

CA on appeal from the Patents County Court (HHJ Fysh) before Scott Baker LJ; Neuberger LJ. 10<sup>th</sup> November 2005.

**JUDGMENT : LORD JUSTICE NEUBERGER:**

1. Mr Locksley Brown bought proceedings against MCASSO Music Productions Limited based on the contention that they had infringed his copyright in the lyrics for a rap number called "*Mr Highroller*". I do not propose to go into the details of the claim; suffice it to say that the hearing lasted three-and-a-half days before HHJ Honour Fysh QC in the Patents County Court and culminated in a reserved judgment given on 10th February 2005. There was a substantial argument as to whether or not Mr Brown had the copyright or shared a copyright in the rap number and the judge held that he had 10 per cent joint ownership of the copyright. There was a claim for damages in respect of which he recovered £180 and interest. He was ordered to pay the defendant's costs after 1st April 2003, each side paying its own costs after that date. As the proceedings had only been issued on 23rd April 2003, the costs ordered against Mr Brown extended to some costs incurred before the case. We were told that Mr Brown had been represented from time to time in various hearings in related proceedings but he represented himself at trial.
2. Mr Brown, acting in person, applied to the Court of Appeal for permission to appeal. In writing and at a hearing, I refused him permission to appeal in respect of the damages award but, at a hearing at which the defendant also appeared, through Mr Stuart Nicol, who appears before us and who appeared below, I decided to permit him to appeal the decision on the costs. This is the hearing of his appeal against costs.
3. The court, and indeed Mr Brown, have cause to be grateful to Ms Michalos, who appears pro bono on his behalf and has provided us with a full and detailed skeleton argument and which deals with arguments which, in most respects, had not been raised by Mr Brown. We are also grateful to Mr Nicol for dealing with the points of which he must have learnt only at short notice, and is not seeking an adjournment which would lead to an increase in the costs of this matter, which are already, on any view, way out of proportion to what was at stake. I think the point is made by the fact that the amount claimed by the defendant in their bill of costs pursuant to HHJ Fysh's order, was £52,663.41.
4. The learned judge identified three reasons as to why he considered that Mr Brown should pay the costs. The first was that there had been an offer by the defendant to settle on 4th March 2003, well before proceedings were issued. The second was that the defendant had offered to mediate the claim in about the end of May 2003, and the offer had been rejected by Mr Brown. The third was that there had been an offer in a letter of 4th December 2003. It is also to be noted that the judge made an order for interim payment of £5,000 on account of: "*c [which I assume was "about"] £10,500 possible costs.*"
5. Ms Michalos contends that the judge was wrong to take into account the three matters which he identified as reasons for making Mr Brown pay the costs and that, in any event, everyone concerned had overlooked the fact that this was a Fast Track case which had never been re-allocated and that, in those circumstances, the costs were too great. She argued that the right order for costs would be that Mr Brown should receive his costs from the defendant.
6. Mr Nicol says that the judge made no mistake on principle. He identifies, quite rightly, the very wide discretion open to a judge in the allocation of costs, and the Court of Appeal should not interfere with the exercise of such discretion unless satisfied that he went wrong in principle. In the alternative, he says that we should substitute the judge's award of 100 per cent costs in favour of the defendant with a substantial proportion of costs in favour of the defendant.
7. In considering this sort of case, one has, as I have already said, to be careful of not substituting one's own discretion from that of the judge. We have to be satisfied before we interfere with the judge's decision that he went wrong in principle.
8. I turn to the three documents which the judge took into account. The first is the letter of 4th March 2003. It is an offer made before the proceedings were begun but Mr Nicol was anxious to emphasise that it was not to be treated as an offer under Part 36.10 of the CPR, he found that it was simply an offer which should have been accepted by Mr Brown, in the judge's view, and therefore the judge was

entitled to take it into account when exercising his very wide discretion pursuant to Part 44.3 of the CPR.

