



Case No: HC05C01374

Neutral Citation Number: [2006] EWHC 3239 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

20th December 2006

Before :

THE HON MR JUSTICE BLACKBURNE

Between :

Matthew Fisher	Claimant
- and -	
(1) Gary Brooker	Defendants
(2) Onward Music Ltd	

Ian Purvis QC and Hugo Cuddigan (instructed by **Jens Hills & Co**) for the **Claimant**
Andrew Sutcliffe QC and Richard Edwards (instructed by **Harbottle & Lewis LLP**) for the
Defendants

Hearing dates: 13th to 16th, 20th and 24th November 2006

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE BLACKBURNE

Mr Justice Blackburne :

Introduction

1. “A Whiter Shade of Pale” was one of the most successful popular songs of the late 1960s. Recorded by the band Procol Harum and first released as a single on 12 May 1967 by Decca Records under licence from Essex Music Ltd, it was an instant success. Already in June 1967 it had reached number one in the UK charts where it remained for several weeks. It reached number five in the American charts with sales in the USA rising to over a million copies. It was no less of a success elsewhere. Worldwide, over six million copies were sold. On 26 March 1968 it was declared to be the International Song of the Year at the Thirteenth Annual Ivor Novello Awards. In 2004 Rolling Stone magazine placed it at number 57 in its “500 Greatest Songs Of All Time” while Channel 4 placed it at number 19 in its chart of the “100 Greatest Songs”.
2. The song and Procol Harum have been the subject of numerous published articles and media interviews. They have inspired a dedicated following of fans and, more recently, the creation of websites devoted to the dissemination of information about them. There are over 770 versions of the song performed by other groups with varying degrees of faithfulness to it as first recorded.
3. It is no exaggeration to say that with the passage of time the song has achieved something approaching cult status. Still popular with many who recall the song when it was first released, it enjoys a following among the generations that have followed. More recently, themes for the song (including in particular its introductory bars) are available as mobile telephone ringtones.
4. These proceedings are concerned with the ownership of the musical copyright in the song as recorded by Procol Harum for its first release in May 1967. I shall refer to the song as so recorded as “the Work”. It is the recording which enjoyed and continues to enjoy such widespread popularity. The musicians on that recording were Gary Brooker (voice and piano), Matthew Fisher (Hammond organ), David Knights (bass), Ray Royer (guitar) and Bill Eyden (drums). (In fact Mr Eyden was a session drummer used for that recording and was not a member of Procol Harum.) The producer was Denny Cordell and the sound engineer Keith Grant. The writers of the song credited on the record label were Keith Reid (lyrics) and Mr Brooker (music). Mr Fisher, who is the claimant, was accorded no such credit.
5. Mr Reid and Mr Brooker, who is the first defendant, assigned their copyright in the words and music of the song (and in one other composition) to the music publisher Essex Music Ltd by an assignment dated 7 March 1967. They did so in return for various royalties and fees, including sheet music royalties, mechanical royalties, synchronisation fees and performance fees. This was some time before the Work - ie the song as released in May 1967 - was recorded. At this early stage the song had four verses and was sung by Mr Brooker to his own piano accompaniment. I shall refer to the song in that form as “the Song” to distinguish it from the Work, ie the song as sung by Mr Brooker to a musical accompaniment by himself and the other members of

Procol Harum (excepting the drummer) and released as the single on 12 May 1967. The Song was registered with the Performing Rights Society (“the PRS”) on 17 March 1967 and at about the same time (it may have been a week or two later: the relevant records are no longer available) it was registered with the Mechanical Copyright Protection Society (“the MCPS”).

6. On 1 July 1967 Essex Music Ltd assigned to Essex Music International Ltd the rights which it had acquired from Mr Reid and Mr Brooker by the assignment of 7 March 1967. In mid-1993 Essex Music International, which following a name change some years earlier became known as Westminster Music Ltd, assigned its interests to Onward Music Ltd, the second defendant. This was with effect from 31 December 1991.
7. Onward Music also claims to own the rights in the master recording of the Work as released in May 1967. This is said to result from a recording contract dated 16 May 1967 (“the recording contract”) entered into by Procol Harum (acting by Mr Reid and a Mr Jonathon Weston as its managers) with Essex Music and an entity described as New Breed Productions. New Breed Productions was a trading name for a company not established at the time but only incorporated on 3 July 1967 (as Straight Ahead Productions Ltd). It was to run the recording operations then being set up by David Platz, who was managing director of Essex Music, and Mr Cordell. Mr Platz and Mr Cordell have since died. The meaning and effect of the recording contract and, in particular, whether it extended to any musical copyright in the Work are matters of dispute between the parties. By a slightly different chain of assignments, Onward Music claims to be entitled to the rights under that contract.

The Work

8. The Work lasts 4 minutes. It comprises 74 bars in 4/4 time made up as follows: an 8-bar introduction, a 16-bar verse (verse one), an 8-bar chorus, a repeat of the 8-bar introduction, a 16-bar verse (verse two), a repeat of the 8-bar chorus, a variation of the 8-bar introduction (the variation being to the fourth and sixth to eighth bars), followed by a brief 2-bar reprise of the start of the chorus. The music fades away in the second bar of the reprise thus bringing the Work to a conclusion.
9. The 8-bar introduction, which, as I have mentioned, is repeated between the two verses and is repeated but with variations after the second verse, features an organ solo by Mr Fisher. Although described as a “solo”, in fact his playing is accompanied but, with the exception of a languorous drum beat, it is difficult to detect any of the other instruments.
10. In paragraph 9.13 of his expert report tendered in evidence on behalf of the defendants, Mr Peter Oxendale, who is a musicologist with impressive qualifications and a distinguished track record as an expert in copyright litigation extending over 26 years, together with many years of experience as a keyboard player, music director and producer in the field of popular music, said this of the Work (and in particular of the so-called organ solo):

“It does not surprise me that many of the versions of the Song contain the Solo. This is because the first recorded version of the Song by Procol Harum in 1967 [ie of the Work] was a huge international hit and the arrangement of the Song, particularly the Solo in the opening measures [ie bars], is both distinctive and memorable and would, in my opinion, be identified by almost anyone familiar with the repertoire of contemporary popular music even after hearing just a few bars.”

Elsewhere, he described the organ solo as significant and as hugely famous. I agree with all of that.

11. Whilst it is important when listening to the Work as first released to distinguish between the musical composition and the memorable performance of it, that is to say the quality of performance by the individual musicians and of the recording, it is undoubtedly the case, and I find, that the organ solo is a distinctive and significant contribution to the overall composition and, quite obviously, the product of skill and labour on the part of the person who created it.

The issues

12. A central issue in this dispute concerns the identity of the person who can claim, for musical copyright purposes, to have composed the organ solo, that is to say the melodic line transcribed as cd18 (showing the solo as it is heard in the eight bar introduction and between the two verses) and cd19 (as it is heard in the eight bar section which follows the second verse and chorus) in the witness statement of Mr Fisher. It is not in dispute that Mr Fisher participated in the evolution of what became the Work by his contribution of the organ part, including the organ solo. What is in issue, however, is the extent to which the organ part, especially the organ solo, is to be viewed as Mr Fisher's invention and, even if it was wholly his invention, whether his contribution of it was such as to entitle him to a share in the authorship of the overall Work. The matter can be broken down into the following issues: (1) the extent of Mr Fisher's contribution to the Work; (2) whether that contribution was capable of conferring on Mr Fisher an interest in the musical copyright in the Work and (3) whether any copyright interest in the Work to which Mr Fisher would otherwise be entitled is defeated by (a) the existence of a copyright interest (otherwise than in Mr Fisher) in an earlier version of the Song and the consequences that flow from that, (b) the terms of the recording contract and (c) defences based upon estoppel, acquiescence and laches.
13. If Mr Fisher's claim overcomes these various hurdles there is then the question of remedy and whether, in particular, the court should grant him a declaration of his copyright interest and, even if it does, whether he should be granted a restitutional remedy in relation to past royalties, and injunctive relief.

Is a fair trial possible?

