May and Mr Gibbs all said that they saw a comment made by Mr Edwards on that Facebook post consisting of a “shifty eyes” emoji, although it was removed very soon afterwards. The defendants suggested that this was evidence that Mr Edwards thought there was something “shifty” about Shape. Mr Edwards, in his witness statement, denied this, having no recollection of making the post. It is unlikely that he would have posted something critical of his very good friend Mr Sheeran. In any event, whatever Mr Edwards thought as to the similarities between Shape and Oh Why is irrelevant to anything I have to decide.
107. In light of the totality of the evidence, I find that Oh Why was not shared with Mr Sheeran by Mr Edwards at any time.

Jake Roche

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108. Jake Roche is a friend of Mr Sheeran. He met him in 2014 and his band “Rixton” supported Mr Sheeran on the North American leg of his tour in 2015. Mr Roche had also been in contact with Mr Chokri for a number of years, although the two had not actually met. Mr Roche exchanged messages with Mr Chokri over his music. He denies ever having heard Oh Why or the Solace EP, or sharing either with Mr Sheeran.
109. As to whether Mr Roche ever heard Oh Why, the defendants rely on three points. First, on 23 June 2014 Mr Chokri messaged Mr Roche, saying “I just sent u a couple of bits. Not mixed yet but you can see where I’m at ATM”. That was followed shortly afterwards by a message saying “I sent the wrong “oh why” scrap that”. After some confusion as to whether Mr Roche had received it, and him supplying his email address, he responded that he had got it, saying “Favourite song is a jam”. The only email record of anything being sent to Mr Roche is an email of the same date, with the subject line: “Fwd: That song that we don’t want to call favourite song”, with a single attachment “Favourite Song.mp3”. That refers to a track which was later included on the Solace EP. The overwhelming likelihood from this evidence is that Mr Roche was only sent that one track.
110. Second, on 30 March 2015 Mr Roche was sent a link by Mr Chokri to Oh Why on the Noisy blog and on 31 May 2015 Mr Chokri sent a generic message to Mr Roche saying that “Solace” is finally out, and referring to where it could be streamed. Mr Roche did not respond to either email. This was a very busy period for Mr Roche (coinciding with supporting Mr Sheeran on his US tour). I accept his evidence that if he had either listened to Oh Why or downloaded Solace it was more likely than not that he would have responded to Mr Chokri.
111. Third, Mr May gave evidence that he had played football with Mr Roche at some point after the release of Solace and that he remembered discussing Mr Chokri with him then. Mr Roche remembered the football game, but not a discussion about Mr Chokri.
112. Collectively, these points provide only a flimsy basis for supposing that Mr Roche listened to Oh Why. They provide even less basis for supposing that he shared it with Mr Sheeran. The defendants pointed to the following in support of the latter contention: (1) Mr Roche accepted he was a “huge fan” of Mr Chokri and that he was living in Mr Sheeran’s flat for some months in 2016, yet these points were not disclosed in his witness statement; and (2) certain alleged inconsistencies in his evidence as to whether he listened to Solace and whether he shared music with Mr Sheeran.
113. I do not think these matters indicate that Mr Roche shared Oh Why with Mr Sheeran. Mr Roche had not sought to hide his relationship with Mr Chokri in his witness statement, and he candidly accepted in cross examination the characterisation of being a “huge fan”. Both he and Mr Sheeran said that Mr Sheeran was away for the whole of the time that Mr Roche stayed in Mr Sheeran’s London flat, as it coincided with Mr Sheeran’s well-publicised year of travelling. I accept that evidence. The fact that Mr Roche did not mention this in his witness statement is irrelevant.
114. The first supposed inconsistency in Mr Roche’s evidence was that he said in his witness statement that he had never listened to Solace, but in cross-examination he said he could not remember listening to it. The latter answer followed, however, questioning as to whether he could be sure about something that happened so long ago. He candidly acknowledged the distinction between believing something had not happened and being

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unable for sure to say that it did not happen. Taken overall, his evidence involved no inconsistency, and was simply that to the best of his recollection he had not heard Solace.

115. I also find no inconsistency in his evidence on the question whether he shared music with Mr Sheeran. He accepted that, when he was together with Mr Sheeran, for example on tour, they would as friends play music to each other, but he would not have taken advantage of that friendship to ask Mr Sheeran to listen to a friend's music. I found his answer that the idea that he would do so makes him "cringe" to be an honest and credible one.

Jake Gosling/Sticky Studios

116. The defendants rely on an alleged connection between Mr Chokri and Mr Sheeran via Sticky Studios. Sticky Studios is owned and operated by Jake Gosling. Mr Gosling had worked with Mr Sheeran on the production of two EPs before his first album, and had worked as producer on Mr Sheeran's first album as well as on a number of tracks on his second album. Mr Sheeran's professional relationship with Mr Gosling ended in 2014, but the two of them remained in touch afterwards.
117. Mr Chokri also recorded at Sticky Studios. He worked with Adam Coltman, however, not Mr Gosling. Mr Chokri said that he played Oh Why to Mr Coltman once at the beginning of a session at Sticky Studios. He also sent Mr Coltman a link to the Solace EP on 30 October 2015 by Facebook message.
118. Mr Gosling's evidence was that he did not know Mr Chokri and had not heard of him prior to being asked to provide a witness statement. He acknowledged that it is possible that he would have met him in passing at Sticky Studios but said that he and Mr Coltman had separate projects, worked with artists separately from each other and kept their work on separate portable drives.
119. The defendants contend that because Mr Gosling was Mr Coltman's publisher, it follows that Mr Coltman would have shared Oh Why with Mr Gosling. I do not accept this. Mr Gosling pointed out that as Mr Coltman's publisher he was interested in anything that Mr Coltman had written, but there was no reason why Mr Coltman would send him the work of anyone else. Mr Gosling also said that Mr Coltman was a private person who often kept himself to himself. Mr Sutcliffe submitted that I should reject Mr Gosling's evidence because it was not credible. On the contrary, I find Mr Gosling's evidence entirely credible. It makes sense that Mr Coltman would provide his own work – but not the work of others – to his publisher, Mr Gosling.
120. In any event, the suggestion that Oh Why might have reached Mr Sheeran through this route founders in light of the fact that it was not put to either Mr Sheeran or Mr Gosling that Mr Gosling shared Oh Why with Mr Sheeran. In those circumstances, and given that their professional relationship ended in early 2014, and that it is inherently unlikely that Mr Coltman ever shared Oh Why with Mr Gosling, I find that there is no realistic possibility that Oh Why reached Mr Sheeran via this route.

Benny Blanco

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121. The possibility that Oh Why reached Mr Sheeran via Benny Blanco (a producer who worked on the Divide album) was not pleaded. Accordingly, the claimants did not have the opportunity to call Mr Blanco to refute the suggestion. Mr Sutcliffe submitted that the possibility arises from certain answers given by Mr Sheeran in cross-examination, to the effect that Mr Blanco shared new music, including rappers, with him. There was no evidence that Mr Blanco was provided with or heard Oh Why or any other music of Mr Chokri. The possibility of Oh Why reaching Mr Sheeran through this route is mere speculation which, particularly as the claimants did not have the opportunity to meet the point, I discount entirely.