9. The letter of 4th March 2003 is of some length and I do not propose to read it out in full. Basically, it offers Mr Brown £450 "as a full and final settlement in this matter." Mr Nicol points out that that is significantly more than Mr Brown recovered. That is true but on the other hand two points can be made about this letter. The first is that it does not deal with Mr Brown's 10 per cent interest in the ownership of the copyright. That was something that was plainly in contention on the pleadings -- see for instance paragraph 3 of the particulars of claim and paragraph 10 of the defence. Given that the offer of £450, although significantly more than the £150 recovered, was "in full and final settlement in this matter", it seems to me that it was not an offer which one can say, with any confidence at all, was better than Mr Brown achieved by going all the way to a hearing and recovering £180 and a declaration as to a 10 per cent interest. Further, it seems to me that Mr Brown can fairly say that there was no offer in respect of his costs in this letter and, while he may not have incurred much in the way of costs, he had issued the proceedings. He may have been acted for on a pro bono basis to some extent but I do not find it convincing to think that he incurred no costs at this stage, and the letter did not offer to reimburse him those costs.
10. There is a further possible point. I am in two minds as to whether or not the letter was confusing in that it referred to the concession that there could be liability for £450 "on a without prejudice basis", and in the short paragraph immediately proceeding the offer, it is expressed to be "on a without prejudice basis, save as to costs." To my mind it is an offer "without prejudice" as to costs but I am bound to say that Mr Brown, particularly as a non-legally qualified recipient of the letter, who may or may not have had lawyers at the time, could have been rather confused as to what it means.
11. In addition, the letter was also an offer which was only open for acceptance within seven days, which again, is not fatal, in terms of taking it into account in one's discretion. Therefore it is not the sort of period that the rules in Part 36 has in mind, referring as it does to 21 days.
12. To my mind, the letter was not something which was wholly irrelevant and was therefore properly taken into account in deciding how to allocate costs. However it cannot be said to be a letter containing an offer which Mr Brown clearly ought to have accepted because, on a fair reading, in light of what the judge decided, he was being forced to give his 10 per cent joint ownership of the copyright and any costs for a figure, namely the difference between £450 and £150, which may or may not have been substantially more or less than what it was worth.
13. The second factor the judge took into account was an offer by the defendant to its solicitors to have a resolution of the dispute affected by the "Musicians Union Dispute Resolution Scheme". The proposal was put to Mr Brown on 30th May 2003 and rejected by him on 10th June 2003. To my mind, the judge, with all due respect to him, was plainly wrong to take that into account as a factor against Mr Brown when deciding to make him pay the costs. First, and perhaps not most strongly, but nonetheless not irrelevantly, when turning down the proposal, Mr Brown explained that the defendant: *"... has had significant dealings and has a long-standing relationship with the Musicians Union which would call into question the partiality of any finding by them on this matter."*  
I think that is a point which a reasonable person, particularly a litigant in person, might fairly take into account.
14. Secondly, M Brown made the point that the issue between the parties was not really within the Musician Union's type of dispute resolution, a point which receives support from observation of HHJ Fysh in paragraph 65 of his judgment. Thirdly, Mr Brown made the point, in terms, that: *"The Courts of England are far more experienced in dealing with such matters and I understand that the 'fast track' route is designed to minimise costs. I am therefore prepared to abide by the ruling of the County Court as the court of competent jurisdiction."*
15. Fourthly, we have been shown the rules of the scheme referred to from which it appears that, once proceedings have been issued, as in this case, by the time the offer was made in May 2003, the Musicians Union scheme does not apply. Finally, as Ms Michalos points out, in the final paragraph of

the 10th June letter Mr Brown says that if the defendants were to admit liability as a matter of public record: "... we can then discuss the appropriate forum for assessing the extent of my damages."

In other words, he was actually saying that if the defendant conceded that which, in the light of HHJ Fysh's conclusion as to 10 per cent of the copyright, the defendant ought to have conceded, he was counter-proposing mediation. To my mind, particularly in light of the guidance given by this court in **Halsey v Milton Keynes General NHS Trust** [2004] 1 WLR 3002, especially in paragraphs 13 and 28, I consider, with the assistance of Ms Michalos' argument, that the judge would have been bound to reject any reliance on that offer of mediation when determining the issue of costs against Mr Brown. The point goes a little further than this because, when the matter was before HHJ Fysh, there was an attempt to negotiate on 28th September 2004 and Mr Connaris, of the defendant, said in terms that, although the parties had been negotiating and had got near a settlement, his discussions: "... made me realise that in my heart I feel we are right, and that I would really like the court to make the decision of whether we are right or whether Mr Brown is right".

He also said: "... I'd love to take the decision of the Court in the end, whichever way it goes."

In other words, even if -- which I do not think, for the reasons I have given, it would have been right to do -- the refusal of Mr Brown to mediate in June 2003 should have been held against him, there was a significant balancing factor the other way in Mr Connaris' unpreparedness to negotiate at a time when the judge was encouraging negotiation, which could be said to be a more significant matter when penalising a party on costs for failing to negotiate in light of what was said in **Halsey**.

