

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2015

Before :

MISS RECORDER AMANDA MICHAELS
SITTING AS A DEPUTY ENTERPRISE JUDGE

Between :

(1) MINDER MUSIC LIMITED
(2) JULIA ADAMSON

Claimants

- and -

STEVEN SHARPLES

Defendant

Mr John Critchley (instructed by **direct professional access**) for the **First Claimant**
The **Second Claimant** in Person
Mr Daniel Burgess (instructed by **Northrop McNaughton Deller**) for the **Defendant**

Hearing dates: 24-25 March 2015

Judgment

Miss Recorder Michaels:

1. This case concerns a dispute as to the ownership of the copyright in a song “Touch Sensitive” which was recorded in 1999 by the Band known as The Fall, featuring the vocalist Mark Smith, and released by Artful Records on an album entitled “The Marshall Suite” in 1999.
2. The First Claimant is a music publishing company to which Mr Smith assigned his publishing rights in the song, and the Second Claimant is a musician who composed the original music of the song and maintains an interest in the copyright in it. The Defendant, Mr Sharples, was the producer of The Marshall Suite (“the Album”) and the central issue to be decided is whether he shares with the Claimants any copyright in the version of the song recorded on the Album, whether by operation of law, as a joint author of the song, or by agreement.
3. The Claimants sought various declarations as to their shares of the copyright in the original version of the song and in the version recorded on the Album, as discussed below. Mr Sharples did not seek any relief by way of counterclaim. For the reasons set out below, I decline to make declarations in the form sought by the Claimants, but I will hear counsel as to whether there is any relief which it would be appropriate for me to grant in the light of my findings.

Background

4. By early 1998, Mark E Smith had been performing as the lead singer of The Fall (“the Band”) for around 20 years, and he was well known. Membership of the Band varied over the years but in 1998 it included Julia Nagle, who has since changed her name to Julia Adamson; she is the Second Claimant in these proceedings. I shall refer to her throughout as “Ms Adamson.” Early in 1998, Mr Smith and Ms Adamson wrote a song together which they called “Touch Sensitive.” Mr Smith wrote the lyrics and Ms Adamson wrote the music. The Band performed the song live on the John Peel Show on 3 March 1998. I shall refer to this version of the song as the “Original Song.”
5. Mr Smith and Minder Music agreed that the publishing or performing rights in the song should be split as to 33.34% to Mr. Smith and 66.66% to Ms Adamson. Neither Mr Smith nor Ms Adamson was able clearly to recollect how it was agreed that they should divide the rights in the Original Song in this way. There was some suggestion that their interests had originally been divided 50/50, but Mr Smith explained in cross-examination that it is commonly the case that the publishing rights in songs are divided as to one third to the lyrics and two thirds to the music and that appears to have been proposed by him as early as March 1999. In any event, there has been no dispute between Mr Smith/Minder Music and Ms Adamson as to that division of the rights since at least February or March 1999.
6. After the Band's performance of the Original Song which was broadcast on the John Peel Show, Mr Smith, Ms Adamson and the other members of the Band continued to work on and develop the Original Song. Changes were made to both the lyrics and the music with, for example, the addition of parts for extra musical instruments, such as an additional bass guitar. Ms Adamson gave evidence that they wanted what she called a Phil Spector type of arrangement of the Song, by which I understood her to mean a more fully orchestrated

version. She also gave evidence that the Band performed a version of the Song at a concert at the Astoria in December 1998, and as I explain further below, it appears that the version then performed was not identical to the Original Song. I shall refer to this second version of the work as "the Astoria Version."

7. By late 1998 or early 1999 the Band had agreed to release an album through Artful Records Limited, a company run by Mr John Lennard. Some recording sessions took place in that period at the Battery Studios which were apparently less than wholly satisfactory, and there was some suggestion that the other members of the Band were not prepared to put in further work in recording the Album because they had not been paid. It seems that Mr Smith and Mr Lennard appreciated that further work was required before the Album could be released and it was at this stage that the Defendant became involved.
8. In 1999, the Defendant was known as Steve Hitchcock, but he is now known as Steve Sharples, and I shall refer to him throughout as "Mr Sharples." It is common ground that Mr Sharples was asked to produce the Album for the Band by a Mr Bernard McMahon. Mr Sharples and Mr McMahon were acquainted because they both worked in the same premises, known as Canalot Studios, Kensal Road, in West London. Mr Sharples was a professional musician/composer and had a recording studio at Canalot. Mr McMahon had been doing PR, press and publicity work for the Band and/or for Artful Records. Mr Sharples' evidence was that Mr McMahon was also the Band's manager or *de facto* manager in January 1999, something which was disputed by the Claimants' witnesses.
9. Mr Sharples said that in about the middle of January 1999 he was approached by Mr McMahon who asked if he could help with the production of the Album. He says that he made an oral agreement with Mr McMahon not only to carry out production work in relation to the Original Song and the recordings which had been made of it at the Battery Studios but also to rewrite the Original Song. He says that Mr McMahon agreed that he would be paid a lump sum for that work and that he would obtain a one-third interest in the copyright in the re-written song. I shall refer to the alleged oral agreement as "the Canalot Agreement." There is a dispute both as to whether any such agreement was made, and as to Mr McMahon's authority to make any such agreement on behalf of Mr Smith and/or Ms Adamson and/or the Band.
10. Mr Sharples gave evidence that later in January 1999 he carried out a good deal of work to both the lyrics and the music of the Original Song and produced another version of it. He then worked further on this version of the Original Song in conjunction with Mr Smith, and produced and recorded this version of it. This was the form in which Touch Sensitive was released on the Album, which I shall call "the Album Version." Mr Sharples claims that this constituted a new copyright work; the Claimants disagree. Mr Sharples' evidence was that Mr Smith not only approved of the work which he had done on the lyrics and music, but expressly agreed orally that Mr Sharples would obtain an equal share of the copyright in the Album Version. That too is in dispute.
11. Further production work was done on various tracks on the Album by Mr Sharples and by Mr Smith (and possibly by other members of the Band and/or Mr McMahon) in February 1999. The Album when released credited Mr Smith, Ms Adamson and Mr Sharples as the writers of the Album Version of Touch Sensitive; Mr Sharples was also credited as the sole or joint author of some of the other tracks on the Album. Mr Smith was listed on the Album sleeve as having performed vocals, keyboards and guitar, Ms Adamson was

credited for keyboards, guitar and programming and Mr Sharples for "string arrangements." Production was attributed to Mr Sharples and Mr Smith, with Mr McMahon named as associate producer and Mr Lennard as executive producer.