Sarah Liversedge

122. In their opening argument, the defendants suggested that since a link to Oh Why was sent to Sarah Liversedge, who they believed was close to Mr Sheeran and had introduced him to other artists such as Amy Wadge and Jake Gosling in the early part of his career, it was possible that she shared Oh Why with Mr Sheeran.
123. Mr Sheeran's evidence was that Ms Liversedge, who was director of A&R at BDI Music Limited, had not played any significant role in his early career. He had wanted to be signed by her when he was much younger, but she had not been interested. She had not introduced him to Amy Wadge or Mr Gosling, both of whom he had met through others when he was only 17. He also said she was not a close friend of his and was "absolutely not" someone who would have introduced new artists to him in 2016. The only evidence presented by the defendants which touched on these points was an extract from BDI Music's website, which stated that it was "proud to be co-publisher of Ed Sheeran's triple platinum number one album 'Plus' produced and co-written by Jake Gosling." When this was put to Mr Sheeran, he pointed out that Ms Liversedge had published Mr Gosling and Ms Wadge, who had written on his first album, but not him. He said that Ms Liversedge had not been a fan of his music in the beginning and really did not want him working with her writers, but BDI Music would naturally wish to take credit for being associated with the album, given its success.
124. The possibility of Oh Why having reached Mr Sheeran via Ms Liversedge was not pressed in closing argument by the defendants. That was sensible, in my judgment, given Mr Sheeran's evidence on the point, which I accept.

(2) Likelihood of Mr Sheeran finding Oh Why for himself

125. There were various strands to the argument that Mr Sheeran would have come across Oh Why himself: (1) he was actively following the "UK scene" in 2015 and 2016; linked to this was the suggestion that he was continually "plugged in" to social media in 2015 and that he was likely to have followed the blog "Noisey" in 2015 and 2016; (2) from March 2015, when he incorporated his own record label, Gingerbread Man Records Ltd, he was looking for new talent; and (3) he was looking for another song in the style of "Bloodstream", which led him to find the Solace EP.
126. I address these points in turn.

Actively following the UK scene

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127. The defendants contend that it is inevitable that Mr Sheeran would have seen Mr Chokri's music, given that he was actively following the "UK scene", which had a limited pool of artists, the "prominence" of Mr Chokri's new material and his and Mr Chokri's mutual friendship with Mr Edwards.
128. The "UK scene" does not have a single comprehensive definition. Mr Chokri described the UK scene between 2010 and 2016 as "a mixture of rappers, singers, poets, championed by channels like SBTV, Grime Daily, and were all amongst a kind of network, circles in London, and saw each other at events – or just on social media and were quite aware of each other". He said it consisted of between 50 to 100 people.
129. Mr Sheeran was asked in cross-examination whether, between 2010 and 2012 the "UK scene" was an integral part of his music, and has remained so, to which he said yes. When asked what he had understood by the "UK scene", however, he said:
- "I think you are referring to the UK rap scene, but then the scene spans lots of different genres. It can be dance hall; it can be Afrobeat; it can be grime; it could be UK rap; it could be R&B. There are lots of different genres on the UK scene. Primarily it would be culture, and – yes, there are lots and lots of different genres."
130. It was clear that Mr Chokri and Mr Sheeran were talking about two quite different things. The "scene" in which Mr Sheeran was interested was a much broader, multi-genre one involving many artists. Mr Chokri was referring to a much smaller set of people who were all aware of each other. Mr Chokri does not claim to have met Mr Sheeran other than on two occasions: the first a very brief encounter at the launch party for SBTV in the summer of 2011; the second at Jamal Edwards' 21st birthday party where he does not say they actually spoke to each other. They were self-evidently not part of the "scene" as described by Mr Chokri. Moreover, even assuming Mr Chokri was prominent in the scene that he describes, I am satisfied that he did not have any real prominence in the wider scene to which Mr Sheeran was referring. The fact that Mr Edwards was friendly with both of them is of little relevance when it is not suggested by Mr Chokri that – via that mutual friendship – he ever met or communicated with Mr Sheeran himself other than the two brief encounters in 2011. (I do not count Mr Chokri's replies to three "tweets" of Mr Sheeran in 2011 as communications with him.)
131. Mr Sheeran's evidence is that while he is now very active in following what he describes as the UK scene, that was not the case between the end of 2015 and the autumn of 2016. In that period he had deliberately disconnected from social media. He travelled extensively and wrote material for Divide.
132. The defendants contend that that evidence is false, and demonstrates a desire to distance himself from Mr Chokri. They refer to a statement by Mr Sheeran in a podcast in November 2021 that "I love the scene so much, I listen to everything, I download everything, I will go to shows, I will do songs with people on the come-up." They also refer to a statement he made in an interview on 14 November 2021 in which he said "I want to stay plugged in, I hate the idea of disappearing for two years."
133. Mr Sheeran's evidence that he "disappeared" for the entire year in 2016 was, however, widely publicised at the time. It is corroborated by interviews he gave on "returning"

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in January 2017, for example on the “Zach Sang Show” on 6 January 2017 and the Elvis Duran Show on 12 January 2017. On the YouTube page for the latter interview is written: “Ed Sheeran is back after a year away from social media and music. He tells us all about being off the grid and traveling the world.”

134. Accordingly, I accept his evidence as to the extent to which he was “off-grid” from the end of 2015, that he got “re-plugged in again” with Mr Edwards in early 2021, and that his comments in more recent interviews were addressing the present and recent past, and not that earlier period.
135. That does not mean (as Mr Sheeran accepted) that he stopped listening to music during 2016, but it corroborates his evidence that he was not actively looking for new music in that period.
136. For all the above reasons, I reject the first of the defendants’ points, namely that by being actively involved in the UK scene he would have come across Mr Chokri.

Looking to find new talent since 2015

137. The premise of this contention is that Mr Sheeran started his own record label in March 2015. It is said that it was therefore inevitable that he would be keeping a close eye on new, unsigned, artists at that time. This submission misunderstands, however, the nature of the endeavour Mr Sheeran was embarking upon. He explained that the purpose of starting his record company was so that as and when he came across a specific artist that he particularly admired he could provide them with a record contract. This is a far cry from being actively on the lookout to sign new talent to his label. The proof of this is in the fact that having signed one artist at the beginning, another (Foy Vance, whom he described as a hero of his) a year later, no-one else was signed until very recently, and the total number of artists signed to his label is three.
138. The defendants referred to footage from the out-takes of the Songwriter film, taken at a mixing session sometime in late 2016. Mr Cook is seen playing a music video featuring a young actress from a famous TV series on his laptop and saying to Mr Sheeran “You should sign her”. The suggestion that this shows that his “trusted circle” knew he was actively looking for an artist to sign is fanciful. The video was of a song by the artist “Birdy”. It was not even the actress’ voice singing in the video. It is clear from the conversation as a whole, and Mr Sheeran’s response (“Why should I sign her?” and “Mate, you are asking me to sign someone who is singing someone else’s song”) that this was nothing more than idle chat while Mr Sheeran was busy working on something else, not a serious discussion about the possibility of signing a new artist.