14. Before coming to those various issues, I should first deal with an anterior question which is whether, given the very many years that have passed since the Work was composed, it is possible to have a fair trial.
15. One of the striking features of Mr Fisher's claim is that it is made so very many years after the Work was first released. Mr Fisher does not suggest that, with the exception of a conversation which he says he had with Mr Reid and, following that, with Mr Brooker sometime in June 1967 when, he claims, he raised with them that he should be credited as a co-writer of the Work, he or anyone on his behalf ever raised his claim until the matter was mentioned in a letter dated 19 March 2004 from the solicitors then acting for him to Mr Brooker's manager, a Mr Chris Cooke. In the brief exchange of correspondence relating to this that then ensued it was represented that Mr Fisher should have been entitled to "a writer's share" from the beginning and that he had "clearly been the victim of a lot of bad advice right from the beginning". Accepting that any monetary claim could not "go back beyond any proper statutory period", the concern as expressed in that letter was "to address the position for the future not the past". After this brief initial exchange, raised in the course of correspondence on other matters, the topic was not further pursued, with the exception of a passing reference in a letter from Mr Fisher's solicitors in October 2004, until a letter dated 14 April 2005 was sent from Mr Fisher's present solicitors to Mr Brooker. In that letter the circumstances of the claim were set out at some length and an open offer made with a view to avoiding litigation. The offer was rejected and on 31 May 2005 these proceedings were launched. They have come on for trial 18 months later.
16. Mr Fisher's silence over his claim is the more remarkable since (1) he remained a member of Procol Harum until August 1969 (ie for over two years after the Work was first released), (2) thereafter and from time to time he took part with Mr Brooker (and with other current and ex-members of Procol Harum which formally disbanded in 1977) on concert tours here and abroad performing as Procol Harum, (3) the Work was one of the tracks on the re-release in 1997 of Procol Harum's first album (the album, as first released, did not contain the Work), (4) he was in frequent dispute with Mr Brooker (and from time to time was, with Mr Brooker, a defendant to proceedings brought by others) arising out of his involvement as a performing member of Procol Harum, the disputes being concerned largely with performance royalties and claims by former managers and (5) there is no doubt from interviews he has given over the years that Mr Fisher regarded himself as the composer of the organ part and that the absence of any formal recognition of this fact was for him a continuing source of grievance. It was not therefore as if there had been no contact between Mr Fisher and Mr Brooker and not as if Mr Fisher was a stranger to litigation or averse to asserting his rights arising out of his musical activities.
17. Even if I accept Mr Fisher's evidence that he did initially raise the matter, although just on that one occasion, with Mr Reid and Mr Brooker in June 1967 - they for their part had no recollection of any such conversation - his admitted failure between then and 2004 even so much as to hint to Mr Brooker that he should be acknowledged as a joint author of the Work is quite extraordinary. In itself, however, Mr Fisher's silence over so long a period is irrelevant to whether he can assert a share in the ownership of the

musical copyright in the Work resulting from his contribution to its composition. The issue of course remains live since the musical copyright continues to endure and will do so for many years to come. It is plainly a right of some value. The question is whether after so many years since the Work was first recorded a fair trial of the issues is any longer possible.

18. For the defendants, Mr Andrew Sutcliffe QC, appearing with Mr Richard Edwards, submitted that it is not. He submitted that a delay of so many years before issuing his claim, even though the claim was not statute barred, was obviously prejudicial in that there were what he referred to as “known unknowns”. He mentioned, by way of example, the form that the Song took when it was the subject of a “demo” recording made before Mr Fisher’s involvement with Procol Harum even began but which has since been lost. (The existence of the demo, it seems, only came to light just before the start of the trial, Mr Brooker having in the meantime entirely forgotten about it.) Also to be considered, said Mr Sutcliffe, was what relevant evidence might have been given by persons who have since died, for example Mr David Platz of Essex Music who, according to a letter by him to Mr Brooker dated 7 March 1967, pronounced the Song (as it then existed) “a certain hit” but who died in 1994. Then there was Mr Cordell, the producer of the successful recording of the Work, who died in 1995. Mr Sutcliffe mentioned also Mr Guy Stevens who had brought Mr Brooker and Mr Reid together and who was closely involved with Procol Harum in its early days but who died in 1981. Mr Sutcliffe also referred to what he described as “unknown unknowns” namely, in his words, “things that we don’t know we don’t know but which if we did know them might have a crucial bearing on the case”. It was, he submitted, fundamentally unfair that the defendants should be called upon to answer Mr Fisher’s claim in such circumstances. He referred me to comments by Lewison J in Barrett v Universal-Island Records Ltd [2006] EMLR 567 at 629 (para 205).
19. Of all the issues in this dispute, this is the one that has most troubled me. I do not doubt that in appropriate circumstances the court has power to dismiss a claim where, with the passage of time, it is no longer possible to have a fair trial of the issues. The question is whether that point has been reached in this case. It is separate from the question whether, even if Mr Fisher establishes his claim, he should be denied any particular relief by reason of his excessive delay in bringing his claim, for example by reference to the defence of laches.
20. In weighing Mr Sutcliffe’s submission on this question, I have had the advantage of considering matters after the evidence has been heard. The key issue affected by the delay is: who composed the distinctive eight bar melody of the organ solo, including the variation during its second repetition. There are only two contenders: Mr Fisher and Mr Brooker. (Both, I should add, struck me as honest witnesses.) Although there were inevitably many matters which neither could remember, both seemed well able to recall the broad course of events and, in particular, the roles each had played in the process of composition. Indeed, Mr Sutcliffe himself described Mr Brooker’s description of the way he came to compose the Song as “impressive in its detail”. Mr Reid was also able to speak to events. It was not suggested that the passage of so many years has meant that other band members (or Mr Eyden) were no longer available or, if available, were no longer in a position to add to what those three could say. It was not clear to me what Mr Cordell, much less Mr Stevens could have contributed to the matter over and above what Mr Brooker and Mr Reid were able to recall. Nor what

additional light Mr Platz might have been able to shed.

21. More importantly and, contrary to what one might have thought from simply reading his witness statement, the clear burden of Mr Brooker's oral evidence, to which I shall come in more detail later, was not that he, Mr Brooker, composed the precise melodic line (transcribed, as I have mentioned, as cd18 and cd19 in Mr Fisher's witness statement) which features in the organ solo - he accepted that it was Mr Fisher who did that - but that the form taken by that melodic line was circumscribed by and effectively dictated by a descending baseline in the Song that he had composed before Mr Fisher had become involved and that its character was inspired by the Bach-like flavour of the Song's original piano accompaniment. In short, this was not a case where each of the two contenders was claiming to have written the same notes. To this extent, therefore, there was really no contest.
22. This fact in my view takes much if not all of the force out of Mr Sutcliffe's demo point. Moreover, it is not clear when the demo was made. For all the court knows, the demo was destroyed once the Work was released and became such an immediate success. I am quite unable to say that but for Mr Fisher's delay in bringing his claim, the demo tape would have been available for the court to hear and evaluate.
23. The fact that Mr Brooker appeared to recall how and when the Song came into being does not exclude the possibility that Mr Brooker may have been deluding himself and that he may simply have forgotten that he wrote the precise melodic line of the organ solo. I have to say, however, that I think that most unlikely and for two reasons. First, it appears that over the years Mr Brooker (and Mr Reid also) have been asked in interview how the Work came to be written. For example, Mr Brooker was interviewed about this by a Mr Claes Johansen in April 1983. Mr Reid had been interviewed by the same person just over a year earlier. It is not therefore a matter which neither has had any reason to think about for almost 40 years. Second, a matter as fundamental to the Work as knowing who it was who devised the distinctive and famous organ solo is scarcely likely to escape the memory of those who claim authorship. The issue is far removed from many which the court is called upon to determine where, as is notorious, a witness can easily persuade himself, even after a relative short lapse of time, that a particular conversation took place or that he saw a particular event or that he reached a particular agreement when, in truth, he did not.
24. With these considerations in mind, I have come to the conclusion that the passage of so many years has not rendered a fair trial impossible. I should add that in reaching that conclusion I have felt quite unable to attach any weight to Mr Sutcliffe's "unknown unknowns" point. I do not think that, even on an issue of this kind, the court can proceed on such a wholly speculative basis.

How the Work came to be written

25. Mr Brooker and Mr Reid had been introduced to one another in 1966 by Mr Stevens, who was a mutual friend. Mr David Platz of Essex Music encouraged the two of them to work together, Mr Brooker composing the music and Mr Reid writing the lyrics.

By early 1967 they had written a number of items. Among them was the Song. I accept that by 6 March 1967, the day preceding David Platz's letter to Mr Brooker, a demo had been made of it. I accept Mr Brooker's evidence that all the demos he made at that time, including therefore the demo of the Song, were of him on his own, ie singing the song and playing the piano but without any other accompaniment. Mr Platz considered the Song to be "a certain hit" and, as I have mentioned, on 7 March 1967 Mr Brooker and Mr Reid assigned to Essex Music their copyright in the words and music of the Song which, at that stage, had four verses.