12. Correspondence from the PRS to Minder Music suggests that Mr Sharples' then publishing company applied to register his interest in the Album Version early in 1999; if so, it seems that the claim was misfiled and may not have come to the Claimants' attention. Mr Fogarty suggested that he knew nothing of the claim until perhaps 2004 or 2005 and the correspondence with PRS shows that he was informed of it in September 2004. The witnesses suggested that the PRS put the Album Version into dispute in 2006, but e-mails from the PRS indicate that it was put into part-dispute in 2005 as a result of the renewed claim to a share of royalties then made by Mr Sharples' publishing company, Universal. Ms Sharples does not seem to have pursued the claim further. Mr Fogarty made repeated efforts to persuade the PRS to release the royalties, but to no avail. The Album Version had in the meantime enjoyed substantial success, in particular because it was used as the soundtrack for some advertisements. However, according to Mr Fogarty, income since mid-2007 has been much lower, allegedly by reason of this dispute. For instance, in January 2012 the PRS was holding some £12,000 in royalties.
13. Despite the suspension of the royalty payments by the PRS, the parties do not seem to have taken any very active steps to resolve the dispute between them for a number of years, although Mr Fogarty continued to press the PRS to reject Mr. Sharples' claim and release the monies it was holding. He corresponded with Ms Adamson for a lengthy period too, but they were unable to reach any agreement as to how to deal with the problem of Mr. Sharples' claim. At one point in 2007 Mr. Fogarty suggested to Ms Adamson that the way to get the royalties released was to agree Mr Sharples' 1/3 share, or try to have only that share put into dispute, but Ms Adamson refused to do so as she said that no agreement had been made to share royalties with him; in 2009, solicitors acting on Ms Adamson's behalf threatened to bring proceedings against Minder Music in the belief that Minder had withheld royalties due to her. This went nowhere.
14. In 2011, Ms Adamson began to correspond with the PRS about Mr Sharples' claim to a one third split, saying that she was 'baffled' by the claim as she was unaware of any agreement with Mr Sharples. In September 2011, she began to correspond with Mr Sharples directly. This eventually led to an agreement being made between them dated 13 August 2013 ("the Settlement Agreement"). It provided that the Album Version should be registered with the PRS/MCPS in the following shares: Mr Smith 33.34%, Ms Adamson 33.33% and Mr Sharples 33.33%, and that income which had arisen following the Suspense Date in 2006 should be distributed to the three parties in those shares.
15. Ms Adamson and Mr Sharples hoped that providing the Settlement Agreement to the PRS would lead to the unlocking of the account for the Album Version of the song. However, that did not happen as a result, as I understand it, of objections by Minder Music. Instead, Minder Music issued the current proceedings against Mr Sharples on 5 March 2014. In September 2014 Minder Music applied to join Ms Adamson as the Second Claimant, and that was done by an order dated 10 November 2014. The main relief claimed by the Claimants was:
 - a. a declaration that Minder Music owns a 33.34% of the copyright in the Album Version and that Ms Adamson owns 66.66% (or such share as the Court shall determine);

- b. a declaration that no part of the copyright is or was owned by Mr Sharples; and
 - c. an inquiry as to damages.
16. Mr Sharples denied that the Claimants were entitled to the relief, on the basis of (a) his alleged oral agreement with Mr McMahon ("the Canalot Agreement"), (b) his alleged joint authorship of the Album Version, and/or (c) his interest in the Album Version by reason of the Settlement Agreement. Mr Sharples did not counterclaim for any relief.
17. Mr Critchley appeared on behalf of Minder Music; he was not instructed on behalf of the Second Claimant who appeared in person, but she relied upon his cross-examination of the Defendant and upon his written and oral submissions. Mr Burgess appeared on behalf of the Defendant.

The evidence

18. I heard the evidence of a number of witnesses on behalf of the Claimants.

Mr Smith:

Mr Smith made three witness statements and was cross-examined at some length.

Mr Burgess, on behalf of Mr Sharples, suggested that I should attach little weight to Mr Smith's evidence because it had been drafted for him by Mr Fogarty, the director of Minder Music. Mr Fogarty had run the proceedings on the company's behalf without the benefit of solicitors and with only intermittent help from counsel, who was instructed directly by Minder Music. In an e-mail of 5 December 2004, Ms Adamson said to Mr Fogarty that she recalled him stating that Mr Smith "would sign anything." Mr Burgess suggested that this indicated that Mr Smith's witness statement was not reliable evidence. However, I do not think much reliance can be placed upon that throwaway remark made by Ms Adamson in the course of some rather acrimonious correspondence with Mr Fogarty.

Mr Burgess also submitted that Mr Fogarty's approach to producing witness statements had been shown to be unreliable because he had drafted a witness statement which Mr McMahon had refused to sign and Mr McMahon subsequently produced a rather different statement on behalf of Mr Sharples. I do not accept that Mr McMahon's refusal to sign the draft exhibited by Mr Fogarty reflects badly on Mr Fogarty, as the draft was produced by Minder Music's Californian attorney, not by Mr Fogarty himself.

Mr Smith stated in his oral evidence that Mr Fogarty wrote down what he (Mr Smith) told him. I see no reason not to believe that evidence. In the circumstances, I do not accept that I should treat Mr Smith's witness statement with any particular care because it was drafted by Mr Fogarty rather than by a solicitor.

I found Mr Smith to be a truthful witness, who was frank about the vagueness of his recollection of some of the events from the relevant period in 1998 to 1999 but was otherwise clear about certain fundamental matters which I discuss below.

Ms Adamson:

Ms Adamson made four witness statements and was also cross-examined at some length.

Mr Burgess again expressed some concern that her witness statements had been drafted for her by Mr Fogarty. In particular, the Defendant raised concerns that Ms Adamson stated in her witness statements that Mr Sharples had not made any contribution to writing the Song, but had accepted in correspondence relating to the Settlement Agreement (and again in the witness box) that he had added string parts to the music of the Album Version. In my view, that apparent inconsistency did not suggest that Ms Adamson's witness statements were untruthful, but instead reflected her view (broadly

shared by Mr Smith) that “the Song” was really the Original Song, and later versions were no more than arrangements of it, not separate copyright works.

The Defendant also pointed to differences between Ms Adamson's 2nd witness statement and her 3rd and 4th witness statements as to the circumstances in which she entered into the Settlement Agreement. In my view, those later witness statements significantly expanded on or emphasised her initial allegation that she had been ‘unfairly pressurised’ into signing the Agreement and were put in higher terms than her oral evidence. In the circumstances, and in the light of the contemporaneous correspondence, I consider that her evidence in relation to the Settlement Agreement must be treated with some care, and I discuss the reliability of that evidence further below.

John Lennard:

Mr Lennard was the director of Artful Records and involved in the recording of the Album in 1999. His witness statement was served in reply shortly before trial and I gave permission for Minder Music to rely upon it in order to respond to the witness statement of Mr McMahon which I mention below. Mr Lennard appeared to be a reluctant witness; he gave his evidence in an off-hand manner which did not inspire confidence. On the other hand, when it was suggested to him that Mr Fogarty had drafted his witness statement, he was adamant that it accurately represented his recollections as relayed to Mr Fogarty, and I accept that his evidence was truthful.

Mr Fogarty:

Lastly, Mr Fogarty gave evidence on behalf of his company. He had no direct involvement with any of the relevant facts from 1998/1999 and his evidence was therefore of limited relevance to the issues before me. He produced a short witness statement shortly before the trial, relating to Mr McMahon's witness statement and the unapproved draft mentioned above, and Mr McMahon's unavailability to give evidence. He was cross-examined about this, but it does not seem to me that this reflected badly upon his credibility.

No further witnesses were called on behalf of Ms Adamson.

19. Mr Sharples provided a lengthy and detailed witness statement. He too was cross-examined at some length. I did not find Mr Sharples a very satisfactory witness. He was not just defensive when asked questions about how successful he had been as a composer, but distinctly evasive. Furthermore, on some points his oral evidence did not match the evidence in his witness statement. For example, in his witness statement he suggested that the Canalot Agreement and further terms of his production agreement had been agreed by Mr Lennard and Mr Smith but in cross-examination he went further, claiming that Mr McMahon had checked the position as to the Canalot Agreement with the rest of the Band and "everybody" agreed. More significantly, it appeared to me that he was quite unable to explain in the witness box a number of significant points in his witness statement. In particular, although he had described in detail in his witness statement the sort of changes he claimed to have made to the song lyrics, he was unable to identify any of those changes in his oral evidence. I deal further with these points when discussing Mr Sharples' claim to joint authorship of the Album Version. As I explain below, it also seems to me that in a number of respects Mr Sharples' evidence was contradicted by the contemporaneous documents. I do not believe that Mr Sharples was seeking to mislead the Court, but it appeared to me from his demeanour and from the nature of the points which he made that he had convinced himself of the reliability of his recollections about the Canalot Agreement and his input to the creation of the Album Version, when those recollections were at best hazy and at worst mistaken.

