

Claimant  
Malcolm Colin Smith  
First  
30 November 2017

Claim no. HC-2016-002849

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

**B E T W E E N:**

**SIR CLIFF RICHARD, OBE**

Claimant

and

**(1) THE BRITISH BROADCASTING CORPORATION**  
**(2) THE CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE**

Defendants

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**WITNESS STATEMENT OF MALCOLM COLIN SMITH**

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I, **Malcolm Colin Smith**, of Stonebridge House, 28-32 Bridge Street, Leatherhead, Surrey KT22 8BZ  
**WILL SAY** as follows:-

1. I am the Claimant's Business Manager and I have worked in this role for 30 years. I am also the Managing Director and Company Secretary of the company which manages the Claimant's professional activities, Balladeer Limited (registered company number 00800125) ("**the Company**", or "**Balladeer**").
2. I make this statement in support of the Claimant's case on the issues which are to be tried at the first trial of this claim ("the First Trial"), principally on the issues of causation which are to be tried in relation to the Claimant's claim for special damages. Those issues are set out at paragraphs 9.3.1-9.3.3 of the Order of the Hon. Mr Justice Mann dated 26 May 2017 and I do not repeat them here. What I say in this statement (and in the Confidential Schedule hereto)

is said without prejudice to any submissions that will be made on the Claimant's behalf as to the limited scope of the issues that are to be determined at the First Trial and as to the nature of the evidence that is or may be relevant thereto.

3. I should also make it clear that I am not authorised by the Claimant to waive privilege in any communications between the Claimant or his agents and his legal advisers, or in any or any other documents protected by legal privilege.
4. I make this statement on the basis of facts and matters which are within my personal knowledge, and which I believe to be true. When I refer to some other source of information, I identify that source. I confirm that such information is true to the best of my knowledge, information and belief.

#### **My role as the Claimant's Business Manager before the broadcast**

5. I am a Chartered Accountant and was the Claimant's advising professional Accountant until I started working with him full time in 1987. My role as Managing Director of Balladeer and as the Claimant's personal Business Manager involves providing advice and assistance to him in relation to all aspects of his professional activities and business including in connection with: his musical career; the vineyard in Portugal; the investment in and management of his properties; the management of his finances; procuring commercial deals and liaising with those in the relevant industries to finalise the details; negotiating the terms and contracts of those deals; the instruction of professional advisers; and acting as the Claimant's Agent and Attorney in relation to his commercial interests.

#### **The role of Balladeer**

6. The Company was incorporated on 8<sup>th</sup> April 1964, and I was appointed as a Director over 40 years ago. The Company was established to manage and exploit the Claimant's professional and commercial interests and to pay and receive the monies involved in the exploitation of Claimant's activities and interests. Put simply, it has been the Claimant's service company for more than 50 years. For the very large majority of its existence, and certainly over the last 30 years, it has (either by itself or, in recent years, together with subsidiary entities) exclusively owned, controlled and exploited the right to the Claimant's services in respect of all his

activities worldwide. The Claimant is and always has been the beneficial owner of 100% of the shares in the Company.

7. For a period of time, the Company had a sound and lighting production company with its own staff, and a publishing company also with its own staff. At their peak, the companies employed a total of twelve members of staff.
8. The Company has a wholly owned subsidiary, Vox Rock Limited (registered company number 05838753) ("VR"). VR was incorporated on 6 June 2006 and at that time the Claimant's services were divided between non-UK activity, which was operated through VR; and UK activity, which was operated through the Company. Therefore, if for example the Claimant records an album overseas, he now does so under his contract with VR, and VR then grants the rights to a record company to exploit the album and the income received in respect of that album comes to VR. If the claimant records an album or undertakes a tour of live performances overseas he does so under his contract with VR. The same applies with other personal services rendered overseas. If either activity happens in the UK, the company involved would be Balladeer.
9. This is entirely usual in the case of a service company which has the exclusive right to the recording, performing and other commercial activities of an extremely successful and long-established artiste such as the Claimant.
10. Approximately 20 years ago, I realised that the sound and lighting and the publishing companies were too reliant on the income from the Claimant's activities, and the income generated from third parties was insufficient for them to trade profitably. Given that the Claimant's activities were likely to slow down (or at least not increase to the extent that it would become viable to keep these companies running), I closed those companies and the relevant employees' contracts of employment were terminated.
11. Gradually the number of staff employed by the Company has been reduced and there are now four people who are permanent employees, including myself. If any additional assistance is required in connection with, for example, a tour, subcontractors are brought in for a specific project and time period.