Looking for another “Bloodstream”

139. This possibility, which Mr Sutcliffe suggested in closing was the most likely way in which Mr Sheeran accessed Oh Why, was based on the following theory: (1) On around 31 August 2016, Mr Sheeran was asked by his record label to find a song in the style of “Bloodstream”, which he had written with Rudimental for his 2014 album “X”; (2) In order to gain inspiration for such a song he had gone looking for songs in the grime genre, and stumbled across a track on the Solace EP called “Trying to Breathe” which, it is said, has certain similarities with “Eraser”, a song Mr Sheeran wrote with Mr McDaid on 5 October 2016; (3) This is corroborated by the “strange” circumstances in

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which Mr Sheeran wrote Eraser, including his admission that he had a billion ideas for a song (which the defendants say means he had been thinking about writing it for several weeks) and the fact that he wrote the verses of Eraser very quickly having asked Mr McDaid to leave the room.

140. This theory is based on a flawed premise, namely that there is any evidence at all that Mr Sheeran would have looked at the songs of other people in order to find inspiration for lyrics for songs of his own. This was never put to him as a possibility. The defendants point out that it *was* put to him that he referenced and interpolated other artists. That, however, was where he did so deliberately, crediting the writers. It was also put to him that he noted down his *own* ideas for song lyrics from time to time, to come back to when he came to write a song. These are completely different to looking at other songs in order to find inspiration for his own lyrics. In any event, the inspiration for Eraser is quite clearly Mr Sheeran's own life experiences. It is an intensely personal song about fame and success, and the pitfalls that come with them.
141. Mr Sutcliffe submitted that it cannot be coincidence that the words of "Eraser" deal with the same themes, in the same order, as the themes dealt with in Mr Chokri's song "Trying to Breathe". Thus, the lyrics to Trying to Breathe include: "Maybe I don't recognise the guy in the mirror"; "I felt secure when drinking, always found a glass to feel this way"; "different keys unlocking different chains"; and "It's a different day, I'm finding solace in this world of pain". And the lyrics to Eraser include: "I look in the mirror questioning what I've become"; "show me the locked doors, I find another use for the key"; "But with that said give me one more, higher, Another one to take the sting away"; and "Save your lovin' arms for a rainy day and I'll find comfort in my pain."
142. The one feature that these songs clearly have in common is the idea of finding comfort, or solace, in pain. The context for that, however, is different in each song. Each is written in the first person, but in Trying to Breathe that person is full of self-loathing, desperation and crying for help. Eraser is, in contrast, about runaway success and how to deal with it. I find nothing suspicious in two writers, coming from such different perspectives, landing independently upon the idea of comfort (or solace) in pain.
143. Aside from that, the references to looking in a mirror, drinking and locked doors (in themselves commonplace ideas) are extracted out of context from extensive lyrics covering much else in Eraser.
144. Nor do I find anything suspicious in the manner in which Eraser was written. Mr Sheeran and Mr McDaid wrote Eraser on 4-5 October 2016 at Mr Sheeran's home in Suffolk. They wrote the chorus and beat together on the evening of the 4 October, and Mr Sheeran wrote the verses the next morning. Mr Sutcliffe put to Mr Sheeran an email which he sent to Mr McDaid at 10:50pm that first evening which said: "Just had a billion ideas for that song. It is going to be mega. I am so excited." He suggested this was indicative of Mr Sheeran's propensity to store ideas for songs in his head over long periods of time.
145. That suggestion does not withstand scrutiny, since the comment was made when Mr Sheeran and Mr McDaid were in the middle of writing the song. The "billion ideas" was clearly a reference to the remainder of the song (the verses) he intended to write the next day. In an interview he later gave to Zane Lowe Mr Sheeran said that he asked

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Mr McDaid to leave the room when he wrote the verses. Mr Sutcliffe suggested this was suspicious behaviour, compounded by the fact that, on his evidence, Mr Sheeran proceeded to complete the song at great speed. The verses, however, comprise a rap – a form of song that Mr Sheeran, but not Mr McDaid, was adept at writing. Mr Sheeran’s evidence, which I accept, is that he simply preferred to free-form rap verses on his own rather than being watched by someone with no particular expertise in that genre.

Conclusion on access

146. Mr Sutcliffe suggested that the evidence overall presented a picture of a successful and well-publicised campaign involving renewing Mr Chokri’s profile in the “UK scene”, bringing Mr Chokri to the attention of Mr Sheeran’s associates and genuine exposure to the music industry more generally. I do not accept this. Mr Chokri is undoubtedly a serious and talented songwriter and while his management were unsurprisingly trying to create some hype around the release of the Solace EP, it had limited success. In my judgment, the possibility that these attempts might have led to it coming to Mr Sheeran’s attention – either because someone he was associated with played it to him or because he found it himself – is at best speculative.

E3. Alleged propensity to copy from others

147. The defendants contend that their case is bolstered by reference to “similar fact” evidence. They rely upon other instances of alleged copying by Mr Sheeran.
148. The admissibility of evidence of other instances of copying was established by the Court of Appeal in *Mood Music Publishing Co v De Wolfe Ltd* [1970] 1 Ch 119. At p.127F-G, Lord Denning MR said that upon the issue of copying “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.”
149. The defendants first rely on various instances where Mr Sheeran deliberately referenced the music of others in his writing, giving credit and seeking appropriate clearance. They contend that even though there is no suggestion of infringement in any of these cases, it is sufficient to show that copying has taken place, citing Copinger (above) at 21-395, where it is commented that it does not matter in such cases that the claimant has not alleged that infringement of copyright has occurred in those other cases.
150. I reject the defendants’ attempt to rely upon those occasions where Mr Sheeran referenced and credited other writers. There is nothing of probative value in them. There is no relevant “similarity” between the actions of someone who pays homage to the work of others, seeking their permission to use a part of their work, and someone who takes the work of others without crediting them. I do not accept the defendants’ submission that a person who copies music – even if this is done with permission – is “self-evidently more likely to copy without permission than a person who does not copy music at all.” On the contrary, the fact that someone is in the habit of openly recognising and crediting the work of others makes it *less* likely that they would set out to steal the creative work of others.