20. The only other witness on behalf of Mr Sharples was Mr McMahon. He provided a witness statement but did not attend for cross-examination. A Civil Evidence Act notice was served in relation to his evidence, on the basis that Mr McMahon lives in the USA. I discuss where relevant below the weight which I am able to give to Mr McMahon's statement.

The Settlement Agreement

21. The issue before the Court in relation to the Settlement Agreement is whether or not it is a valid and binding agreement upon which Mr Sharples is entitled to rely. No issue was identified in the Schedule to the Case Management directions as to the effect of the agreement, if it is valid, and I did not hear argument on this.

22. Ms Adamson and her publishing company, Invisible Girl Music Publishing Ltd, entered into the Settlement Agreement with Mr Sharples on 30 August 2013. The recitals to the agreement identify the Album Version, refer to the dispute as to whether or not Mr Sharples had contributed to writing the version of the Original Song embodied in the Album Version and state that the parties had agreed to settle the dispute on the basis that Ms Adamson would grant Mr Sharples "half of her copyright interest in the [Album Version] with the intended effect that [they] shall each have a 33.33% interest in the copyright of the [Album Version]."

23. The Settlement Agreement provided that in consideration of the payment of £1 (and other unidentified consideration) by Mr Sharples to each of Ms Adamson and her publishing company, the Album Version should be registered with PRS/MCPS and other appropriate collection societies as to 33.34% to Mr Smith, and 33.33% to each of Ms Adamson and Mr Sharples. The agreement specifies that Mr Sharples should have a song writing credit only in relation to the Album Version and should receive his share of music publishing income arising from exploitation of it (apart from live performances) including monies held in suspense by the PRS and MCPS.

24. In the Amended Particulars of Claim, Ms Adamson admitted having signed the Settlement agreement but denied being bound by it. The Claimants' position was that the Settlement Agreement was void or voidable, and had been avoided by Ms Adamson's application to join the proceedings, on three possible bases (i) it was an agreement to settle a fraudulent claim by the Defendant (because he knew that there was no Canalot Agreement and no contribution by him as a joint author); (ii) there was no consideration for the Settlement Agreement or (iii) the Settlement Agreement should be set aside as an unconscionable bargain. The agreement was said to be an unconscionable bargain because Mr Sharples knew that Ms Adamson was an impecunious single mother and he unfairly pressed a substantially disadvantageous settlement on her. All of this was denied by Mr Sharples. In the end, point (ii) was sensibly not pursued and although Mr Critchley argued on behalf of the Claimants that Mr Sharples never had a sincere belief that he was a co-writer of the Album Version, he did not seriously pursue the argument that Mr Sharples had been making a fraudulent claim other than in so far as the law on unconscionable bargains requires a finding of some moral culpability or impropriety. The arguments as to the effectiveness of the Settlement Agreement turned, therefore, on the question of unconscionable bargain.

25. Counsel were able to agree the law on seeking equitable relief on the grounds of an unconscionable bargain as summarised in paragraphs 7-133 to 7-143 of Chitty on Contracts (31st ed). In particular, they referred me to Lord Templeman's approval in *Boustany v Piggott* (1995) 69 P. & C.R. 298 (PC) of the following summary at p 303 (footnotes omitted):

“(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that “one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience”:

Multiservice Bookbinding v. Marden;

(2) “Unconscionable” relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: *Lobb (Alec) (Garages) Limited v. Total Oil (Great Britain) Limited*;

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, “it was not right that the strong should be allowed to push the weak to the wall”: *Lobb (supra)*;

(4) A contract cannot be set aside in equity as “an unconscionable bargain” against a party innocent of actual or constructive fraud. Even if the terms of the contract are “unfair” in the sense that they are more favourable to one party than the other (“contractual imbalance”), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: *Hart v. O'Connor* applied in *Nichols v. Jessup*;

(5) “In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances” *per* Mason J. in *Commercial Bank of Australia Ltd. v. Amadio*.”

26. As I have said above, Ms Adamson's reasons for saying that the Settlement Agreement was voidable as an unconscionable bargain varied between her four witness statements. In her first witness statement in May 2014 she said only that she was in financial difficulty in 2013 and offered a share in the song because she could not afford to go to court, as a solution to free up the song. When she made her second witness statement in September 2014, at a time when she wished to be added as the Second Claimant to the action, she added that she was ‘unfairly pressurised’ into signing the agreement; Mr Sharples knew she was desperately short of money and also knew that he had no true claim to the song. Her third witness statement, also of September 2014, went further and alleged that Mr Sharples, his manager and his solicitor emailed and phoned her at different times and she felt “a bit bullied,” and was not taken seriously or listened to at a time when she was struggling financially. She said that the emails do not give a true reflection of the situation or of the numerous telephone conversations she had with Mr Sharples, through which he knew of her situation. She explained that because of her financial difficulties, she entered into a debt relief order in October 2013.
27. Mr Critchley described Ms Adamson's fourth witness statement of February 2015 as the ‘high-water mark’ of the case on unconscionable bargain. There she repeated that the documents do not show the whole story, but she felt “surrounded and badgered” by the Defendant, his manager and lawyer, and was put under pressure by Mr Sharples who knew that she was unwell and in terrible financial circumstances, because she told him so.

She said that he had phoned her remorselessly, sometimes several times an evening, and was by turns demanding and cajoling. She became disorientated and confused and unclear as to what was included in the agreement. In cross-examination, Ms Adamson said that the lock-up of the royalties had created anguish and that she was exasperated and desperate to get the song unlocked.

28. Mr Sharples denied having bullied or badgered Ms Adamson and denied knowing of her personal circumstances, financial or otherwise.
29. The emails which passed between Ms Adamson and Mr Sharples in 2011 do not show Ms Adamson being badgered or bullied by Mr Sharples or anyone else. Mr Sharples' position was that he was prepared to wait as long as it took to resolve his claim to one third of the rights. Ms Adamson denied that Mr Sharples had any claim to be joint writer of the song, but tried to resolve the impasse by making what she described as a "peace-making" offer that he should have 10% of the publishing rights in the Album Version. In the course of the correspondence in 2011, Ms Adamson did say to Mr Sharples that she could not afford long calls to mobile numbers as "phone credits are precious" but that seems to be the only suggestion that money was tight. Those negotiations petered out in 2011.
30. However, on 19 March 2013 Ms Adamson approached Mr Sharples again, suggesting that they should come to some sort of arrangement because otherwise none of them would benefit from the Song. She suggested drafting an agreement assigning 33.33% of the song from her share to him and attached a rough draft agreement. Mr Sharples responded positively, although he made it plain that he was not happy that she proposed to deal only with any prospective royalties, as he wished to have one third of the royalties in the suspense account. He said that he was getting his lawyers to look at it and Ms Adamson responded that she would have to get a lawyer to check it on her behalf, although she was reluctant to do that. The correspondence then went on at some length, involving Mr Sharples' management company who produced a more formal draft agreement on his behalf. By late April/early May the draft was broadly in the form of the Settlement Agreement.
31. Nothing in Ms Adamson's witness statements dealt with whether or not she had received any legal advice. In cross examination, Ms Adamson said that she had effectively had no legal advice in relation to the negotiation of the Settlement Agreement, although she had had a small amount of free advice from a friend. The friend was Lisa Bindahnee, a media solicitor who, as Ms Adamson put it, had a "quick look" for her. Some of the correspondence in April 2013 was blind copied to Ms Bindahnee, and she was sent the draft produced by Mr Sharples' advisers on 20 April 2013. The documents show that she identified a number of points in the draft which needed to be addressed and on 26 April she offered to speak directly to Mr Sharples' manager on Ms Adamson's behalf, an offer which does not seem to have been taken up by Ms Adamson. Ms Bindahnee was also sent some amended drafts in May but it is not clear from the documents whether she commented upon them. In the circumstances, it seems to me that Ms Adamson did have some legal advice, even if informal and some months before signature of the Agreement. At that stage, nothing in Ms Adamson's e-mails to Ms Bindahnee suggested that she was being bullied or pressured into the proposed agreement, nor was she confused about the effect of the proposed agreement.

