



has been emailed to you it is to be treated as 'read-only'.  
You should send any suggested amendments as a separate Word document.

Approved Judgment**Mr Justice Zacaroli:**

1. In the judgment handed down in this action on 6 April 2022, I granted the declarations sought by the claimants and dismissed the defendants' counterclaim. The claimants sought an order that their costs of the proceedings be paid by the defendants, to be assessed on the standard basis. The defendants contended that there should be no order as to costs. At the hearing on 8 June 2022, I announced my decision that the defendants would be ordered to pay the claimants' costs. These are my reasons for doing so. I will use the same definitions and abbreviations as appear in the main judgment.
2. The starting point is to identify the winners and losers in the action because the general rule is that the unsuccessful party pays the costs of the successful party: CPR 44.2(2)(a). There is no dispute as to this: the claimants undoubtedly won and won on every substantial point. This is not a case where a proportionate costs order might be justified on an issues-based approach.
3. Instead, the defendants claim that the conduct of the claimants, both before and during the proceedings, is such that they should be deprived of all of their costs (or, although no separate arguments were addressed to this possibility, of part of their costs). For the reasons which follow, while I accept that the conduct of the parties is a matter which the court is entitled to take into account in exercising its discretion in relation to costs (CPR 4.2(4)(a) and 4.2(5)), I am not persuaded that I should exercise my discretion otherwise than by ordering the defendants to pay the claimants all of their costs in such amount as will be determined on detailed assessment.
4. Specifically, the defendants allege that the claimants: (1) failed to engage in pre-action correspondence; (2) failed to remedy that default, by then failing to provide disclosure of documents (predominantly voice notes and project files) relating to how Shape came to be written; (3) maintained that failure throughout the litigation; (4) demonstrated "awkwardness and opacity" so as to strengthen the defendants' conviction that infringement had occurred; and (5) failed (in the case of Mr Sheeran) to provide an adequate response to failings in disclosure, following an order of Meade J of 2 December 2021.
5. I will deal first with the allegations in respect of pre-action conduct. I considered this briefly in the main judgment, at §213-217, in connection with the defendants' contention that declaratory relief ought to be refused. The conclusions I reached there are equally relevant to the question of costs, and for convenience I set out those paragraphs in full:

"213. Second, the claim was said to be premature, because the claimants failed to comply with pre-action protocols, there being no letter of claim, no pre-action disclosure, and no attempt to engage in alternative dispute resolution. The dispute commenced with a phone call from the defendants' former solicitors to the fourth claimant in September 2017, in which – as evidenced by the letter from the claimants' former solicitors that followed shortly afterwards – he claimed that Shape infringed copyright in Oh Why and stated that his clients were in the process of taking steps to place Shape in suspense at collecting societies. In their response, the claimants' solicitors denied the allegation, referred to a report from the musicologist Peter Oxendale who confirmed there was no basis for infringement, and stated "we hereby put you on notice that our clients will take immediate action to protect their interests should you or your clients be so misguided as to take steps to implement your threat."

214. Correspondence continued between solicitors, albeit slowly. On 26 March 2018, the defendants' solicitors sent a copy of a preliminary

Approved Judgment

report by Mr Siddell. They said that Double-click to enter the short title Approved Judgment their clients were “very upset” that their work had been taken without permission and exploited commercially “on such a grand scale”, and had been urged by others to freeze collection society payments (but they – the solicitors – were trying to persuade them not to do so).

215. On 14 May 2018, the claimants’ solicitors wrote to the defendants’ solicitors stating that it was incumbent upon them properly to set out their allegations and that the preliminary report of Mr Siddell fell far short of that. At that point, unbeknown to the claimants, the defendants had in fact already put Shape into suspense with the PRS a couple of days earlier. As soon as the claimants’ solicitors found out, they acted on the warning they had given in September 2017 and issued this claim.

216. The defendants rely on an email from their former solicitor of 23 May 2018, in which he objected to the claim having been issued quickly, in disregard of the CPR, and said that his clients had acted against his advice in putting Shape into suspense at the PRS, and that he continued to advise them that they should agree to cease suspension “if we can agree a way forward with your clients”.

217. The defendants suggest that in these circumstances, it was heavy-handed and premature of the claimants to issue the proceedings and that this disentitles them to the declaratory relief sought. I disagree. Whether it was true or not, the claimants were justified in thinking that putting Shape into suspense at the PRS was a tactic designed to extract a settlement. They had given fair warning that they would protect their position if such a step was taken, and they could take little if any comfort from the defendants’ solicitor saying he had advised his clients to lift the suspension, given that he had already said that his clients had taken that step in the first place against his advice. In any case, even if the claimants’ actions were premature, that is water under the bridge: the defendants have maintained, and widened, their attack on the claimants – and on Mr Sheeran in particular – ever since.”