26. In the edition of Melody Maker for the week ending Saturday 25 February 1967, Mr Fisher had advertised his services as a Hammond organist with a view to joining a professional group. Apparently, having a Hammond organ (as Mr Fisher had) gave him an edge over other organists. As it happens, four weeks earlier Mr Brooker and Mr Reid, acting with Mr Stevens' assistance and encouragement and wanting to form a band, had themselves placed an advertisement in Melody Maker. It appeared in the edition for the week ending Saturday 28 January. They were seeking a lead guitar player, a bass guitar player and an organist.
27. Mr Reid answered Mr Fisher's advertisement. The result was that a week or so later Mr Brooker and Mr Reid visited Mr Fisher's home in Croydon where, at the time, he was living with his mother. Not surprisingly after almost 40 years, Mr Fisher's recollection of their first meeting differed from that of Mr Brooker and Mr Reid. The principal difference was whether on that occasion Mr Fisher heard a rendering of the Song. He thought that he did not but accepted that he may have been provided by Mr Reid with a typed copy of the lyrics. Mr Brooker thought that he did play the Song. He recalled performing it on the Bechstein piano in the Fishers' house. I do not think that this difference of recollection much matters. For what it is worth, I prefer Mr Brooker's account.
28. A few days after their initial meeting, Mr Fisher telephoned Mr Reid to say that he would be interested in joining the new band as its Hammond organist. He turned out to be just what Mr Brooker and Mr Reid were looking for and he duly became a member of Procol Harum. Straightaway the band, at that stage comprising Mr Brooker as pianist and vocalist, Mr Knights on bass guitar, Ray Royer on lead guitar, a person known only as "Tubs" as drummer and Mr Fisher on his Hammond organ, began rehearsing the material that Mr Brooker and Mr Reid had written, including the Song. Initially they rehearsed at a school hall in Chalk Farm. Later they moved to a church hall in Stockwell.
29. I accept Mr Brooker's evidence that, so far as the Song was concerned, what the band rehearsed was what he and Mr Reid had already written. But that is not to say that the Song was the same as the Work, ie as it was heard when first released as a single in May 1967. At that very early stage, the Song had four verses and lasted around ten minutes. At the start of the Song and at the end and also between each verse and chorus there was an instrumental section, making five such sections in all. During early rehearsals piano and organ alternated the instrumental sections. More importantly, Mr Brooker and Mr Fisher were improvising their respective instrumental sections over the original chord sequence that Mr Brooker had composed. As Mr Brooker put it, they were "inventing" and "improvising". Asked by Mr Iain Purvis

QC, appearing with Mr Hugo Cuddigan for Mr Fisher, whether, apart from the chords, the instrumental section would be different each time the Song was rehearsed, Mr Brooker stated that he did not think that the instrumental sections “would necessarily have been vastly different but it wouldn’t have been exactly the same either”. In particular, accepting that each musician had his own ideas when improvising, he agreed that Mr Fisher’s improvisations would not be the same as his own and that, when playing the piano, he (Mr Brooker) “did not play what Matthew Fisher played on the record”.

30. This was in accordance with Mr Brooker’s approach to the role of the band’s members which was that each would make his own contribution. In short, although Mr Brooker had supplied the Song (ie the sung verses, using the lyrics written by Mr Reid, and the chorus together with a piano accompaniment comprising chords with, as Mr Brooker put it, “some individual notes that run between the chords”), it was up to Mr Fisher as organist to improvise his own accompaniment. Or, as Mr Brooker accepted, the philosophy of the band was that the different musicians each made their own musical contributions. The result was, as I accept, that the individual musicians would feed off each other in what they improvised.
31. In due course it was decided that the number of verses should be reduced, ultimately to just two with the instrumental sections reduced in number accordingly. It was also decided that Mr Fisher would perform all of the instrumental sections on his Hammond organ.
32. Against that general background of how the band worked and how the Song became to be structured, the key question is to decide to what extent the Work as recorded differed, so far as the organ part was concerned, from the Song which Mr Brooker had presented to the band for rehearsal. In particular, to what extent was the melodic line of the organ part Mr Fisher’s own invention?
33. A constant theme in the evidence of Mr Brooker and Mr Reid was that, as Mr Brooker put it in paragraph 28 of his witness statement:

“In spite of the differences between the piano and the organ, what was played by Matthew [Fisher] in rehearsal, and on the recording, both in harmonic and melodic terms, was essentially the same as what I had composed at the piano.”

Or, as Mr Reid put it in paragraph 11 of his witness statement:

“The difference between [the Song] as it was when Gary [Brooker] and I wrote it, and the version of [the Song] released on the record [ie the Work] was that the song was much longer when we first wrote it. Otherwise it’s the same. It had the introduction and melodies that everyone recognises. Of course, in the recorded version they are adapted and played on the Hammond Organ. And obviously, the record has a full instrumentation ie drums, bass, lead guitar, Hammond Organ,

vocals and piano.”

And in paragraph 13:

“Even with a different organist, the record would have sounded essentially the same.”

34. Françoise Brooker, Mr Brooker’s wife, though claiming no musical expertise but speaking as someone who had attended some of the rehearsals when the Song was undergoing rehearsal so as to become, when recorded, the Work, thought that:

“The song, as Gary played it to me on the piano, was the same as the recorded version and included the now-famous introduction.”

Michael Chittenden, a friend of Mr Brooker going back to before the time the Song was written, recalled how:

“In early 1967 Gary would often sing and hum to me ... parts of a song which he was composing”

and how later, when Mr Brooker played a test record of the Work:

“I specifically recognised the organ introduction, on the test record, from what Gary had been humming earlier in the year.”

35. By contrast, it was Mr Fisher’s evidence that when it came to the recording of the Song he decided that he would construct what he described as “a definitive solo”, that he spent some time at home composing the solo, that it received the approval of Mr Brooker and the other members of Procol Harum when he played it over to them and that, by agreement, it was incorporated into the Song when they performed it for the purpose of the recording.
36. His evidence was that just as the vocal part and chorus, together with the descending bass line which underlies the organ solo, were written by Mr Brooker and inspired by JS Bach’s Air on a G String (which, in the Jacques Loussier version, provided the musical background to a famous advertisement for Hamlet Cigars familiar at the time to anyone with ears to hear), he, Matthew Fisher, found inspiration for the organ solo in another of JS Bach’s works, namely “Wachet auf, ruft uns die Stimme” (“Sleepers awake, the voice is calling”). Having decided that he wanted to incorporate something which reflected that piece in the organ solo, he adapted it, by small changes in note value and pitch, so that it could be combined with the descending bass line provided by Mr Brooker with its echoes of Air on a G String. The working in of this reference to Wachet Auf led to Mr Fisher making, he said, a small alteration to the bass line in bar 8, namely the substitution of a root position G chord for a bass C on the first beat of the eighth bar and the substitution of two first-inversion chords, F and G7, in place of a bottom G in the second half of the eighth bar.
37. Although maintaining that, in spite of the differences between piano and organ, the

Work was essentially the same as what he had played on the piano, Mr Brooker nevertheless accepted that Mr Fisher's changes to the chord sequence in the eighth bar were because the existing bass line in that bar did not fit in with what Mr Fisher had constructed. He accepted that the organ solo was the result of a careful creative process on Mr Fisher's part and that it was a melody in its own right which he, Mr Brooker, had not played before. The particular passages from Mr Brooker's cross-examination where he accepted that this is what happened were as follows:

“Q. In performance terms, but Mr Fisher's evidence is that he was concerned to make sure that that instrumental section was the best it could be and therefore he spent some time in putting it together and composing the thing that he would ultimately play. That makes sense, doesn't it?

A. It makes sense that he would have thought about what he was going to play in going in to make a demo or on the recording. He had already thought about it by then. You know, it was being played like that on the demo.

Q. You had given him the job effectively of taking those solos and it was his responsibility to create the best solo he could, wasn't it?

A. Yes.

Q. What he ended up with and the solo --- let's take the introduction to the solo that he recorded, both on the demo and on the ultimate record as sold, was the result of that careful composition[al] process, wasn't it?

A. Might I just ask this. When somebody says composing, is there really a definition of what that means?

Q. Let's use a more neutral term. A careful creative process?

A. It was a careful creative process, yes.

MR JUSTICE BLACKBURNE: On whose part?

A. On Matthew's part.”

And later:

“Q. You are not claiming responsibility for bars 3 to 6 which are the references to Wacht Auf that Matthew gave evidence about two days ago?

A. I know that I very often play an F in that third bar. Quite a long note.

Q. Perhaps we can cut through it. This is a melody which is complete in its own right, isn't it? It's a tune that stands by itself.

It's not just a series of unconnected bars?

A. No.

MR JUSTICE BLACKBURNE: Do you agree with what he is putting to you?

A. I agree that it is a melody, that top line, yes.

MR PURVIS: And that melody is Mr Fisher's melody. It's his tune, he came up with it?

A. Again I would say that not all of those notes were thought of by Matthew. They were based upon what he had heard me play or even the way I had improvised it at times. He ended up with these notes which he repeated.

Q. Which in this form had not been played by you? It's Matthew's composition?

A. I will say this. In this form on these eight bars, is it?

Q. Yes.

A. I had never played that all the way through, those eight bars, that melody."

38. It is also of interest to note what Mr Reid's view was of Mr Fisher's participation in the process of composition when interviewed about the Work by Mr Claes Johansen in early 1982. Omitting conversational hesitations Mr Reid stated there were "three things about that record [the Work] that are important ...There's the song, Gary's singing and the organ playing ...". A little later he stated: "...the organ player ...plays whatever he thinks of playing ...so ...Matthew contributed his organ part, just the same as if there had been another organist, he would have played something else...". Yet later he stated: "...that particular song [ie the Song]... gave him [Mr Fisher] probably the scope to write a part ...He didn't write the chord sequence...Gary wrote the song, so the organ part ...he made up his part to play over ...the organ sequence. I mean ...the chord sequence". It is clear that, at that time at least and in marked contrast to his evidence before me, Mr Reid considered that it was Mr Fisher who wrote the organ part.
39. Mr Sutcliffe placed great emphasis on the fact that in a statement which Mr Fisher had made in 1989 in connection with legal advice he sought at that time as to whether he could bring a claim (the statement was disclosed late in the course of these proceedings), there was no mention of Bach's Wacht Auf. He also drew my attention to the fact that in a passage in that same statement concerned with how he agreed to construct the organ solo and how he did so at home on his piano, Mr Fisher referred to "selecting what I considered to be the best ideas that I could remember using at rehearsals". This showed, said Mr Sutcliffe, that Mr Fisher was doing no more than adopting, or at any rate adapting, what he described as "Mr Brooker's original Bachisms".