32. The negotiations faltered in May 2013, when it seemed that Minder Music was threatening to bring proceedings. On 22 May, Ms Adamson suggested reverting to her original draft of the agreement but when this went nowhere she e-mailed Mr Sharples' manager on 20 July, proposing to revert to the draft which had been current in May, although she wished to clarify that the only version of the song to be affected by the agreement was the Album Version. After some brief to-ing and fro-ing, leading to the incorporation of a clause designed to clarify the position as Ms Adamson had asked, the Settlement Agreement was signed and dated 13 August 2013. Again, there is nothing in the correspondence in July or August 2013 which would suggest either that Ms Adamson was being bullied into the settlement by Mr Sharples or his representatives or that she was confused as to the effect of the agreement. On the contrary, in my view her e-mails are clear and businesslike, and I note that she correctly identified a mistake in the draft. After the agreement had been signed, she continued to communicate in perfectly civil terms with Mr Sharples and took steps to draw the Settlement Agreement to the PRS's attention with a view to unlocking the suspended royalty account.
33. It seems to me that it was Ms Adamson who wished to revive the negotiations in both March and July 2013 and there is no suggestion in any of the documentation that she was in any way coerced into doing so by Mr Sharples. It is particularly significant, it seems to me, that she had advice in April/May 2013 and did not at that stage suggest that she was being coerced or bullied into making the agreement. Although her financial position may have deteriorated after May 2013, there is nothing in the correspondence from July 2013 onwards which refers to this or shows any stress or confusion on Ms Adamson's part. In my judgment, none of the correspondence supports the complaints in Ms Adamson's 4th witness statement in any way.
34. Moreover, in the witness box, when it was suggested to her that she had not told the Defendant of her financial position, Ms Adamson said that she did not divulge her financial woes to everyone. That seems to me consistent with Mr Sharples' evidence that she had told him that money was a little tight, but he had no idea that she was in extreme difficulty; he said that he had no idea that she had a child, let alone that she was a single mother. Mr Sharples also accepted that Ms Adamson had complained of the high cost of mobile phone calls, and agreed that they had some lengthy phone calls, which he ascribed to discussing working together on new projects, something reflected in some of the email correspondence. He did not accept that he had badgered her on the telephone.
35. I accept that Ms Adamson was in financial straits and so was extremely keen or possibly desperate to release the accumulated royalties for the Album Version. However, as to whether Mr Sharples had been informed of the extent of Ms Adamson's financial or personal difficulties, I prefer Mr Sharples' evidence to that given in Ms Adamson's witness statement, especially in the light of her oral evidence on the issue. None of the evidence persuades me that Mr Sharples was aware of the full extent of Ms Adamson's financial difficulties and so could have taken advantage of her problems. She contradicted her written evidence in the witness box when she said that she did not choose to disclose the full extent of the financial difficulties. As a result, to the extent that Ms Adamson's fourth witness statement claimed that Mr Sharples knew that she was unwell and in terrible financial circumstances, because she told him so, I reject that evidence. For these reasons, and in the light of the correspondence and the evidence which Ms Adamson gave orally, I am not prepared to accept the evidence given in Ms Adamson's third and fourth

witness statements that she felt bullied or badgered into entering into the Settlement Agreement.

36. It is evident that Ms Adamson's approach in the correspondence was businesslike and she referred on numerous occasions to taking legal advice as to the proposed agreement. Not only did she claim that she was taking advice, but in fact she did so, although probably to a lesser extent than she suggested to Mr Sharples and his representatives. In those circumstances, it is difficult to see how Mr Sharples could have thought that he was in a position to take advantage of Ms Adamson, and in the light of Ms Adamson's evidence taken as a whole I am not persuaded that he sought to do so in an unconscientious manner.
37. It might be said that for Ms Adamson to give up half of her interest in the Album Version for £2 was foolish. The terms of the Settlement Agreement were certainly more favourable to Mr Sharples than to Ms Adamson unless he already had a good claim to one third of the royalties which, for the reasons given below, I do not find to be the case. However, Ms Adamson anticipated that the Settlement Agreement would resolve the long-standing difficulty at the PRS, and lead to the release of royalties which had been held in suspension for several years. Ms Adamson would get only half of her initial share, but had improved her prospects of getting some payment at a time when she was in financial need. In any event, however, I do not consider that Mr Sharples imposed objectionable terms upon Ms Adamson in a morally reprehensible manner, nor that he took advantage, still less took an unconscientious advantage, of Ms Adamson's circumstances. In my judgment, his claim to a share in the copyright was (for the reasons I give below) optimistic, if not exaggerated, but far from fraudulent. In the absence of any unconscionable conduct on his part, there are no grounds to set aside the Settlement Agreement.
38. In case I am wrong in reaching that conclusion, for completeness I will consider the alternative bases upon which Mr Sharples claims to be a co-owner of the publishing rights in the Album Version.

The Canalot Agreement

39. The first issue relating to the Canalot Agreement is whether any such agreement was made by Mr McMahan and Mr Sharples. If I find that there was such an agreement, then there is a separate issue as to whether Mr McMahan had the actual or apparent authority of the Band or of Mr Smith/Ms Adamson to enter into the agreement on its/their behalf.
40. Mr Sharples alleged in the Defence that Mr McMahan "acting on behalf of Mr Smith and/or the Second Claimant" entered into an oral agreement for the Defendant to "produce and as far as necessary re-write *the Track*" (emphasis added) and that "in consideration for that work, the Defendant would be entitled to a 33.33% share of the publishing rights in the resultant song (the "New Song")." This was supported by Mr. Sharples' witness statement which said that the oral agreement was made between about 12 and 14 January 1999.
41. It was also pleaded that after the song had been re-written "the Defendant explained the terms of the Canalot Agreement to Mr Smith who stated that he was happy with what had been agreed." This alleged agreement too was set out in some detail in Mr Sharples'

witness statement; he described playing his reworked version of the Song to Mr Smith on or about 17 February 1999, and Mr Smith “bouncing on his feet”, grinning in approval. Mr Sharples said that he clearly recalled saying to Mr Smith that he was a “third-share writer” of that version, which Mr Smith agreed was so.