6. The defendants maintain, in relation to the question of costs, that the claimants failed to comply with the Practice Direction – Pre-Action Conduct and Protocols (the “Practice Direction”). That states that parties should provide each other with sufficient information so as to enable them to understand each other’s position, to make decisions about how to proceed, to try to settle the issue without proceedings, to consider a form of ADR, to support efficient case management of the proceedings and to reduce the costs of resolving the dispute (see paragraph 3 of the Practice Direction).
7. It is important, in considering the Practice Direction, to bear in mind that although the proceedings were commenced by the claimants, it was the defendants who were making the positive allegation. The defendants’ solicitors recognised this in their letter of 26 March 2018, saying “it is of course usual, and in accordance with the CPR, that **the party making the allegation** would set out its case in the first instance...” (emphasis added).
8. Immediately after the claim of infringement had been raised, the claimants’ solicitors had written (on 29 September 2017) denying it, and referring to the fact that their clients had sought the views of a musicologist, Peter Oxendale, “who confirms that he can see no evidential basis for an infringement claim.”

Approved Judgment

9. The defendants' solicitors sent a copy of their own musicologist's report (Mr Siddell) with their letter of 26 March 2018. They complained that Mr Oxendale's report had not been made available to them. In fact (although because it was provided on a without prejudice save as to costs basis, I was unaware of this when drafting the main judgment), the claimants did (on 8 May 2018) supply the defendants with Mr Oxendale's report, together with a further report answering Mr Siddell's report.
10. Mr Oxendale's reports reached a conclusion that was ultimately echoed to a large extent in the main judgment. It was shortly after this that the defendants, without further warning, took action which caused the suspension of payment of royalties by the PRS. As I pointed out in the main judgment at §213, the claimants had, in September 2017, warned the defendants of reprisals if they followed through on their threat to suspend PRS royalties.
11. In those circumstances, I do not accept the defendants' characterisation that there was a failure by the claimants to comply with the Practice Direction, and certainly not so as to visit any costs consequences on them. All that they had received by way of pre-action information from those asserting a claim of infringement was an expert's report. They had responded with a clear denial that any copying took place, and with two expert's reports of their own, one specifically answering the report provided by the defendants. They had done as much, if not more, than the defendants, who were asserting infringement, before the defendants acted precipitously by putting the PRS payments into suspension. The commencement of proceedings was a reasonable reaction in circumstances where (as I found in the main judgment) it was fair to see the defendants' conduct as a tactic to extract a settlement.
12. Insofar as the defendants contend that the claimants acted without taking up the suggestion from the defendants' solicitor to settle without court proceedings, I refer again to §216-217 of the main judgment. It is true that the defendants' then solicitor said that he continued to advise his clients that they should agree to cease suspension "if we can agree a way forward with your clients". But the value of that was immediately diminished by the acknowledgment that the defendants had acted *against* their solicitor's advice in contacting the PRS in the first place.
13. The defendants contend that that the claimants' pre-action steps fell far short of the requirement to disclose "key documents relevant to the issues in dispute": see paragraph 6(c) of the Practice Direction. They contend that the claimants should have disclosed voice memos or other ambient recordings of the writing session on 12 October 2016, project files and, to the extent that any such "key documents" were missing, they should have provided an explanation of how Shape came to be written. I do not accept that there was any obligation on the claimants to go this far, which would have necessitated making the kind of searches required in a full disclosure exercise. The defendants themselves, who were positively asserting infringement, had given no disclosure at all in support of their assertion (which was a critical element of their claim) that the claimants had had access to Oh Why.
14. The remainder of the defendants' points relate to alleged failures on the part of the claimants, after the commencement of proceedings, to provide disclosure and explanations relevant to the process of creating Shape. Before turning to some of the matters of detail, I make the following over-arching points in support of my conclusion that the matters relied on by the defendants do not justify departing from the general rule that the losing party pays the successful party's costs.
15. First, the defendants' core complaint is that they were not given at an early enough stage the disclosure and explanations which would have enabled them to understand how Shape was written. In order to succeed, however, it was critical for them to establish that the claimants had at least heard Oh Why. They failed to do so. None of the disclosure or explanations about which complaint is made went to that issue.