40. I am unable to deduce from that short passage any acceptance by Mr Fisher that he was doing little more than copying what Mr Brooker had earlier performed. At most, Mr Fisher was building upon “ideas” used in the course of rehearsal. The passage did not even suggest that the ideas came from Mr Brooker. Nor is it significant that the statement fails to mention Wachtel Auf. It refers instead to writing something “along the lines of a Bach Choral Prelude”. Bach’s Wachtel Auf is just that: a chorale prelude. In short there is nothing in the statement which contradicts the essential thrust of Mr Fisher’s evidence which was that, inspired by the Bach-like flavour of the Song, it was he who came up with the distinctive organ solo.
41. Mr Fisher’s contribution to the Work was not confined to the organ solo and the small amendments to the bass line of the eighth bar of the solo. Indeed, the organ is heard throughout the four minutes of the work. It accompanies the vocal parts (the two verses and chorus) but in a subsidiary role. I did not understand it to be in dispute, but in any event I find, that Mr Fisher wrote the organ accompaniment to the vocal parts. Its form in that subsidiary role is dictated by the melodic line of the sung part and in itself is not particularly distinctive (with the possible exception of two bars of descending four-note sequences in the 13th and 14th bars of each 24 bar section). Bars 17 to 20 of the section comprise eight descending chords struck on the first and third beats of each bar. They are of no particular originality and do no more than follow the descending bass line. If Mr Fisher’s only contribution to the Work had been the organ accompaniment to the sung parts, it would be a nice question whether that contribution would qualify to entitle him, other things being equal, to be regarded as a joint author of the Work. It is not a question that I have to decide since, at the end of the day, I am concerned with Mr Fisher’s contribution to the Work as a whole, prominent in which, as I have described, is his composition of the very distinctive organ solo.
42. Reviewing the evidence as a whole, it is abundantly clear to me that Mr Fisher’s instrumental introduction (ie the organ solo as heard in the first eight bars of the Work and as repeated) is sufficiently different from what Mr Brooker had composed on the piano to qualify in law, and by a wide margin, as an original contribution to the Work. The result in law is that Mr Fisher qualifies to be regarded as a joint author of the Work and, subject to the points to which I shall next turn, to share in the ownership of the musical copyright in it.
43. Before coming to those points I should mention that towards the start of his evidence-in-chief Mr Sutcliffe invited Mr Brooker to give a solo keyboard and vocal performance of what he recalled as the state of the Song before Mr Fisher contributed his organ solo. This evidence seemed to me to be of very dubious value. But, for what it was worth, there was scarcely any trace in the performance of the Wachtel Auf reference which features in Mr Fisher’s organ solo. Rather, the Bachian flavour, over and above the descending bass line echo of Air on a G String, derived from another piece by JS Bach, later identified by Mr Oxendale as the second movement of Bach’s Keyboard Concerto No 5 in F Minor (BMV 1056). It is, of course, very difficult to believe that what Mr Brooker played in court was the same as the Song in its completed form before Mr Fisher became involved, now almost 40 years ago, although Mr Brooker seemed to think that what he played would have been like the Song as it then existed. What, however, was of interest about this exercise was that, structurally, the piano accompaniment consisted principally of a series of chords struck on each beat of each bar. Overall, there was nothing akin to the flowing organ melody which is such a

distinctive feature of the Work.

The arrangement point

44. It is well established that the fact that a musical work is an arrangement of an earlier copyright work does not mean that the arrangement cannot attract a separate copyright. The question is whether by comparison with the original work the arrangement exhibits a sufficient degree of originality, namely the application by its author of skill and labour in its creation (beyond what is involved in reproducing the original work). If it does the arrangement is capable of constituting a separate copyright work. In principle the degree of originality required is no different from what is required in order to establish copyright in any other work (whether a work of sole authorship or one of joint authorship). See Redwood Music Ltd v Chappell & Co Ltd [1982] RPC 109.
45. There was more than a hint in the expert report of Mr Oxendale (see paragraphs 7.4.3, 8.21, 8.22, 8.28 and 11.11) that where the arrangement is the result of a collaborative effort on the part of members of a band, each contributing his own skill and labour to the production of an overall copyright work, nevertheless, because the skill and labour relates to the creation of musical elements of the arrangement of the original work and not to the composition of the original work itself, the person or persons so contributing should not be entitled to any share in the copyright in the resulting work. In such circumstances, as I followed his report, copyright in the arrangement should remain wholly in the creator of the original work. This view appeared to derive from what, in section 10 of his report, Mr Oxendale referred to as “custom and practice in the music industry”. Thus in paragraphs 10.26 and 10.27, Mr Oxendale observed:
- “10.26 I myself have been a member of a number of bands since the early 70s and I have frequently been involved in scenarios such as that involving Mr Fisher where I and other band members have been presented with a song in a similar state to that of the Song described by both Mr Brooker and Mr Fisher (ie a finished work in terms of vocal melody, lyrics, structure and form) and asked to ‘rehearse it up’ for either recording or live performance or both.
- 10.27 In many instances, significant and original musical material in the form of solos (whether improvised or developed into extra musical parts), intros, outros (codas), musical ‘hooks’, countermelodies and secondary melodies has been input into the arrangement by myself and other band members but, to the best of my knowledge and belief, none of my fellow band members would ever have considered himself to be a joint author of the song.”
46. In view of the cases that have come before the courts (for example Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45 and on appeal at [2003] EWCA Civ 143; [2003] EMLR 18), the practice to which Mr Oxendale refers is plainly not universally shared. But whether or not, in the instances envisaged, band members consider themselves to be joint authors of the song - if by that is meant the musical

work that is the product of the collaborative rehearsal process which Mr Oxendale describes - the fact is that, in law, whether under the Copyright Act 1956 ("the 1956 Act") (the provisions of which apply to the questions I have to decide) or under the Copyright, Designs and Patents Act 1988 ("the 1988 Act"), provided the contribution of the individual band member to the overall work is both significant (in the sense that it is more than merely trivial) and original (in the sense that it is the product of skill and labour in its creation) and the resulting work is recorded (whether in writing or otherwise), that band member is entitled to copyright in the work as one of its joint authors and to any composing royalties that follow. This assumes, of course, that there is no contractual arrangement to the contrary.

47. Mr Sutcliffe rightly did not seek to advance any submission along the lines suggested by Mr Oxendale's report. Nor could he properly do so as no pleaded case was advanced on that basis. Instead, he had an altogether more subtle argument. It derived from, and depended upon, the existence of the earlier demo recording of the Song which Mr Brooker had made (of himself alone both singing and playing the piano) on some date prior to 7 March 1967. (That demo is not to be confused with demo recordings of the Work as played by Procol Harum which were made at the Marquee Studios in Wardour Street in March or early April 1967 and which predated the recording made at the Olympic Studios in Barnes from which the master recording of the Work as released on 12 May 1967 was made.)

48. The argument ran thus. (1) The Brooker demo, so soon as it was made, gave rise to musical copyright in Mr Brooker - as composer of the music - in the Song recorded on it (see section 49(4) of the 1956 Act); (2) the Work was an arrangement of that earlier copyright work (see section 2(6)(b) of the 1956 Act) with the result that, at best, Mr Fisher's claim is to be a joint owner of the copyright in an arrangement; (3) that being so, the arrangement, if it was not to be an act restricted by copyright (by sections 2(5)(a) and (f) of the 1956 Act), required the licence of the copyright owner of the original work, ie the Song as recorded on the Brooker demo (see section 1(2) of the 1956 Act); (4) by the time the arrangement (ie the Work) was made, copyright in the Song had been assigned to Essex Music (by the assignment dated 7 March 1967); (5) although Essex Music consented, ie gave its licence, to the arrangement of the Song which resulted in the Work, it was entitled to impose its terms for doing so; (6) that consent did not extend to an acceptance that Mr Fisher should have any separate rights in the arrangement (ie the Work); (7) ergo, Mr Fisher has no such entitlement; (8) alternatively to (7), Essex Music licensed the making of the arrangement on the condition or understanding that it would control the copyright in the arrangement and be entitled to collect all royalties and other income derived from its exploitation and that therefore Mr Fisher could not assert any copyright in the Song or in any version of it; (9) the condition or understanding on which Essex Music's licence was given was express, if Mr Fisher's account of his conversation with Mr Brooker and Mr Reid in the summer of 1967 is accepted, but in any event is to be implied either by reason of the fact, as they confirmed in their oral evidence before the court, that if in 1967 Mr Brooker and Mr Reid had been asked by Mr Fisher for a copyright share in the arrangement (ie in the Work), they would have refused, or by reason of the failure of Mr Fisher for nearly 40 years thereafter to claim or assert any right to a share in the copyright in the arrangement (ie the Work) or any right to share in other income from its exploitation.