42. That version of events was not altogether supported by the witness statement of Mr McMahon, who said only that Mr Sharples had told him that he would “require a share of the publishing on any tracks he made a musical contribution to. I discussed the proposal with [Mr] Smith and through a number of subsequent meetings with myself, [Mr] Smith and [Mr Sharples] the publishing splits were mutually agreed.” This does not seem to me to suggest that a definitive agreement in terms of the pleaded Canalot Agreement was made on or around 12 - 14 January 1999. Moreover, the version of the agreement put forward by Mr. McMahon makes far more sense to me than Mr Sharples’ version, as the latter would have amounted to a commitment to give Mr Sharples a one third share however small his eventual contribution to the composition or lyrics.
43. Furthermore, Mr Sharples' own evidence suggested that he did not consider that he had entered into a binding agreement with Mr McMahon prior to starting work on the Song. Mr Sharples gave evidence that having done some preliminary work he "paused the process" to allow Artful and his solicitors, Sheridans, to finish negotiating the "finer points of the contract." No contract was agreed at that stage. Mr Sharples' alleged conversation with Mr Smith, confirming that he was happy with the one third split, would not have been necessary had there been a firm agreement in place with Mr McMahon. Mr McMahon's witness statement also suggests that there were further three-way discussions before any agreement was reached.
44. As I have already mentioned, Mr Sharples was credited on the sleeve as one of the three writers of the Album Version of the song and he naturally placed a good deal of reliance upon that apparent acknowledgement of his input as a writer. Mr McMahon stated that the writing credits were all agreed with Mr Smith and that he had circulated them to each member of the Band. Mr Sharples too alleged that the sleeve had been approved by Mr Smith, but Mr Smith recollected only having approved the use of the photographs or artwork produced for the sleeve. He did not recall having approved the label copy but thought Mr McMahon or Artful Records might have done that. He attributed the sleeve credits to his own or the Band’s "notorious sloppiness" in relation to such matters. Mr Smith's evidence appeared to me to have the ring of truth about it. I do not find it the least surprising that the album credits were not checked with care by the members of the Band at the time. Mr Smith's evidence also appeared to me to be consistent with the contemporaneous documents (discussed below) emanating from Mr Smith.
45. Mr Sharples also relied upon a statement made by Ms Adamson suggesting that she had been told by some unidentified person employed by Artful that Mr Sharples was entitled to a writing credit in relation to the Album Version. That last statement appears to me to be too vague to be of any real help to Mr Sharples.
46. In my judgment, none of the contemporaneous documentation which has survived from early 1999 supports Mr Sharples' case that there was an oral agreement in place which entitled him to a one third share of the publishing rights (or any other copyright interest) in the Album Version of the Song. In particular, on 1 February 1999, Sheridans, the experienced media solicitors who were acting for Mr Sharples, wrote to Mr Lennard

setting out their understanding of what had been agreed as to payment of an advance and royalties and referring to a conversation which the writer had had with Mr Lennard. The letter said “We discussed the publishing side of things. [The Defendant] has mentioned to me that what he thought would be fair was a straight split dependent on the number of writers on the particular track ... I know you are going to speak to [Mr] Smith about this and come back to me.” The letter was pleaded by the Defendant as evidencing the terms of the Canalot Agreement, but it does not seem to me to do so, nor to indicate that an oral agreement had been concluded in terms of that oral agreement in January 1999, rather the contrary. Had there been any such agreement, Mr Sharples would have told his solicitors about it and they would have relied upon it. Indeed, that letter does not even reflect the terms of the “agreement to agree” described in Mr McMahon’s witness statement. Instead, at that stage (before Mr Sharples did any further work on the Album), his solicitor relied upon his own oral discussions with Mr Lennard and sought to negotiate terms for a fair share of publishing income.

47. Mr Smith did not accept that Mr Sharples had made any contribution towards the lyrics or that his contribution towards the musical arrangement amounted to composition. I discuss this further below. He denies having agreed that Mr Sharples should have a one third share of the publishing rights in the Album Version. Those denials are consistent with the position which Mr Smith adopted in correspondence with Mr Fogarty in March 1999. At that time, he sent a number of hand-written faxes to Mr Fogarty setting out the credits for the songs on the Album, in which he identified the authors of Touch Sensitive as himself and Ms Adamson, one third to himself and two thirds to Ms Adamson. Although the work described by Mr Sharples as re-writing the Song would have been completed by that stage, Mr Smith did not credit him for a share as a co-author, although he did credit Mr Sharples with a share in other songs on the Album.
48. Similarly, Mr Smith entered into a copyright assignment with Minder Music in relation to various songs. It was formally dated 1 February 1999. The assignment related only to the proportion of each song written or composed by Mr Smith, as specified in the Appendix to the agreement. The Appendix attributed a share in Touch Sensitive to Mr Smith of 33.34% and the remaining 66.66% to Ms Adamson. It is very probable that the agreement was not executed on 1 February 1999, given some correspondence between Minder Music and the solicitors who were asked to draft the assignment in March 1999, and the fact that the Appendix seems to have been signed by Mr Smith in April 1999. Regardless of the date of execution of the assignment, however, it seems to me quite clear that in March/April 1999 Mr Smith did not regard Mr Sharples as having an interest in the Song; whilst Mr Smith's own share would have remained at one third, the Appendix specifically states that the remaining two thirds belonged to Ms Adamson. It seems unlikely that Ms Smith was intending to deny Mr Sharples rights to which he thought he was entitled, given his acceptance of his interest in other songs.
49. In addition, on 25 March 1999, Minder Music wrote to Mr McMahon attaching a list of works on the Album "together with definitive writers and percentage shares as per Mark E Smith." The list attached again gave the one third/two thirds division between Mr Smith and Ms Adamson. Possibly in response to that fax, Mr McMahon wrote to Mr Fogarty by fax on 28 April 1999. He said "I've spoken to Mark as regards the overgenerous percentages handed out on certain tracks and the non crediting of writers on others. He does not wish however to amend the percentages that you have at this stage. I should point out that these do not conform with the label copy on the CD which was also

approved by him. I am particularly concerned by the non recognition of [Mr Sharples] in your percentages. [Mr Sharples] is published by Rondor Music.” It was suggested on behalf of the Defendant that this fax supported his case that Mr McMahon acknowledged that there was a pre-existing agreement that Mr Sharples should be given one third of the rights in the Album Version. Whilst Mr McMahon may have meant that he was concerned that Mr Sharples was not credited for Touch Sensitive, he certainly did not say that the failure to credit him was a breach of a pre-existing agreement reached with Mr Sharples and/or with Mr Smith, nor did he tell Mr Fogarty that Mr Sharples was due one third of the royalties. It seems to me that the terms of this fax do not support the Defendant's case.

50. The Defendant also relied upon some comments made in later correspondence by Ms Adamson to the effect that Mr Smith had or must have agreed that Mr Sharples should have a share of the publishing rights in the Album Version. I do not consider that those comments prove that any such agreement had been made or even that Ms Adamson believed that they had been made. I think that they simply reflected her view, some years after the event, that any claim to that effect by the Defendant could only have been based on some agreement with Mr Smith of which she knew nothing and which could not have affected her own share of the copyright.
51. In all the circumstances, weighing up Mr Sharples' evidence, the credits on the Album sleeve and Mr McMahon's evidence against all of the other factors set out above it seems to me that on the balance of probabilities no binding agreement was entered into in January 1999 in the terms of the alleged Canalot Agreement, nor did Mr Smith affirm any proposal to enter into an agreement in such terms. There appears to have been at the very most an agreement to agree whatever shares seemed fair once the production of the Album was complete.

Mr McMahon's authority to make the Canalot Agreement

52. It is necessary for me to consider whether Mr McMahon was in a position whether as the Band's manager or otherwise to bind Mr Smith and/or Ms Adamson and/or the Band as a whole to the terms of the alleged Canalot Agreement (or, indeed, even to make an 'agreement to agree' on their behalf).
53. Counsel for Minder Music and Mr Sharples helpfully agreed as to the law on actual or apparent authority. They agreed that an agent may be given express or implied actual authority by his principal and that this may authorise the agent to do whatever is necessarily or normally incidental to the activity expressly authorised. Mr Burgess referred to *Norwich Union Life & Pensions Ltd v Strand Street Properties Ltd* [2009] EWHC 1109 (Ch) at [231] in support of the proposition that an agent appointed as project manager of a task who is given authority to appoint a team of professionals for the project has implied authority to agree the fees to be paid to those persons. However, whether the agency extends to such acts is a matter of fact to be decided in each case: Lloyd LJ said in the unsuccessful appeal in that case ([2010] EWCA Civ 444, 29 April 2010) at [64] “it does not seem to me that one can safely proceed on the basis that there is any general or normal rule as to the scope of the authority of a project manager.” Nevertheless, an agent will have implied authority to do whatever is necessarily or normally incidental to the activity expressly authorised, or such authority may arise from the principal's

acquiescence in the agent assuming further powers: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 498.