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151. In Mr Sutcliffe’s opening submissions, he suggested that Mr Sheeran would only credit other writers where they were famous. At the start of his evidence, Mr Sheeran strongly denied that, and pointed to examples of him having credited and cleared the use of unknown artists. That evidence was not challenged. The allegation made in opening submissions had no evidential basis, and I reject it.
152. The defendants, secondly, rely on other instances which they say demonstrate Mr Sheeran copying without obtaining permission. Such evidence can be potentially helpful, and may properly be relied on provided that it is not oppressive or unfair, and the other side has fair notice of it: see *Mood Music* (above) at p.127D. They point to three examples of which prior notice was given, and two further examples which were put to Mr Sheeran for the first time during his cross-examination.

Photograph

153. The defendants rely, as similar fact evidence of deliberate copying, on the similarities between the melody of the choruses in “Photograph” (written by Mr Sheeran and Mr McDaid in about April 2012) and “Amazing”, written by Martin Harrington and Thomas Leonard in 2009, recorded by Matt Cardle and released by him in February 2012.
154. On listening to Photograph and Amazing, there are undoubted similarities. The following transcription of the choruses was provided by Mr Ricigliano (there being no material differences between his transcription and that of Mr Siddell):

P
So you can keep me in-side the po-cket of your

A
How did you find me You came out of no-where like

P
ripped jeans hold-ing me clo-ser 'til our eyes meet

A
light-ning It's kind of a-maz-ing how you found me

P
you won't ev-er be a-lone Wait fur-me to come home

A
through all the noise some-how

155. Although the words are entirely different, the shape of the melody in each case follows a very similar pattern. In particular, most of the points of emphasis in each tune (ripped jeans/lightning; eyes meet/found me; alone/somewhat) hit the same notes, and the second bar of each phrase follows the same rhythmic pattern (crotchet-rest-crotchet). The notable exception is the first phrase (find me/keep me), which in Photograph ends on a note a fourth below that in Amazing.

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156. Similarity alone, however, is not enough to establish copying, let alone *deliberate* copying (which is the only point to which the allegation of similar fact evidence is said to go).
157. In considering whether the similarity is indicative of copying or mere co-incidence, it is important to note both the simplicity of the melodies, the differences between them, and the fact that they are each set to the same repeated four-chord sequence (I-V-VI-IV) which is itself so commonplace in pop music that it cannot be suggested that it is copied from any other particular song. Mr McDaid commented that the melody of Photograph was not “strikingly original” and that it “follows the chord progression in an obvious way”. Mr Ricigliano agreed with the assessment of it as an “obvious” pop melody. That is in my judgment a fair description.
158. Within the shape of the melodies, there are important differences in the “pick-up” notes to the points of emphasis: in Amazing, in all but the first phrase, the pattern is C-D-C-F (i.e. encompassing an interval of a fourth to reach the second bar), whereas in Photograph it is either E-E-E-F or D-E-E-F (i.e. involving no interval greater than a tone).
159. It is not suggested that Mr McDaid was guilty of deliberately copying Amazing. His evidence that he had never heard Amazing was not challenged. In an email dated 18 February 2016 after a claim had been made in the US by the writers of Amazing, Mr McDaid said to his manager, Mr Erik Eger, “Listen to Matt Cardle’s “amazing”. I had not heard it but they have a case. Stu [Mr Sheeran’s manager] needs me to get the writing files. He’s not panicking but it is close. Ouch!!”. This was a frank recognition that on hearing the songs side by side there was a distinct similarity that might support an objective conclusion of copying, but corroborates his evidence that he had not previously heard Amazing.
160. The fact that Mr McDaid co-wrote the song and had not heard Amazing makes it less likely (albeit not impossible) that the chorus was deliberately copied from Amazing. To overcome this, the defendants contend that Mr Sheeran (alone) wrote the chorus. They point to supposed inconsistencies in the claimants’ evidence as to how the song was written, and the speed at which it was written.
161. The supposed inconsistencies in the claimants’ evidence are, in my judgment, no more than an expected lack of clarity of recollection of an event which took place a decade ago. It is not disputed that Mr Sheeran and Mr McDaid wrote Photograph together. It was written in a hotel room while Mr Sheeran was on tour with Mr McDaid’s band, Snow Patrol, in the US. The defendants’ contention that Mr Sheeran wrote the chorus alone is based on Mr McDaid’s honest acceptance that he does not specifically remember the writing of the chorus, and a line in Mr McDaid’s email of 18 February 2016 to his manager (referred to above) which it is said indicates that it was Mr Sheeran who wrote the chorus.
162. The former point is based on parts of the evidence taken out of context. Mr McDaid was clear in saying that he believed both he and Mr Sheeran wrote the chorus, but at this distance of time he does not have an actual recollection. Mr Sheeran’s evidence was, taken overall, to the same effect. The fact that Mr Sheeran cannot recall whether the words or melody came first is irrelevant. Even if, as the defendants infer, the lyrics

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came first, that says nothing about whether the melody was copied. Mr Sheeran's lack of recollection after ten years is in itself wholly unsurprising.

163. The latter point stems from a mis-reading of the email, in which Mr McDaid said: "Met with Stu [Stuart Camp, Mr Sheeran's manager]. Slightly worrying legal stuff about photograph. He's had 3 court cases about thinking out loud and a "nudge" about photograph". The suggestion is that the reference to "He's" had a nudge about Photograph was intended to convey that Mr Sheeran had written the chorus. On my reading of the email, the "he" in question is more naturally a reference to Mr Camp. Even if it was Mr Sheeran, it would be understandable, as the song is identified with him as its performer, to refer to "him" receiving a complaint in respect of Photograph. I do not see how it can possibly be read as an acknowledgment by Mr McDaid that he had not had any part in writing the chorus.
164. For reasons already noted, I reject the suggestion that the speed at which Mr Sheeran wrote songs is any indication of copying.
165. The defendants finally rely on the fact that a lawsuit brought by the writers of Amazing in the US was settled on terms that involved (without admission of liability) ceding to the claimants in the US action a substantial share of the copyright in the work (35% of the publishing income from Photograph) and payment of a lump-sum of \$5.4 million. The sheer size of this settlement, contend the defendants, is indicative of an admission of conscious copying. I do not accept this. It indicates an appreciation that there was a substantial risk of losing a case of copyright infringement, which would have come before a jury in the US, and that it was therefore in Mr Sheeran's and Mr McDaid's commercial interests to reach a settlement instead of spending a large amount of time and money on going to trial. It is important to note that a finding of subconscious copying was sufficient to mean they would lose the case. In view of the objective similarities between the songs there was a clear risk of that. (It is unnecessary to reach a conclusion on subconscious copying, and I would have difficulty doing so without exploring (1) the extent to which Mr Sheeran or Mr McDaid had access to Amazing and (2) what other possible sources exist for the melody in Photograph.)
166. For these reasons, I reject the contention that Mr Sheeran deliberately copied Amazing when co-writing Photograph with Mr McDaid, and that it therefore provides any reason to suppose that he deliberately copied Oh Why when co-writing Shape.