12. VR does not carry any reserves to speak of: the Claimant is paid a basic annual salary by VR and earnings received by VR in addition to that are generally appointed to the Claimant as a bonus.
13. Balladeer does, however, retain reserves. Some years ago (at least 15, if not 20), I set a target of trying to retain approximately £2 million in reserves in the Company at all times. This would allow some flexibility in the event there was no touring or recording activity. The administrative expenses of Balladeer were at the time typically around £500,000 per year, and this figure hasn't changed dramatically since the time that I set the target. The retained reserves meant that the Company would be secure for three years or so (perhaps a little more) without the need to push the Claimant to generate additional income or inject working capital. For the avoidance of doubt, the usual operating expenses of the Company include lawyers' and other professional fees incurred in looking after the Claimant's interests on a 'normal' basis, but these have tended to be fairly low.
14. My intention was that – again, in usual circumstances - anything above this £2 million threshold would be distributed to the Claimant in the ordinary course. In the period leading up to the BBC's broadcasts (on 14 August 2014) the Company was in very good health, and had retained reserves well above this £2m target at 30 April 2014, the end of the previous trading year. Furthermore, in the previous 5 years (prior to 14 August 2014) dividends had been declared and paid to the Claimant, most of them very substantial. Further details of this are given in the Confidential Schedule to this statement.
15. Since August 2014, however, this plan has been blown apart and the Company has had to make radical changes to its balance sheet and its approach to paying dividends to the Claimant. This would not have been necessary had it not been for the unlawful acts of the Defendants. Indeed, to avoid any cash flow difficulties as far as is reasonably possible, the Company (and VR) has borrowed from the Claimant the money that would otherwise have been distributed to him by way of dividends and bonuses.
16. The PHA Media invoices and the Michael Simkins LLP/Simkins LLP (together, "**Simkins**") invoices that form the basis of the claim for special damages were all addressed to Balladeer

(as plainly appears from the copies disclosed by the Claimant). They were all paid directly by Balladeer. Further:

- 16.1. In terms of legal costs incurred with Simkins in the period between 14 August 2014 and 26 October 2016, the sum of £279,261 is claimed as special damages, with much (but not all) of the balance being included within the costs bill that the Claimant will seek against the Second Defendant on an *inter partes* assessment if his claim succeeds. More details of the categories of work done and the reasons why it needed to be done are contained in the witness statement of Gideon Benaim of Simkins;
- 16.2. In terms of the PR costs that were incurred with PHA Media in the relevant period, the sum of £108,500 is claimed as special damages. More details of the work done and the reasons why it needed to be done are contained in the witness statement of Neil McLeod of PHA.
17. It is for these reasons (and having regard also to the financial details contained in the Confidential Schedule) that I can say with confidence that, assuming the Court accepts the Claimant's case that the expenditure of the additional legal costs in the sum of £279,261 and the additional PR expenses in the sum of £108,500 was caused by the Defendant's unlawful acts, the sums which they represent would have been distributed by the Company to the Claimant as part of the dividends payable in the years ended 30 April 2015, 2016 and 2017, entirely consistently with the previous and normal practice of the company, and that losses based upon these sums are properly claimable as damages in this action.
18. Similarly, had the agreed contractual advance for the revised edition of the Claimant's book '*My Life My Way*' been paid to VR (which would have been the contracting party with the publisher), that sum, too, subject to one qualification, would, on a balance of probabilities, have been paid to the Claimant by way of bonus for the respective year(s). The only qualification is that an agent's commission of 10% would have been deducted from the advance payable by the Publisher, and paid directly to the agent. Should the Claimant succeed on the issue of liability at the First Trial, credit will be given at the trial on quantum of special damages for this commission. I deal in more detail with the book deal and the reasons why it did not go ahead below.