54. Mr Burgess also relied upon the doctrine of apparent authority. In the absence of actual/implied authority of any of the kinds mentioned above, a principal may be bound as against a third party by the acts of another person within the authority which that person appears to have, if the third party reasonably believes that the alleged agent has authority to act on behalf of the principal and that belief arises from the principal's conduct, whether by representation or otherwise. The obligation of a principal in such circumstances is based on estoppel. The importance of showing that the representation moves from the principal (not the alleged agent) is emphasised at 8-011 of Bowstead and Reynolds on Agency, 20th ed which states:

“... the general doctrine of apparent (sometimes called alternatively ostensible) authority ... is plainly based on the notion of a representation by the principal. The leading case, which is constantly cited, is *Freeman & Lockyer v Buckhurst Park Properties (supra)* in which Diplock LJ said [at p 503]:

“An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.”

.... Use of a more neutral word "manifestation" is probably, because it is less specific, a better formulation of the notion, common to most legal systems but uneasy in its justification, that apparent authority stems in some way from the principal's conduct.”

Bowstead continues at 8-013:

“**Liability only.** Normally, of course, the actual and apparent authority will coincide, and it will be unnecessary for the doctrine of apparent authority to be invoked. But when it is, the full consequences of the agency relationship do not flow, but the doctrine is primarily concerned with the question whether the principle is bound, and the burden of proof is on the person alleging it.”

55. It does not seem to me that the evidence establishes that Mr McMahon had been appointed as the manager of the Band in a formal sense, or even that he was its *de facto* manager. Mr Smith, Ms Adamson and Mr Lennard all accepted that he did press and PR work on behalf of the Band, and there was some suggestion that he had also undertaken other tasks and possibly arranged a tour for the Band. Mr Smith accepted that Mr McMahon had been a good press officer but said that they had another agent who had booked concerts for the Band and other work had been carried out by Artful Records and by his sister. He did accept that Mr McMahon had got involved in discussing the credits for the album, as is clear from the documents to which I have already referred. Mr Smith said that Mr McMahon had never been their manager although he may have thought that he was. His view was that during 1999 Mr McMahon had been ‘deluded’ and presumed

that he had a greater role than he did; this had become very difficult and he had had to sever the connection with Mr McMahon.

56. Ms Adamson was much less clear as to Mr McMahon's involvement and her evidence on this point was rather confused. She recalled him being a PR person and thought he had perhaps helped with a tour and with the album artwork. She did not accept that he was the Band's manager or *de facto* manager. Mr Lennard accepted that Mr McMahon had not just dealt with PR (after the Album had been recorded) but had also been involved in coordinating the production of the Album, for example, organising recording sessions, and that he was the common link between Artful Records and the Defendant. Mr Lennard in his witness statement suggested that Mr McMahon had contributed very little of substance, but was paid for his PR work by Artful.
57. I accept that the evidence of the Claimants' witnesses on this point was not free from inconsistency. However, that is hardly surprising in all the circumstances and given the time which has elapsed, and indeed the same may be said for the evidence on behalf of the Defendant.
58. Mr Sharples' Defence pleaded that Mr McMahon was or held himself out to be the manager of the Band. He pleaded that he had been approached by Mr Lennard and Mr McMahon about the possibility of him helping in the production of the Album. He also pleaded that Mr McMahon had expressly told him at the alleged meeting relating to the Canalot Agreement that he had recently been asked by Mr Smith to manage the Band. In his witness statement, Mr Sharples said that Mr McMahon informed him that he had been acting as the Band's manager for some months. Mr Sharples said that Mr McMahon subsequently told him that he had checked that Mr Lennard and Mr Smith were happy for him to do further work on the Album, but he did not give any evidence that Mr Smith or any other member of the Band had told him that Mr McMahon was the Band's manager or entitled to act on its behalf. In his oral evidence, he confirmed that Mr McMahon had said that he was the manager and no one had told him anything to the contrary; he thought that Mr Lennard had also said this. However, significantly, he did not allege that either Mr Smith or Ms Adamson had told him that Mr McMahon was their/the Band's manager. None of this amounted in my view to a manifestation by them or the Band that Mr McMahon was their/its manager.
59. Mr McMahon said in his witness statement that he had "a very close working relationship" with Mr Smith and was authorised to be involved in all aspects of his professional career. He said that he never had or sought a written management agreement. He did not say that he was appointed as manager, only that he was the person to whom most people would speak regarding the Band and its professional activities. This evidence does not support Mr Sharples' evidence that he told him at the time that he was the Band's manager.
60. Mr McMahon also said that after problems arose following the initial recording sessions for the Album, he had organised and supervised some further sessions with two of the musicians, as a result of which Mr Smith had said "if you think you're so bloody clever, you produce the album." It was submitted that this amounted to an express authorisation by Mr Smith for Mr McMahon to produce the album. Without having had the benefit of seeing Mr McMahon in the witness box, I am not able to judge whether his rather precise recollection is correct, but even if Mr Smith did make some such comment to Mr

McMahon, it seems clear to me from the evidence on both sides that it should not be taken to indicate that Mr McMahon had been given *carte blanche* to undertake all the arrangements necessary to produce the album. If any such comment had been made, it might explain why Mr McMahon approached Mr Sharples to be the producer of the Album, but I am not prepared to accept on the balance of probabilities that Mr McMahon was thereby appointed as the manager of the band or even as the producer of the Album. It does not seem to me that Mr McMahon had authority to agree Mr Sharples' fees as producer of the album, and Mr Sharples does not seem to have thought that he did. On the contrary, Mr Sharples' own evidence was that this (and the song-writing shares) had to be officially confirmed by Mr Lennard and Mr Smith. Further, the correspondence between Sheridans and Mr Lennard also shows that terms had to be agreed with Artful Records, whilst Mr Sharples' solicitor suggested to Mr Lennard that he should speak with Mr Smith (not Mr McMahon) about the publishing splits. Equally, as I have already found, that correspondence does not suggest that Mr McMahon had the authority to commit Artful/the Band to giving Mr Sharples a share in any copyright. In my judgment, all of these matters weigh against Mr Sharples' claim that Mr McMahon told him that he was the Band's manager.

61. Furthermore, even if I am wrong, and Mr McMahon had been given a general authority to make the arrangements necessary for the production of the album, it does not seem to me that such authority would necessarily have included the authority to commit Mr Smith and Ms Adamson to share their copyright in the proposed Album Version of the Original Song. This, it seems to me, goes further than making arrangements for the production of the Album. In the absence of any evidence that a producer would normally or customarily have had such power in the record business at the time, I do not consider that any appointment of Mr McMahon to make the arrangements for the production of the Album would have given him implied authority to make such an agreement in relation to any copyright. I am fortified in that view by the fact that Mr Sharples, on his own evidence, did not rely upon his alleged agreement with Mr McMahon but felt it necessary to ask his solicitors to negotiate with Mr Lennard and then sought to confirm the position directly with Mr Smith. Furthermore, Mr McMahon himself said that discussions as to publishing splits subsequently took place between himself, Mr Smith and Mr Sharples.
62. The contemporaneous correspondence (such as the fax of 28 April 1999) shows that Mr McMahon had at least sought to have some input into the credits on the Album sleeve and the appropriate publishing splits. However, he did not write in terms which suggest that he had already agreed the writing splits with the Defendant or that he had managerial control over such matters.
63. In my judgment, therefore, the evidence does not establish that Mr McMahon had been appointed as the manager of the Band. I do not consider that he had actual authority (whether express or implied) to bind Mr Smith and/or Ms Adamson or the Band as a whole to any agreement which would have required them to share the copyright in the Original Song or any version of it with Mr Sharples. It seems to me that all the statements upon which Mr Sharples relies emanated from Mr McMahon, not from Mr Smith or the Band; he did not give evidence of having had any reason to consider that Mr McMahon was the band's manager other than the statement allegedly made to him by Mr McMahon to that effect. In all the circumstances, I do not find that any representation or manifestation was made by Mr Smith, Ms Adamson or any other member of the Band

which would have justified a reasonable belief on Mr Sharples' part that Mr McMahon had authority to act on behalf of Mr Smith/Ms Adamson/the Band.