16. Finally, there is the judge's reliance on the letter of 4th December 2003. If the other two offers were insufficient to justify the judge's order on costs, then, to my mind, this letter also cannot justify the judge's decision on costs. It is true that it was written "without prejudice save as to costs" and that it was therefore an offer which it was appropriate to take into account. It is true that it offered Mr Brown more, namely a 20 per cent share in the income from publishing royalties rather than 10 per cent, but it does not appear that he was being offered any money because it is stated in terms that his claim "is actually worth £0.00". Assuming in favour of the defendant, that the offer of a 20 per cent share should be treated as extended to a 20 per cent share of the income received in the past, which he had not yet been paid, there are still problems with this letter as an offer under Part 36. First of all, it specifically states: "Each party to pay its own legal costs."

Not only does that mean that the letter does not comply with Part 36, as decided in **Mitchell v James** [2004] 1 WLR 158, but it also is a far less favourable offer to Mr Brown than he *might* have expected because he might have expected an offer to pay his costs under a Part 36 offer. Furthermore, it does not comply with Part 36 because it not only makes no reference to the fact that it is a Part 36 offer or to the fact that it is to be open for 21 days, but it suggests in the final sentence that the offer is only intended to be open for seven days, namely: "We await hearing from you in the next 7 days before our client incurs further legal costs."

In light of the guidance given by this court in, most recently, **The Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc** [2005] EWCA Civ 854 at paragraphs 24 and 25, it seems to me that this letter cannot be validly treated as a Part 36 offer. Quite apart from anything else, if it is to be read as making an offer in money terms, there was no money paid into the court. It simply fails too many of the requirements of Part 36, which is particularly significant if it is written to a litigant in person.

17. Standing back, in these circumstances, it seems to me that the judge did err in principle. I think he was entitled to rely upon the first letter but only to a limited extent. He was not entitled to rely on the second letter and he was not entitled to rely on the third letter. In those circumstances, we are free, in my view, to deal with the matter as we think appropriate. It would be possible to remit it to the judge but, for my part, I consider that inappropriate because the costs in this case are already way out of proportion to what these proceedings are worth. To my mind, it must be appropriate for this court to deal with the costs and put an end to this unfortunate case.

18. In my judgment, it is probably most sensible to approach the allocation of costs by reference to the guidance given by the Court of Appeal in **Roache v News Group Newspapers Ltd** [1998] EMLR 161, by asking oneself: "*...who, as a matter of substance and reality, had won?*"

In light of the correspondence and facts as I have recited them, I think the plain answer is that neither side has won. The defendant has lost a hotly contested claim as to whether the claimant had any ownership of copyright and the defendant has had to pay money to the claimant. On the other hand, the claimant has recovered far less than he hoped and claimed. Further, the defendant has made attempts to settle, which could be taken into account, but not nearly to the decisive extent which, to my mind at any rate, the judge thought.

19. Additionally, as was mentioned and no doubt relied on by the claimant in the correspondence which I have referred to, this case has always been a Fast Track case. The fact that it was heard [*come*] *sic* first by the Patent County Court does not alter that. The defendant's costs of £50,000 far exceed the appropriate level of costs recoverable in a Fast Track Case, in my judgment. Furthermore, it is noteworthy, as I have said, that the judge thought £10,000 or thereabouts, was an appropriate rate of costs. Additionally, it does seem to me that there is some force in the fact that there were costs orders made "*in the case*" relating to an application by the defendant to strike out, which failed, and an application to transfer the case to the Patent County Court, by the defendant, which would be unfair for Mr Brown to pay.
20. To my mind, looking at matters in the round, the right order in this case is to make no order for costs here or below. It can be said that, on this appeal, the claimant has succeeded and can therefore look for costs. To my mind, one has to pay some regard to the orders of the County Court judge, even though, as I have said, he was quite wrong to place reliance on the second and third letters. The first letter, though not as decisive as the judge thought, was something he could properly have taken into account. He may therefore have been right to give the defendant a limited amount of costs below. To my mind, justice, fairness and efficiency all lead to the conclusion that one should notionally set off the costs that, in light of the judge's order, the defendant might have got below against the costs that the claimant might say he is entitled to on his appeal. I would accordingly allow this appeal and make no order for cost here and below.

**Order:** Appeal allowed. No order for costs here or below.

MS C MICHALOS (instructed by the Pro Bono Unit) appeared on behalf of the Appellant

MR S NICOL (instructed by Messrs Rohan & Co, Aviation House, 1-7 Sussex Road, Haywards Heath, West Sussex RH16 4DZ) appeared on behalf of the Respondent