49. Enlarging on that argument Mr Sutcliffe submitted that the arrangement could only lawfully be made in the first place because the owner of the copyright consented to it. If, he said, musicians go into a recording studio not expecting to receive any publishing royalties for their efforts, but are content to receive record royalties as band members, the object of the recording session will be defeated if those same musicians are to be permitted after the event to withdraw their consent to the use of their arrangement. Absent any agreement to the contrary, he said, the natural inference to draw from such conduct is that the owner of the copyright in the prior work has consented to the making of the arrangement on terms that the musicians will not share in the publishing royalties.

50. Drawing on the custom and practice to which Mr Oxendale had referred, Mr Sutcliffe went on to submit that it might be argued that the practice of treating only the composer of the prior work as the writer for the purpose of publishing royalties was unfair to the other musicians as it deprived them of the fruits of their creative labours. But this ignored the fact that if the record is successful the musicians will normally benefit from record royalties. He submitted that an approach whereby each musician contributing to the arrangement, provided his contribution is significant (ie non-trivial) and original, can share in the copyright of the arrangement gives rise to practical problems. Thus, if a work exists in multiple versions, each entitling its authors to share in the publishing royalties arising from the exploitation of that version, the work will require multiple registrations with the collecting societies and sophisticated monitoring to ensure that royalties are paid to the correct parties. Second, he said, if the author of the original work is not one of the arrangers, steps will have to be taken to ensure that a share of the arranger's copyright is paid to the owner of that original work. Third, he said, if all the band members are in principle entitled to a publishing royalty, the result will inevitably be a drastic paring down of the share of royalties payable to the writer and publisher of the original work, especially if there is a multiplicity of versions. In those circumstances, he said, it was hardly surprising that this is not something to which writers and publishers have generally agreed. These difficulties can be avoided if regard is paid to what he referred to as "the legal and commercial reality", namely that the owner of copyright in an original musical work, which is not itself an adaptation from an earlier work, is entitled by virtue of his copyright to dictate the terms on which any adaptation of that work is made and exploited.

51. Applying that to the present case, Mr Sutcliffe submitted that Essex Music was entitled as the owner of the copyright in Mr Brooker's original work to dictate the terms on which the exploitation of the arrangement (ie the Work) would be permitted. Even though a new copyright subsisted in the Work, it was up to Essex Music to decide whether or not that arrangement should be exploited and if so whether the owners of the copyright in it should participate in the publishing income. There was no evidence that Essex Music agreed that Mr Fisher should share in the publishing income. But just as Mr Fisher claimed (although Mr Reid and Mr Brooker had no recollection of the matter) that he had approached those two in the summer of 1967, shortly after the Work had been released, to obtain their agreement to him having his name on the Song but that they would not do so, similarly, said Mr Sutcliffe, it was to be inferred that if Mr Fisher had approached Essex Music for such recognition, he would have received the same response. In fact, said Mr Sutcliffe, Mr Fisher's evidence was that, having got nowhere when he approached Mr Reid and Mr Brooker, he saw no point in taking the issue up directly with Essex Music. Thereafter, the arrangement was exploited for

nearly 40 years without objection from Mr Fisher. In these circumstances, said Mr Sutcliffe, it was to be inferred that Mr Fisher agreed that his arrangement was to be exploited on terms that he would never share in the publishing income, in short, that he would not assert any interest in the musical copyright to the Work.

52. Before coming to the argument itself, I make the following general observations. The first is that the argument assumes that the Work is an arrangement, ie an adaptation, of the Song. Mr Sutcliffe described this as a “fundamental” factor. Although I shall consider the argument on the footing that this is so, I regard the assumption to be somewhat unreal. This is because, according to Mr Brooker’s witness statement, and I accept, the whole point of forming Procol Harum was to have a band to perform the songs that he and Mr Reid had written. As Mr Reid put it:

“We [ie Mr Brooker and he] established a regular routine of him composing music for my lyrics. We worked in this fashion for some time; building up a collection of our songs with a view to getting them recorded by established recording artists. However, instead of doing this we decided to take matters into our own hands and perform the songs ourselves. We therefore formed the band Procol Harum.”

Mr Brooker recalled that the Song was one of the pieces he played to Mr Fisher at their first meeting. It was, with other works, what Mr Fisher and the band members began to rehearse as soon as he joined Procol Harum. In short, the whole thrust of Mr Brooker’s evidence, together with that of Mr Reid, was that - so far as the Song was concerned - what was to be performed and recorded and released as a single was a piece of music comprising vocals and band accompaniment, ie the Work (as it became) and not some earlier version consisting simply of Mr Brooker singing and playing the piano.

53. The second is that the argument depends on the existence of the earlier recording, ie the demo made by Mr Brooker some time prior to 7 March 1967. (Indeed, there was no evidence that Mr Fisher even knew of the existence of any earlier demo recording which, as Mr Sutcliffe was at pains to establish, was made before Mr Fisher had become a member of Procol Harum.) The argument simply does not run if there was no earlier fixation of the Song. To that extent, therefore, there is an element of fortuitousness about the argument.
54. Third, at least one of the reported decisions in this field has involved the contribution by a session musician to a musical work when the genesis for the work had already been the subject of an earlier recording. See, for example, Beckingham v Hodgens [2002] EMLR 45 at paragraph 12. The case went to the Court of Appeal (see [2003] EMLR 18). It is a little surprising that the argument now run by Mr Sutcliffe and which he submits provides a complete answer to Mr Fisher’s claim was overlooked in that case. This is not least when the unsuccessful defendant was not slow to raise defences to the claim.
55. Those observations aside and taking the argument on the basis of its two fundamental assumptions, ie that the Song (as performed by Mr Brooker alone) had been recorded

on the pre-7 March 1967 demo tape and that, in law, the Song constituted a copyright work, it is plain, as Mr Sutcliffe accepted, that Essex Music, as owner of the copyright in that earlier work, agreed to the making of the arrangement which resulted in the Work. Since the argument also assumes that Mr Fisher's contribution to the Work was such as to qualify him as a joint author of it, the question is whether any and if so what terms were agreed as between Essex Music and Mr Fisher regulating the basis upon which Mr Fisher made his contribution.

56. The re-amended defence, after pleading that there was no agreement between Essex Music and Mr Fisher that Mr Fisher would share in any income derived from the musical copyright in the Work, goes on to allege that Essex Music's licence to the making of the arrangement "was given on the express or implied condition that all royalties and other income derived from the exploitation of the arrangement would be paid to the owner of the copyright in the Song and that the Claimant [ie Mr Fisher] would not assert any copyright in the Song or any version of it". It pleads that the condition was "express if [Mr Fisher's] account of his conversations with [Mr Brooker] and Mr Reid in the summer of 1967 is accepted", but pleads that the condition is "in any event to be implied by reason of [Mr Brooker] and Mr Reid's evidence that, had [Mr Fisher] asked them for a copyright share in the Song in the summer of 1967, they would have refused his request; and/or ...is to be inferred from the conduct of the parties for nearly 40 years thereafter during which [Mr Fisher] never claimed or asserted any right to share in the copyright of the Song (in any version) or any right to share in the income from the exploitation thereof".
57. In my judgment, it is impossible on the evidence to say that there was any kind of express agreement between Mr Fisher and Essex Music that he would not claim any copyright interest in the Work or that Essex Music's "licence" was given on that basis. This is because there was no evidence of any communications between Mr Fisher and Essex Music relevant to the matter, let alone any that resulted in the agreement or understanding or condition that is alleged. The conversation which Mr Fisher says that he had, initially with Mr Reid and later with Mr Brooker, in the early summer of 1967 (when, according to Mr Fisher, he asserted that his contribution to the Work should be recognised but was met with a rebuff) - a conversation which, as I have mentioned, neither Mr Reid nor Mr Brooker was able to recall - cannot assist in the establishment of any express condition. Not the least of the reasons is that neither Mr Reid nor Mr Brooker represented Essex Music. Even if they did, the conversation in question took place several weeks after the Work had been released and, necessarily therefore, sometime after the Work had been composed and recorded.
58. Nor can I see any grounds justifying the implication of such a term in Essex Music's licence on the basis pleaded. There has to be some agreement between Mr Fisher and Essex Music before any term or condition can be implied into it. But no agreement is alleged. On the contrary, the pleading denies the existence of any agreement. The fact that if Mr Fisher had asked Mr Brooker and Mr Reid for a copyright share in the Work in the summer of 1967, they would have refused, is irrelevant to the alleged implication of a term. Nor can I see that Mr Fisher's silence for nearly 40 years justifies the implication.
59. What other basis can there be for implying such a term? Business efficacy cannot

assist. Nor was it pleaded. That merely leaves reliance on some usage or custom of the music industry to the effect that in circumstances where someone in the position of Mr Fisher contributes to the arrangement of an existing copyright work that person accepts, without more, that he will have no copyright interest in the arrangement, however significant and original his contribution may be. That in substance was what Mr Sutcliffe was driven to rely on.

