

Case No: CH2008/APP/0204
CH2008/APP/0210

Neutral Citation Number: [2009] EWHC 175 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 12th January, 2009

BEFORE:

MR JUSTICE KITCHIN

BETWEEN:

PHONOGRAPHIC PERFORMANCE LIMITED

-and-

BRITISH HOSPITALITY ASSOCIATION & OTHERS

MR PUSHPINDER SAINI QC (instructed by GSC) appeared on behalf of
Phonographic Performance Limited
MR ROBERT HOWE QC (instructed by Denton Wilde Sapte & Eversheds) appeared
on behalf of the Interested Parties

APPROVED J U D G M E N T

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J U D G M E N T

MR JUSTICE KITCHIN:

1. I must now decide the issue of who should bear the costs of these appeals and of the hearing before the Tribunal.
2. As recorded in my judgment, the Tribunal held, in substance, that (a) a reference under Section 128A is limited to a consideration of a licensing scheme insofar as it concerns the public performance of broadcast sound recordings only, and (b) the Tribunal has no power under Section 128B to order back payments in respect of users of sound recordings not contained in a broadcast. It also rejected the new schemes on a summary basis because they were not limited to licences to play broadcast music in public and indicated that the use of recordings delivered other than by broadcast remains covered by the established tariffs.
3. PPL sought on its appeal an order that the decision of the Tribunal should be set aside save insofar as it concluded that its jurisdiction in references under Section 128A is limited to ruling upon the terms of a licensing scheme insofar as it concerns the public performance of broadcast sound recordings and that the Tribunal has no power under Section 128B to direct back payment of fees in respect of users of sound recordings which are not contained in a broadcast.
4. The Interested Parties sought on their appeal an order that the Tribunal has jurisdiction to consider and determine all the terms of any licensing schemes referred to it under sections 128A and 128B, an order that the established tariffs should apply to licensees who do not wish to play excepted sound recordings and, further, an order and declaration that the Tribunal has jurisdiction to give directions for any necessary repayment of sums overpaid by licensees who do not wish to play and have not played broadcast sound recordings.
5. Both these appeals were in large measure successful, in that I found (a) that it was not appropriate to order that the established tariffs apply to users who do not wish to play broadcast sound recordings and to make consequential directions for repayment under Section 128B, and (b) that the Tribunal does have jurisdiction under Section 128B to consider a delivery system neutral licensing scheme as a whole.
6. The general principles which I should apply in considering who should bear the costs of these appeals are well established and set out in CPR 44.3. Both parties agree that I should, if practicable, make a single order in respect of both appeals, so avoiding the need for a double assessment.
7. In my judgment, the material considerations to the exercise of my discretion are these. First, the fact that the parties have each succeeded in substance on their appeals constitutes an important factor which points to the payment to the

successful party of its costs incurred in relation to its appeal.

8. Second, the points raised on these appeals were, as is apparent from my judgment, difficult ones, and it seems to me that the respective positions taken by the parties were reasonable.
9. Third, I have gained the overwhelming impression from the hearing of these appeals and the further arguments directed to me today that the bulk of the costs of the appeals was incurred in relation to the question of jurisdiction.
10. Fourth, nevertheless, I recognise that the finding by the Tribunal that the use of recordings delivered other than by broadcast remains covered by the Established Tariffs was of very great significance to PPL and constituted a matter in relation to which it could afford to leave no stone unturned.
11. Assessment of costs is necessarily not a scientific exercise. Doing the best I can on the materials before me and in the light of the submissions made to me on behalf of the parties, I have reached the conclusion that justice requires a payment by PPL to the Interested Parties of a significant proportion of their costs. As to what that proportion should be, my attention has also been drawn by Mr Saini QC, who has appeared on behalf of PPL, to a significant difference between the sizes of the statements of costs incurred by the parties. PPL's costs of these appeals amount to approximately £68,000. The Interested Parties, represented as they have been by two firms of solicitors, have presented to me statements of costs in the total sum of approximately £137,000. It is apparent that the Interested Parties have incurred approximately twice the level of costs as PPL. I have to say that I do find that discrepancy very surprising. It seems to me that it would not be right at this stage to indicate whether it was or was not appropriate for the Interested Parties to be represented on these appeals by different solicitors. However, having taken the course that they did, I do not see how an overall figure for the costs incurred of approximately double that of PPL can be justifiable. In my judgment, a figure of approximately £70,000 for what turned out to be less than a one day hearing is much closer to that which I would have considered reasonable and proportionate. For these reasons, I propose to determine the appropriate deduction upon that basis.
12. In the light of all the foregoing I have reached the conclusion that a fair and proportionate sum to award to the Interested Parties in respect of their costs of the appeals is 60%, that is to say 60% of their assessed costs.
13. I must now consider the question of the costs incurred before the Tribunal. The Tribunal itself indicated that it was minded to make no order for costs in relation to the hearing which took place before it. Mr Saini invites me to say it is not appropriate to disturb that conclusion. Mr Howe QC, who has appeared on behalf of the Interested Parties, submits that, the Interested Parties having succeeded on their appeal and that being the primary issue before the Tribunal, they should be awarded their costs of the hearing.
14. There is no dispute between the parties as to the principles I should apply in

considering these rival submissions. Under CPR 52.10(2) this court has all the powers of the Tribunal. The Tribunal's powers include a power under section 151 of the CDPA to order that the costs of a party proceeding before it shall be paid by such other party as the Tribunal may direct. Guidance as to how this discretion should be exercised was given by the Court of Appeal in AEI Rediffusion v PPL [1999] 1 WLR 1507. In substance, the Tribunal and consequently this court too, should exercise its discretion by taking into account and giving due weight to all relevant factors in a principled and proportionate fashion.

15. Mr Saini submits that I should not disturb the conclusion reached by the Tribunal for the following reasons. First, it is apparent from the Practice Direction issued by the Tribunal in January 2006 that it contemplated a procedure under Sections 128A and 128B which is essentially written.
16. Second, the Tribunal itself raised the question of and instigated the oral hearing.
17. Third, the hearing was, at the end of the day, essentially one involving and concerned with case management and ultimately required a consideration of five matters, of which the question of jurisdiction was only one. By way of illustration, Mr Saini pointed out that the first 40-odd pages of the transcript, which extends to some 206 pages in total, were directed to just one of these other issues.
18. In all these circumstances he submits the hearing was essentially something imposed by the Tribunal on both parties and constituted, in substance, a request for help and was something which neither party should therefore have to pay the costs of.
19. In my judgment, there is considerable force in these submissions and they are all matters which I believe it is appropriate to take into account in exercising my discretion. Nevertheless, I believe PPL should bear a proportion of the Interested Parties' costs of the hearing before the Tribunal because it is, in my judgment, quite clear from the history of the matter that the need for a hearing was substantially driven by the jurisdiction issue, which was raised squarely by PPL in its reply submissions served in April 2006 and pursued in correspondence thereafter. Had that issue not been raised at all, then I am doubtful there would have been any need for a hearing. Even if there had been a hearing, I have no doubt at all that it would have been very substantially shorter than that which ultimately took place.
20. In my judgment, justice requires that the Interested Parties are compensated for the costs which they have incurred as a result of the jurisdiction point having been raised by PPL, and it remains to consider what proportion of their costs I should award to them. Once again, it is not possible to arrive at any precise conclusion as to the costs incurred as a result of the point having been raised, but doing the best I can in the light of the various matters to which I have referred, I have again reached the conclusion that the Interested Parties should be awarded 60% of their costs of that hearing.