64. Mr Sharples relied, in the alternative, upon Mr Smith's alleged oral confirmation of the terms of the agreement as to sharing the publishing rights, in particular by his approval of the credits on the Album sleeve. I accept Mr Smith's evidence that he did not confirm any such agreement or approve the Album credits, but that his position was set out in his faxes to Mr Fogarty in March 1999, and I therefore reject this alternative argument.
65. For all these reasons, in my judgment Mr McMahon was not the Band's manager and did not have the authority of Ms Smith or Ms Adamson to hold himself out as such manager. I do not find that he had either actual or ostensible authority to enter into an agreement on behalf of Mr Smith, Ms Adamson or the Band.

Joint authorship

66. Lastly, I need to deal with the question of Mr Sharples' claim to be a joint author of the Album Version.

67. Section 10(1) of the 1988 Act defines a "work of joint authorship" as:

"A work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors".

68. The parties all agree that there are differences between the Original Song and the Album Version, both lyrically and musically, and that the Astoria Version and the Album Version are adaptations of the Original Song. I shall deal separately with the lyrics and music, as literary and musical works each attracting separate copyright protection (the definition of a musical work in the Copyright, Designs & Patents Act 1988 of course excludes any words intended to be sung or performed with the music).

69. An adaptation of an existing work may attract its own copyright as long as sufficient effort, skill and labour has been expended in producing it. In essence, the question is whether the changes made to the prior versions are not merely trivial but incorporate original work by the author, and do not merely slavishly copy the earlier work. See for example *Redwood Music Ltd v Chappell & Co. Ltd* [1982] RPC 109 at 117 and *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, [2005] 1WLR 3281 at [31]-[36]. The position is summarised at 4-35 of Copinger & Skone James on Copyright (16th Ed) as follows (footnotes omitted):

"All [authors] must therefore make some contribution to the literary, dramatic, musical or artistic form in which copyright subsists. The question is whether the collaborator takes a part in producing the matter which is the subject of copyright, i.e. whether he has contributed the right kind of skill and labour and in sufficient amount. It may [be] helpful to break this requirement down into four elements: (1) the collaborator must make a contribution of some sort; (2) it must have been significant; (3) it must have been original; and (4) it must have been a contribution to the creation of the work. ... the skill and labour need not be contributed in an amount equal to that of the other co-author or co-authors and need not be of the same kind, so that, for example, someone whose principal role is to arrange the songs written by his collaborators can be a joint author"

70. Counsel agreed that the test of co-authorship in relation to a musical work was as set out

by Hazel Williamson Q.C. sitting as a Deputy Judge of the High Court in *Bamgboye v Reed* [2002] EWHC 2922 (QB), [2004] ETMR 5 at [41]-[42]:

“41 ... I was additionally very helpfully referred by Mr Harbottle to the case of *Hadley v Kemp* [1999] EMLR 589 at 642. At pp.642 to 644 there is a summary of the authorities on joint authorship in the field of pop music from which ... the following broad principles apply:

- (1) whether a person is a joint author is a question of degree;
- (2) the contribution must be to the creation of the musical work, not to its performance or interpretation;
- (3) the contribution does not need to be equal in terms of quantity, quality or originality with that of the other collaborators, but it must still be significant, and
- (4) the cases agree that if there are two or more persons who are joint authors they own the copyright in equal shares, but it is suggested that is not an invariable rule because sometimes the authors may be joint tenants rather than tenants in common and in that case until severance there are no shares.

42 Mr Harbottle submitted — and in my judgment this must be right — that there is no requirement that joint authorship necessarily involves equality on a 50:50 basis. It would be possible for there to be, as it were, a joint ownership in unequal shares in principle.”

71. The learned judge concluded that Mr Bamgboye had made a contribution to the work as co-author, but his contribution was smaller than that of his co-author. She ruled that he was entitled to 33% of the copyright, not the 50% he had claimed.
72. In *Fisher v Brooker* [2009] UKHL 41, [2009] F.S.R. 25, the claimant sought a share in the copyright of the song “A Whiter Shade of Pale” claiming that he had not only played the organ on the famous recording of the song, but composed part of the song, making him a joint author. The trial judge, Blackburne J, held at [2006] EWHC 3239 Ch; [2007] FSR 12 at [42] that the Claimant’s “instrumental introduction (i.e. the organ solo ... as repeated) is sufficiently different from what Mr Brooker had composed on the piano to qualify in law, and by quite a wide margin, as an original contribution to the work.” He therefore held that he “qualified to be regarded as a joint author of the work.” He referred at [96] to *Bamgboye* and said “I see no reason in principle why Mr Fisher’s share in the Work should not be something less than an equal undivided share if the circumstances justify that result.” He concluded that his interest in the work should be reflected by according to him a 40% share in the musical copyright. The Court of Appeal dismissed the Respondents’ appeal on that issue and it did not form part of the arguments in the House of Lords.
73. It is therefore plain that in an appropriate case a co-author’s contribution may justify him having a share of copyright which is not equal to that of his co-author(s).

The lyrics

74. There was annexed to the Defence a transcript of the two versions of the lyrics from the recordings of Original Song and the Album. Mr Smith delivers the lyrics in a manner which at some points makes it hard to hear the words, nevertheless, the Claimants did not accept that the Defendant’s transcriptions were wholly accurate. Mr Sharples attributed the differences between the two versions to the work which he claimed to have done to

revise the Original Song, but Mr Smith and Ms Adamson both gave evidence that the Original Version had been substantially changed and developed by the Band in rehearsal and in performances in the period between the John Peel broadcast and January 1999, that is, before Mr Sharples was approached by Mr McMahon.

75. At the beginning of the trial Ms Adamson produced a new audio file purporting to be a recording of the Astoria Version, played in concert on 16 December 1998. The recording had not previously been disclosed, as Ms Adamson had obtained it from a fan of the Band only just before the trial. The Claimants wished to rely upon the file to prove that the lyrics of the Song had changed between the John Peel broadcast and the recording of the Album Version. The recording was not of high quality and also differed from the other versions in having a long musical introduction and fewer lyrics; Ms Adamson explained that this was because of the way in which it was performed at the concert. At my direction, the Claimants produced a transcript of the Astoria Version lyrics which the Defendant did not dispute was at least broadly accurate.
76. The three versions of the lyrics before me were all somewhat different. For example, some lines/verses in the Original Version are elided or appear in a different order in the Album Version. I accept the Claimants' evidence that the lyrics had been amended by the time of the performance at the Astoria, even though fewer lyrics can be heard on that recording. For example, the Original Song included these lines:

"You are burstin' for a pee
So you go behind a tree
Two couples followed safe
That as will be the end"

The Astoria Version instead included the following verse:

"So you go behind a tree
And you're dying for a pee
And a Star Wars police vehicle pulls up."