60. Leaving aside the fact that no such usage or custom was pleaded, the nearest that the evidence got to the existence of such a usage or custom was that of Mr Oxendale to which I have already referred. But that evidence fell far short of what would have to be shown, namely, some invariable and certain usage or custom whereby, absent any agreement to the contrary, the contribution of someone in the position of Mr Fisher would not give rise to such an interest. The existence of such a custom is contradicted by the fact that, over the years, musicians have claimed, and successfully claimed, to be joint authors of musical works as a result of their contributions as band members.
61. The only other matter to which Mr Sutcliffe could point was the standard form of licence agreement (AP.1) issued by the MCPS to enable record producers to make copies of master recordings of musical works within the MCPS repertoire. Clause 9 of AP.1 provides, so far as material, that a producer may make modifications to musical works within the MCPS's repertoire as that producer considers necessary in order to satisfy the requirements of the relevant recording but only on terms, inter alia, (1) that no such modification is to be made which would amount to an adaptation of the musical work unless the relevant member of the Society (ie the copyright owner) has consented in writing to the modification, and (2), by clause 9.4, that neither the producer nor anyone claiming through him nor anyone who carries out such modification may claim an interest in the copyright in the musical work in question, whether in its original or in its modified form, or any share of any income derived from its exploitation, unless the copyright owner otherwise agrees "and any authority or consent contained in this clause or granted by the relevant member of the Society shall unless otherwise agreed be conditional upon no such claim being made". Mr Sutcliffe informed me that this form of agreement, together with other materials, was authorised by the Copyright Tribunal in March 1992 and - this being his point - was reflective of industry practice. Although he could not point to anything similar existing prior to 1992, he submitted that the position was no different in 1967, on the basis that the Copyright Act 1956 was, so far as material, in no different form from the current legislation.
62. In my judgment, aside from this being an unpleaded point, the fact that AP.1 is widely used (as I shall assume it is) and has the blessing of the Copyright Tribunal does not go nearly far enough to demonstrate the existence of some invariable practice within the industry, let alone one that existed in 1967, that the contributor to a musical arrangement will forego any copyright interest in that arrangement to which he would otherwise be entitled.
63. It follows that I do not accept that the existence prior to 7 March 1967 of a demo recording by Mr Brooker of the Song provides any defence to Mr Fisher's claims. The plain fact is that the matter was left at large: Mr Fisher made his contribution as part of a collaborative effort with Mr Brooker and the other band members without anyone at the time considering what, in copyright terms, the consequence was of his so doing.

Subject only to the other defences, the consequence in law was that he qualified as a joint author of what resulted, namely the Work.

The recording contract

64. As I have mentioned, this contract was entered into on 16 May 1967 between Procol Harum, acting by Mr Reid and a Mr Weston as its “Manager”, and Essex Music and New Breed Productions, described in the contract as the “Company”. So far as material the recording contract provided as follows:

“1. The term of this agreement shall be for a period of one (1) year with four (4) successive options to renew this agreement as set out in Clause 4 hereof. During the term of this agreement the PROCOL HARUM agrees to record, and Company will accept commercially satisfactory ‘master’ records of [sic] the equivalent thereof on six (6) record sides at 45 R.P.M. or the equivalent thereof in playing time to be chosen by Company or more if Company shall so desire. The PROCOL HARUM agrees to record such selections at such times during the term hereof, as Company may designate and at Company’s designated recording studio. ... We reserve the right to specify the material recorded, the method and the manner of recording your accompaniment (instrumental and vocal) arrangements and copying in respect of recordings made hereunder and we shall pay the cost of such accompaniment and copying which are specifically undertaken in respect of such recordings.

2. The Manager agrees that during the term of this agreement the PROCOL HARUM will not perform for any other person, firm or corporation for the purpose of making phonograph records. The Manger agrees that the PROCOL HARUM will not perform any selections which they have performed hereunder for any other person, firm or corporation for the purpose of making phonograph records for a period of ten (10) years from the expiration of this agreement. ...

3. In consideration of this agreement and without further payment than as herein provided, the Manager grants to Company, (a) the right to manufacture, advertise, sell, release, license or otherwise use or dispose of in any or all fields of use through the World or in any part thereof, records embodying the performances to be recorded hereunder, upon such terms and conditions as the Company may approve; (b) the right to use and publish and to permit others to use and publish the PROCOL HARUM’s name and photographs; to write and publish and to permit other to write and publish articles concerning the PROCOL HARUM for advertising or trade purposes in connection with the sale and exploitation of Company products ...; (c) the sole and exclusive rights in, titles to, and ownership of, including, but not limited to, the right to use and control all masters, matrices, records, or other reproductions of the

performances embodied in which recordings by any method now or hereafter known, obtained from recordings made hereunder and performances embodied therein; (d) the sole and exclusive right, if Company so desires, to publicly perform the records or to permit the public performances thereof by means of radio broadcast or otherwise; (e) the right to incorporate in records to be made hereunder instrumentations, orchestrations and arrangements owned by the Manager at the time of recording them.

(a) This agreement between us shall be deemed the consent required by Section 1 of the Dramatic and Musical Performers Protection Act 1958 ...”

65. Mr Sutcliffe submitted that to the extent that Mr Fisher made any contribution to the Work it was a contribution to the arrangement of Mr Brooker’s Song for the purposes of a recording and, as such, within the scope of clause 3(e) of the recording contract. He submitted that the purpose and effect of clause 3(e) was to secure for the Company all of the rights, apart from the publishing rights in the Song which it (or, at any rate, Essex Music) already had, necessary to exploit the copyright of Procol Harum in all recordings made by it during the term of the recording contract and that the contract, although entered into after the Work was recorded and released, was obviously intended to apply to the Work. He submitted that by entering into the recording contract, Mr Fisher gave his consent to the making of the recording incorporating his contribution to the Work and to the exploitation of the Work by the Company and its successors on the terms set out in the recording contract. He submitted that the result of all of that was that if Mr Fisher were otherwise able to establish any copyright interest in the Work he could have no claim against the Company or its successors in respect of their exploitation of it.
66. Since there was no evidence to indicate that some other recording agreement was entered into to cover Procol Harum’s performance of the Work, released on 12 May 1967, I am willing to assume, as Mr Fisher seemed to accept, that the recording contract applied to the Work even though the Work was recorded some weeks before the contract was made. That said, I have difficulty in understanding quite how the recording contract can assist the defendants. For, even assuming that the recording contract did cover the Work it is quite unreal to go on to argue, as Mr Sutcliffe sought to do, that the Work was no more than an arrangement (within the meaning of clause 3(e)) of Mr Brooker’s earlier Song. If the recording contract applied to the Work at all, it applied to it as a recording of a performance by Procol Harum, not as some kind of an arrangement owned by the band. Moreover, the recording contract was just that: a recording contract. It merely gave to the Company the right to exploit the recording. It did not purport to take from Mr Fisher any copyright interest he had in the musical composition. Equally, Mr Fisher could not in the face of the contract, to which he was a party, assert his copyright interest in the Work to deny the Company the right to exploit the recording in accordance with the contract’s terms. Nor does he seek to do so. In my view the contract is simply irrelevant to the establishment by Mr Fisher of his copyright interest in the Work.

Estoppel, acquiescence and laches

67. Mr Sutcliffe submitted that Mr Fisher's assertion of an interest in the musical copyright in the Work and his claim for relief based on that assertion are barred by estoppel, acquiescence and laches. He identified five specific matters to which these defences were applicable. Taking them in a slightly different order from that in which Mr Sutcliffe dealt with them those matters were: (1) Mr Fisher's failure to assert his claim before the Work was released on 12 May 1967; (2) Mr Fisher's decision in the early summer of 1967 not to pursue his claim but to remain with and benefit from membership of Procol Harum; (3) the circumstances in which Mr Fisher left Procol Harum in August 1969; (4) Mr Brooker's efforts in promoting Procol Harum's repertoire, including the Work, and in keeping it in the public eye for nearly 40 years; and (5) Mr Fisher's long delay in asserting his claims.
68. As was made clear by Oliver J in Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133 at 151 and restated by Jonathan Parker LJ in Beckingham v Hodgens [2003] EWCA Civ 143; [2003] EMLR 18 at paragraph 36, a party who seeks to set up an estoppel (and it matters not whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement) must establish that it would be unconscionable for the other party (in this case Mr Fisher) to be permitted to deny what he has allowed or encouraged the first party to assume to his detriment. Detriment is an essential element. Absent detriment in some form suffered by the party seeking to set up the estoppel, no question of unconscionability sufficient to support an estoppel can arise.
69. As regards the first of the five matters, the contention is that if Mr Fisher had asserted his rights before the Work was first released, Essex Music would have had the opportunity to decide whether to release the Work (ie with Mr Fisher's contribution included) or to re-record it in a different arrangement (ie without the organ solo and with a different organ accompaniment), and that, as a result of Mr Fisher standing by and saying nothing until after the Work was released, Essex Music was denied that opportunity. While the defendants cannot now say what action Essex Music would have taken if Mr Fisher had raised his claim before 12 May 1967, nevertheless, said Mr Sutcliffe, the possibility that another and different version of the Song would have been made and released "cannot be dismissed out of hand".
70. I am of the view that this defence fails. The complaint is not that Mr Fisher said or did anything to encourage Essex Music to believe that he would not be asserting a copyright interest but that he kept silent: he failed to assert his rights. There was certainly no evidence that he indicated in any way that he was foregoing his rights. Indeed, it was not established, and it was not put to Mr Fisher in cross-examination, that at any time up to the release of the Work he had any clear appreciation of his right to share in the musical copyright which he might wish to forego or, if he did, that he had any awareness that by failing to assert his claim (assuming that he knew it to be the copyright owner in the original Song) he might have allowed or encouraged Essex Music to think that he would forego any claim. Second, it is not clear in what way Essex Music has suffered detriment. The Work was an extraordinary success from the moment it was released. It rose to the top of the UK charts where it remained for six weeks. There was unsurprisingly no evidence to suggest that if Mr Fisher had raised

