

## Locksley Brown v Mcasso Music Production Ltd

### The Case

**Court:** Patents County Court.

**Judge:** HHJ Fysh QC.

**Hearing Date:** 10 February 2005.

**Representation:** The Claimant appeared in Person. Stuart Nicol (instructed by Rohan and Co) for the Defendant.

**Summary:** Copyright - joint authorship - infringement (limited use)  
- music industry practice - damages

#### **Facts:**

The Defendant (Mcasso), a specialist music company, was commissioned to produce a track for use in a television commercial. Employees of the Defendant produced a first version of the music and lyrics for the song 'Mr High Roller'. It was considered by one of the authors of the song that the song needed the input of someone who could give the song an authentic 'ragga feel'. The Claimant (Mr Brown p.k.a. Virgo Don), a vocalist, producer and songwriter, and an expert in the field of Dancehall reggae (Ragga), was invited by the Defendant to make changes to the song. He carried out these changes (which were noted in writing) in the presence of the original authors with whom he discussed his changes. The changes were made for various reasons including the fact that the original language used was incorrect. The final version of the song was used in a Kellogg's advert for two months. Mr Brown was paid a set fee for the session and a "buy-out" fee for his copyright in the song for use in respect of the commercial for a two-month period. The Defendant subsequently used the commercial for various other purposes such as on its website for nine months as an example of its work, but without notice to or having obtained further permission from the Claimant. The Claimant argued that he was a joint owner of the copyright in the song and that he was entitled to damages for its unauthorised use. The Defendant argued that the uses it had made of the song were non-commercial and not for viewing by the public at large.

#### **Held:**

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The Court held that the Claimant's contribution contained sufficient 'skill and judgment' to make him a joint author of the lyrics and it did not matter that his contribution was less than that of the other authors. It was also held that copyright had been infringed, as the Defendant did not obtain the Claimant's permission for use of the song on the show reel. Documentation was produced to show that were the song to be released, The Claimant's creative contribution to the success of the song would be 10 per cent of the whole and this was not refuted, however it is likely that had the uses been cleared from the outset the parties would have most likely settled on no more than a notional figure for The Claimant's contribution. The usage in question was in respect of a 10 per cent contribution to claimed "ancillary" usage by a firm in the advertising industry. The court ruled in favour of the Claimant, but decided that the Claimant's contribution should equate to a notional £20 per month. This fee was deduced through 'Judicial estimate' as the expert evidence on damages put forward by both sides was in His Honours words "to say the least, poor...".

The Court after considering relevant case law derived the following propositions regarding the requirements for joint authorship: (1) there must have been a significant and original (i.e. all my own work) contribution by the joint author to the final form the work (2) whether a person is a joint author is a question of fact and degree (3) the Court is entitled to take into account experts' views (4) the onus is on the person asserting joint authorship to make good their case (5) the adaptation of an original work may give rise to an original work in which copyright subsists (6) the individual contributions of the joint authors need not be equal in terms of quality, quantity or originality and (7) in addressing the issue of joint authorship the Court is required to answer a sort of jury question.

### **Comment:**

This case highlights the importance of ensuring all rights are cleared and for all relevant uses. For those who contribute to copyright works, it highlights the fact that different rates can be achieved for different uses and this can be a significant negotiating point when entering into an agreement for the use of one's work.

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### The Appeal

**Court:** Court of Appeal, Civil Division.

**Judge:** Scott Baker and Neuberger JJ.

**Hearing Date:** 10 November 2005.

**Representation:** Christina Michalos (instructed by the Pro Bono Unit) for the Claimant. Stuart Nicol (instructed by Rohan and Co) for the Defendant.

**Summary:** Costs—Order for costs—Discretion—Whether judge taking irrelevant matters into account—Whether costs award excessive.

The Claimant brought proceedings against the Defendant Company in the county court alleging infringement of copyright for lyrics in a dancehall reggae (ragga) style song. The case was allocated to the fast track. In the course of the proceedings there was substantial argument as to whether the Claimant owned the copyright or shared ownership of it. The judge decided that the Claimant had a 10% ownership of the copyright. The judge awarded the Claimant £180, but then ordered him to pay the Defendant's costs. The judge took the view that the costs order in the defendant's favour was justified on the basis that the Claimant had failed to accept two offers by the Defendant to settle the action and had rejected an offer by the Defendant to mediate the claim. The Defendant subsequently presented the Claimant with a bill of costs for over £52,000. The Court of Appeal gave the Claimant permission to appeal these costs.

The Claimant contended that it had been wrong for the judge to consider the matters that he had. He further contended that the judge had overlooked the fact that the case had been allocated to the fast track.

**The appeal would be allowed.**

In the light of established authority, it was clear that although in the circumstances, the judge had been entitled to consider the Defendant's first offer to settle the action on a limited basis only, he had not been entitled to consider the offer to mediate and the

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second offer to settle the action. Further, since the action had been allocated to the fast track, the bill of costs that had been served on the Claimant had been excessive. It followed that the judge had taken irrelevant matters into account in making the costs award. Accordingly, he had erred in the exercise of his discretion.

The right order would be **no order as to costs**.

### **Comment:**

This Appeal highlights the importance of properly constructing offers to settle when seeking the protection of the Court under PART 36. Also the fact that costs should always be kept within the limits set by the relevant 'track' that cases are allocated to. Further, the benefits of actually seeking a conclusion settlement.

Roache v News Group Newspapers Ltd [1998] EMLR 161, Mitchell v James [2003] 2 All ER 1064 and Halsey v Milton Keynes General NHS Trust [2004] 4 All ER 920 applied.