Approved Judgment

16. Second, none of the disclosure or explanations, once provided to the defendants, caused them to alter their approach at all. Instead, they not only maintained their attack on Mr Sheeran, but broadened it by asserting that he was a “magpie” who habitually misappropriated song ideas from other writers. In other words, none of the alleged defaults by the claimants in providing disclosure or explanations had any impact on the proceedings overall.
17. Third, the allegation of access was not in fact pursued at trial against Mr McCutcheon or Mr McDaid. That made it inevitable that no case of copying could be maintained against them, but that was acknowledged by the defendants only after the conclusion of their evidence.
18. That is not to say that the claimants’ conduct, insofar as the defendants’ complaints are made out, has no consequence. First, the defendants have the benefit of interlocutory costs awards in their favour on certain issues, including the order of Meade J of 2 December 2021, in which the claimants were ordered to pay two-thirds of the costs incurred by the defendants. Second, the possibility remains that the costs judge will, in conducting a detailed assessment, disallow some part of the claimants’ costs in relation to the complained matters on the grounds that they were unreasonably incurred or were disproportionate. My decision is simply that the claimants are entitled to an order for costs in their favour, and that they are entitled to have *all* of their costs subjected to detailed assessment.
19. I turn to some of the detailed points made by the defendants relating to conduct during the course of the proceedings.
20. Underlying much of the defendants’ criticism is their contention that the claimants had created an “evidential void”, by not making or maintaining ambient recordings of the recording session, and then failing to fill that void with adequate explanations. The contention that there was an evidential void is based, at least in part, on comments that Mr Sheeran has made to the media following publication of the main judgment. The defendants claim that he said, in an interview for the BBC programme “Newsnight”, that ever since the problems occurred with his song Photograph (i.e., prior to the song writing session for Shape), he has filmed recording sessions, so that if copyright infringement claims are made, he can produce the footage so that potential claimants can see there is nothing there. The defendants contend that “this is precisely what should have happened in the present case. It never did.”
21. This, however, is to turn reality on its head. The fact that songwriters have been led, as a purely defensive measure to ward off copyright infringement claims, to film their song writing process cannot be translated into an obligation to do so, owed to those who may bring such claims. In fact, as the claimants pointed out, what Mr Sheeran had said related to recording sessions “for my stuff”. The writing session for Shape was a collaboration with Mr McCutcheon, as well as Mr McDaid, so what he said in the Newsnight interview did not apply. This was the first time Mr Sheeran had worked with Mr McCutcheon (see §50 of the main judgment) – a well-established and successful music producer – so it was hardly likely that Mr Sheeran would insist on filming their writing session.
22. Accordingly, I reject the contention that the claimants had initially created an evidential void, or that they maintained that failure throughout the litigation.
23. The claimants disclosed such voice memos from the recording session as had been retained. These were under Mr McDaid’s control. The defendants (rightly, for reasons I set out in the main judgment) abandoned any claim that Mr McDaid was guilty of any wrongdoing in not retaining other voice notes which had been made on the day. I reached a clear conclusion in the main judgment as to Mr McDaid’s honesty and willingness to assist the court.
24. The defendants now criticise Mr McDaid for inconsistencies in his evidence as to whether, and when, he knew that other voice notes (beyond the 47 seconds that have been disclosed from the

Approved Judgment

writing/recording session on 12 October 2016) had been made, but since lost, or as to when and what he told his solicitors about this. It is important in this context to distinguish between what Mr McDaid can remember, and what he has reconstructed with the benefit of hindsight and other information.