## **Background to the involvement of PHA Media and Simkins**

19. Prior to 14 August 2014, the Company had retained the services of PHA Media Limited (“PHA”) to handle public relations for the Claimant but only on a limited basis.
20. The first time PHA was retained was in mid-2013, when it carried out some PR work for a one-off fee of £5,000. Then in July 2014, I agreed that PHA's services would be retained over a three-month period for a (total) cost of £5,000 plus VAT for general consultancy services with effect from 18 July 2014. In both cases I was happy for Balladeer to be invoiced for the services and to pay the invoices because I took the view that these were legitimate expenses for the Company to meet, given that it was the Claimant's service company and given that its only substantial asset was the right to the Claimant's services.
21. Before the BBC broadcast, the Claimant had also retained Simkins. Simkins had acted for the Claimant and his companies since the 1960s providing advice on, predominantly, the development of his music career.
22. Solicitors at Simkins specialising in reputation protection have also acted for the Claimant since 2013 with the provision of legal advice and assistance on online matters or those concerning the media. The dramatically-increased need for advice from Simkins from the day of the BBC's broadcasts and the aftermath of that coverage is evident from the fact that Simkins' time in the ten-day period between 14 August to 24 August 2014 cost more than all the work that took place in the preceding sixteen months. (This aspect is addressed in more detail in the witness statement of Gideon Benaim). Again, I was happy for Balladeer to be invoiced for and to pay all the invoices for this work dating from August 2014 to October 2016 (which is the period which covers the legal costs the subject of the special damages claim) for the same reason as applied in the case of PHA's fees.

## **My role as the Company's Managing Director and the Claimant's Business Manager after the broadcast**

23. When the raid on the Claimant's property was carried out by South Yorkshire Police and broadcast by the BBC around the world, it became immediately clear that PHA's services

would be required on a more long-term and intensive basis. We did not have the necessary skills and resources "in house".

24. On 26 August 2014, Phil Hall of PHA emailed me to ask if I would authorise an increase in the fees given the much-enhanced level of work involved and the number of enquiries and, specifically, international calls (which required out-of-hours responses given the time difference) that were received. PHA's fees were, therefore, increased to £5,000 per month backdated to 12 August 2014. I was liaising with Phil Hall and agreeing to the increased retainer fees (as evidenced by my email of 27 August 2014).
25. Following the BBC's broadcast, it was necessary to ask Simkins to be on hand to provide urgent advice, to react to media enquiries without delay, to interact on short notice with PHA and the media (both print and broadcast), to advise the Claimant on potential libel claims against publishers or broadcasters who inaccurately reported the story, to seek to prevent inaccuracies appearing in the media and online, and to prevent further harm being caused to the Claimant's reputation or further intrusion into his private life. All of this was self-evidently of significant importance to the Company's commercial interests and activities, as well as to the Claimant.
26. I was corresponding (both by telephone and email) with the team of lawyers at Simkins on a daily basis, very often multiple times per day including in the evenings and at weekends and while on vacation, often at short notice and on an extremely urgent basis. We were all very much 'firefighting' throughout this period, particularly in the immediate aftermath of the broadcast.
27. My entire role working for the Company and the Claimant was completely transformed following the broadcast. The days that followed were relentless, exhausting, concerning and extremely hard work; all of which was exacerbated by the fact that the world's media was now watching as a result of the media attention that the BBC had given to the raid.
28. I felt huge responsibility for the Claimant to ensure that the damage was as limited as it could be, although I realised early on that it would be a difficult if not impossible task, given the

BBC's decision to broadcast the raid in such a sensational way before the police had even decided whether or not to arrest or charge the Claimant (which of course they never did).