Shape/No Scrubs

167. In an early version of Shape, Mr Sheeran deliberately referenced the US R&B band "TLC" by using the line "TLC on the jukebox", and in that context thought it would be good to use a part of the melody from their song "No Scrubs" (written by Kandi Burruss, Kevin Briggs and Temeka Cottle and released by TLC in 1999). He recognised that clearance would be needed from the owners of the copyright in No Scrubs in order to do so. On 28 October 2016, Mr Sheeran's manager approached Alison Hook, VP of Sampling and Copyright Infringement at Sony Music Publishing, to seek clearance. Since part of the copyright in No Scrubs was also owned by Sony Music Publishing, she did this via her US office.
168. Subsequently, however, and before any response had been received to the clearance request, Mr Sheeran changed his mind about referring to TLC and about using a part of

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the melody in No Scrubs. He therefore changed the melody of the pre-chorus. He did not believe that any clearance was now required.

169. Upon the release of Shape, lawyers for the copyright owners of No Scrubs nevertheless immediately complained. Clearance was then sought and obtained, and credit was given to the writers of No Scrubs. The claimants did so on the advice of their US lawyer, Don Zakarin. He stated, in an email to the claimants' English lawyers dated 11 January 2017: "I view this as a self-inflicted potentially serious wound. Even if Ed won the case that was brought (hopefully it never happens), he looks like someone who borrows songs from others and tries to work around. It's a bad image to project in general and horrible with two actions already pending."
170. I do not know what the position under US copyright law might have been, and this was no doubt sound advice on a commercial level. Having compared the relevant passage in Shape with No Scrubs, from an English law perspective, however, I find there are insufficient similarities between them to demonstrate that Shape continued to include a substantial part of No Scrubs.
171. The melody of No Scrubs over an eight bar phrase (if transposed into A minor) falls within a narrow compass: mostly over the three notes, C, D and E. Only twice over the eight bars, a phrase ends on a low A.
172. The melody in Shape in contrast ranges over nearly an octave, from low A to top G. It is divided into four two-bar phrases. The first and third of the two-bar phrases start on A, following a contour from A up to E, then back again. The second of the two-bar phrases starts on a top G, falling via E, D and C to the low A. In the fourth phrase, this then repeats. In the second phrase, the contour of the second bar is essentially C-D-A.
173. The words of the two passages are entirely different, and the differing rhythm of the respective melodies is clearly derived from the different words.
174. All this is in the context of both songs using only notes from the minor pentatonic scale. There are limited ways to set a two-bar phrase predominately using (in the case of No Scrubs) only three tones or (in the case of Shape) five tones. Given the vast number of songs written to the minor pentatonic scale it is inherently likely that on a close examination superficial similarities can be identified between selected parts of a great many songs.
175. For the above reasons I consider that the circumstances in which the pre-chorus of Shape initially copied from No Scrubs, but was changed so that it no longer did so, do not provide any support for the contention of copying and concealing levelled at Mr Sheeran.
176. Whether or not the change was done to save money (as the defendants contend) does not alter this conclusion, but Mr Sheeran's track record of giving credit to a number of other writers suggests it was not. The contrary suggestion is based on a line in the diary of Mr David Howells, Mr McCutcheon's manager. This purported to record a conversation he had with Mr McCutcheon, in which Mr McCutcheon relayed that Mr Sheeran had said, with reference to the change made to the pre-chorus of Shape, "we just saved ourselves \$4m". Mr McCutcheon did not remember it. Mr Sheeran said it was not the sort of comment he would make, as he rarely talks about money, although

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Mr Howells said that he noted this down because he recognised it as a joke, not a serious comment. If it was said at all, it seems to me that Mr Howells’ analysis is likely to be correct: no-one could possibly have known at the time that Shape would be an enormous hit, and so would have had no reason to think that re-writing Shape to avoid a No Scrubs reference would result in a benefit of anything like \$4 million.

Strip That Down/It Wasn’t Me

177. “Strip That Down” (written by Mr Sheeran and Mr McCutcheon in October 2016), is alleged to have been copied from a song called “It Wasn’t Me”, written by Orville Burrell, Rickardo Ducent, Shaun Pizzonia, Brian Thompson, Sylvester Allen, Harold Ray Brown, Morris Dickerson, Le Roy Lonnie, Jordan Charles, William Miller, Lee Oskar and Howard E Scott, and recorded and released by Orville Burrell under the stage name “Shaggy” in 2000.
178. The circumstances in which Strip That Down was written provide no evidence of a propensity to copy and conceal. The claimants’ evidence is that the similarity between Strip That Down and It Wasn’t Me was noticed after it had been written (so this was an instance of subconscious copying), but long before the song was released in May 2017. Once the similarity had been noticed, the matter was passed to a musicologist, Mr Peter Oxendale, for review. His opinion was that the similarities were such that clearance would be needed or the track would need to be changed. Clearance was duly sought – and obtained – in January 2017.
179. The defendants dispute that this was an instance of subconscious copying. They point to the fact that in an interview published in Music Week in December 2018, Mr McCutcheon (who co-wrote Strip That Down) is reported as having said “I sat there and I remember thinking, ‘OK the pre-chorus sounds a lot like Shaggy’s ‘It Wasn’t Me’. Now, normally, and this is what I love about Ed Sheeran, you’d go ‘OK, we might need to look at that’, but Ed was like, ‘No, let’s approach them and see if they’re OK for us to use that!’”. There is an apparent discrepancy between that account and Mr Sheeran’s evidence that it was subsequent to the initial writing session that the similarity with It Wasn’t Me was pointed out.
180. The first point to note is that the interview with Mr McCutcheon does not indicate *when* he “sat there” spotting the resemblance. The precise timing was irrelevant to the point he was making in the interview. Second, both he and Mr Sheeran are candid that they cannot remember precisely when the similarity was subsequently spotted. Third, and in any event, if – as Mr Sutcliffe suggested to Mr McCutcheon – his recollection in December 2018 of the details of what took place in late 2016 is likely to be more reliable than his recollection today, that recollection is of *him* having spotted the likeness, and Mr Sheeran immediately suggesting they seek clearance. It reinforces the conclusion that Mr Sheeran was being open and honest.
181. The defendants also contend that the speed at which Strip That Down was written was itself “indicative of copying”. I have dealt above with, and rejected, that general proposition. The fact that Mr McCutcheon described Mr Sheeran’s behaviour on this occasion (“free-styling” the melody and lyric on the spot) as “bizarre” must be read in context: he was saying that he thought it bizarre at the time, which was one of the first times he had worked with Mr Sheeran. Having worked a lot with Mr Sheeran since, he has become used to the fact that Mr Sheeran works at incredible speed. He certainly

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meant nothing sinister by the comment. Equally, the fact that Mr McCutcheon thinks that a little bit of the song may have been written beforehand (possibly by him or possibly by Mr Sheeran) is no reason to think that the reference to It Wasn't Me was an intentional copy.