his interest with Essex Music before the release and had insisted on his claim, Essex Music would have abandoned the recording and produced another (necessarily one which did not contain Mr Fisher's organ part) which would have been at least as successful as the Work was. Any idea that this might have happened is the purest speculation. At least as likely is that, appreciating the quality of the Work as recorded and acknowledging, as this defence necessarily assumes, that Mr Fisher had contributed to the Work by his composition of the organ part, Essex Music would have been only too willing to acknowledge his role in the authorship of the Work.

71. The second of the five matters, namely Mr Fisher's decision following his abortive meeting with Mr Reid and Mr Brooker in the early summer of 1967 (assuming that the meeting took place) not to pursue his claim but to remain with and continue to enjoy the benefits of membership of Procol Harum, depends on a remark contained in the statement (referred to earlier) which Mr Fisher prepared in 1989 in connection with advice he sought at that time as to whether he had and should pursue a copyright claim. As I have mentioned, the statement was only disclosed in the course of these proceedings. As it had not been previously communicated to the defendants at any relevant time, I am unable to see how the defendants can rely on it as giving rise to the pleaded estoppel.
72. The slightly wider point urged in the re-amended defence, that if Mr Fisher had raised his claim at any time after 12 May 1967 he would have been excluded from Procol Harum, has little if any support in the evidence. Mr Brooker himself accepted that he had a general awareness as a result of interviews that Mr Fisher had given that Mr Fisher was unhappy at not being accorded a writing credit for the Work. Yet the two continued to perform together from time to time over the years. They continued to perform together notwithstanding other disputes between them. But even if Mr Fisher had squarely raised his claim with Mr Brooker and had been required to leave Procol Harum, it is not enough to show, as the pleading alleges, that Mr Fisher would have been excluded from Procol Harum and would therefore have ceased to benefit from his association with Mr Brooker. The question is whether, as a result, the defendants or either of them suffered detriment as a result of his failure to speak out. I am quite unable to see that they have.
73. The third of the five matters concerns the circumstances in which Mr Fisher left Procol Harum in August 1969. It appears to be the case - and I shall assume although the documents which have survived from that time barely support it - that when Mr Fisher and Mr Knights left Procol Harum in 1969 they were released from the band's debts in return for giving up their right to artists' royalties on issued recordings to which as band members they were entitled. That was certainly the understanding of Mr Brooker and Mr Reid, and Mr Fisher did not deny that this was so. In their witness statements Mr Brooker and Mr Reid both stated that if at that time they had known of Mr Fisher's intention to claim a writer's share of the Work they would not have released him from the debts without first resolving the issue of that share. The contention is that Mr Fisher's silence caused Mr Brooker to alter his position to his detriment by agreeing to release Mr Fisher from the band's debts when, if he had known of the claim, he would not have done so or would have done so on more favourable terms.
74. The difficulty about this contention is that, as Mr Brooker accepted, the discussions

which resulted in the agreement to release Mr Fisher (and Mr Knights) from the band's debts in return for the surrender of their share of the performing royalties did not include, and were not intended to include, any composing royalties. The composing royalties to which Mr Fisher was entitled (and there were several arising out of other works) remained unaffected. Or as Mr Reid put it:

“...It wouldn't have occurred to us to have said - to have brought the publishing royalties into it. The debts had been incurred by the band, mostly by touring, tour support, so we felt those things are rightly to do - we were promoting the records. They were to do with record royalties so we wouldn't have considered that publishing royalties should be part of that. We would have thought the fair thing was record royalties. We settled the debts in return for the record royalties.”

In other words, as the debts that were being released arose from the band's performances and touring activities it was only fair that, in return for their release from them, Mr Fisher (and Mr Knights) should give up their share of the profits derived from those performances.

75. It is quite true that, as Mr Fisher did not at the time raise his claim to be recognised as a co-composer of the Work, it is not possible to be certain that the claim would not have entered into the discussions if it had been raised. Not the least of the difficulties in evaluating the contention, however, is in knowing just what Mr Fisher's share of the band's indebtedness was and therefore how much of that share Mr Brooker was personally agreeing to carry in return for Mr Fisher's release. The evidence so far as it went suggested that the additional burden on Mr Brooker was no more than two thousand to three thousand US dollars. On balance I am not persuaded that if Mr Fisher had raised his claim the parting of the ways between him and the other band members would have been significantly different.
76. The fourth of the five matters concerns Mr Brooker's efforts in promoting Procol Harum's repertoire (including the Work) over many years. What is asserted that he did so “in the belief that [Mr Brooker] and Mr Reid were solely entitled to enjoy the fruits of its success and ...were solely entitled to represent themselves as the writers of the Song”. (See paragraph 22(3)B of the re-amended defence). The evidence did not support this interpretation of events. Thus, it was put to Mr Brooker in the course of his cross-examination and he accepted that the fact that he had been named as sole composer of the Work, in contrast to the work being recognised as the composition of himself and Mr Fisher, made no difference to the extent to which he, Mr Brooker, performed the Work over the years. Mr Purvis submitted, and I agree, that any suggestion to the contrary would have been perverse since the Work was by far the most successful song that Procol Harum (or Mr Brooker) ever had. Moreover, he submitted, it was difficult to see how increasing sales of the Work could amount to detriment not least when throughout the whole period down to spring 2005, the defendants had been receiving, between them, all of the musical copyright royalties. In short, the more they have promoted the Work, the more they have earned.
77. Mr Sutcliffe nevertheless submitted that Mr Fisher's position was indistinguishable in

this respect from the claimant's position in Godfrey v Lees [1995] EMLR 307 in that Mr Fisher was seeking to benefit from the efforts of others in a way which was unconscionable after so long a delay. The point about Godfrey v Lees, however, was that it was only as a result of the unceasing efforts of the defendants in that case that the songs in issue achieved any public recognition at all and with that recognition profit for the defendants. There is no comparison between the situation there and the circumstances of this case where the Work was a huge success from the moment that it was released.

78. The last of the five matters is Mr Fisher's long delay before asserting his claims. Of itself delay provides no defence. It might have been different if Mr Fisher had been claiming some form of equitable relief, for example rescission of a transaction entered into as a result of fraud or undue influence, where delay, usually coupled with some other circumstance, may justify the court in denying relief. See, for example, The Lindsay Petroleum Company v Hurd (1874) LR 5 PC 221 and Elton John v Richard Leon James [1991] FSR 397.
79. Mr Brooker said that in October 2003 he and Mr Fisher had a conversation in the course of which Mr Fisher suddenly referred to his belief that he should have had a composer credit in respect of the Work but then stated that he realised that he had no such claim, that "it won't happen" and that he now felt much better in his own mind and more relaxed. Mr Fisher recalled a conversation with Mr Brooker but stated that it took a quite different course. I do not need to reach any findings on what occurred and precisely what was said since even if Mr Fisher did say what Mr Brooker understood him to have said, I cannot see that it assists Mr Brooker. Mr Brooker does not claim to have acted on the faith of what Mr Fisher said on that occasion. In his closing submissions, Mr Sutcliffe only referred to the conversation in order to emphasise Mr Fisher's delay in bringing his claims.
80. In his written closing submissions Mr Sutcliffe referred to other factors which, he submitted, "cannot be ignored when considering the justice of Mr Fisher's claim". He referred to the second defendant having acquired Essex Music's rights without notice of the claim, the fact that Mr Brooker was committed to a publishing agreement under which his participation in royalties is shared with the second defendant whereas Mr Fisher, if successful, will receive his share without any such deduction, the fact that if Mr Fisher had asserted his claim in 1967, he might have been required to assign his interest to Essex Music on the same terms as applied to Mr Brooker and Mr Reid, and that it seemed hardly fair suddenly to deprive Mr Brooker of a portion of the publishing income which he had reasonably regarded as his own for almost 40 years. Sympathetic though I am to some of these points, I fail to see that they give rise in law to any defence to a claim which is otherwise established on the facts.
81. Before leaving the topic of estoppel, it is worth observing that the purpose of the estoppel pleas is to deprive Mr Fisher of the entitlement which he is otherwise able to establish to a copyright interest in the Work, in short to deprive him of a valuable property right. If I had thought that the defendants made out any of their estoppel pleas, I would have had to consider how best to give effect to the equity thereby established. It is now well recognised that in approaching that task the court is likely - and in this case I would have considered it appropriate - to balance the expectation or

assumption generated by the estoppel, namely the non-assertion by Mr Fisher of any copyright interest in the Work, against the degree of detriment suffered by the defendants on the faith of the conduct which has given rise to the expectation or assumption. Or, as it was put by Aldous LJ in Jennings v Rice [2002] EWCA Civ 159; [2003] 1 FLR 501 at [36], “The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment”. See also the observations to similar effect of Robert Walker LJ at [56] in the same case. On the facts of this case, where it is difficult to discern any or any appreciable detriment, it would in my judgment be a wholly extravagant and unjust result to deprive Mr Fisher for the remainder of his life and 70 years thereafter of his interest in the Work’s musical copyright on the basis of the estoppels that have been pleaded, the more so when for almost 40 years the defendants have enjoyed the fruits of that copyright interest without the need to account for any part of them to Mr Fisher.