### **The effect of the broadcast on the Claimant's business and personal life**

29. There were many aspects of the Claimant's business affected by the fact that the knowledge of the police investigation and raid was so widespread, some of which form part of this claim. Not only did the Claimant suffer enormous personal distress but his commercial plans and other arrangements were thrown into complete disarray as soon as news of the raid and the investigation spread.
30. In addition to the impact that the broadcast had upon the Claimant's private life, which was obvious following the number of emails and telephone calls I received immediately following the broadcast, the Claimant also had to voluntarily withdraw from a number of public appearances including his annual attendance at Wimbledon, his planned trip to the US Open and a performance at a charitable concert at Canterbury Cathedral, in order to avoid overshadowing the events and causing a media storm purely as a result of his attendance. Despite not being arrested or charged, the Claimant was unable to continue living his life as normal or to do the things he enjoyed, including incidentally the pursuit of his charitable interests.
31. I had to be involved at all stages and in all aspects of the process when dealing with the Claimant's decision not to attend or be part of those events and I sought the counsel of PHA and Simkins where appropriate in light of the risk that anything that the Claimant did (or did not do) would become a front-page story – given the level of media attention the raid had attracted.
32. Three specific instances where the Claimant's commercial interests were adversely affected by the broadcast of the raid were in relation to (1) an album of Rock 'n' Roll classics that was scheduled for release through Sony Music Entertainment in the autumn of 2015; (2) an album of Christmas songs that was intended to follow the release of the Rock 'n' Roll album; and (3) a revised edition of the Claimant's autobiographical book, *'My Life, My Way'*. The first and third of these deals were in the final stages of negotiations. I had committed a great deal of

time negotiating and liaising with the commercial parties involved and in seeking to agree terms which were mutually acceptable. In the circumstances, the projects had to be postponed or cancelled. A significant amount of work and time was wasted in respect of those deals and the earning opportunity was lost or postponed.

33. Naturally I had to keep the Claimant informed to some extent about the progress (or lack of it) of these deals, although I tried to shield him as much as possible from the day to day *minutiae* of such matters. It was a difficult enough time as it was for the Claimant, and at this stage in what had been a very long and successful career I am sure he would far rather not have had to deal with these disruptions, and that they only added to the enormous stress and anxiety he was already having to cope with.

**The lost book deal – ‘*My Life, My Way*’**

34. I turn now to the deal for the revised edition of the Claimant’s autobiography, ‘*My Life, My Way*’, the terms of which had been substantially agreed at the time when the BBC coverage took place. I understand that the Claimant gives evidence in his witness statement about the impact of the coverage on the two record deals as well as on the book deal, but I shall address the latter in more detail as it forms the basis of part of the Claimant’s claim for special damages.
35. The previous edition of ‘*My Life, My Way*’ (written with Penny Junor) had been published in paperback in 2009. By 2014 negotiations with the publishers for a revised and up-dated edition were in their final stages and a substantial non-recoverable advance had been agreed (the figure is pleaded in the Confidential Schedule to the Particulars of Claim and repeated below). This was all prior to 14 August 2014. The offer from the publisher (Headline) is set out below an email from the literary agent (Simon Trewin of WME) dated 10 July 2013 which has been disclosed in this action. As can be seen, the advance was to be paid over several stages, commencing with the signature of the head contract and culminating in the publication of the paperback edition. The contracting party would have been VR.
36. There were several features of the deal which are very important to note,