182. The defendants next contend, however, that in seeking clearance, misrepresentations were made to those who owned the songwriting rights to It Wasn't Me. Specifically, when Ms Hook emailed the respective owners of the copyright in It Wasn't Me, attaching a demo of Strip That Down, she said that Mr Sheeran and Mr McCutcheon were in the process of writing a new song for one of a number of artists under consideration. This is said to be misleading, because Liam Payne had already recorded Strip It Down.
183. This point goes nowhere, since Mr Sheeran was unaware of the precise terms in which clearance was sought. He did not see either of the relevant emails. There would have been no reason for him to have done so. The most that can be said is that in an email from Jim Doyle (who worked for Mr Sheeran's management company, and was referred on the sleeve note to Divide as "the clean up man") to Alison Hook, Mr Sheeran is reported as being happy with the approach (to the clearance request) that "this is a working demo and no mention is made of Liam Payne". This goes no further than that Mr Sheeran may have been aware of a negative – that in seeking clearance mention would *not* be made of Liam Payne.
184. According to Ms Hook and Helen Papaleontiou, head of Sampling and Infringement at Universal Music Publishing, it was standard industry practice not to reveal the performer of a song for which clearance was sought. I accept that evidence, which makes common sense: clearance is in respect of the *writing* of a song. Even if, therefore, there was anything misleading in the terms of the emails sent seeking clearance for Strip That Down, it does not implicate Mr Sheeran, and provides no support for the allegation that he deliberately copied and concealed the work of others. It is not necessary, therefore, to consider to what extent the emails were positively misleading, although I note in this respect that although Liam Payne had already recorded the song, a rap section was still to be completed and the person to perform that section had yet to be identified.

Lift Me Up/Lay Lady Lay

185. It was put to Mr Sheeran in the witness box that the first line of a song "Lift Me Up" (which he had started writing with Mr McDaid in January 2016 but which did not make the album) – "little lady lay with me a while" – was copied from a Bob Dylan song, "Lay Lady Lay" (which includes the lyric "Lay lady lay, lay across my big brass bed; Stay lady stay, stay with your man awhile").
186. There was no notice given of this point, which therefore fails the fairness test for similar fact evidence in *Mood Music* (above), although it is right to point out that the lyrics only came to the defendants' attention shortly before trial. There was unsurprisingly no opportunity for the claimants to call evidence to explain the process by which Mr Sheeran and Mr McDaid wrote Lift Me Up. Mr Sutcliffe maintained that the first line of Mr Sheeran's song was an obvious copy of Lay Lady Lay, and that Mr Sheeran's denial that he was well acquainted with Bob Dylan's song was not credible. Mr Sheeran denied there was any copying involved. This is another song co-written with Mr

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McDaid, who when asked whether the line was a reference to Bob Dylan’s song said “absolutely not”. Mr McDaid is not accused of deliberately copying anything. If he was not deliberately copying from Bob Dylan, then it is difficult to see why it must be inferred that Mr Sheeran was doing so. In any event, merely because both phrases use the words “lay”, “lady” and “a while/awhile” is not enough in my judgment to make Mr Sheeran and Mr McDaid’s words a copy of a substantial part of the song Lay Lady Lay. Accordingly, I reject the suggestion that this is an example of deliberate copying or otherwise provides any support for the claim in relation to Shape.

Take it Back

187. Finally, the defendants rely on the lyrics Mr Sheeran wrote to a rap, entitled “Take It Back” in 2013. This is not relied on as similar fact evidence, because there is no suggestion that the words were copied from anywhere else. Instead, it is relied on as an apparent admission by Mr Sheeran that he is in the habit of plagiarising others. The relevant lyrics are:

“I’m not a rapper, I’m a singer with a flow,
I’ve got a habit of spitting quicker lyrics you know,
You found me ripping the writtens out of pages they sit in,
I never want to get bitten because plagiarism is hidden”

188. Mr Sutcliffe submitted that Mr Sheeran’s denial that these words meant that he was in the habit of copying and concealing others’ work was untruthful and that he knew that these lyrics “mean what they say” and support the proposition that Mr Sheeran has a propensity to copy and steal. I reject this argument, which depends on the (in my judgment incredible) proposition that by 2013 Mr Sheeran had developed a habit of plagiarising other peoples’ songs and decided to publicise that fact to the world.
189. When the lyrics were first put to Mr Sheeran and he was asked what they meant he said he did not know. However, in putting the lyrics to him, Mr Sutcliffe mis-stated the last line as “never once *I get bitten* because plagiarism is hidden”.
190. The following day, Mr Sheeran was asked whether, having reflected on it overnight, he still did not know what they meant. He pointed out that Mr Sutcliffe had misstated the lyrics, and that “getting bitten” is when someone “bites your flow”, that is they copy the flow of your words. The line “I never want to get bitten because plagiarism is hidden” simply meant that he did not want to find that someone plagiarised his work by taking his flow. “Ripping the writtens” referred to ripping out pages of a notebook as he writes lyrics (“spitting quicker lyrics”).
191. Given that Mr Sheeran was faced with this point in the witness box with no advance notice and that when it was first put to him the lyrics were materially misstated, I find nothing suspicious in his having improved on his explanation by the second day of cross-examination.

E4. Criticisms of Mr Sheeran’s evidence and the three “fingerprints”

192. In their closing submissions, the defendants collated instances of what they called “particularly problematic” parts of Mr Sheeran’s evidence. Many of these I have dealt with already. Many are references to passages in Mr Sheeran’s evidence which the

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defendants do not accept, but which I have accepted (such as Mr Sheeran denying that he was aware of Mr Chokri, his evidence as to the speed at which he writes, his denial that he generally collates song ideas, his explanations for the change from “heya” to “oh I” and for the instrumental part which temporarily replaced the OI Phrase, and his comments captured on film at a mixing session discussing the OI Phrase).