25. In particular, he has maintained throughout that he does not have an actual recollection of what voice memos he made (or indeed much else that occurred) on the day. When, therefore, he said “I know as a fact” that other voice memos existed (in his second witness statement), he was clearly referring to the logical conclusion that they existed because he had been shown the video made for the New York Times, which included clips of voice memos that were additional to the ones he knew he had retained. It was not his evidence at any time that he had made ambient recordings of the entire recording session.
26. As to the project files, the defendants complain that these were disclosed in a usable form only very late in the day. These had been disclosed initially in February 2020 by the claimants uploading the files to the Relativity disclosure platform. It later transpired – as I explain below – that this form of disclosure introduced a glitch which made it difficult, and in some cases impossible, to review the files. The defendants, however, never in fact tried to review them when disclosed at that time. In a letter from their solicitors dated 5 March 2020, various complaints were made about the disclosure offered by the claimants (without having sought to review it). Mr Sutcliffe pointed to a passage in the letter which referred to the claimants having said that it was not possible for the defendants to download the Wav or ProTools files. That was simply wrong, however, as it was based on a misreading of the earlier letter from the claimants’ solicitors to which the 5 March letter was responding. That error was then pointed out in a further letter from the claimants’ solicitors dated 19 March 2020.
27. Complaint was also made that the files were not provided in their native format, in order to preserve metadata, and that access was provided only to one user and only for three weeks. In their letter of 19 March 2020, the claimants’ solicitors pointed out that these points were also wrong, in that the files were presented in a form that retained their metadata, and that the limited form of access the claimants were granting was at their own expense, but if the defendants were prepared to pay for further access, then that was available.
28. In fact but, according to the claimants, unbeknown to them until much later, the process of uploading the project files to the Relativity platform had produced a glitch which meant that the ProTools files had become disaggregated, and the Logic files were lost altogether.
29. This, however, was not appreciated in 2020 due to the fact that the defendants did not actually look at the disclosed materials at the time.
30. The same disclosure was provided, in accordance with the court timetable for extended disclosure, in March 2021. This time, the defendants’ solicitors were heavily engaged in another case, and it was not until late August 2021 that the defendants sought to review the documents, and the problems caused by the Relativity platform were unearthed. It appears that it took the claimants a while to appreciate the problem but, when they did (on 12 November 2021), they provided access in a form which enabled the project files to be fully reviewed by the defendants.
31. I accept that the claimants shoulder some, but far from all, of the blame for the fact that it was not until November 2021 that the project files were made available in a form that they could be properly reviewed by the defendants. They should have been made available in that form in February 2020, and again in March 2021. However, I do not accept that this should have a bearing on the costs order to be made at the end of the trial. The glitch which prevented the files being reviewed by the Relativity platform in February 2020 was not appreciated by the claimants at the time. I accept in this respect Mr Mill’s submission that it is hardly likely that

Approved Judgment

the claimants deliberately uploaded documents in a way that they could not be reviewed. The defendants chose not to engage at all with the disclosure provided in February 2020 for reasons which, at least to a large extent, did not withstand scrutiny. As a result, the glitch was not then discovered. The delay between March 2021 and August 2021 was as a result of the defendants' solicitors being engaged on another matter. At best, therefore, the claimant's shoulder some of the blame only for not reacting more quickly after the end of August 2021, when the defendants *had* attempted to review the files but encountered difficulties. The defendants have a costs order in their favour referable to the disclosure application made in the autumn of 2021. To the extent that the claimants' costs have been increased by any failings in their approach to disclosure, it is open to the costs judge to disallow amounts as unreasonable or disproportionate on detailed assessment. Overall, I am not persuaded that the claimants' conduct in relation to disclosure of the project files is such that it should warrant departure from the general rule that costs follow the event.

32. That leaves the defendants' complaint that the claimants failed to provide an adequate explanation for how Shape came to be written. Insofar as complaint is made that the claimants failed to answer a Part 18 request, that is answered by the fact that Master Kaye ordered that to the extent that the claimants had not answered the request, they were not obliged to do so. I do not accept the defendants' characterisation that the claimants' evidence as to how Shape came to be written had to be "dragged out" of them. It was properly a matter to be included in witness evidence, which it was.
33. It is true that there were some discrepancies in the recollections of the three songwriters. I addressed those in the main judgment, noting that it is not surprising that their recollections of everything that occurred in a song writing session which took place five years earlier, at great speed, and which none of them would have had any reason to believe would need to be recalled at some future date, differ and are less than perfect. The defendants' written submissions resurrect a criticism at trial, that Mr Ricigliano's "explanation" of aspects of Shape, was not foreshadowed in a pleading. I do not think that the claimants were required, however, to plead each and every reason in support of the negative proposition that Shape was not derived from Oh Why.
34. Again, I do not consider that such imperfections as existed in the claimants' evidence justify any departure from the general rule as to costs.
35. As to the defendants' contention that the claimants' failure to provide a clear and consistent account of the song writing process, and the extent to which it was recorded on the day, served to increase their conviction that there had been infringement, the problem with this is that their conviction that Mr Sheeran had deliberately copied from Oh Why was maintained right through to the end of the trial, even after everything which led the court to the conclusion that Mr Sheeran had not copied, deliberately or otherwise, had been fully aired. That conviction was based on numerous points which I addressed, and rejected, in the main judgment.
36. Finally, I am not persuaded that the errors that Mr Sheeran made in his written evidence relating to disclosure warrant any sanction by way of costs reduction. These related, for example, to the apparently "lost" Macbook, and his failure to search a box containing devices which he thought related only to the Photograph litigation, and which he understood to have been already searched for material relating to that song. I accept that these defaults were the result of error, and were not deliberate.
37. I have to balance all of the matters of which complaint is made together with all the relevant circumstances, including the three overarching points made above. Balanced against those, I consider it is appropriate that the claimants' success is reflected in an order that their costs are paid by the defendants, without reduction save for that which is made as part of the process of detailed assessment.