82. It follows that these defences all fail.

Relief

83. Mr Fisher claims various forms of relief.

(1) A declaration

84. I do not accept Mr Sutcliffe’s submission that the grant of declaratory relief is subject to the kind of equitable considerations that come into play when the court is asked to grant equitable remedies, although I accept that whether in a given case a declaration should be granted is a matter for the court’s discretion.

85. That said, I can see no reason why I should not grant the declaration that Mr Fisher seeks which is that he is a co-author of the Work and a joint owner of the musical copyright in the Work. Not only will such a declaration serve to put beyond doubt what his interest is in the musical copyright and thus enable the two collecting societies to adjust their records and account for royalties accordingly, but it will also serve to indicate what Mr Fisher’s rights are in case he should need to enforce them against third parties either here or abroad. Relevant to this is that Mr Fisher’s interest in the musical copyright is a property right. It has many years to run. The fact that, for whatever reason, he has not sought to establish that interest before now does not mean that, by declining a declaration, the court should make it difficult for him to vindicate and enforce that interest, so long as it lasts, in the future.

86. I propose therefore to grant the declaration as sought. I consider later what his share should be.

(2) An injunction

87. Mr Purvis submitted that by continuing to exploit the musical copyright in the Work

and by authorising others to do so, notwithstanding that any implied licence by Mr Fisher to permit this has been revoked, the defendants are or will be infringing his copyright and therefore that an injunction should issue to prevent that from happening. He does not seek to restrain any exploitation of the Work within the scope of the arrangements with the two collecting societies since, as a member of both, Mr Fisher has authorised them to license others to undertake such activities and once his interest in the musical copyright is recognised and given effect to by those two societies he will receive his appropriate share of the royalties arising as a result of such licensed activities. The concern is with any exploitation of the musical copyright in the Work directly carried out or authorised by the defendants.

88. I did not detect any intention on the defendants' part to continue to exploit the musical copyright in the Work in defiance of any interest in it which Mr Fisher is able to establish. The fact that in the pleadings the defendants intimated an intention to continue to exploit or authorise others to exploit the copyright in the Work, which was a point relied on by Mr Purvis, must be understood in the context in which the plea was made, namely a denial that Mr Fisher had any interest in the musical copyright. It does not follow, and I do not consider that the evidence justifies a finding, that if Mr Fisher should be able to establish an interest the defendants would simply ignore that fact and proceed as if he had none.
89. In the circumstances therefore I decline to grant any injunctive relief. It is premature to grant it.

(3) A restitutionary claim

90. Mr Fisher claims payment to him by the defendants of his share of the monies paid out to them by the two collecting societies in the six years before the issue of these proceedings.
91. The two societies make payments to persons who are registered with them as owners of the musical copyright in a particular work, as at all material times the defendants have been recognised to be in respect of the Work. (There are differences between how the two societies operate but it is not material to set out what they are.)
92. The basis for the restitutionary claim is that because Mr Fisher was not registered as an owner of the Work with either society, although by virtue of his interest in the Work he should have been, the defendants have received a greater share of the royalties than they should. This happened because registration occurred on the mistaken basis that Mr Brooker alone was author of the music in the Work. The result, submitted Mr Purvis, was that for 38 years or so prior to the issue of these proceedings the defendants have been unjustly enriched at Mr Fisher's expense and they should now be made to disgorge the amount that they unjustly received. He accepted that this must be confined to the limitation period.
93. Mr Purvis submitted, in reliance on a passage from the judgment of Parke B in Kelly v

Solari (1841) 9M&W 54 and 58, that where money is paid to another under the influence of a mistake in circumstances where if the true facts had been known the money would not have been paid, an action lies to recover the money and it is against the conscience of the recipient to retain it. He submitted that the necessary elements of such a claim were present here in that the two societies had paid monies to the defendants on the supposition that they were entitled to 100% of the musical copyright in the Work whereas, in truth, they were not and instead a part of it should have been paid to Mr Fisher (who at all material times has been registered with the two societies). He submitted that it did not matter that it was not Mr Fisher who had made the payments but the two societies (as recipients of the royalties received by them in respect of the exploitation of the musical copyright in the Work by licensed third parties) since the decided cases recognise the ability of the true owner to recover money which was rightfully his from the person to whom the money in question had been wrongly paid by the collector of the money. He cited as an example Lyell v Kennedy (1889) 14 App Cas 437. He referred me also to various passages from Goff and Jones on The Law of Restitution.

94. I am not persuaded that Mr Fisher establishes any restitutionary right against the defendants. I was not taken to any authority directly applicable to circumstances comparable to those in this case. The plain fact is that Mr Fisher has sat back and permitted the two societies to account to the defendants for royalties in respect of the musical copyright in the Work for nearly 40 years. The fact that he may have had no awareness of his right in law to share in the royalties or had felt unable to vindicate his claim in the meantime (whether because of poor advice or for other reasons) does not seem to me to matter. For so long as the societies had no knowledge of Mr Fisher's claims, they had no option but to account to the defendants in the way they did. For so long as Mr Fisher chose not to make and establish his claim the defendants had no reason to think that they were not entitled to the payments they received. Moreover, for so long as Mr Fisher allowed the societies to account to the defendants, notwithstanding his long held belief that as co-writer of the music he was entitled to share in the musical copyright or at the least to be recognised as having co-written the Work, he must be taken to have gratuitously licensed the exploitation of his copyright. That implied licence must have continued at least until 19 March 2004 when, through his then solicitors, his claim was first intimated to Mr Brooker. Even then it was scarcely clear from the letter that he was revoking the licence. In my view any revocation of the implied licence only came about, at the earliest, when his present solicitors sent their letter before action to Mr Brooker. That was in April 2005. It was only in May 2005 that his solicitors notified the second defendant of any claim.
95. Given those circumstances there is, in my judgment, no injustice to Mr Fisher in the fact that the defendants have received all of the royalties prior to receiving the letters before action. The claim was issued on 31 May 2005. In my judgment, any right by Mr Fisher to share in the royalties only arose from that time.

The share

96. 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. In Bamgboye v Reed [2004] EMLR 5 the court declared the claimant to be entitled to a

33% share in the musical copyright.

97. Mr Fisher's pleaded claim was for a 50% share. No positive case was advanced by the defendants against that result assuming, contrary to their defence, Mr Fisher was successful in establishing a copyright interest. Mr Oxendale endeavoured to grapple with the point in the course of his evidence in re-examination. He did so with my permission notwithstanding that the defendants' evidence had not addressed the point and notwithstanding that the question had not arisen out of Mr Purvis' cross-examination of Mr Oxendale. As it turned out Mr Oxendale considered that, in terms of quantity and quality, Mr Fisher's contribution might be thought to justify a three-eighths' share. Mr Purvis submitted, however, that it would be wrong for the court to have regard to Mr Oxendale's evidence on the point since he had said nothing about it in his written report and Mr Fisher had not therefore had the opportunity to obtain his own expert report on the matter.

98. It is true that the defendants have not advanced a positive case on their pleadings on this point. On the other hand they have made no admission either. It seems to me that I have to grapple with the point. Having heard what Mr Oxendale had to say on the matter, which was no more than a calculation of the percentage involvement quantitatively of the organ part in the overall Work tempered by a subjective assessment of the significance of that involvement, I did not find that his views provided any assistance beyond what I could assess unaided by his expertise. In any event I had the impression that what he had to say on the matter was very much thought up as he went along. The question ultimately is a highly subjective one. Doing the best I can I have come to the view that Mr Fisher's interest in the Work should be reflected by according him a 40% share in the musical copyright. His contribution to the overall work was on any view substantial but not, in my judgment, as substantial as that of Mr Brooker. As between the two it seems to me that Mr Brooker should be accorded the greater share.

99. The declaration that I am willing to make should reflect that share.