193. The criticisms levelled at him, Mr McDaid and Mr McCutcheon that they have failed adequately to explain precisely how the various elements in Shape (or Photograph) were created, are misplaced. As I have explained above, it cannot reasonably be expected – where songs are co-written in a “live” session with three writers chipping in ideas – that they will recall who came up first with which particular element. That is particularly so after more than five years (in the case of Shape) or 10 years (in the case of Photograph). Mr Sheeran’s response was apposite: “you are asking me to remember like really, really tiny specific details of things that were not important at the time.”
194. Some of the criticisms are based on things Mr Sheeran said in interviews after the release of Shape that differ on points of detail from his evidence (and that of Mr McCutcheon and/or Mr McDaid) at trial. For example, in December 2017 he suggested that, having finished Divide “they” (presumed to be his publishers) wanted him to write songs for other people and he chose a song in the “tropical house dance” style. This does not fit completely with the evidence (which I have accepted) as to the way in which Shape was created on 12 October 2016. Another example is an interview he gave with the Breakfast Club on 10 March 2017, in which he referred to “the chorus originally was done, and that was meant to be the one we were going to send off and then I did the lyrics for the verse”. In cross-examination Mr Sheeran was asked what he meant by “the chorus was originally done”, but he did not know.
195. Mr Sheeran has given many, many interviews for promotional and entertainment purposes – no doubt being asked the same or similar questions about Shape on multiple occasions. The fact that there are some discrepancies in the details of his descriptions of writing Shape is not surprising, and not a reason to disbelieve the evidence given at trial, corroborated by others as it has been. As for the Breakfast Club interview, I agree that his reference to the chorus “having been done” does not make sense (I note Mr Sheeran refers later in the interview to it being 5:30 in the morning and it is yet another time when he was asked the same questions about the creation of Shape in an entertainment/promotional context), but I do not read anything into it. The creation of Shape is recorded in the Protools sound files, which show the song being created as a whole in the space of a couple of hours. There is no question of the “chorus” (even assuming that includes the OI Phrase, which the claimants regard as a post-chorus section) having been created separately and earlier. As for the fact that Mr Sheeran says that he had in mind that it could be a song for Rihanna, but he sung it from the perspective of a man, I accept his explanation, which was that the references to boy/girl were easily interchangeable. As a man, he chose to sing it from the male perspective.
196. Criticism was also made of prior failings in the claimants’ compliance with their disclosure obligations. I do not find, however, that this undermines the credibility of Mr Sheeran’s evidence. The defendants repeat the complaint about the deletion of voice notes from 12 October 2016 but, as I have indicated already, the voice notes belonged to Mr McDaid and there is no suggestion that he did anything wrong in this respect.

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197. As to the remainder of the specific points of criticism of Mr Sheeran's evidence, while I do not address them individually, I have had regard to them all in concluding that Mr Sheeran presented his evidence straightforwardly and honestly, in an attempt to assist the court.
198. The defendants also contended that there are three unique fingerprints of Mr Chokri within Mr Sheeran's work: (1) the similarity of the lyrics of Eraser to those of Trying to Breathe; (2) the "high G" in one of the versions of the OI Phrase sung by Mr Sheeran on 12 October 2016, which reflects a similar high G in the last time the "Oh Why" phrase is sung in the OW Hook; and (3) the fact that certain of the Protools sound files from 12 October 2016 were labelled "Oh Why".
199. There are no such fingerprints. I have already rejected the argument in relation to Eraser. As to the high "G", the relevant sound file to which the defendants refer was simply one of a number of "takes" of harmonies to be stacked on each other to produce the choir effect that appears on the demo version of Shape at the end of the day on 12 October 2016. There is nothing surprising in one of the harmonies incorporating the fifth note of the pentatonic scale. It is true that certain of the sound files were labelled "Oh Why" in the Shape Protools project on 12 October 2016. That was not done by Mr Sheeran, however, but by Mr Pursey, a recording engineer at Rokstone studios. It was not suggested to Mr Sheeran that he saw the labels at the time. It is common ground that "Oh I" and "Oh why" sound indistinguishable when sung to repeated notes. I reject the suggestion that in the particular sound files in question what is clearly being sung is "Oh why". The fact that an engineer in the studio labelled the files as he heard them goes nowhere.

E5. Conclusions on copying

200. Mr Sutcliffe urged me to stand back from the detail and focus on the bigger picture. The case, he said, boiled down to four unassailable points: the similarities between the songs, not by a laser-like focus on individual elements (because to do so risked losing the song), but by listening to the sounds as a whole; the "one-in-a-million" chance of two unique sounds correlating with one another within the space of months; the three "fingerprints" in Mr Sheeran's work; and the lack of credible explanation from the claimants for the creation of the OI Phrase.
201. Of necessity, in view of the nature of the allegations in this case, I have analysed in some detail the musical elements that went into the creation of Shape, but I agree with Mr Sutcliffe that it is important to stand back from the detail. When I do so, however, I come to the opposite conclusion to him. It is in reality the defendants who have focused on the three points of particular similarity between Oh Why and Shape, while ignoring points of difference, the fact that each element is a common building block in music of this and many other genres, and the use of the same or similar elements in other parts of Shape and in other Ed Sheeran songs.
202. Having reviewed all the circumstances, their use together in the OI Phrase by the writers of Shape is explained in my judgment by reasons other than copying. The "one-in-a-million" chance of them being used together (and the fact that the precise notes, vocalised and harmonised in the same way has not been found before) is no more than a starting point when considering whether one is copied from the other. While Mr Chokri's initial reaction to the similarities, posted on Facebook in January 2017, is

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understandable, coincidences (which, by definition, would not be remarked upon in the absence of marked similarities) are not uncommon.

203. Listening to the sounds as a whole, as urged by Mr Sutcliffe, the two phrases play very different roles in their respective songs. The OW Hook is the central part of the song, and reflects the song's slow, brooding and questioning mood. Without diminishing its importance, the OI Phrase plays a very different role: something catchy to fill the bar before each repeated phrase "I'm in love with your body". The use of the first four notes of the rising minor pentatonic scale for the melody is so short, simple, commonplace and obvious in the context of the rest of the song that it is not credible that Mr Sheeran sought out inspiration from other songs to come up with it. As to the combination of elements upon which the defendants rely, even if Mr Sheeran had gone looking for inspiration, then Oh Why is far from an obvious source, given the stark contrast between the dark mood created by the OW Hook in Oh Why and the upbeat, dance feel that Mr Sheeran was looking to create with Shape.
204. I have already dismissed the supposed fingerprints and the lack of explanations.
205. Accordingly, for the reasons I have set out above, I conclude as follows:
- (1) While there are similarities between the OW Hook and the OI Phrase, there are also significant differences;
 - (2) As to the elements that are similar, my analysis of the musical elements of Shape more broadly, of the writing process and the evolution of the OI Phrase is that these provide compelling evidence that the OI Phrase originated from sources *other than Oh Why*;
 - (3) The totality of the evidence relating to access by Mr Sheeran to Oh Why (whether by it being shared with him by others or by him finding it himself) provides no more than a speculative foundation for Mr Sheeran having heard Oh Why;
 - (4) Taking into account the above matters, I conclude that Mr Sheeran had not heard Oh Why and in any event that he did not deliberately copy the OI Phrase from the OW Hook;
 - (5) While I do not need to resort to determining where the burden of proof lies, for completeness:
 - (a) the evidence of similarities and access is insufficient to shift the evidential burden so far as deliberate copying is concerned to the claimants;
 - (b) the defendants have failed to satisfy the burden of establishing that Mr Sheeran copied the OI Phrase from the OW Hook; and
 - (c) even if the evidential burden had shifted to the claimants, they have established that Mr Sheeran did not deliberately copy the OI Phrase from the OW Hook.

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- (6) Finally, again taking into account all the matters I have considered above, I am satisfied that Mr Sheeran did not subconsciously copy Oh Why in creating Shape.