- 36.1. Firstly, it was an integral part of the revised edition that it would be published to coincide with the Claimant's birthday celebrations for his 75<sup>th</sup> birthday, which were due to take place the following October, ie October 2015. Indeed, its release was designed to "commemorate the great man's 75<sup>th</sup> birthday in 2015" (to use the publisher's wording in Mr Taylor's email of 24 June 2013).
- 36.2. Secondly, and linked to the first point, the contract included some promotional commitments on the part of the Claimant that would need to be carried out around the time of the book's launch. This was the subject of further negotiations between Mr Trewin and the publishers in mid-2014, the results of which are set out in Mr Trewin's email to me of 6 June 2014. It will be seen that the publishers required the Claimant to appear on at least one prime-time TV chat show and/or in one major national radio interview; and that this would be timed to coincide with the completion of his planned week of special birthday concerts at the Royal Albert Hall in October 2015.
- 36.3. Thus, the deal for the revised edition was time-sensitive, in that it was firmly linked to the Claimant's birthday and concert activities in October 2015. There was thus only a limited window of opportunity within which to sign the deal and prepare the revised edition.
- 36.4. Thirdly, in addition to the requirement for fresh and up-to-date photographs for the revised edition, it was also an integral part of the deal that there would be an entirely new chapter of 3,000 words to "update the story" of the Claimant's life.
37. Following the events of 14 August 2014, I didn't hear anything about the book for some time, and I assumed that the publishers had been frightened away by the publicity given to the raid and the investigation. As it happened, however, on 4 November 2014 the Claimant's agent (Mr Trewin) received an email from the publishers asking whether my position as regards the book had changed in light of the "story about the police investigation". I was surprised that the publishers appeared to be still interested in the deal, having heard nothing further from them about the book for nearly three months, and having assumed that they had lost interest in it. I said as much in my response to Mr Trewin of 5 November 2014.

38. I also responded to the effect that I was very enthusiastic as to the viability of the deal, but that I did not believe that the timing was appropriate in the circumstances as they then stood. I therefore asked the agents to pursue the project by "keeping it simmering on the front of the stove". My expectation at the time (based on information that had come from the police) was that the investigation would soon be concluded – the initial estimate of the police was that the investigation should take no longer than 10–12 weeks – and that, since in our minds there was no truth to the allegation being made, no charges would be brought and then the Claimant would be able swiftly to move on with his life.
39. On this basis, there would have been ample time for the update to the book to be prepared, given that it was to be an additional chapter, based on a lengthy interview with the Claimant, together with some up-to-date photographs, prior to the hardback edition being published in September/October 2015. (The page proofs would have had to be signed off on in late April 2015.)
40. In the event, however, the deal never progressed, essentially because the investigation dragged on for nearly two years, by which time the 75th birthday celebrations had been and gone. I have little doubt that, even though the publishers appeared to be willing to proceed with the revised edition of the book whilst the investigation was still ongoing, the Claimant would have been reluctant to be involved with it whilst everyone knew there was such a cloud hanging over his head, not least because he would have had to talk about what would have been a very painful subject in his interview with Penny Junor and in his promotional interviews at the time of the launch. I understand that the Claimant himself confirms this in his own witness statement.
41. I have no record of hearing anything further from Mr Trewin on the subject of the deal and it would appear that in any event discussions between the literary agents and the publishers fizzled out because of this delay. I understand that the agents have recently approached the publishers to enquire whether they have any interest in proceeding with the revised edition of the book now, and they have been told that the publishers do not wish to proceed because they do not now regard it as commercially viable.

42. I have no doubt in my mind that had the BBC not published its 'story' of the police raid on the Claimant's home and the details of the investigation into him; or broadcast its footage of the search in such a sensationalistic and intrusive way using film taken from a helicopter, all of which led it to being picked up by every single national newspaper and by international media, the consequences following 14 August 2014 would have been far less intense and distressing for the Claimant and far less disruptive to the commercial plans on which I had been working. Of course there would have been some work involved in dealing with the police raid itself (principally involving criminal defence lawyers) and with the investigation, but the stress and pressure of dealing with that situation, and the knock-on impact on other aspects of his life, could have been alleviated without the attention of the world's media and the constant enquiries from the newspapers and broadcasters across the globe.

**Statement of Truth**

I believe the facts stated in this witness statement and in the Confidential Schedule hereto are true.

Signed .....  


**Malcolm Colin Smith**

Dated: 30/11/2017