Approved JudgmentPayment on account

38. It is common ground that a payment on account should be ordered. The only dispute is as to the amount.
39. The claimants' costs are divided into two parts: those that were the subject of an agreed budget, and those that had been incurred prior to that.
40. According to the schedule to the Order of Master Kaye dated 16 July 2020, the total of the claimants' costs in the agreed budget (which covered everything from at least part of the disclosure exercise to the end of trial) was £997,912.25. The claimants accept that approximately £97,000 of that should be deducted, because it relates to aspects of the case where they were ordered to pay costs. That leaves a balance of approximately £900,000.
41. There was no dispute that where, as here, there has been an approved or agreed costs budget, then the amounts contained in it are a sensible starting position for determining a reasonable sum. That is because on a detailed assessment the court will not depart from an agreed or approved budget unless satisfied that there is good reason to do so. I propose to adopt the same approach taken by Birss J in *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch) and, taking into account the vagaries of litigation and the possibility of at least some departure on detailed assessment, I will order 90% of those cost which were included in the agreed budget as estimates. That comes to the sum of £810,000.
42. So far as incurred costs are concerned, the approach is different. The court is required to arrive at a reasonable sum, being an estimate of the sum likely to be recovered on assessment subject to an appropriate margin to take account of error.
43. The costs incurred by the claimants by the time of the agreed costs budget were approximately £402,000. Of that sum, approximately £118,000 related to the costs of applications relating to similar fact evidence, where the claimants have no entitlement to costs against the defendants. Excluding that sum, the resulting figure is £284,000.
44. The defendants make various criticisms of the amount of incurred costs:
- (1) The amount claimed in respect of statements of case (£287,767.26) is said to be excessive, given that the pleadings served by the claimants were relatively short. A partial answer to this is that this included the amount of £118,000 that related to the similar fact evidence applications, which is *not* claimed by the claimants. The resulting figure is £169,767.26. That is still a very high figure in light of the relatively short statements of case.
  - (2) Most of the defendants' complaints in relation to the costs of disclosure were aimed at the estimated costs for disclosure included in the budget. They contend that the claimants ought not to be rewarded for the cost of additional searches caused by making inadequate disclosure first time around, or extra work caused as a result of the problems created by the use of the Relativity platform. All such costs, however, would have been over and above those which the defendants agreed were reasonable in the agreed budget, and the claimants are only claiming by way of interim payment an amount by reference to that agreed budget.
  - (3) The claimants also claim approximately £50,000 incurred costs in relation to disclosure. That would appear to include costs relating to upload to the Relativity Platform in February 2020 and, as such, at least part of it may be vulnerable to reduction on detailed assessment given the (albeit unappreciated) problems with that approach.

Approved Judgment

- (4) The defendants also criticise the amount claimed in respect of estimated costs of witness statements, given that corrective statements were required. Such costs, however, would have fallen outside the estimate which had been agreed in respect of witness statements, and (as with disclosure) the claim for payment on account is made only by relation to the agreed budgeted costs.
- (5) Criticism is also made of the budgeted amount for ADR cost on the basis that nothing happened in this respect. The claimants deny that nothing else happened. The amount involved (at just over £6,000) is in any event de minimis in comparison with the overall costs incurred by both parties.
45. The claimants contend that the defendants' criticisms, if well-founded, are catered for by the fact that the claimants seek only 60% of the incurred costs by way of interim payment. In my judgment, taking account of the points made above relating to the pleadings and disclosure, a slight reduction from this is appropriate to represent the margin to take account of error, and I will order 55% of the sum claimed in respect of incurred costs, resulting in the sum of £156,200.
46. Finally, the defendants contend that such sum as the original sixth and seventh defendants incurred should be deducted, because (following the discontinuance of the claim by them) they have been ordered to pay the defendants' costs of and occasioned by the claims of the original sixth and seventh defendants. Mr Mill pointed out, however, that this is not a usual case of discontinuance because it was simply a case of the wrong corporate entities having been identified in relation to the rights arising from Mr McDaid's participation in writing the song. Accordingly, the original sixth and seventh defendants were replaced by the new sixth defendant. Mr Mill informed me that the internal costs liability of the former has been overtaken by the latter. The claimants are nevertheless prepared to deduct £50,000 from the amount claimed by way of costs to cater for costs relating to the change-over. In my judgment, that is a sufficient amount in order to deal with that point.
47. Accordingly, taking into account each of the above points, the amount to be awarded by way of interim payment is: (a) £810,000 plus (b) £156,200, less (c) £50,000 = £916,200.