F. Other issues

206. In light of the conclusions I have already reached, the other issues which depend upon copying being established do not arise. I nevertheless express my conclusions briefly:

- (1) I am satisfied that the elements of the OW Hook said to be similar to the OI Phrase represent the expression of the intellectual creativity of Mr Chokri and Mr O'Donoghue. I reject the claimants' contention that the OW Hook was copied from Mr Sheeran's cover of Jamie Woon's interpretation of the Johnny Cash song, Wayfaring Stranger. The most that could be said is that the layered chant Mr Sheeran creates in his performance finds echoes in the chant Mr Chokri created for the OW Hook. This is plainly insufficient to support a claim of copying. In any event, I accept Mr Chokri's evidence that he did not have Mr Sheeran's performance in mind when creating Oh Why: in my judgment, Oh Why is the product of Mr Chokri's creative mind and personal experiences.
- (2) I accept the claimants' contention that none of the elements of similarity on which the defendants rely in itself represents that which confers originality on Oh Why as a musical work. The use of the rising minor pentatonic scale is a generic and commonplace building block in many musical genres. The fact that each note of the scale is repeated does not in my judgment alter that conclusion. The use of a vocal chant and its harmonisation with low and high octaves are equally generic and commonplace ideas. Nevertheless, if it had been necessary to decide the point, I would have concluded that the combination of these features did sufficiently represent the intellectual creativity of Mr Chokri and Mr O'Donoghue. Although there is no claim to infringement of copyright in the lyrics, I think that the setting of music to a distinct vocal sound (e.g. humming, "ahh", "ooh", etc) can be considered part of the orchestration of a musical work: see, for example, *Hayes v Phonogram Ltd* [2003] ECDR 11, per Blackburne J at [60].

G. Relief

207. The claimants seek a declaration that in creating and exploiting Shape they have not infringed copyright in Oh Why. The conclusion that they have not done so follows inevitably from the findings set out in this judgment.
208. The defendants nevertheless contend that the declaration sought should not be granted. The court's power to make declarations is a discretionary one. When considering whether to grant a declaration, the court should take into account "justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any special reasons why or why not the court should grant the declaration": *Financial Services Authority v Rourke* [2002] CP Rep 14, per Neuberger J at p.11. In *Nokia Corp v InterDigital Technology Corp* [2006] EWCA Civ 1618, the Court of Appeal said:

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“15. Normally before the Court will exercise its discretion to grant a declaration, there must be some real reason for doing so. Normally it will decline to grant a declaration in favour of a party against whom no claim has been formulated for the obvious reason that there is no real point in doing so.

...

20. ... There would have to be a real commercial reason for the person seeking the declaration to have standing to do so.”

209. The defendants contend that the declarations sought should be refused on the following grounds.
210. First, because there is no commercial basis for the declaration, given that the total amount of royalties in suspense as a result of the defendants’ actions is “only” £2,200,000, and the claimants have refused to reveal the total amount of income from Shape that they continue to receive (but it is to be inferred that it was considerably more). I have no hesitation in rejecting this ground.
211. While it is true that each of Mr Sheeran, Mr McCutcheon and Mr McDaid said that they were unaware of the amount of royalties that were frozen, that the money was unimportant and that they were here to clear their names, that does not apply to the corporate claimants and £2,200,000 is in itself a substantial amount of money. That alone provides a commercial justification for declaratory relief. In addition, the desire of the songwriters to clear their names is also a reason to grant this declaratory relief. Each is someone highly successful in the industry, whose reputation would be at risk from accusations of deliberate copying. It was not until after they had been cross-examined that it was made clear that Mr McCutcheon and Mr McDaid were not accused of deliberate copying.
212. As for Mr Sheeran, the justification for declaratory relief was only increased by the fact that although the case only relates to Shape, it was pursued against him on a basis (which I reject) that he is a “magpie” who habitually deliberately copies and conceals the work of other songwriters.
213. Second, the claim was said to be premature, because the claimants failed to comply with pre-action protocols, there being no letter of claim, no pre-action disclosure, and no attempt to engage in alternative dispute resolution. The dispute commenced with a phone call from the defendants’ former solicitors to the fourth claimant in September 2017, in which – as evidenced by the letter from the claimants’ former solicitors that followed shortly afterwards – he claimed that Shape infringed copyright in Oh Why and stated that his clients were in the process of taking steps to place Shape in suspense at collecting societies. In their response, the claimants’ solicitors denied the allegation, referred to a report from the musicologist Peter Oxendale who confirmed there was no basis for infringement, and stated “we hereby put you on notice that our clients will take immediate action to protect their interests should you or your clients be so misguided as to take steps to implement your threat.”
214. Correspondence continued between solicitors, albeit slowly. On 26 March 2018, the defendants’ solicitors sent a copy of a preliminary report by Mr Siddell. They said that

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their clients were “very upset” that their work had been taken without permission and exploited commercially “on such a grand scale”, and had been urged by others to freeze collection society payments (but they – the solicitors – were trying to persuade them not to do so).

215. On 14 May 2018, the claimants’ solicitors wrote to the defendants’ solicitors stating that it was incumbent upon them properly to set out their allegations and that the preliminary report of Mr Siddell fell far short of that. At that point, unbeknown to the claimants, the defendants had in fact already put Shape into suspense with the PRS a couple of days earlier. As soon as the claimants’ solicitors found out, they acted on the warning they had given in September 2017 and issued this claim.
216. The defendants rely on an email from their former solicitor of 23 May 2018, in which he objected to the claim having been issued quickly, in disregard of the CPR, and said that his clients had acted against his advice in putting Shape into suspense at the PRS, and that he continued to advise them that they should agree to cease suspension “if we can agree a way forward with your clients.”
217. The defendants suggest that in these circumstances, it was heavy-handed and premature of the claimants to issue the proceedings and that this disentitles them to the declaratory relief sought. I disagree. Whether it was true or not, the claimants were justified in thinking that putting Shape into suspense at the PRS was a tactic designed to extract a settlement. They had given fair warning that they would protect their position if such a step was taken, and they could take little if any comfort from the defendants’ solicitor saying he had advised his clients to lift the suspension, given that he had already said that his clients had taken that step in the first place against his advice. In any case, even if the claimants’ actions were premature, that is water under the bridge: the defendants have maintained, and widened, their attack on the claimants – and on Mr Sheeran in particular – ever since.
218. Third, the defendants point to disclosure failings on the part of the claimants. These were the subject of prior applications, with appropriate costs orders being made where necessary. I find nothing in this which would count against the declaration being granted.
219. Finally, the defendants complain that Mr Oxendale (whose report was relied on merely at the pre-action stage) is not independent, because he has been instructed many times by the claimants and is effectively their “in-house adviser”. Even if he was, that provides no reason to deny the declarations sought. I reject, in any event, that his prior connection with the claimants meant that he did not provide his report independently. As one of a handful of expert musicologists in this field, it is not surprising that he has been called on in an advisory capacity by the claimants on many occasions.
220. Accordingly, none of these points dissuades me from exercising my discretion to grant the declaration sought.
221. It also follows that the counterclaim falls to be dismissed.