The Album Version (as transcribed by Mr Sharples) is different again:

"And you're dying for a pee
So you go behind a tree
And a Star Wars police vehicle Paul's off
I say gimme a taxi"

77. Another verse of the Original Song went:

"Well everyone you meet,
In the pubs and on the street
Is touch sensitive
Don't frown and you're a creep
If you smile you're a liar
If you don't say "it's bitter cold"
You're drunken too"

However, the Astoria Version included the first three lines of that verse and then went straight into the refrain repeating the words "I know" and "Hey Hey." The Album Version differed again:

"In the cars or on the street
If you smile you are a creep
If you don't say it's very cold
You are drunk or too old."

78. These are not the only differences in the lyrics. On the whole the Album Version is more repetitive than the Original Song, it omits some lines from it but adds some fresh lines or words, and the Astoria Version has fewer lyrics than either of the others. It is clear that the lyrics on the Astoria tape and on the Album were adaptations of the Original Song lyrics. This need not prevent them from being original copyright works in their own right.
79. In my judgment, there is very little in the Astoria Version of the lyrics which is different from the lyrics of the Original Song. The main originality lies in the line relating to "a Star Wars police vehicle" and I do not consider this sufficient to amount to render the Astoria Version as a whole an original copyright work. However, the differences between the Original Song/the Astoria Version and the Album Version are more significant in both quantity and quality and in my judgment they are sufficient for that version to attract separate copyright protection.
80. The more difficult question is whether Mr Sharples was the author or a co-author of the lyrics of the Album Version, as Mr Smith denied using any lyrics but his own. In Mr Sharples' witness statement he gave an explanation of the sort of work which he claimed to have carried out to the lyrics. For example, he said that following his agreement with Mr McMahon to work on the recording, he took words from the Original Song (or, to be more accurate, from the initial recordings made at the Battery studios) and split them into syllables which he then joined up again to make new words, and he changed the sound of some vowels to make them into other words. In his witness statement he said that the words were further improved when Mr Smith later came to his studio, and gave one particular example of the change that was made when they worked on the lyrics together, in what he described as a rather conversational process: he said that Mr McMahon's assistant, Paul, came to tell Mr Smith that he was due to leave to give an interview. Mr Smith asked him to get him a taxi and Mr Sharples asked Mr Smith to record the line "Paul's off, I say gimme a taxi!"
81. Mr Sharples claimed in court to have influenced and 'steered' the lyrics that were recorded as a result of him working with Mr Smith in what he described as an organic manner. He said that his recollection was blurred, but that his practice was to steer singers rather than tell them what to sing. He confirmed that he had changed the sequence of words/syllables and made new words, changing their content and meaning, but he was unable to remember exactly which bits of the Album Version lyrics he claimed to have re-written in this way. Looking at the lyrics, it is not evident to me that any of the original words were split into syllables and joined back together in the manner described in the witness statement, although certainly the original words were moved around in the Album Version. Mr Sharples said that he particularly remembered the taxi line as he thought it was quite funny. The difficulty which I have with that part of his evidence is that having listened carefully to the Album Version, I agree with the Claimants that the transcript of

the lyrics which is annexed to the Defence does not seem completely accurate. I accept the Claimant's contention that the line is not "And a Star Wars police vehicle Paul's off" but is the same as in the Astoria Version, the more comprehensible "And a Star Wars police vehicle pulls up." I can hear no reference to the name Paul in the Album Version and in all the circumstances I do not believe Mr Sharples' account about the name Paul being inserted in front of the words "gimme a taxi."

82. In the circumstances, I consider that Mr Sharples' account of his input to the rewriting of the lyrics for the Album Version is not reliable. I prefer the evidence of Mr Smith on this point. He was adamant that the lyrics of the Album Version were all written by him and I see no reason not to accept his evidence on that point. In my view Mr Smith's evidence was supported by that of Ms Adamson. She was asked whether she ever had any input to the lyrics of songs which she wrote with Mr Smith and said that sometimes she did, however, she immediately qualified that answer by saying that her input was that sometimes she came up with the title of a song. This does not seem to me to suggest that anybody but Mr Smith worked on the lyrics of the Band's songs, in contrast to the collaborative effort which Ms Adamson described as being undertaken by the members of the Band in writing and arranging the music.
83. For all these reasons, I conclude that Mr Sharples would not have been entitled to claim to be a joint author of the literary copyright in the lyrics of the Album Version.

The music

84. Mr Sharples claimed in the Defence to have changed the music of the Song in a number of ways: by re-arranging the guitar and vocal parts, adding the bass harmony, fixing the middle harmonies and adding the staccato string melodies. In his witness statement, he expanded upon the Defence somewhat, saying that he had added (rather than "fixed") the middle harmonies using legato and staccato string sample as well as adding the staccato string melodies. He also said that he had repitched some of the main melody "effectively making a newer melody line." He relied upon his credit on the Album sleeve for "String arrangements."
85. The Claimants do not accept that Mr Sharples made any sufficient changes to the Original Song to be a joint author of the music of the Album Version. Although Mr Smith and Ms Adamson accept that Mr Sharples was responsible for adding the strings to the Album Version, they were both adamant that he was not a co-author with them, a position which they have maintained throughout, but which it seems to me flows from their understandable view that the song is essentially the same in all of the versions rather than from any analysis of the copyright position.
86. There was annexed to the Particulars of Claim a letter from the well-known expert, Peter Oxendale, which he had sent to Mr Fogarty after listening to the Original Song and the Album Version. He commented on the music in particular that
- Both versions were in the same key, at similar tempi and with similar instrumentation
 - Both commenced with the same guitar riffs
 - The riffs were repeated in both versions as instrumental 'hooks'
 - Both featured the same chord sequences.

There was however no formal expert evidence on the question of whether the music of the Album version is an original copyright work and Mr Oxendale's informal letter can plainly not be treated as if it were an unchallenged expert report. I must therefore decide the point on the basis of the written and oral evidence and by listening to the three versions of the Song provided to me.

87. On the second day of the trial, Mr Sharples sought my permission to introduce and rely on a further audio file which he had extracted from some of the original tapes in his possession as it included the string parts of the Album Version. The existence of the original audio files had been disclosed by Mr Sharples, but the Claimants had not been provided with copies of them nor with facilities to listen to them on inspection. For the reasons given in an *extempore* judgment at the hearing, I refused the Defendant permission to rely on that file, and it is a matter of some concern to me that audio files which were plainly of potential significance were not made available at a time when the Claimants' witnesses could have considered them. As a result, the only sound recordings available to me were of the three versions of the Song.
88. Counsel for Minder Music asked Mr Sharples about the points from Mr Oxendale's letter that I have set out above. He accepted all of them, save that he said that the Album Version used only parts of the same chord sequences. He claimed to have "tweaked" the melody line and that the strings carried the melody, even if the string passages were kept short "not to bore people."
89. Mr Sharples asserted that the string sections stood on their own. In my view, that is to overstate their significance, but I accept that the strings are audible between the refrains and amount to short but discrete parts of the instrumental elements of the Album Version. In my judgment this adds texture and interest to the music absent in the earlier versions. I am unable to make a similar finding in relation to the other changes which Mr Sharples said he made to the music. There may be some changes to the bass line and the guitar parts, but on balance I do not think that these reflect a process of composition of new music or an original arrangement of music by Mr Sharples. In these respects, I prefer Mr Smith's evidence that Mr Sharples was in that respect carrying out the task of a record producer, not acting as a composer.
90. I conclude that Mr Sharples did make a small but significant original contribution to the composition of the music of the Album Version by composing and adding the string sections to the work. As I do not accept that there had been any prior agreement between the parties in the form of the Canalot Agreement (or indeed otherwise) that Mr Sharples should have a one third share of the copyright in any song to which he made a contribution as composer regardless of its significance, and his contribution to the Album Version was relatively small, I do not accept that his share of the copyright would have been as great as one third. In my view, his contribution as co-author would have been properly reflected by a 20% share of the copyright in the music of the Album Version.